



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 186 OF 2018

(Formerly ELC. No. 441 Of 2006 – Nairobi)

JAPHET MURIITHI NDEGWA.....PLAINTIFF

VERSUS

ANDERSON KATHENDU MWITL.....DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 28th April, 2016. In the Plaint, the Plaintiff is seeking for an order to compel the Defendant to release the necessary completion documents to complete the transfer of Apartment No. E2 together with one (1) parking space located on Land Reference No. 12715/402 Machakos (*the suit property*).

2. The Plaintiff has averred in the Plaint that by an Agreement dated 21st January, 2014, the Defendant agreed to sell to him all that property known as Apartment No. E2 together with one (1) parking space located on Land Reference No. 12715/402 Machakos for Kshs. 3,000,000; that he made a deposit of Kshs. 1,500,000 and that the balance of the purchase price of Kshs. 1,500,000 was to be paid on or before completion.

3. The Plaintiff finally averred that the Defendant defaulted in complying with his obligations under the Sale Agreement; that an order of specific performance should issue and that in the alternative, the Executive Officer of the Court be directed to sign the transfer documents in respect of the suit property. The Defendant did not file a Defence. The suit proceeded for hearing in the absence of the Defendant.

The Plaintiff's case:

4. The Plaintiff, PW1 informed the court that he entered into an Agreement of Sale dated 21st January, 2014 in which the Defendant agreed to sell to him all that property known as Apartment No. E2 together with one (1) parking space located on Land Reference No. 12715/402 Machakos for Kshs. 3,000,000.

5. According to PW1, the aforementioned Agreement provided that he was to take possession of the suit property upon completion. It was the evidence of PW1 that he paid a deposit of Kshs. 1,050,000 and made a further deposit of Kshs. 450,000 at the time of signing the Agreement by way of Cheque No. 000584 dated 24, January, 2014.

6. It was the evidence of PW1 that the balance of the purchase price was Kshs. 1,500,000; that the Defendant defaulted in complying with his obligations under the Sale Agreement and that the Defendant has refused to answer any enquiries regarding the sale. It was the evidence of PW1 that his claim is for specific performance.

Submissions:

7. The Plaintiff's counsel submitted that the Plaintiff has always been ready and willing to finalize the sale upon receipt of the completion documents and that despite numerous measures, it is the Defendant who has failed to honour his obligations; Counsel relied on the case of ***Kukal Properties Development Ltd vs. Maloo and 3 Others (1993) eKLR*** where the court held as follows:

“Where the contract is in writing and its terms clear and unambiguous, no extrinsic evidence may be called to add or detract from it.”

Analysis and findings:

8. It is not in dispute that on 21st January, 2014, the Plaintiff entered into an Agreement of Sale of Apartment No. E2 together with one (1)

parking space located on Land Reference No. 12715/402 Machakos with the Defendant. In the said Agreement dated 21st January, 2014, the Defendant agreed to sell to the Plaintiff the suit property for a consideration of Kshs. 3,000,000.

9. The Agreement provided that the Plaintiff was to pay a deposit of Kshs. 1,500,000 on execution of the Agreement. According to Clause 2.2 of the Agreement, the balance of the purchase price of Kshs. 1,500,000 was to be paid to the Defendant “on or before completion”. The ‘completion date’ was agreed at 90 days from the date of signing of the Agreement or upon the vendor procuring the completion documents whichever shall be earlier. At Clause 8, under the sub-heading ‘completion’, the Sale Agreement provided as follows:

“Upon receipt of the purchase price the vendor shall procure and hand over to the purchaser’s advocate the following documents: Original Lease over the property; executed Transfer of Lease in favour of the Purchaser or the purchaser’s nominee; consent to transfer from the management company and copies of the vendor’s PIN Certificate and ID (hereinafter referred to as the Completion documents.”

10. Clause 6 of the Agreement provided that the property is sold in vacant possession and the property shall be given to the purchaser upon completion. The Plaintiff’s case is that when he enquired about the completion documents, the Defendant went silent.

11. The remedy of specific performance which the Plaintiff is seeking is an equitable remedy. In **Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited (2006) eKLR**, the court held as follows:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

12. In the case of **Gurdev Singh Birdi & Another vs. Abubakar Madhbuti (1997) eKLR**, the Court of Appeal held as follows:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487v of volume 44 of Halsbury’s Laws of England, Fourth Edition, a Plaintiff seeking equitable remedy of specific performance of a contract:

‘must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’”

13. The Agreement of Sale that the Plaintiff entered into shows that the Defendant was only supposed to hand to the Plaintiff the completion documents upon receipt of the purchase price. Further, the Agreement provided that the Plaintiff was only supposed to take possession of the suit property upon completion. Having not paid the full purchase price, it follows that the Plaintiff has not complied with the Sale Agreement and in particular Clause 8.

14. It is trite that where a party does not comply with the Agreement for sale, he is not entitled to the equitable relief of specific performance. To the extent that the Plaintiff has not paid the full purchase, he cannot accuse the Defendant for failure to hand to him the completion documents.

15. Furthermore, there is no evidence before me to show that the Defendant is the registered owner of the suit property. Indeed, the Sale Agreement between the Plaintiff and the Defendant, at Clause A, provides that ‘the vendor (the Defendant) is in the process of effecting registration of the Lease from Heritan Limited and Olonyori Estate Management Company Limited to himself.’

16. No evidence was placed before this court to show that indeed the Defendant eventually had the Lease in respect of the suit property from Heritan Limited registered in his favour or that as at the time this suit was filed, the suit property was registered in the Defendant’s favour. That being the case, and considering that courts do not issue orders in vain, it is my findings that the Plaintiff’s suit cannot succeed,

17. For the reasons I have given above, it is my findings that the Plaintiff has not proved his case on a balance of probabilities. The Plaintiff’s Plaint dated 28th April, 2016 is therefore dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF JUNE, 2021

O.A. ANGOTE

JUDGE