



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 172 OF 2018

(FORMERLY CIVIL SUIT NO. 2925 OF 1997)

PARMINDER SINGH SANDHU.....1ST PLAINTIFF

NANAK ENTERPRISES WORKS LIMITED2ND PLAINTIFF

VERSUS

OLYMPIC ESCORT INTERNATIONAL

COMPANY LTD.....1ST DEFENDANT

OLYMPIC FRUIT PROCESSORS LTD.....2ND DEFENDANT

KEZIAH WANJIKU NGANGA.....3RD DEFENDANT

JUDGEMENT

Background

1. The Plaintiffs commenced this suit vide the Complaint dated the 20th November, 1997 and filed on the same day. The Plaintiffs seek *inter alia* an order of Specific Performance of the agreement contracted by parties herein in respect of the property known as L.R. No. 209/4931/14 in Nairobi. In the alternative, the Plaintiffs pray for transfer of the suit property to either the 1st Plaintiff or the 2nd Plaintiff. The Plaintiffs also pray for damages and costs of the suit.
2. The Defendants filed their statement of Defence on the 22nd June, 1999.

THE PLAINTIFF'S CASE

3. The Plaintiffs' claim is for specific performance of the agreement of sale. They also pray for damages and the costs of the suit. The claim is in respect of the property known as L.R.NO. 209/4931/4 situated in Nairobi.
4. The said property is owned by the First Defendant. The 2nd and 3rd Defendants were the authorised agents of the First Defendant for purposes of the sale of the suit property.
5. The agreement between the parties though not formally reduced into writing was evidenced in writing. The purchase price for the property, L.R.NO. 209/4931/4 in Nairobi was the sum of Kenya Shillings Three Million Five Hundred Thousand (K.Shs. 3, 500,000/=). The said sum was paid in full and received by the 2nd and 3rd Defendants on behalf of the 1st Defendant. Pursuant to the said Agreement, the 1st Defendant allowed the Plaintiffs to take possession of the suit premises as beneficial owners. The Plaintiffs who were hitherto rent paying tenants stopped paying the rent after the sale and no demand for rent has ever been made thereafter. Subsequently, vide the Letter dated 9th November, 1995, the 2nd Defendant undertook to transfer the suit property to the Plaintiffs.
6. The 1st Defendant despite making promises failed, refused and or neglected to complete the said sale or take any steps towards such completion. It is on that backdrop that the Plaintiffs filed their case seeking to enforce the completion of the transaction with the Defendants.

Defendants' case

7. The Defendants in their statement of Defence deny entering into any sale agreement with either the Plaintiffs for the sale of the suit property as alleged in the Plaint and in particular avers that if any proposal was made for sale, then it never materialized and no contract was ever entered into.
8. The first Defendant claims that the proposal and/or offer to purchase the premises never crystallized and the first defendant received no consideration for the purchase of the suit property. That if any amount was paid to any other Defendants then it was not for the purchase of the suit property.
9. The Defendants aver that if any money was paid by the Plaintiffs then it was for some other contract and not for the purchase of the suit premises. The Defendants alleged that there was no privity of contract in regard to the suit premises between the Plaintiffs and the 2nd and 3rd Defendants.
10. The Defendants further argued that the Plaintiff was just a tenant. Though he was in occupation of the suit property he was a mere licensee. That the 2nd Defendant had no authority to hand over possession of the suit premises.
11. This file was transferred from the High Court to this Court on the 10th April, 2018. On numerous occasions, despite being served with Mention and Hearing Notices, there was no appearance for the Defendants. On 6th February, 2019, the Defendant's Advocates upon being served received the notice under protest on the basis that they were no longer acting for the Defendants. However, no application to cease from acting was ever made as required in law. The Court therefore made a determination to the effect that the Advocates were properly on record for the Defendants and any service effected upon them on behalf of the Defendants was proper service.
12. The matter came up for hearing on the 5th October, 2021. There was no appearance for the Defendants despite their Advocates having been served. There was an Affidavit of Service on record filed by the Plaintiffs' Counsel confirming service of the Hearing Notice. The matter proceeded virtually.
13. The Plaintiffs called in One Witness, Parminder Singh Sandhu, the 1st Plaintiff and a Director in the 2nd Plaintiff's Company, Nanak Enterprises Works Limited as Plaintiffs' Witness 1 (PW1). He adopted his Witness Statement dated the 19th February, 2013 as his evidence in- chief. He also produced the documents on the list of documents dated the 19th February, 2013 and filed on the 21st February, 2013 and marked them as Plaintiffs' Exhibit 1 to 16 in the order in which they appeared on the list in support of his case.
14. He further stated that the Suit Property was L.R. NO. 209/4931/4 which they had bought and paid for in full. The 2nd Defendant as an authorised agent of the 1st Defendant confirmed receipt of the full purchase price in the letter of 9th November, 1995. Despite the acknowledgement, the Defendants have refused to transfer the land to the Plaintiffs. He prayed for orders as listed in the Plaint.
15. The Plaintiffs are and have been in possession of the suit property. The Title is a leasehold in the name of Olympic Escort International Company Limited, the 1st Defendant, registered under the now repealed Registration of Titles Act (RTA).
16. The Plaintiff filed their submission and their Counsel highlighted the same on the 10th November, 2021.

Issues for Determination

17. It is the Court's opinion that the issues for determination are;
 - A. Whether there was a valid Legal Contract for Sale of Land between the parties.***
 - B. Whether the Plaintiffs are entitled to the Order of Specific Performance.***
 - C. Whether the Plaintiffs are entitled to an award of damages.***
 - D. Who should bear the costs of the suit***

Analysis and Determination

A. WHETHER THERE WAS A VALID LEGAL CONTRACT FOR SALE OF LAND BETWEEN THE PARTIES

18. Section 3 (3) of the Law of Contract Act before the amendment of 1990, provided that:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

- (i) has in part performance of the contract taken possession of the property or any part thereof; or*

(ii) *being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.*”

19. In the present suit, the claim is in respect of the property on L.R. NO. 209/4931/4 situate in Nairobi. Although parties never reduced their Agreement for Sale into writing, evidence placed before the Court confirms existence of an agreement for sale. The Plaintiffs have annexed the copies of the cheques which were paid to the Defendants.

20. The correspondence exchanged between the 2nd Plaintiff and the 2nd Defendant refers to the sale of Industrial premises on Plot No. 209/4931/4 Nairobi. The letter dated 22nd November 1994 does acknowledge the receipt of Cheque No. 32464 for Kshs.500,000/- towards the deposit of the agreed purchase price of Kshs. 3.5 Million. The letter of 9th November, 1995 acknowledges the payment of the full purchase price and promises to avail the transfer documents subject to early processing by the relevant authorities.

21. This was the reason why the Defendants allowed the Plaintiffs to take possession of the suit premises as beneficial owners. The Plaintiffs stopped paying rent henceforth and no demand for rent was ever made thereafter. The Plaintiffs have continued to occupy the property in question from October 1994 up to date.

22. From the evidence at hand, the Plaintiffs paid the full purchase price which amount was acknowledged by the Defendants herein. The Plaintiffs were thereafter allowed to take possession of the suit land and they have continued to do so till now.

23. It is therefore my finding that there was a valid contract of sale for land in accordance with the applicable Law of Contract at that time, between the parties herein.

WHETHER THE PLAINTIFFS ARE ENTITLED TO THE ORDER OF SPECIFIC PERFORMANCE

24. The Court of Appeal in the case of Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 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 focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

25. In Godfrey Ngatia Njoroge v James Ndungu Mungai [2019] eKLR Justice L. Gacheru while granting an order for Specific Performance stated as follows:

Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative.

The Learned Judge further relied on 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 unenforceable. 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 influence or where it will cause severe hardship to the defendant.”

26. Having already found that there was a valid contract for sale of land and that the Plaintiffs have fully paid the agreed purchase price, the Court is of the view that granting an order of Specific Performance is the best way to ensure that justice is served for all.

B. WHETHER THE PLAINTIFFS ARE ENTITLED TO AN AWARD OF DAMAGES

27. In the case of Kinakie Co-operative Society Vs Green Hotel (1988) KLR 242, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages.

28. In this case, the Defendants sold land to the Plaintiffs. The Defendants thereafter refused to transfer the land despite having been paid the full the purchase price. The Plaintiffs however, have always and are still in possession of the suit land.

29. The Plaintiffs were unable to prove the loss that they have suffered. They did not place any material before the Court to assist in the assessment of damages. The Court therefore has no basis to award any damages to the Plaintiffs.

C. WHO SHOULD BEAR THE COSTS OF THE SUIT

30. The Plaintiff being successful in this case he should be awarded costs of the case. The Defendants shall therefore bear the costs of this suit.

31. Accordingly, the Plaintiffs' claim is allowed in the following terms:-

a) An order of specific performance be and is hereby issued and the 1st Defendant, OLYMPIC ESCORT INTERNATIONAL COMPANY LIMITED is ordered to transfer the Title No. 209/4931/4 to the 2nd Plaintiff, NANAK ENTERPRISES WORKS LIMITED, forthwith.

b) The costs of this suit be borne by the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

M.D MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR. SEVANY FOR THE PLAINTIFF

NO APPEARANCE FOR THE DEFENDANT

COURT ASSISTANT: HILDA

M.D MWANGI

JUDGE