



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA ELC 650 OF 2017

FRANCIS KIARIE KAMAU.....1ST PLAINTIFF

MICHAEL KAMAU WANDEGWA.....2ND PLAINTIFF

VERSUS

SAMMY KIMEMIA NJUGUNA.....1ST DEFENDANT

THERESA WAIRIMU NJUGUNA.....2ND DEFENDANT

JUDGMENT

By Plaint dated 7th July 2017, the Plaintiffs sought for Judgment against the Defendants herein jointly and severally for the following orders;

- a. An order directed to the Land Registrar at Thika to remove the Caution registered against the property known as land Reference Number Kiambu / Gatwanyanga /4891, registered by the 2nd Defendant herein on the 4th August 2014.
- b. An order of Specific Performance compelling the Defendants herein jointly and severally to complete their obligations both under the Contract for sale and the subsequent Addendum in respect to the transfer of the one decimal six hectares property being land Reference Number/ Kiambu / Gatwanyanga /4891.
- c. In lieu of prayer (a) and (b) above (and in tandem with the terms of the Addendum) the Defendants herein jointly and severally pay all the monies paid towards the purchase price together with a compound interest at 20% per annum from the receipt of the said purchase price from the Plaintiffs .
- d. General and Aggravated damages
- e. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

In their statement of Claim, the Plaintiffs averred that by a written agreement dated **14th April 2012**, the Plaintiffs and the 1st Defendant agreed that the Plaintiffs would purchase one decimal six hectares of the suit property at a consideration of **Kshs.8,900,000/=** . That on or before the signing of the sale agreement, the sum of **kshs.2,500,000/=** would be paid by the purchasers and the balance of the purchase price would be paid on or before the completion date and in any event, in exchange of the completion documents. That it was the sole responsibility of the vendors to cause the subdivision of the suit property to enable the purchasers obtain vacant possession and further procure the completion documents

That the 1st Defendant intimated to the Plaintiffs that he had the **consent** of the 2nd Defendant, to transact and deal with **L.R 344**, the suit property herein and pursuant to the said agreement, the Plaintiffs paid **Kshs.6,100,000/=** on the understanding that the 1st Defendant would cause the subdivision of **L.R 344**, to make way for creation of **1.6 ha** and ensure a successful transfer of the aforesaid portion to the Plaintiffs. That the subdivision was successful done and the title for the portion acquired to wit **L.R 4891**, which was however, in the names of the 1st Defendant. That the 1st Defendant obtained the necessary completion documents, but on the registration of the transfer, to the Plaintiffs names, the same was unsuccessful as the Plaintiffs learnt that a **Caution** had been lodged against the title by the 2nd Defendant who is the spouse to the 1st Defendant.

That upon conducting a search, the Plaintiffs learnt that the 2nd Defendant had lodged a title on or about the **4th of August 2014**. That they

entered into a subsequent addendum to the agreement dated **19th June 2015**, in which the 1st Defendant undertook to ensure that the said caution was removed, but the 1st Defendant has failed to make any attempts to have the same removed.

The Plaintiffs particularized breach by the 1st Defendant as failure to cause the caution to be removed and failing to pay for the procurement of the consent to transfer the suit property and he has thus frustrated Contract .

The suit is opposed and the 1st Defendant filed a Statement of Defence dated **26th April 2018**, and denied committing any act of breach of the agreement. He averred that he executed the agreement, sold the suit property **L,R 4891**, to the Plaintiffs and handed over all the transfer documents. That the suit is bad in law

The 2nd Defendant filed a Defence dated **6th March 2018**, and denied all the allegations made in the Plaintiff. She averred that the alleged subdivision and sale transaction in relation to **L.R 4891 and 4892**, was done without due respect to her rights in the property as the spouse. That she did not give any express or implied consent to transact and or deal on a portion of the property Known as **L.R 344**, which is matrimonial property . Further that the subdivision is clandestine and Illegal and that she lodged the caution to safeguard her interests and that of the four issues in the marriage . That it is within the law for a spouse to lodge and maintain a caution to the property in question, being ,matrimonial for which she was instrumental in its acquisition . That the suit against her is bad in law and unfounded and ought to be dismissed . That she was not a party to the Contract of sale and the subsequent addendum and therefore cannot be compelled to complete a non -existent obligation through an order of Specific Performance.

This matter proceeded by way of viva voce evidence wherein the Plaintiff called two witnesses and the Defendants called four witnesses and closed their case.

PLAINTIFFS CASE

PW1 Francis Kiarie Kamau adopted his witness statement dated **7th July 2017**, as part of his evidence. He further testified that the Plaintiffs had purchased the suit property from **Sammy Kimemia at Kshs.8.9 million**, and they made payments of **Kshs.6.1 million**. That they paid **Ksh.2.5million**, after signing the sale agreement and paid the rest through installments done through **RTGs**. That the final balance was to be paid upon transfer of the land to the Plaintiffs by **Kimemia**. That the vendor was to subdivide and give them the Title as per the written agreement. He produced the sale agreement dated **14th April 2012**, as Exhibit 1. That the subdivision was completed and it produced a **Title Deed**. He produced the said Title Deed for **L.R 4891, as exhibit 2**, transfer document Exhibit 3, Application for consent as Exhibit 4. That they appeared before the **Land Control Board** on **26th September 2013**. That the 1st Defendant's wife was present, but he did not talk to her. That there was no objection at the time of applying for consent, and a search was done and there was no encumbrance. He produced the search as Exhibit 5 . That they lodged an Application for transfer, and the same was rejected as a **Caution** had been registered in favour of **Teresia**.

He produced the search confirming the **Caution** as Exhibit 6. That they tried to resolve the matter amicably, and they did not reach any agreement. That they had an addendum agreement dated **19th June 2015**, which he produced as Exhibit 7, which the 1st Defendant committed that he would have the issue resolved, which he has failed to do. He produced a letter to the **Land Registrar Thika** dated **19th September 2015**, as Exhibit 8 and a reminder dated **21st October 2016** as Exhibit 9 and Response from the Land Registrar Thika as Exhibit 10.

That he was buying **4 acres** with his partners at **Gatwanyanga** and he was to get 4 acres from **4891**, and the 1st Defendant was to get the remaining 1 acre. That they paid about **Kshs.6.1 million and** there was a balance. That the 1st Defendant was the registered owner of the suit property and the 2nd Defendant only came in after she lodged a caution. That the Land Control Board gave **consent** to transfer. That the purchaser was **Thika East Park**, and the Plaintiffs were Directors and were given all the completion documents, which were rejected and they later learnt that a caution had been registered . That the 1st Defendant should deal with his family issues and have the caution removed.

Further that he is not known to the 2nd Defendant, and the demand was made to the 1st Defendant and he blames the 2nd Defendant for placing the caution. That he did not have any documents to show that he is the Director of **Thika East Park Ltd** . That the 1st Defendant told them that the 2nd Defendant as his wife, and he did not indicate any issues. The 1st Defendant has not filed any suit as against the 2nd Defendant and that payment of **Kshs.6.1 million**, to the 1st Defendant is not contested. That it was not their duty to confirm who the

1st Defendant came with at the **Land Control Board**.

PW2 Michael Kamau Wandegwa, adopted his witness statement and testified that the 1st Plaintiff is a Co Director at **Thika East Park Ltd**. That they have not achieved the goal of having the land transferred to them and that PW1 was the one actively dealing with the issue. That they bought the land from **Sammy Kimemia**, who gave them the consent documents and they paid him **Kshs.6.1 million**. That the transaction is not completed because of the caution placed by his wife. That he has not produced any document to show that he is a Director of **East Park Ltd**. That the land was to be registered to the said Company and the transfer was to the Company.

DEFENCE CASE

DW1 Sammy Kimemia Njuguna testified that he sold 4 acres of **L.R 344**, to the Plaintiffs. That he was selling the land for **Kshs.8.9 million**, and upon execution of the agreement, he was paid **Kshs.2.5 million**, later he was paid **Kshs.6.1 million**, and he has so far received **Kshs.6.7 million** . That he executed the transfer documents with **Thika East Park Ltd**, and that the Plaintiffs are Directors of the said Company. That the land was subdivided and there were two parcels **No. 4891 and 4892**, and there are two **Title Deeds** to that effect . That they obtained consent to transfer and he gave the Plaintiffs the original documents . That he did not attend the Land Control Board.

Further that the transfer was not effected as his wife registered a Caution . That **Teresia** is in the U.S.A and has been there since **1999**, and she was not a joint owner of the suit property and had no objection to the sale of the suit property. That they have not been living together and they have other properties registered. He denied colluding with his wife to have the caution placed. That he should not be punished for failure to complete the transaction as the Contract was frustrated.

That he did not know how the Plaintiffs obtained the consent and that his son had placed the caution on the suit land and later it was removed. That his son registered the caution against the subdivision and vide a **Court Order** the same was removed. That there is no Application to lift the caution herein. That the Land was not a matrimonial home. Further, that he purchased the land in **1991**, and got married in **1974**. That he wanted to transfer the suit property, but he did not achieve the said goal. That he does not wish to sell the land anymore as circumstance have changed. That he has done nothing to ensure that the caution is lifted. He confirmed that he is still bound by the terms of the sale agreement and he had not rescinded the Contract . He denied frustrating the Contract.

2ND DEFENDANTS CASE

DW2 Teresia Wairimu adopted her witness statement dated **26th February 2018**, as part of her evidence in Court . She produced her bundle of documents dated **28th March 2018** as Exhibit 1 . That she got married to the 1st Defendant in **1974**, and they have four issues. That she placed a Caution on the suit property. Further that the subdivision was done illegally . That she had placed a Caution on the original land and she removed a caution and allowed the 1st Defendant to take a loan with **Barclays Bank of Kenya**. That the suit property is their matrimonial land as she had taken a loan and had the land registered in her husband's name. That she had no knowledge of what the 1st Defendant was doing with the money that he received as she did not receive any. That she does not support the land transaction as she paid for the land after working for so long. That if the sale is allowed, the family will be left destitute, and she did not want to sell the land.

That together with the 1st Defendant, they bought the land in **1991** and the matrimonial home was the original **L.R 344**, and that there is a permanent house, thereon, though not complete, and she lives there when she comes to Kenya. That the family does not have any other property. That **Michael** lives on the suit property, and he is managing the same, and that her husband sold the land without her knowledge.

DW3 Micheal Mwangi Kimemia, adopted his witness statement dated **16th March 2018**, and testified that he cautioned **L.R 344 in 2005**. However, the same was removed and subdivided. That the suit property is family land and that the caution was in place in **2012**, and was removed by a Court order which was not genuine . That the Court order emanated from **Misc Application No. 90 of 2012**, and when he inquired from the **Executive Officer**, of the Court, he was told that the said order was not genuine . That the suit property is their matrimonial home and that is where they live.

That they have not moved to the house on the land because the house is not complete, but there is someone managing the land . That he lives in Buruburu, in the home where he was born as he works in **Nairobi** and cannot operate from the suit land.

DW4 Thomas Kagichi testified that he is the Senior Deputy County Commissioner . That he saw the Application dated **10th September 2013**, and that there are minutes related to the meeting dated **10th September 2013** .That he did not Chair the meeting and therefore could not authenticate the minutes.

That he saw a letter of consent which is a carbon copy given on **26th September 2013**. That he could not give details that led to the **Consent**, but that if there were no objections consents are given . That he could not tell who were the attendees as he was not the Chairman. That the certificate of the search, the Applications and the receipt and an agreement does not form a part of the requirements. That as per the minutes, there is a coram, the Chairman was present and the parties appeared. That the Applications were made by the seller. That the Board made the minutes, but they were not signed. That the Application was allowed as the Board sat and issued a consent.

Thereafter, the Court directed the parties to file written submissions and in compliance with the said directives, the parties filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and finds that the issues for determination are;

- 1. Whether spousal consent was required**
- 2. Whether the Plaintiffs are entitled to the orders sought.**

1. Whether Spousal Consent was required

The issue of spousal consent is at the core of the instant suit. The 1st Defendant who is the registered owner of the suit property entered into a sale agreement with the Plaintiffs, but the 2nd Defendant is his wife. According to Plaintiffs, all the necessary obligations were performed, but when the Plaintiffs as purchasers sought to transfer the suit property to their Company or themselves, they noted that, the 2nd Defendant had registered a caution

It is the 2nd Defendant's contention that before the sale took place, she did not give her consent to transfer the suit property, which consent was necessary as the suit property is their matrimonial property. The sale agreement between the Plaintiffs and the Defendants was entered into on **14th April 2012**. At the time of the sale agreement was being executed , it is not in doubt that the concept of spousal consent was not a requirement as the requirement was introduced by the **Land Act** which came into force on **2nd May 2012**. See the case of **Gladys Wanjiku Waititu ... Vs... Housing Finance Company Ltd & Another (2017) eKLR:-**

“The requirement of spousal consent was introduced by Section 79(3) of the Land Act 2012. The Act came into force on

2nd May 2012. Prior to that date there was no requirement for spousal consent and the second defendant did not need to obtain spousal consent prior to registration of the Charge instruments dated 28th October 2009 and 1st September 2010. Simultaneously with the Land Act, 2012, Parliament also enacted the Land Registration Act 2012 which also came into operation on 2nd May 2012. Section 109 of the Land Registration Act 2012 repealed the Registered Land Act. I am not alone in holding the view that there was no requirement for spousal consent prior to 2nd May 2012. Mutungi J stated as follows in Barclays Bank of Kenya Ltd –vs- Attorney General & Another (2015) eKLR:-

“I further hold that Section 79(3) of the Land Act cannot apply to prior charges taken prior to the coming into force of the Land Act 2012 and a Chargee of a matrimonial property under a prior charge will be taken to have accrued a right over the charged property without the requirements of spousal consent and would in terms of Section 162 of the Land Act 2012 be entitled to have the benefit of the rights and interests conferred by the prior charge notwithstanding the absence/lack of spousal consent as envisaged under Section 79(3) of the Land Act 2012.”

The Court therefore finds and holds that there was no requirement for a spousal consent to be sought before the suit property was sold. However, a spouse had a beneficial interest over the suit property if the same was matrimonial land and therefore the spouse had an overriding interest and if the Court was to find that the suit property was matrimonial home, then it follows that the spousal consent would have been necessary.

Though there is a **Matrimonial Property Act**, that would guide the Court in determining the same, the Court notes that **Matrimonial Property Act** came into force on the 16th /January/2014, and the same cannot apply retrospectively. It would then follow that the position pre-matrimonial Property Act would be as applied in the case of **Mugo Muiru Investments Limited ...Vs... E W B & 2 Others [2017] eKLR** where the Court of Appeal stated as follows;

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property”.

From the above, it is not in doubt that the overriding interest pre 2nd May 2012, was a matrimonial home occupied by that spouse. The 2nd Defendant testified that she lives in the **United States of America**. That she has lived out of the Country for **20 years** and a calculation of the same shows that she has lived in USA from the year **2000**. Further, while recognizing this is not a Family Court, the Court notes that the 2nd Defendant did not produce any evidence before the Court to show that she is the one who acquired the suit property. It is clear from the testimony of DW2, that she has not lived on the suit property for over 20 years.

It is further clear from the evidence of DW3 that though there is a building on the suit property, the same is incomplete and no one lives on the said property. It is only said that there is a caretaker that has lived on the suit property. DW 3 further testified that his parents live separately and that his father lives at **Kenol** and his mother in the **USA**. He further testified that they had not moved to the house on the suit property as it is not complete, and but there was someone managing the same.

A “matrimonial home” means **any property that is owned or leased by one. or both spouses and occupied or utilized by the spouses as their family home**

It is quite clear in this instant that the suit property was not a matrimonial home. The 2nd Defendant had an overriding interest over the suit property, only when the same was a matrimonial home, which in this case is not.

The Court finds and holds that given that the suit property was not a matrimonial home and as the Contract for sale was entered into before coming into force of the **Land Act, 2012**, the spousal consent was not a requirement and whether or not it was sought, the same could not invalidate the said Contract. See the case of **Isha Mohamed Noor ...Vs...Kenya Commercial Bank Limited & another [2018] eKLR** where the Court held that

16. I find no reason to deviate from the above finding that Charges registered before the enactment of the Land Registration Act 2012 cannot be invalidated on the basis that Spousal consent had not been obtained. It was not a requirement prior to the enactment and the Plaintiff’s pursuit to invalidate the charges herein registered in the years 2009 and 2010 on similar grounds appears to me to be a very long shot which is by all standards unlikely to hit the target.

2. Whether the Plaintiffs are entitled to the orders sought. The plaintiffs have sought

The Plaintiffs have sought for an order of **Specific Performance** and also an order seeking to remove the Caution registered by the 2nd Defendant. The Plaintiffs sought for orders of specific performance. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiffs seeks to rely on meets the requirements of a contract of sale of land. The Plaintiffs and the 1st Defendant entered into an agreement for sale of the suit property herein and that the same was reduced into writing and signed by all the parties. **Section 3 (3) of the Contract Act** provides that;

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiffs and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3)** of the **Contract Act**. Further, the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. This court finds that the said sale agreement is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

Granting of specific Performance is discretionary and as such the Court in deciding whether or not to grant the orders, should look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of **Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

“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 adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

The Court has already found that there is a valid Contract. Specific Performance would not be ordered if there was a mistake or illegality, or when it would cause severe hardship to the Defendant, and Further to grant or not to grant the said orders is discretionary. The Court has considered the circumstances of this case and notes that the Contract was not illegal as spousal consent was not necessary as per the above analysis. Further, the Court notes that though the 2nd Defendant claims that the suit property is matrimonial home, she does not live on the said property and has actually been living in USA for the last 20 years. Therefore no hardship would be occasioned to the 2nd Defendant.

The parties agree that all the obligations had been performed by the parties and the only obstacle is the Caution that was lodged. The Court having held that the caution was based on alleged spousal consent that was not a requirement, further, finds and holds that the only recourse there is, is to order the removal of the caution. Therefore this Court finds and holds that the Plaintiffs are entitled to the Orders sought in their claim.

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs. However costs usually follow the event and in this case, the Court finds and holds that the Plaintiffs being the successful parties are therefore entitled to costs of the suit.

Having now carefully read and considered the Pleadings by the parties, the evidence adduced, the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiffs have proved their case to the required standard of balance of probabilities, Consequently the Plaintiffs' claim as contained in the Plaint dated 7th July 2017, is found merited and the same is allowed in the following terms;

a. An order be and is hereby made directed to the Land Registrar, Thika Land Registry to remove the Caution registered against the property known as land Reference Number Kiambu /Gatwanyanga /4891, registered by the 2nd Defendant herein on the 4th August 2014.

b. That An order of Specific Performance be and is hereby made compelling the Defendants herein jointly and severally to complete their obligations both under the Contract for sale and the subsequent Addendum in respect to the transfer of the one decimal six hectares property being land Reference Number/ Kiambu/ Gatwanyanga /4891.

c. That the Plaintiffs shall have Costs of this suit together with interest thereon.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy