



REPUBLIC OF KENYA

IN THE MAGISTRATE COURT OF KENYA AT MACHAKOS COUNTY

COURT NAME: MACHAKOS MAGISTRATE COURT

CASE NUMBER: MCELCE/E079/2022

ZAMZAM MARIAM OMAR VS HARRISON NDETO KILONZO AND JOHSON NZUKI KILONZO AND 2
OTHERS

JUDGMENT

Introduction

[1] This Judgment determines a suit for specific performance and permanent injunction concerning the parcel of land known as Balloted Commercial Plot No. 0966, situated within Konza Ranching and Farming Co-operative Society Limited, measuring approximately two (2) acres (hereinafter referred to as "the suit property"). The suit was instituted by the Plaintiff, Zamzam Mariam Omar, against the Defendants, who are the personal representatives and beneficiaries of the Estate of the late Mwelu Kilonzo alias Mwelu Kilonzo Kilaki.

[2] The Plaintiff's claim is premised on a Sale Agreement dated 17th February, 2020. She asserts that she purchased the suit property for a consideration of Kshs. 3,300,000/-, of which she paid a deposit of Kshs. 2,000,000/-. She alleges that the Defendants breached the agreement by entering into a second sale with a third party and by refusing to confirm the grant of letters of administration to facilitate the transfer. Despite being served with summons and the hearing notice, the Defendants did not enter an appearance or file any defence, and the matter proceeded ex parte.



Plaintiff's Case

[3] PW1, Zamzam Mariam Omar, the Plaintiff, testified and adopted her witness statement dated 22nd July, 2022. She stated that on 17th February, 2020, she entered into a written Sale Agreement with the four Defendants for the purchase of the suit property at an agreed purchase price of Kshs. 3,300,000/-.

[4] Regarding payment, PW1 stated that she paid a total deposit of Kshs. 2,000,000/-. She clarified that Kshs. 1,950,000/- was paid via bank transfer from her husband's account (Robley Muktar Mohamed), and the balance of Kshs. 50,000/- was paid in cash on the date of execution. She produced several documents in support of her claim, including the Sale Agreement (Exhibit 1), bank transfer confirmation (Exhibit 2), and a copy of the Allotment Letter for Plot No. 0966 (Exhibit 3).

[5] PW1 further stated that it was an express term of the agreement that the Defendants would transfer the property upon the production and confirmation of the Grant of Letters of Administration for their deceased mother's estate. She produced a copy of the Letters of Administration Intestate issued to the 1st and 4th Defendants on 19th November, 2021 (Exhibit 4). She averred that despite being listed as a creditor in the succession proceedings (Succession Cause No. E102 of 2021), the Defendants became adamant and refused to move for the confirmation of the grant.

[6] PW1 averred that the Defendants, in a display of bad faith, entered into another sale agreement with third parties (Benjamin Ndavi Muia and others) on 8th March, 2021, for a higher price of Kshs. 3,900,000/-. She produced a copy of this second agreement (Exhibit 5) and a letter dated 24th December, 2021, from the Defendants' advocates to the Chairman of the Konza Society, requesting the rectification of records to favour the new purchasers (Exhibit 6).

[7] PW1 concluded her testimony by stating that she is ready and willing to pay the balance of Kshs. 1,300,000/- in exchange for the title deed. She prayed for specific performance of the contract, a declaration of ownership, and a permanent injunction to protect her interest.



Analysis and Determination

[8] Since the Defendants did not participate in the proceedings, the Plaintiff's evidence remains uncontroverted. However, the legal burden of proof remains on the Plaintiff to prove her case on a balance of probabilities as per Sections 107 and 108 of the Evidence Act. The issues for determination are:

- a) Whether there exists a valid and enforceable sale agreement between the Plaintiff and the Defendants.
- b) Whether the Defendants are in breach of the said agreement.
- c) Whether the Plaintiff is entitled to the reliefs sought.

Existence of a Valid Agreement

[9] The formalities for a valid land contract are governed by both the Law of Contract Act and the Land Act. Section 3(3) of the Law of Contract Act, Cap 23, provides:

"(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."

[10] Furthermore, Section 38 of the Land Act, 2012 (as amended), reinforces these requirements with specific detail regarding the attestation of signatures. The section provides as follows:

"38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed. (2) Subsection (1) shall not apply to— (a) a contract made in the course of a public auction; (b) the creation or operation of a resulting, implied or a constructive trust; or (c) any



agreement or the



contract made or entered into before the commencement of this Act, provided that the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act."

[11] In the present case, Exhibit 1 is a comprehensive written agreement. It is signed by the Plaintiff and all four Defendants. Their signatures were attested to by Rahma Adan Jillo, an Advocate and Commissioner for Oaths. The document specifies the property, the parties, and the consideration. I am satisfied that the Plaintiff has demonstrated compliance with the statutory dictates of Section 3(3) of the Law of Contract Act and Section 38 of the Land Act.

Breach of Contract

[12] The evidence establishes that the Plaintiff paid a substantial deposit of Kshs. 2,000,000/-. The Defendants' subsequent actions, namely, selling the same property to a third party (Exhibit 5) while the first agreement was still subsisting, constitute a fundamental breach of contract and an act of fraud. The Plaintiff has provided concrete evidence in the form of the bank transfers and the signed agreement. The Defendants' attempt to dispossess the Plaintiff after receiving her money is a clear breach of their duty as vendors.

Relief of Specific Performance

[13] Specific performance is an equitable remedy. The court has the discretion to order it where damages would not be an adequate remedy, especially in contracts involving land. I rely on the case of ***Njoroge v Maina [2023] KEELC 20295 (KLR)***, where the court held that:

"In Gurdev Singh Birdi and Marinder Singh Ghatora vs 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.”

[14] The Court in the above case cited ***Reliable Electrical Engineers Ltd. vs Mantrac Kenya Limited (2006) eKLR***, where it was stated that:

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

[15] The Defendants have offered no evidence to challenge the Plaintiff's claim of a valid, subsisting contract. I find that the Plaintiff has performed her part of the bargain by paying the deposit and has shown a consistent readiness to pay the balance.

Disposition

[16] In view of the foregoing, I am satisfied that the Plaintiff has proved her case on a balance of probabilities. I accordingly enter judgment for the Plaintiff against the Defendants as follows:

- a) A declaration is hereby issued that the sale agreement dated 17th February, 2020, is valid and binding upon the parties.
- b) an order of specific performance is hereby issued directing the



Defendants to complete the sale of the balloted commercial plot no. 0966, Konza Ranching and Farming Co-operative Society Limited, to the Plaintiff.



c) The plaintiff is directed to pay the balance of the purchase price, being Kshs. 1,300,000/-, into the Defendants or within thirty (60) days, in exchange for the completion documents.

d) A permanent injunction is hereby issued restraining the Defendants, their agents, or any person claiming under them from selling, transferring, or in any other way alienating the suit property to any third party other than the plaintiff.

e) The Defendants shall pay the costs of this suit to the Plaintiff.

Delivered electronically, signed, and dated at Machakos, this 5th day of February, 2026.

Hon. C. C. Oluoch

Chief Magistrate

SIGNED BY:
HON. CHARITY OLUOCH



THE JUDICIARY OF KENYA.
MACHAKOS MAGISTRATE
COURT MAGISTRATE COURT
DATE: 2026-02-05 13:11:40

