



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC SUIT NO. 729 OF 2017**

**STANLEY THYAKA MUINDI.....APPLICANT**

**VERSUS**

**MATEWA AGENCIES LTD.....1<sup>ST</sup> RESPONDENT**

**JOHNSON K MATERE.....2<sup>ND</sup> RESPONDENT**

**ELIZABETH W MATERE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Applicant filed an **Originating Summons** against the Respondents seeking for the following orders;

- 1. An order of Specific Performance compelling the Respondents to complete the sale Agreement dated 15<sup>th</sup> January 2013 by delivering all the completion documents.***
- 2. An order of Specific Performance compelling the Respondents to execute the transfer documents and transfer all those parcels of land known as LR. No.4953/4746 and 4953/4748 in favour of the Applicant in default of which the Deputy Registrar of the Court to execute all such documents as may be necessary for securing the transfer of the suit property to the Applicant.***
- 3. Costs of the suit plus interest.***
- 4. Any other remedy as the Court may deem fit.***

The Application is based on the grounds that the Applicant and the 1<sup>st</sup> Respondent entered into a sale agreement for the sale and purchase of

**L.R Nos.4953/4746 & 4953/4748**, for a consideration of **Kshs.1,500,000/=** and the Applicant paid a deposit of **Kshs.750,000/=** as down payment of the purchase price and a further **Kshs.750,000/=** as the final purchase price and upon execution of the Agreement he was granted possession and he has been in possession to date. However, the Respondents have failed to deliver the Completion documents to enable transfer of the property, despite the Applicant fulfilling his part of the bargain and it is in the interest of Justice that the orders sought be granted.

In his **Supporting Affidavit**, the Applicant reiterated the contents of the grounds in support of **Originating Summons** and further averred that the Agreement was duly executed by the Directors of the 1<sup>st</sup> Respondent being the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It was his contention that having paid the full purchase price, which payment was duly acknowledged by the Vendors' Directors in the presence of the Vendors' Advocates, and the completion date being 90 days from the date of execution of the Agreement. The Respondents have refused to deliver the completion documents in breach of the agreement. The Completion documents being; Original Title Deed, Duly executed transfers, colored passport photographs, copies of the Vendors Pin Certificate, Consent to transfer from the Commissioner of Lands, Land Rates and Rent Clearance Certificate.

He further averred that despite engagements by his Advocates for the Respondents to deliver the completion documents, the same has not been forthcoming and he urged the Court to order for specific performance as every land is unique and as such he is aggrieved by the delays.

The suit is contested and the 3<sup>rd</sup> Respondent filed a Replying Affidavit and averred that she is a Director of the 1<sup>st</sup> Respondent and therefore competent to swear the Affidavit. She further averred that the Applicant took immediate possession and ownership of the parcels of land upon execution of the agreement. She further averred that the suit parcels emanated from the land parcel Known as **LR 4953/2011**, of which the rates in respect of the subtitles was paid to facilitate closure of the mother title but their efforts were frustrated by the **Ministry of Lands Nairobi**, who failed to process the title documents that were to be surrendered to the Applicant. She further averred that they fully complied

with all requirements by the **Ministry of Lands**, and the breach of contract has been occasioned by delays in the **Ministry of Lands** and not by the Respondents. She urged the Court to summon the concerned officers to give an explanation. Further that they are willing to complete the **Sale Agreement** but the requisite documents have not been released

The 2<sup>nd</sup> Respondent in opposing the suit also filed a **Replying Affidavit** and adopted the averments of the 3<sup>rd</sup> Respondent. It was his contention that it is the **Ministry of Lands** that is mandated to issue title deeds and not the 1<sup>st</sup> Respondent. He averred that he ceased being a Director and shareholder of the 1<sup>st</sup> Respondent in **January 2017**, but before he retired he had done his due diligence. He averred that the Ministry of Lands should be held accountable as they are the ones who refused to issue title deeds from the suit properties. As a result he sought help from the then Kiambu Governor and the late **Hon. David Mwenje**, but his efforts did not bear any fruits. It was then that some buyers got frustrated and opted to pay bribes and about **45 titles** were released. He further contended that the **Ministry of Lands** has now become digitized and what remains is for the Applicant to pay rates and rents to expedite the process.

The Court has now carefully read and considered the Pleadings by the parties and the written submissions. It is this Court's opinion that the issues for determination are;

1. *Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were improperly sued*
2. *Whether the Sale Agreement contract was valid.*
3. *Who should procure the Completion documents*
4. *Whether the Applicant is entitled to the Orders sought*

1. *Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were improperly sued*

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were Directors of the 1<sup>st</sup> Respondent. In the Sale agreement provided as evidence before this Court, the Vendor was **Matewa Agencies Limited**, which is limited liability Company. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents signed the said Agreement as Directors of the Company. A Company is a separate entity from its Directors and shareholders. It can sue and be sued on its own and unless it can be shown that the Directors had any misgivings or are involved in fraud, they do not become personally liable for the deeds of the Company. See the case of **George Williams Omondi & Another... Vs...Co-operative Bank of Kenya Ltd & 2 Others [2016]Eklr, where the Court Cited the case of H M B Kayondo... Vs... Somani Amirali, Kampala HCCS No.183 of 1994**, where it was held that;

*“There is no doubt that a Company duly registered is a legal entity distinct from the subscribers or those who formed it. Once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities, appropriate to itself. The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the Company is not, in law, the agent of the subscribers or trustees for them. Nor are the subscribers as members like any shape or form except to the extent and the incidence of incorporated is the same whether the shares in the company are in the hands of one man or many... Courts are in general precluded from treating a company as the alias, agent, trustee or nominee of its members, but they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct and this is what is meant by lifting the veil of incorporation...Since the defendant was the sole proprietor of his company, he knew or ought to have known that the company did not have funds to meet the cheques on due dates. To permit the defendant to hide behind corporate personality will amount to allowing him to escape the consequences of his breach of fiduciary trust placed in him by the plaintiff...Accordingly, the corporate veil is lifted and the defendant held personally liable.” [Emphasis added].”*

The Applicant has not alleged nor proved any misgivings on the part of the Directors neither has he asked for the corporate lifting of the veil. See the Case of **Victor Mabachi & Another...Vs...Nurturn Bates Ltd, Civil Appeal No.247 of 2005 [2013] eKLR**, where the Court held that

*“a company as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.*

As such the Applicant cannot be said to sue the Directors personally. This Court therefore finds that the Directors were wrongly enjoined to the suit.

2. *Whether the Sale Agreement contract was valid.*

In deciding whether or not a Contract for the sale of land is valid the Court must look at whether or not the said Contract meets the requirements of **Section 3(3)** of the **Contract Act** which 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.*

This Court has looked at the sale agreement that has been produced, and noted that the Sale Agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same 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”.*

Since all the above ingredients have been met in the instant sale agreement entered between the Applicant and the 1<sup>st</sup> Respondent, the Court finds and hold that the **Sale Agreement** between the two is valid.

### **3. Who should procure the Completion documents**

The Applicant has alleged that the completion date was **90 days** and despite his Advocates writing to the Defendants to complete the transaction they have neglected to do so. This Court has gone through the sale Agreement. Having found that the same was valid and enforceable it would therefore mean that the parties are bound by the terms of the Contract. See the case of Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999, where the Court held that:-

*“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”*

Though the Defendants have alleged that the Applicant was aware of the tribulations that were facing them, this Court notes that in the Contract that was signed by the parties it was clear that the said suit properties were being sold free from any encumbrance. Parties are bound by the terms of their contracts and the Court can not be seen to be rewriting the contract for the parties. See the case of National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, where the Court held that:-

*“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.*

Further there have been allegations by the Respondents that they have nothing to do with the completion documents as it officials from the **Ministry of Lands** that are in possession of the documents that are required.

This Court has already noted that the contract signed by the parties was valid. In the said **Sale Agreement**, the Vendor had the obligation of presenting to the Applicant the completion documents as listed. The Respondents cannot now turn around and claim that they are not responsible for the same. The Respondents have urged the Court to summon the Ministry of Lands officials to come to court to explain why they are yet to issue the title. This Court notes that there are procedures to be followed in compelling government officials to do that which they are mandated to do. This Court takes great exception by the allegations by the 2<sup>nd</sup> Respondent that land officials had to be bribed in order for other parties to get title deals. While these allegations have not been substantiated, it does not escape that indeed there were parties that were issued with title deeds. It therefore means that it is indeed clear that the Applicant can also get his title deed and that fact is not farfetched.

The Respondents are being dishonest when they require the Applicant to follow up on the issue on his own. The purpose of Judicial Review proceeding and specifically an order of Mandamus cannot be gainsaid. At this juncture, this Court finds that the 1<sup>st</sup> Respondent is bound by the term of the Contract and as the Contract required that the Vendor provides the Applicant with the completion documents, it is therefore its mandate to ensure that the same are procured.

### **4. Whether the Applicant is entitled to the Orders**

The Applicant has sought for specific performance and for such orders to be issued, the Court must first determine whether there was an enforceable contract. As earlier noted, the Court did find and hold that there was a valid Contract and as such the same is enforceable.

This Court has perused the **Sale Agreement** that has been produced, and noted that the same is in writing and signed by all parties and further there was consideration. It thus met the requirements of **Section 3(3)** of **Contract Act**. 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. 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.”*

As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to. Though the Respondents have alleged that the Ministry of Lands have taken long to process the title deeds it has further been contended that with respect to the Mother Title to that the suit properties emanated from, there were titles that were processed. It would therefore mean that the processing of the title for the Applicant will not present any difficulties.

Though the Respondents have alleged that it is the Applicant’s fault as he has not yet paid Rates and Rents of the suit property, no proof or even a simple letter to the Applicant requiring him to present the same has been produced in this Court. Further the Applicant has been in possession of the suit land for several years and has also developed it. In this instant therefore, **damages** may not be an appropriate remedy and as such **Specific Performance** is the best way to ensure that justice has been served. The award is specific performance will not prejudice the Applicant nor the Respondent at all.

This Court therefore finds that the Applicant is entitled to the orders sought. The Respondents should have taken the necessary measures before this matter escalated to Court and as such the Applicant being the successful party is entitled to costs of the suit.

Having now carefully considered the available evidence and the exhibits thereto together with the written submissions , the Court finds that the Applicant has discharged his duty of proof on a balance of probabilities against the Vendor and the Vendor herein is the 1<sup>st</sup> Respondent.

Having found that the Corporate Veil had not yet been lifted, then the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were improperly enjoined herein. However, it is the duty of the 1<sup>st</sup> Respondent to ensure that all the completion documents were procured and that it completes its part of the bargain.

For the above reasons, the Court finds that the Applicant has proved his case against the 1<sup>st</sup> Respondent on the required standard of balance of probabilities. Consequently, Judgment is entered for the Applicant against the 1<sup>st</sup> Respondent in respect of **prayers No.1, 2 & 3**.

The said actions to be performed and completed by the 1<sup>st</sup> Respondent within a period of 60 days from the date hereby.

It is so ordered.

**Dated, Signed and Delivered at Thika this 21<sup>st</sup> day of June, 2019**

**L. GACHERU**

**JUDGE**

**21/6/2019**

**In the Presence of**

**Ms. Njoki Mwaura H/B for Mr. Muoki for the Applicant**

**Ms. Gachomba H/B for Ms. Kiongera for the Respondent**

**Lucy - Court Assistant**

**Court - Judgment read in open Court in the presence of the above advocates.**

**L. GACHERU**

**JUDGE**

**21/6/2019**