



Timau Agro Industires Limited v National Oil Corporation of Kenya (Civil Case 237 of 2013) [2025] KEHC 2547 (KLR) (Civ) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 237 OF 2013**

MA ODERO, J

FEBRUARY 21, 2025

BETWEEN

TIMAU AGRO INDUSTIRES LIMITED APPLICANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The Plaintiff herein Timau Agro Industries Limited commenced this suit vide the plaint dated 11th June 2013 seeking judgment against the Defendant for:-
 - a. An Order for Specific Performance by the Defendant of the Contract for the purchase of all that property known as Land Reference MN/VI/3713 CR 28260 situate in the Municipality of Mombasa and registered in the District of Mombasa.
 - b. An Order directing the Defendant to deposit a sum of Kenya Shillings Two Hundred and Twenty Nine Million, Three Hundred and Twenty Thousand (Kshs. 229,320,000) being the purchase price for all that property known as Land Reference MN/VI/3713 CR 28260 situate in the Municipality of Mombasa registered in the District of Mombasa as agreed upon between the Plaintiff and Defendant, in an escrow account in the names of the Plaintiff's Advocates and the Defendant's Advocates pending the registration of the Transfer in favour of the Defendant.
 - c. An Order for damages in favour of the Plaintiff assessed as the difference between the Contract Price of Kenya Shillings Eight Million, Four Hundred Thousand (Kshs. 8,400,000) and the prevailing market price as at the date of the delivery of the judgment.
 - d. Interest on (b) and (c) above at Court Rate from the 10th April 2012 until payment in full.
 - (e) Costs of this suit.



- (f) Any other or further orders this Honourable Court may deem fit and just to grant.”
2. The Defendant National Oil Corporation Of Kenya opposed the suit through their statement of Defence dated 10th July 2013 and 5th February 2014.
Amended on 5th February 2014.
 3. The matter was canvassed by way of Vive Voce evidence with each side calling one (1) witness in support of their case.
 4. At the outset I wish to explain the delay in preparation of this judgment.
When I heard this matter I was stationed in the Commercial & Tax Division Milimani Court Nairobi. Upon my transfer to the Family Division the file was on 15th January 2021 allocated to Hon. Justice Mativo (as he then was), who on 3rd March 2021 directed that the proceedings be typed. On 21st September 2021 the Hon. Deputy Registrar confirmed that the proceedings had been typed and were ready.
 5. Thereafter on 22nd December 2023 the Hon. Deputy Registrar noted that the file had no date for future action. On 7th March 2024 the Presiding Judge allocated the file to Hon. Justice Visram.
 6. By that time I had been transferred and had moved to Nyeri High Court.
Vide a letter dated 9th October 2024 the Hon. Principal Judge forwarded the file to me at Nyeri directing that I prepare the judgment which I am now undertaking.

Background.

7. The Plaintiff was at the material time the registered owner of the Property known as Land Reference Number MN/VI/3713 CR 28260 in Miritini Mombasa County(hereinafter referred to as the ‘suit property’)
8. Vide a letter of Expression of Interest for outright purchase of the suit property dated 27th February 2012 the Defendant invited the plaintiff to submit its offer.
9. The plaintiff submitted its offer of Purchase dated 28th February 2012.
The property which comprised 27.3 acres was on offer at Kshs.8,500,000/= per acre.
10. On 5th March 2012, the Plaintiff attended the opening of the Plaintiffs offer at the Defendants premises and the Defendant expressed satisfaction with all aspects of the plaintiffs offer.
11. Subsequently at a meeting held on 12th April 2012 between the Plaintiff and the Defendant it was agreed that the total purchase price was to be Kshs. 229,320,000 and that a deposit of 15% being Kshs. 34,398,000 was to be paid. That the balance of the purchase price would be paid upon registration of the transfer in favour of the Defendant. It was further agreed that the Plaintiff would evict all the squatters on the property and would remove the suit property from the market.
12. The Defendant then wrote a letter of Award dated 10th April 2021 in which they reiterated their letter of expression of outright purchase of the suit property. The defendant requested that the plaintiff sign the letter of Award signifying acceptance of the same and return the signed letter of Award together with the Plaintiff’s bank details and a Sale Agreement.
13. By a letter dated 16th April 2012, the plaintiff returned the letter of Award duly executed and provided all the details requested for by the Defendant, thereby signifying the Plaintiff’s acceptance of the Award.



According to the plaintiff upon signing its acceptance of the award the Defendant was expected to immediately make a deposit of Kshs.34,398,000/= into the plaintiffs account and return a duly executed sale agreement within a reasonable time.

14. The Defendant however did not respond to the Plaintiffs enquiries until vide a letter dated 24th July 2012 the Defendant indicated that it would be ready to finalized the transaction in September 2012.
15. The Plaintiff alleges that the Defendant continued in default until at a meeting held on 13th February 2013, the Defendant agreed that it would complete the transaction as soon as possible. That the Defendant also indicated that it would consider any upward adjustment in the price in order to compensate the plaintiff for the lapsed time.
16. The Plaintiff got tired of waiting for the Defendant to act as per the Award and filed this suit seeking specific performance of the contract.
17. As stated earlier the suit was opposed. The defendant contended that the High Court had no jurisdiction over this matter as the suit property could only be acquired through direct procurement under the Public Procurement and Disposal Regulations 2006.
18. The Defendant further asserted that no contract existed between the parties and that the suit was premature as the Defendant was yet to communicate the decision of its tender committee to the plaintiff.
19. According to the Defendant no formal agreement setting out specific details of the sale had been executed between the parties. That in any event the Defendant had not paid any consideration to the Plaintiff at the time the suit was filed.
20. The Defendant asserted that there was no 'consensus ad idem' or meeting of minds between the parties as they were still negotiating in light of the variation in price by the plaintiff. That the Defendant had submitted a second expression of interest dated 28th February 2013.

That no price had been agreed upon between the parties and the matter was still open and subject to negotiations between the parties. As such there existed no contract capable of enforcement. The Defendant stated that before it could execute the Sale Agreement the Government of Kenya issued a directive that all projects for acquisition above Kshs. 50 million were to be subject to a feasibility study. That the Defendant being a government corporation was bound by this directive. That the feasibility study took longer than had been anticipated.

21. The Defendant stated that vide a letter dated 6th March 2013 the Plaintiff subsequently re-valued the property at Kshs. 15,000,000 per acre making a total purchase price of Kshs. 409,500,000. However the chief land Registrar valued the property at Kshs. 4,945,054.95 per acre giving a total purchase price of Kshs. 135,000,000 which amounted to a difference of Kshs. 355,000,000.
22. The Defendant further stated that on 12th June 2013 their tender committee on the advice of the chief land Registrar advised against Purchasing the suit land as the same was found not suitable for construction due to the fact that there were outstanding land rent arrears on the property and it would involve expensive litigation to evict the illegal squatters. The Defendant offered that the plaintiff was at liberty to sell the suit property to a third party of their choice.
23. The Defendant stated that the present suit was defective, frivolous and vexations and urged the court to dismiss the same in its entirety.



The Evidence

24. Pw1 Lawrence Muriithi Mbabuthe Managing Director of the Plaintiff company who is also an Advocate of the High Court of Kenya testified on behalf of the Plaintiff. He relied entirely upon his witness statement dated 11th June 2013 which basically captured the Plaintiffs claim as stated in the plaint dated 11th June 2013.
25. Pw1 confirmed that the plaintiff was the registered owner of the property known as LR NO. MN/VI/3713 CR 28260 located in Miritini, Mombasa County. Pw1 told the Court that the plaintiff had appointed a company known as Chevron Properties to source for a buyer for the suit property. That upon securing a buyer, the Plaintiffs were to pay Chevron a 10% commission.
26. The witness insists that the Plaintiff duly executed the letter of Award dated 10th April 2021 which Award set out all the terms and conditions of the sale. He asserts that the said letter of Award was never withdrawn, revoked and/or terminated thus it remains binding and enforceable upon the parties.
27. Dw1 states that to date the Plaintiff has received no payment from the Defendant. He concedes that the parties mutually agreed to have the purchase price reconsidered in view of the length of time the whole transaction had taken.
28. However instead of sending the plaintiffs an amended letter of award the Defendant instead sent a letter dated 28th February 2013 requiring that the Defendant re-submit all relevant documentation and information relating to the suit property which letter required a response on or before 17th February 2013 i.e the response was required before the date when the letter had been written.
29. Pw1 lamented that the failure/refusal by the Defendants to complete the contract had left the Plaintiff with mounting pending bills and urged the court to direct specific performance by the Defendant of the contract. He also sought damages on account of the Defendants failure to complete the sale.
30. Pw1 ALEX LEONARD testified for the Defendant. He told the court that he was the Head of Procurement at the National Oil Corporation of Kenya.
31. DW1 relied entirely upon his witness statement dated 5th March 2015 which was basically a recap of the statement of Defence dated 10th July 2013 and the Amended Defence dated 5th February 2014.
32. Pw1 insisted that there was no valid and enforceable contract between the parties. He stated that there were two expressions of Interest one dated 27th February 2012 and the other dated 6th March 2013.
33. According to Dw1 as a result of the Plaintiffs variation of the purchase price the parties entered into a re-negotiation of the contract for sale.
That the new price was rejected by the Defendants Tender Committee.
That no formal contract was entered into by the parties, and that at the time the plaintiff filed this suit the contract was still open and was subject to negotiations.
34. The Witness states that this suit has been filed mala fides with the ulterior purpose of compelling the Defendant to Purchase an unsuitable parcel of land or to compel the Defendant to enter into an illegal transaction. He urges that the suit be dismissed with costs.
35. Following conclusion of oral hearing parties were invited to file and exchange their written submissions. The Plaintiff filed the written submissions dated 10th November 2020 whilst the Defendant relied upon its written submissions dated 11th January 2021.



Analysis And Determination.

36. I have considered the plaint filed by the Plaintiff the statement of defence filed by the Defendant, the evidence on record as well as the written submissions on record.
37. The first question to be answered is whether there existed a legally enforceable contract between the Plaintiff and the Defendant. It is trite law that he who alleges must prove.
38. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
39. This was reiterated in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal held that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
40. Therefore the Plaintiff who contends that a binding contrast existed between the parties has the legal burden to satisfy the court that this is indeed the case.
41. The elements of a contract were summarized in the Halsbury’s Laws of England 4th (ed.) Re-Issue Vo. 9(1) paragraph 603 at page 340. as follows:
- “To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as ‘consensus ad idem’); (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise.”
42. The Plaintiff contends that upon the Defendants issuing the Agreement of Award dated 10th April 2013 a valid and legally enforceable contract came into force. That the Defendant was therefore obliged to immediately deposit the sum of Kshs. 34,398,000 into the Plaintiff’s account and provide a duly executed Sale Agreement to the Plaintiff within a reasonable time. However the Defendant failed to do this.
43. On its part the Defendant asserts that no valid Sale Agreement existed between the parties as the Defendant was yet to communicate the decision of its Tender Committee to the Plaintiff and in the meantime the Plaintiff was at liberty to sell off the property to a third party.



44. A contract consists of offer, acceptance and consideration. In the case of William Muthee Muthiani v Bank Of Baroda[2014] eKLR the Court of Appeal stated that;-
- “In law of contract, the aggrieved party to an agreement must in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the other for breach”
45. Generally the determination of whether or not a valid contract exists will require an examination of the conduct of the parties, any communication between them which would objectively lead to the conclusion that they intended to create a legally binding relationship and that all terms had been agreed upon between the said parties..
46. In the British case of RTS Flexible Systems Ltd v Molkerei Alois Muller[2010] 1 WLR 753, Lord Clarte observed as follows;-
- “The general principles are not in doubt. Whether there was binding contract between the parties and if so, upon what terms subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”
47. I have carefully perused the correspondence on record between the parties herein. According to the letter of Award dated 10th April 2012 written by the Defendant to the plaintiff (see Page 11 of Defendants Bundle filed on 20th June 2017) the Defendant communicated to the plaintiff the formers decision to purchase the suit property at a negotiated price of Kshs. 8,400,000/= per acre. The total payable for the entire property totaling 27.3 acres was to be Kshs.229,320,000/=.
48. The same letter went on to state that a 15% deposit would be paid to the Plaintiff’s lawyer, that the Plaintiff would have the responsibility to evict the squatters on the property and that the balance of the purchase price was to be paid upon registration of the title into the Defendants name and handover of vacant possession.
49. The final paragraph of the letter stated as follows:-
- “Meanwhile we are finalizing on the due diligence for the land in regards to confirming whether or not the land falls within the jurisdiction of KPLC, Rift Valley Railways or any road reserve. The feedback will be communicated to you”
50. The Plaintiff asserts that this letter constituted the Agreement between the parties. However I do not agree. The letter left many issues up in the air. Firstly no timeline was given by when the 15% deposit was to be paid to the plaintiffs lawyers. Further no timelines were set for the eviction of the squatters who were on the suit property. In the same letter the Defendants also mentioned other aspects of due diligence they would need to undertake before making a final commitment.
51. Finally the Defendant made the sale conditional upon their confirming that the land was free from any encumbrances. As such the so called Agreement cannot be said to have been an unconditional acceptance of the offer by the seller as it depended on confirmations yet to be made by the purchaser.



I therefore find and hold that the letter of Award was conditional and could only be confirmed once all the conditions mentioned therein had been met.

52. The plaintiffs state that by way of the letter dated 16th April 2012 they returned the letter of Award and Sale Agreement duly executed on their behalf and assert that this act signified the plaintiff's unconditional acceptance of all the terms and conditions in the letter of Award.
53. It is pertinent to note that the Sale Agreement was never executed by the Defendants. Therefore no binding Agreement for sale existed. Indeed the Plaintiffs have not produced any evidence of Sale Agreement duly executed by BOTH parties. It is only upon execution of such Sale Agreement that a binding contract would arise.
54. The Plaintiff states that instead of remitting the deposit to their Advocates, the Defendants instead went quiet. That is not entirely correct. In February 2013 the parties held another meeting and there was a move by the plaintiff to re-negotiate the purchase price due to the time that had elapsed. The plaintiff proposed a higher purchase price for suite land. Quite understandably the Defendant would have needed time to consider that new price and follow its laid down procedures with respect to the new purchase price proposed by the plaintiffs. In their letter dated 24th July 2024 the Defendant wrote to the plaintiffs Advocate explaining the reasons why they had not executed the Sale Agreement. In said letter the Procurement co-ordinator for the Defendant stated thus

“We have not executed the agreement due to pertinent issues which have emerged and which need to be resolved. We are undertaking some studies related to this acquisition to guide us on the way forward in line with mandatory financial requirements that have emerged. Our position on this matter will be provided after all matters that require our attention are resolved. [own emphasis]
55. By the above letter Defendants made it very clear that they were not ready and did not intend to enter into a binding contract with the plaintiff at that stage. The fact that the plaintiff entered into and entertained fresh discussions on a purchase price is further proof that no binding Agreement had as yet been reached.
56. The second round of discussions led to a second expression of interest which was issued by the Defendants on 28th February 2013. By a letter dated 6th March 2013 (see page 17 of Defendants bundle filed on 20th June 2017) the plaintiff through their Advocate offered to sell the property at an increased price of Kshs. 15,000,000 per acre making a total purchase price of Kshs. 409,500,000.00 It is clear that the old offer had been abandoned. The plaintiffs chose to maintain a studious silence on this second offer in their evidence.
57. By declaring new purchase price the plaintiff had by its conduct effectively retracted/abandoned its earlier Expression of Interest and were starting the process afresh. No agreement was ever reached as his second expression of interest. It is my finding that the correspondence exhibited by the plaintiff did not meet the threshold of a binding contract. Moreover the Plaintiffs did not prove that they had fulfilled the conditions which they were to meet i.e the removal of all squatters from the suit land. The pre-conditions for entering into a contract had not been fulfilled.
58. Having found that no valid contract existed between the parties, there would be no basis upon which the court can make an order of specific performance. The letters and correspondence amounted merely to negotiations between the parties. No binding contract was entered into.

No consideration was paid and the plaintiff had the option to sell the property to a third party.



59. In the case of Gharib Suleman Gharib v Abdulrahman Mohamed Agil Civil Appeal No. 112 of 1998 the Court held that.

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the forces being whether or not specific performance will do more perfect and complete justice than an award of damages.” [own emphasis]

60. Likewise in Thrift Homes Ltd v Kenya Investment Ltd 2015 eKLR the court stated that:-

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”. [own emphasis]

61. The Plaintiff had the duty to show that a contract existed and to show that it had performed all the preconditions of the contract which it had undertaken to perform. The Plaintiff has failed to prove this thus the relief of specific performance is not available to them.

62. For the same reasons the plaintiffs prayer for an order of damages is not tenable. There was no legally enforceable contract between the plaintiff and the Defendant therefore the plaintiff's claim for payment of the difference between the alleged contract price and the prevailing market price for the suit property has no basis.

63. Finally I find no merit in this suit. The same is dismissed in its entirety.

Costs will be met by the plaintiffs.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY, 2025

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MAUREEN A. ODERO

JUDGE

