



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 229 OF 2011

JULIE MUKAMI KANYOKO.....1ST PLAINTIFF

SIMON NGETA KANYOKO.....2ND PLAINTIFF

PERPETUA WANJIRU KANYOKO.....3RD PLAINTIFF

VERSUS

SAMUEL MUKUA KAMERE.....1ST DEFENDANT

ANNE WAMBUI KAMERE.....2ND DEFENDANT

JUDGMENT

Background

1. The plaintiffs brought this suit on 20/5/2011 through a plaint dated 29/4/2011. They sought, among other prayers, an order of specific performance against the defendants. They contended that on 15/1/2007, they entered into a land sale agreement with the defendants, pursuant to which the defendants agreed to sell to them a piece of land marked as **Plot E** and designated as **Land Reference Number 27/347**, measuring 0.1817 of a hectare, and situated in Ridgeways, Nairobi. The said piece of land was a subdivision out of **Land Reference Number 27/38 (Original Number 27/21/1)**. The agreed purchase price was Kshs 3,500,000. Under the agreement for sale, purchase price was to be paid in instalments. The last instalment (Kshs 1,000,000) was to be paid upon registration of the property in the names of the plaintiffs. The plaintiffs contended that they duly discharged their contractual obligations and paid beyond the agreed instalments, leaving a balance of only Kshs 250,000, which they were ready and willing to pay. The defendants, however, breached the contract by failing /refusing/neglecting to discharge their obligations under the contract.

2. Consequently, the plaintiffs sought the following verbatim reliefs against the defendants:

a. Specific performance of the agreement dated the 15th January 2007

b. General damages for breach of contract

c. Costs of this suit

d. Interest at court rate

3. The defendants did not file a defence, despite service. Consequently, the Deputy Registrar of the court entered interlocutory judgment against them. On 3/7/2013, this court (**Mutungu J**) set aside the order of interlocutory judgment which had been erroneously entered by the Deputy Registrar but disallowed the defendants' plea for leave to file a defence out of time. The court ordered that the plaintiffs' suit be set down for formal proof. Attempts to overturn the decision of Mutungi J were declined by the Court of Appeal when the Court of Appeal (**Warsame JA**) declined the defendants' application for leave to file a record of appeal out of time.

4. An *ex-parte* formal proof hearing was subsequently conducted on 17/10/2018, culminating in an *ex-parte* judgment dated 19/12/2018. The said *ex-parte* judgment dated 19/12/2018 was subsequently set aside by a consent order adopted on 8/7/2019. A fresh formal proof hearing was subsequently conducted on 14/11/2019. Upon closure of the plaintiff's case, the defendants expressed intention to lead evidence. This attracted objection from the plaintiffs who contended that, without a defence, the defendants had no right to lead evidence.

5. On 30/9/2020, the court rendered a ruling relating to the plaintiffs' objection to the defendants' attempt to lead evidence in the absence of a defence. The court found that the defendants had no right to lead evidence because they did not have a defence on record in this suit. Parties subsequently filed written submissions.

Plaintiff's Evidence

6. The plaintiff called one witness, Julie Mukami Kanyoko - PW1 [**1st the plaintiff**]. She testified that she learnt of a sub-division of a parcel of land at Ridgeways, Land Reference Number 27/38 (Original Number 27/21/1), which was owned by the defendants. The parcel of land was to be sub-divided into portions of ½ acre for residential buildings. She stated that, together with her co-plaintiffs, they entered into an agreement with the defendants for purchase of ½ acre portion marked as **Plot E** and designated as **Land Reference Number 27/347** on the approved Survey Plan held by the defendant. The agreed purchase price was Kshs. 3,500,000/=. The purchase price was to be paid in instalments as per the agreement. They paid the agreed instalments and in fact overpaid by Kshs 750,000. She added that the outstanding balance which was Ksh. 250,000/= was to be paid on completion.

7. She stated that they had been in physical possession of the suit property since 2007 but the property was still registered in the names of the defendants. She testified that the defendants were in breach of the material contract because they did not furnish the plaintiffs with completion documents on completion date as stipulated in the agreement. She produced a list of documents which included; a survey plan showing the land, a deed plan, copies of cheques showing payment, a letter to the defendants, a letter to the defendant's advocate and a demand letter.

8. In her evidence during cross examination, she stated that at the time of purchase, the beacons relating to the sub-division scheme were in place. She did not know if documentation relating to sub-division was fully completed. They chose the suit property on the basis of an authenticated survey plan, a copy of which the 1st defendant gave to her. The defendant had never reached to them regarding the sub-division of the suit property. A service road was not one of the requirements in the agreement for sale. She did not know if the defendants had processed a title for the suit property. She did not know if any approval had been granted in relation to the sub-division scheme.

9. In re-examination, she stated that they were in possession of the plot at the time of testifying. They had been in possession of the plot for the preceding 12 years. All the people who bought plots in the sub-division scheme were in possession of their respective plots and some had developed their plots while others had sold their plots to third parties. Under clause 4 of the agreement for sale, the defendant undertook to avail title documents to the plaintiffs within three (3) months.

Plaintiff's Submissions

10. The plaintiffs filed written submissions dated 4/12/2002 through the firm of AGN Kamau Advocates. They gave a detailed background to the suit. They adopted their earlier written submissions dated 23/11/2018. Counsel for the plaintiffs argued that the general rule was that specific performance would be granted where the common law remedy of damages was inadequate and that equity would not be invoked if damages would grant the plaintiffs full compensation or put the plaintiffs in the position they would have been in had the contract been performed. Counsel added that in contracts relating to land, no two parcels of land were alike, and as such, it was an accepted principle that damages would not be adequate compensation in disputes relating to land contracts.

11. Counsel for the plaintiffs added that the plaintiffs had shown their willingness to uphold their end of the agreement and had fully complied with the contract and even paid sums above the agreed instalments. He added that the plaintiffs had demonstrated their willingness to pay the balance of the purchase price [Kshs 250,000] by depositing it in court.

12. Counsel urged the court to be guided by the following guiding principles when evaluating the appropriateness of an order of specific performance: (i) the remedy is equitable and therefore the court is to satisfy itself that on the facts presented, it would be equitable to grant it; (ii) the remedy is granted when it is demonstrated that damages would not be adequate; (iii) specific performance is a discretionary relief and the discretion is exercised judiciously; (iv) the remedy may be withheld if granting it would occasion hardship to the defendant; and (v) the party seeking the relief must demonstrate his readiness to fulfil his contractual obligations.

13. Counsel added that damages would not be an adequate remedy because the suit property had become of sentimental value to the plaintiffs who purchased it in 2007 and had been in possession since then.

14. On the prayer for general damages for breach of contract, counsel submitted that due to the defendants' breach, the plaintiffs were unable to obtain development approvals and/or use the property as a collateral to borrow development funds. Counsel urged the court to take into account the fact that the defendants had never attempted to mitigate the plaintiffs' damages and had all along wanted to frustrate the plaintiffs' desire that the contract be completed.

Defendant's Submissions

15. The defendants filed written submissions dated 22/1/2021 through the firm of Gachanja & Co Advocates. Counsel for the defendants submitted that because the defendants neither filed defence nor led evidence, their submissions were going to be restricted to: (i) evidence and facts revealed by the 1st plaintiff in her testimony (ii) issues of law, in particular, whether the plaintiffs were entitled to the remedy of specific performance as prayed for in the plaint. Counsel subsequently proceeded to submit extensively on factual matters on which no evidence had been placed before court, such as the defendant's alleged inability to procure sub-division approvals.

16. They submitted that since the plaintiffs had not adduced any evidence to show that they had developed the suit property, damages by refund of the purchase price paid was an appropriate remedy. Counsel for the defendant also added that the plaintiffs did not establish existence of a title that could be transferred to them pursuant to an order of specific performance.

17. Counsel added that the remedy of specific performance was not available because: (i) the plaintiffs had not established why damages would not be an appropriate remedy; (ii) the amount of money paid towards purchase of the property (Kshs. 3,250,000) was refundable; (ii) the agreement provided for default and consequences; and (iv) the plaintiffs had not shown how that particular piece of land was unique from any other property in the area. Counsel urged the court to decline to grant the remedy of specific performance.

Analysis and Determination

18. I have considered the plaintiffs' pleadings, evidence, and submissions. I have also considered the defendant's submissions. Similarly, I have considered the relevant law and jurisprudence. In the absence of defence and appropriate controverting evidence on part of the defendants, the following are the two questions which fall for determination in this suit: (i) Whether the plaintiffs have proved their case on a balance of probabilities as required by the law, by demonstrating breach of contract on part of the defendant; and (ii) If the answer to the first question is in the affirmative, what remedy is appropriate in the circumstances of this suit. I will analyse the two issues sequentially in the above order.

19. The defendants did not file a defence. They, however, filed written submissions dated 22/1/2021 in which they extensively focused on factual matters on which they had not led evidence. I will not anchor my findings on those unsupported factual matters.

20. Suffice to state that the defendants submitted that it was not in contention that parties to this suit entered into the material agreement for sale and that a total sum of Kshs 3,250,000 had been paid by the plaintiffs to the defendants in pursuance of the contract. They also submitted that the balance of the purchase price (Kshs 250,000) had been deposited in court by the plaintiffs pursuant to the earlier Judgment of the court which was subsequently set aside by consent of the parties. On their part, the plaintiffs led evidence by the 1st plaintiff (Julie Mukami Kanyoko PW1). No controverting evidence was led to challenge her evidence.

21. Clause 4 of the material agreement dated 15/1/2007 required the defendants to, within three months, process and obtain a title in the names of the plaintiffs in relation to the sub-division sold to the plaintiffs, namely **Plot E** delineated as **Land Reference Number 27/347** on the approved survey plan and on Deed Plan No 257165. There is evidence that the plaintiffs duly discharged their obligations under the contract. The defendants did not process the title as agreed despite receiving 93% of the agreed purchase price way back in 2007. The court is therefore satisfied that the plaintiffs have demonstrated breach of contract on part of the defendants and have proved their case against the defendants on a balance of probabilities.

22. The second question relates to the appropriate remedy available to the plaintiffs in the circumstances of this suit. The plaintiffs sought an order of specific performance. They also sought general damages for breach of contract. They did not seek a refund of the purchase price. The plaintiffs contended that damages would not be an adequate remedy because they had been in possession of the suit property since they purchased it in 2007 and the property had become of sentimental value to them and could not be switched with any other property.

23. On their part, the defendants submitted that the appropriate remedy in the circumstances of this case was an award of damages. Because the defendants denied themselves the opportunity to tender defence and lead evidence, there was no evidence to support their proposal that the appropriate remedy was in form of damages. There was also no evidence of genuine hindrance to the defendants' obligation to convey the suit property to the plaintiffs.

24. Specific performance is an equitable remedy that is confined to cases where the common law remedy of damages is inadequate. Secondly, land in Kenya, and indeed in a number of common law jurisdictions, is always treated as being of unique value. Thirdly, the court would ordinarily not decree specific performance if at trial it is demonstrated through evidence that the vendor will be unable to convey the land to the purchaser. Fourthly, the duty to lead evidence to demonstrate that an order of specific performance should not issue is that of the party opposed to the order of specific performance.

25. In the present suit, the plaintiffs led evidence demonstrating that the suit property is one of the eleven (11) plots in a sub-division scheme carried out by the defendants. The plots in the scheme have been sold and developed. Ownerships relating to some of them have changed. The plaintiffs have been in possession of the plot which is the subject matter of this suit since 2007. The defendants received 93% of the purchase price way back in 2007. No evidence was tendered to demonstrate genuine hindrance against fulfilment of the defendants' contractual obligations to convey the suit property to the plaintiffs. The plaintiffs deposited balance of purchase price [Kshs 250,000] in court and the money is still held in court. In the circumstances, the court agrees with the plaintiffs that it would be inappropriate and indeed inequitable to uproot the plaintiffs from the suit property which they purchased in 2007 and which they have had possession of since then and tell them to pursue the defendants for damages. The appropriate and equitable remedy in the circumstances of this case is an order of specific performance in favour of the plaintiffs.

26. The second limb of the plaintiff's claim relates to general damages. I have taken into account the fact that the plaintiffs have been in actual possession of the suit property since 2007 although they have not been able to develop it due to failure by the defendants to process title in the plaintiffs' names as agreed. I have also taken into account my preceding finding in this judgment to the effect that the plaintiffs are entitled to an order of specific performance. I would in the circumstances assess and award general damages for breach of contract at only Kshs 1,000,000 (One Million).

27. There are no special circumstances to warrant departure from the general principle that costs follow the event. The defendants will therefore bear costs of this suit.

28. In the end, I make the following disposal orders in this suit in tandem with the reliefs that were sought in the plaint:

a. An order of specific performance is hereby issued compelling the defendants to complete specific performance of the agreement dated 15/1/2007 between them and the plaintiffs within 90 days from today. In default of specific performance by the defendants within the said period, the Director of Surveys shall prepare survey documents relating to the ½ acre portion sold to the plaintiffs by the defendants out of Land Reference Number 27/38 (Original Number 27/21/1) and the Chief Land Registrar shall cause title documents to be issued to the plaintiffs upon execution of requisite documents by the Deputy Registrar of this Court.

b. The defendants shall pay the plaintiffs Kshs 1,000,000 being general damages for breach of contract and the said sum shall attract interest at court rate from the date of this Judgment.

c. The defendants shall bear costs of this suit.

d. Upon the defendants satisfying the terms of this Judgment, the court shall release to them the balance of purchase price in the sum of Kshs 250,000 deposited in court by the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mbirwe holding brief for Mr A G N Kamau for the Plaintiffs

Mr Gachanja for the Defendants

Court Assistant: June Nafula