



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 565 OF 2015

JOSEPH KIPRONO MASWAN.....PLAINTIFF

VERSUS

VERONICA MUKAMI NKATHA REITHI.....1ST DEFENDANT

REV. JOHN ROBERT PACKARD.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff brought this suit initially against the 1st Defendant only in the High Court by way of a plaint dated 7th July, 2003. The plaint was amended on 9th March, 2009 to add the 2nd Defendant to the suit. In his amended plaint dated 9th March, 2009 the Plaintiff sought the following reliefs;

- a) A declaration that the Plaintiff is the rightful owner of all that property comprised in L.R No.13459/49(original number 13459/9/2) measuring naught decimal one eight seven one (0.1871) of a hectare or thereabouts situated in the City of Nairobi as delineated on Land Survey Plan No. 186244.
- b) An order of Specific Performance directing the 1st Defendant to transfer all that property comprised in L.R No.13459/49 (original number 13459/9/2) measuring naught decimal one eight seven one (0.1871) of a hectare or thereabouts situated in the City of Nairobi as delineated on Land Survey Plan No.186244 to the Plaintiff.
- c) An order of specific performance directing the 1st Defendant to deliver up the original Certificate of Title and the Deed plan to the Registrar of Titles for purposes of processing the transfer in favor of the Plaintiff.
- d) An order compelling the 2nd Defendant to lift and/or remove the said caveat registered against the suit property and allow the 1st Defendant to transfer the suit property to the Plaintiff.
- e) In the alternative and without prejudice to prayer (a), (b) and (c), the Plaintiff prays for refund of the sum of Kshs. 590,000/= together with interest at the rate of 30% per annum with effect from 4th October 1995 until payment in full and general damages for breach of contract.
- f) Costs of the suit
- g) Interest on (e) above at court rates
- h) Any other or further relief that this Honourable Court may deem fit to grant

2. The 1st Defendant filed a defence and counter-claim against the Plaintiff dated 22nd May, 2006 in which she sought the following reliefs;

- i. A declaration that the Agreement between the Plaintiff and the 1st Defendant is null and void.
- ii. A declaration that the 1st Defendant has been discharged from the performance of the Agreement dated 4th October, 1995.
- iii. An order compelling the Plaintiff to deliver up possession of the suit property L.R No.13459/49 to the 1st Defendant.

iv. An order for all necessary and consequential accounts directions and inquiries.

v. An order compelling the Plaintiff to pay all rates, rents, taxes and all outgoings in respect of the suit property LR No.13459/49 since 30th October, 1995 to the date when he delivers the possession to the 1st Defendant.

vi. An order that the Plaintiff pays the 1st Defendant Mesne Profits since 30th October, 1995 until the date he delivers up possession to the 1st Defendant.

vii. A permanent injunction restraining the Plaintiff whether acting by himself, his servants or agents, in conjunction or association with any person from interfering in any way whatsoever with the 1st Defendant's use, possession, occupation and enjoyment of the L.R No.13459/49 or harassing her or intimidating her in any way whatsoever.

viii. General damages.

ix. Cost of this suit and Counter claim.

x. Interest on vi, viii and ix above at the rate of 30% per annum from 30th October, 1995 until payment in full.

xi. Any other relief this Court may deem fit to grant.

3. The Plaintiff averred that on 4th October, 1995 he entered into an agreement with the 1st Defendant to purchase all that property known as L.R No.13459/49(original number 13459/9/2) measuring naught decimal one eight seven one (0.1871) of a hectare situated in the City of Nairobi as delineated on Land Survey Plan No. 186244 (hereinafter referred to as "the suit property") at a price of Kenya Shillings Nine Hundred and Eighty Thousand only (Kshs. 980,000/=).

4. The Plaintiff averred that it was agreed that he would pay to the 1st Defendant a sum of Kenya Shillings Five Hundred and Ninety Thousand (Kshs.590, 000/=) upon execution of the sale agreement and the balance of the purchase price within seven (7) days after the registration of the transfer in his favour and that the 1st Defendant would obtain all the requisite clearances and consents and execute all documents and papers to facilitate the completion of the agreement.

5. The Plaintiff averred that he paid the agreed sum of Kshs.590, 000/= but the 1st Defendant refused to take necessary steps to facilitate the procurement of a certificate of title for the suit property in her name thereby breaching the terms of the agreement.

6. The Plaintiff averred that the 2nd Defendant had registered a caveat against the suit property claiming purchaser's interest despite the fact that the Plaintiff had acquired purchaser's interest in the suit property prior to that of the 2nd Defendant hence the Plaintiff's interest takes priority over that of the 2nd Defendant.

7. In her defence and counter claim filed on 24th May, 2006 the 1st Defendant admitted having entered into a sale agreement with Plaintiff but denied that she breached the agreement. The 1st Defendant averred that she had always been willing to refund the payment she received from the Plaintiff as a deposit since despite all her efforts to ensure completion of the agreement by procuring a Certificate of Title, it was until 13th November, 2001 that the same was issued in her name.

8. The 1st Defendant averred that the Plaintiff knew that the suit property was not registered in her name. The 1st Defendant averred that it became impossible for her to transfer the suit property to the Plaintiff in the absence of a Certificate of Title hence the agreement of sale expired and was deemed null by passage of time on 30th October 1995 coupled with the conduct of parties.

9. The 1st Defendant averred that after the said agreement lapsed, the Plaintiff resorted to a systematic scheme of harassing her by among others; making a report to the police that she had obtained money by false pretense, causing her to be summoned by the Kenya Police to the criminal Investigation Department and calling her through her mobile telephone and hurling insults at her and issuing threats.

10. The 1st Defendant averred that she made it clear to the Plaintiff that that the agreement of sale had not only lapsed but she was neither able to complete the agreement nor was she willing to have any dealing with him any further having regard to his conduct. The 1st Defendant averred that the agreement stood rescinded.

11. The 1st Defendant averred that pending the completion of the agreement, the Plaintiff took possession of the suit property but breached the terms of possession by; failing to keep it in good state, failing to tend it in a good husbandry manner, failing to pay rates, rents, taxes and other costs, digging trenches and dumping boulders and assorted rocks on the suit property.

12. The 1st Defendant averred that the Plaintiff had refused to deliver up possession of the suit property in breach of the Law Society Conditions of Sale which were part of the agreement.

13. The 1st Defendant averred that the suit property had a market rental value of Kshs. 15,000/- per month at the time the Plaintiff took possession thereof, which value had steadily risen. The 1st Defendant claimed *mense* profits from the Plaintiff from 30th October, 1995 until possession is given up.

14. The Plaintiff filed a reply to defence and defence to 1st Defendant's Counter Claim on 8th June, 2006. The Plaintiff averred that the agreement for sale between the parties was extended by the 1st Defendant's conduct of holding the sum Kshs. 590,000/- that was paid to her as a deposit hence the 1st Defendant was estopped from using lapse of time to the detriment of the Plaintiff.

15. The Plaintiff denied that he was involved in the harassment of the 1st Defendant or that he breached the terms on which he was granted possession of the suit property. The Plaintiff averred that the suit property was sold to him in vacant possession on the date of completion and since the 1st Defendant was in breach of the terms of the agreement by failing to complete the agreement, he had not taken possession. The Plaintiff averred that the 1st Defendant was not entitled to the reliefs sought in the counter-claim since the Plaintiff was not in possession of the suit property.

16. The 2nd Defendant did not enter appearance.

17. At the trial, only the Plaintiff turned up. The 1st Defendant did not attend court for the hearing despite service. The Plaintiff who gave evidence as PW1 adopted his recorded witness statement filed in court on 5th April, 2012 as his evidence in chief. He also produced his bundle of documents filed in court on 5th September, 2014 as Plaintiff's Exhibit 1.

18. The Plaintiff stated that he purchased the suit property at a consideration of Kshs. 980,000/-. The Plaintiff stated that after entering into the agreement for sale with the 1st Defendant in respect of the suit property and paying the deposit of Ksh.590, 000/- to the 1st Defendant, he took possession of the property and constructed a site office thereon. The Plaintiff stated that the 1st Defendant refused to transfer the suit property to him. He stated that he was seeking specific performance and that he was willing to pay the balance of the purchase price.

19. On examination by the court, the Plaintiff stated that the suit property is situated off-Langata road and that it was not clear to him why the Plaintiff refused to transfer the suit property to him.

20. The court directed the parties to make closing submissions in writing. The Plaintiff filed submissions on 19th October, 2021 in which he submitted that he has proved his case against the Defendants on a balance of probabilities and urged the court to grant the reliefs sought.

21. Since the 1st Defendant did not tender evidence in proof of her counter-claim against the Plaintiff, the counter-claim was not prosecuted and the court need not make any determination on the issues raised therein. The counter-claim is dismissed. With regard to the Plaintiff's suit, the following in my view are the issues arising for determination which I will consider together;

- a) Whether the agreement for sale agreement dated 4th October, 1995 is enforceable.
- b) Whether the Plaintiff is entitled to an order for specific performance.
- c) Whether the Plaintiff is entitled to the reliefs sought.
- d) Who is liable for the costs of the suit?

22. I find the agreement for sale dated 4th October, 1995 between the parties valid in all material respects. The agreement was performed in part by the Plaintiff. The Plaintiff paid a deposit in the sum of Kshs. 590,000/-. He was to pay the balance of the purchase price once the suit property was transferred to him by the 1st Defendant and registered in his name. The 1st Defendant had contended that the agreement was not enforceable because the 1st Defendant was unable to perform her part of the agreement as at 30th October, 1995. Whereas I am in agreement with the 1st Defendant that from the evidence on record, she was unable to perform her part of the agreement due to lack of a certificate of title, the parties from their conduct kept the agreement alive. There is no evidence that any of the parties treated the agreement as having been frustrated. The 1st Defendant held on to the deposit that was paid to her while the Plaintiff kept on pursuing the completion of the agreement. As at the time the Plaintiff came to court in 2003, the 1st Defendant had obtained a Certificate of Title in respect of the suit property and she was in a position to complete the agreement. Since the agreement dated 4th October, 1995 was not rescinded by any of the parties, it is my finding that the same is enforceable.

23. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhubuti CA No.165 of 1996 it was held that:

“...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...a plaintiff 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.”

24. Specific performance is a discretionary remedy. It follows therefore that even if the plaintiff has satisfied all the conditions for the grant of the relief, the court can still decline to grant the same for good reason. In Amina Abdulkadir Hawa v Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors have stated as follows:

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

25. As I have stated above, the Plaintiff had performed his part of the agreement for sale between him and the 1st Defendant. I am satisfied that the plaintiff has met the conditions for grant of an order for specific performance. The 1st Defendant did not give evidence at the trial. There is therefore no evidence that the 1st Defendant will have any difficulty in performing the agreement for sale dated 4th October, 1995. In any event no such difficulty was pleaded in the 1st Defendant’s defence.

26. In addition to the order for specific performance, the Plaintiff had also sought a declaration that he is the owner of the suit property, an order that the 2nd Defendant lifts the caveat that he had registered against the title of the suit property so that the transfer in favour of the Plaintiff could be registered. The Plaintiff had also sought as an alternative relief a refund of the deposit in the sum of Kshs. 590,000/- together with interest and general damages for breach of contract.

27. I am of the view that the Plaintiff is not entitled to a declaration that he is the rightful owner of the suit property. The property is registered in the name of the 1st Defendant and can only be owned by the Plaintiff once the same is transferred to him and he pays the balance of the purchase price. With regard to the order seeking removal of the caveat registered by the 2nd Defendant, the 2nd Defendant did not file a defence to the Plaintiff’s claim. The Plaintiff’s contention that his interest in the suit property accrued earlier than that of the 2nd Defendant was not rebutted. The Plaintiff is in the circumstances entitled to the order. With regard to the alternative relief, specific performance is a discretionary remedy as mentioned earlier. It was therefore in order for the Plaintiff to seek alternative remedy in the event that the court was to find that an order for specific performance is not available to him.

Conclusion:

28. In conclusion, it is my finding that the Plaintiff has proved his case against the Defendants on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendants on the following terms;

- a) An order for Specific Performance directing the 1st Defendant to transfer to the Plaintiff forthwith all that property comprised in L.R No.13459/49 (original number 13459/9/2) measuring naught decimal one eight seven one (0.1871) of a hectare or thereabouts situated in the City of Nairobi as delineated on Land Survey Plan No.186264(the suit property).
- b) An order for specific performance directing the 1st Defendant to deliver up forthwith the original Certificate of Title and the Deed Plan in respect of the suit property to the Plaintiff for the purposes of processing the transfer in favor of the Plaintiff.
- c) An order lifting and/or removing the caveat registered against the suit property by the 2nd Defendant on 29th July, 2002 as entry No. 3 to allow the registration of the transfer of the suit property in favour of the Plaintiff.
- d) The Plaintiff shall pay to the 1st Defendant the balance of the purchase price in the sum of Kshs. 390,000/- within seven (7) days of registration of the transfer of the suit property in favour of the Plaintiff.
- e) The Plaintiff shall have the costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2021

S. OKONG’O

JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

MR. ODOYO FOR THE PLAINTIFF

N/A FOR THE 1ST DEFENDANT

N/A FOR THE 2ND DEFENDANT

MS. C.NYOKABI-COURT ASSISTANT