



REPUBLIC OF KENYA



**Sieki v Ngigi (Environment & Land Case E020 & 31 of 2020
(Consolidated)) [2024] KEMC 150 (KLR) (10 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 150 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
ENVIRONMENT & LAND CASE E020 & 31 OF 2020 (CONSOLIDATED)
PA NDEGE, SPM
SEPTEMBER 10, 2024**

BETWEEN

MARTHA YUNICE BOSIBORI SIEKEI PLAINTIFF

AND

DAVID MWANGI NGIGI DEFENDANT

JUDGMENT

A. Consolidated Suits

1. This judgment relates to the consolidated suits. In the first suit, ELC No. E20 of 2020, the plaintiff therein, Martha Yunice Bosibori Siekei, is vide a Plaint dated 02/11/2020, seeking for the following orders against the Defendant therein, David Mwangi Ngigi: -
 - a. An order of Permanent Injunction restraining the Defendant, his agents or servants from selling, advertising for sale, transferring, interfering or dealing with any manner whatsoever with the plaintiff's parcel of land.
 - b. An order of Cancellation of the Notice to Rescind the contract issued to the Plaintiff by the Defendant as the same should not be treated as a way of rescinding a contract since the Plaintiff still had sometime left for her to complete payment of the purchase price when she was surprised with the Notice of rescinding their contract.
 - c. An order of Specific Performance be issued to the Defendant compelling him to complete and meet his part of the contract as per the contents of the Agreement dated 15.03.2018.
 - d. Costs of the suit be borne by the Defendant.
2. It is the Plaintiff's claim that the Notice to Rescind was issued by the Defendant prematurely. That vide the contents of a Further Agreement, the Defendant acknowledged the existence of the initial agreement dated 15/03/2018 and that the payment of the purchase price was to conclude on or before



the end of December 2019. That the notice to rescind or cancel the Sale Agreement however came on 15.03.2018.

3. In his Statement of Defense dated 31/11/2020, the Defendant through the firm of Antony Musili & Co. Advocates, admitted the content of the further agreement, but that the plaintiff reneged on the terms of the agreements. That the defendant wrote to the plaintiff on 13.09.2018 indicating his intention to cancel the sale agreement as the plaintiff was not honoring the terms of the sale agreement.
4. In ELC No. E31 of 2020, Nicodemus Onchuru Omwenga, vide a plaint dated 18.11.2020, seeks the following orders against the defendant therein, Martha Yunice Bosibori Siekei:
 - a. Declaration Order that Njoro/Ngata Block/2/6369 measuring 0.39 Ha belongs to Hysa Housing Co-operative Society Limited
 - b. A permanent Order of Injunction restraining the defendant by herself, her agents, servants and or employees from entering, developing, remaining, trespassing, and or threatening the plaintiff's quiet enjoyment and possession of all that parcel of land known as Njoro/Ngata Block 2/6369 belonging to Hysa Housing Co-operative Society Limited.
 - c. Costs of the suit
 - d. Any other relief that this honorable court may deem fit to grant.
5. It is however noteworthy that in this second suit, there was no Statement of Defense filed by the Defendant. Thus the suit is deemed unopposed. The matters were therefore consolidated just for purposes of the plaintiff, Nicodemus Onchuru Omwenga, proving his case against the defendant who happens to be the plaintiff in the first suit.
6. All the parties herein testified and mainly relied on their written statements and basically reiterated the averments in their respective pleadings. After the close of hearing, written submissions were filed by the 2 plaintiffs only.

B. Issues for determination

7. The court has gone through the pleadings, the evidence and written submissions by the plaintiffs. The issues calling for determination are:
 - (i) If the sale agreements were valid in law.
 - (ii) If parties abided by their terms and conditions
 - (iii) If there was breach of the terms and conditions of the aforesaid sale agreement.
 - (iv) If there was any notification of breach by the defendant, David Mwangi Ngigi.
 - (v) What were the consequences of the breach, acquiescence and or variation of the sale agreement.
 - (vii) If the plaintiffs are entitled to specific performance, injunction or declaratory orders sought in their respective suits, costs and interests.

C. Determination

8. It is trite law that parties to a suit are bound by their pleadings and issues for courts determination flow from the pleadings. See IEBC vrs Stephen Mutinda Mule (2014) eKLR. In Raila Amolo Odinga & Another vrs IEBC & 2 Others (2017) eKLR the Supreme Court of Kenya held no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in



support of the case set up by them and that pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration. Further the court stated the issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party and hence the court is not permitted to frame an issue not arising from the pleading.

9. In these suits the primary pleadings before the court are the respective complaints and a Statement of Defense in EE020 of 2020. Again, as aforesaid, there was no defense filed against the Plaintiff or suit in E31 of 2020. It is however clear from the pleadings and evidence that the plaintiff, Martha Yunice Bosibori Siekei, did not complete payment of the purchase price as agreed in the further agreement, that is before the end of December 2019. She confirmed that she had a huge balance as at October 2020, when the Notice to Rescind was issued.
10. At clause 7 the sale agreement states it was subject to the Law Society of Kenya Conditions of sale so far as the same were not inconsistent with the terms and conditions. The sale agreements were duly executed and witnessed by Ogeto Onsongo Peter Advocate.
11. The Law Society Conditions of Sale and the agreement for sale (1989) edition provided a general guideline for conveyancing lawyers and parties with salient features such as the deposit, completion date, possession, appointment, interest on purchase price, delivery of title, objection and requisitions and, tenancy.
12. In *National Bank Of Kenya Ltd Vrs Pipeplastic Sunkolit (k) Ltd & Another* (2003) 2 E.A 503 the Court of Appeal held that a court of law cannot rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.
13. In *William Kazungu Karisa vrs Cosmas Angore Cnzera* (2006) eKLR, the court held the basic rule of law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties.
14. Further in *Kanyango vrs KCB Ltd & Another* (2004) 1 KLR 126, the court held it was not the duty of courts to make contracts but to construe any such contracts and arbitrate on them. In these suits, parties set out the timelines for the payment of the deposit and the completion date which was not later than December 2019. I do not find any justification by the plaintiff on the reason why she did not complete the payment process by the end of December, 2019 as covenanted.
15. The sale agreement did not provide for issuance of notice of either party should one default. The Law Society of Kenya Conditions therefore come into play. Clause 7 (b) thereof provides for service of a completion notice of 21 days. In *Elijah Kipkorir Barmatel & Another vrs John Kiplagat Chemweno & 3 Others* (2010) eKLR the court held a notice must be served on the defaulting party before any assertion can be made that time was of essence.
16. In *Sisto Wambugu vrs Kamau Njuguna* (1983) eKLR the court held contracts for sale of land gives the vendor the right to rescind the sale if the purchaser does not pay on the appointed day after giving a reasonable notice to the defaulting party making time of essence. In this suit, it has not been explained in any way whatsoever, the main contributing factor for the delay or inability to pay the purchase price as covenanted. As confirmed by the Plaintiff in her pleading, necessary notices were issued to her, informing her of the breach and intention to rescind. From what they had paid initially, in the alternative allow the defendant to resale the land and make a refund. That is what the defendant herein did. He then sold and eventually transferred the land parcel to Hysa Housing Co-operative



Society Limited. As aforesaid, the plaintiff, Martha Yunice Bosibori Siekei, filed no defense against Hysa Housing Co-operative Society Limited, who I hereby find to be an innocent purchaser for value without notice.

17. In *Syedna & Others vrs Jamil Engineering Co. Ltd* (1973) E.A 294 the court held the general principle where a buyer has paid but is unable to complete the contract. For a party to be entitled to an order for specific performance he must be prepared to demonstrate performance of his part of the terms or willingness to perform them and further to show that they had not acted in contravention of the essential terms of the said agreement. Though failure to deliver up the balance of the purchase price by the appointed time does not necessarily bring the agreement to an end, it all depends on the hardship that the parties may encounter if specific performance is ordered. I do find that in this case, the land parcel has since been resold and transferred to the plaintiff in ELC E031 of 2020, who have since taken possession. Specific performance is therefore not a viable remedy in these consolidated suits.
18. In any case, Martha Yunice, appears to have no issue against Hysa Housing Co-operative Society Limited. I thus do hereby find the case ELC E031 of 2020, to have merit and do hereby allow the suit as prayed. I on the other hand find no merit in ELC E020 of 2020, which I do hereby dismiss with costs.
19. In the premises I do hereby enter judgment against the defendant in E031 of 2020 as follows: -
 - a. A declaration order be and is hereby issued that Njoro/Ngata Block 2/6369 measuring 0.39 Ha belongs to Hysa Housing Co-operative Society Limited
 - b. A permanent Order of injunction be and is hereby issued restraining the Defendant in E031 of 2020 by herself, her agents, servants and or employees from entering, developing, remaining, trespassing, and or threatening the plaintiff in E031 of 2020's quiet enjoyment and possession of all that parcel of land known as Njoro/Ngata Block 2/6369 belonging to Hysa Housing Co-operative Society Limited
 - c. Costs of the suit in E031 of 2020, awarded to the Plaintiff therein.
 - d. Costs of the suit in E020 of 2020 awarded to the Defendant therein.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 10TH DAY OF SEPTEMBER, 2024

In presence of: Karanja Mbugua present for the plaintiff in E020/2020; Kimure for the plaintiff in E031/2020; Plaintiff in E031/2020.

HON. ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

