



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLOS NO. E008 OF 2024 (O.S)

JOSEPH OWINO K'OJWANDO
PLAINTIFF

=VERSUS=

JOSEPHINE MUTHONI NYAGA1ST
DEFENDANT

JOB NYAGAH NJAGARI.....2ND
DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit by way of an Originating Summons dated 7th February 2023, seeking the following orders:

a. The Defendants do execute the transfer forms and any other completion document in respect of Nairobi/Block 82/6260 in favour of the Plaintiff within 30 days.

b. In default of payment within the time prescribed, the Deputy Registrar to execute the said Transfer Forms in place of the Defendants.

2. The Originating Summons is based on the grounds appearing on its face together with the supporting affidavit of Joseph Owino K'Ojwando sworn on even date.

THE PLAINTIFF'S CASE

3. The Plaintiff averred that the Defendants are the registered owners of Nairobi/Block 82/6260, having acquired the property through transmission as beneficiaries of the estate of the late Edith Igoki Nyagah.
4. He further averred that he entered into a sale agreement dated 17th August 2020, with the Defendants to purchase the suit property for a consideration of Kshs. 4,000,000/=, which he paid in accordance with the terms of the agreement. He asserted that the Defendants undertook to execute all necessary completion documents to facilitate the transfer of the property in his favour.
5. The Plaintiff argued that, despite his full performance of the contract, the Defendants have failed and neglected to execute the required documents and have remained evasive despite repeated requests made personally and through his advocates, necessitating the institution of these proceedings.
6. In light of the foregoing, the Plaintiff asserts that he is entitled to an order of specific performance compelling the Defendants to complete the transaction, and in default, that the Deputy Registrar be authorized to execute the transfer documents on their behalf. He contends that the Defendants would not suffer any prejudice if the orders sought are

granted. In conclusion, he urged the Court to allow the application as prayed.

7. Though duly served with summons through substituted service, the Defendants neither entered an appearance nor filed any statement of defence. The matter proceeded as an undefended suit.

ANALYSIS AND DETERMINATION

8. Having considered the Originating Summons and the affidavit in support, the only issue for determination is whether the Plaintiff is entitled to the orders sought.
9. Although the suit was undefended, the Plaintiff has a duty to prove his case on a balance of probabilities as required by law. Section 107 of the Evidence Act provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

10. In **Kirugi and another vs Kabiya & 3 others (1987) KLR 347**, the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

11. Similarly, in **Gichinga Kibutha vs Caroline Nduku (2018) ekLR** the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

12. The Plaintiff seeks an order of specific performance arising from a sale agreement dated 17th August 2020 regarding Nairobi/Block 82/6260.

13. Specific performance is an equitable remedy granted at the Court’s discretion. The remedy is not automatic and will only be granted when the Court is satisfied that the Contract is valid and enforceable, and that it would be just to compel performance. The Court must also consider the intention of the parties as expressed in the agreement.

14. In **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] KEHC 2855 (KLR)**, the Court stated as follows:

“Specific performance, like any other equitable remedy, is discretionary, and the court will only grant it on the well-settled 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, mistake or illegality, which makes the contract invalid or unenforceable. Even where 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 where damages are not an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

15. Similarly, in Halsbury's Laws of England (4th Edition) at paragraph 487 vol. 44, it was emphasized that a party seeking such relief must demonstrate performance of all essential terms of the contract :

“A plaintiff seeking specific performance 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 ought to have been performed at the date of the writ in the action. However, this rule only applies to term as which are essential and considerable. The court does not bar a claim on the ground that

the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term, although in such cases it may grant compensation”

16. The first issue for determination is whether there exists a valid and enforceable contract between the parties. The Plaintiff produced a sale agreement dated 17th August 2020, executed between himself and the Defendants.

17. **Section 38** of the **Land Act** outlines the formal requirements of a contract for the disposition of an interest in land as follows:

“(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land —(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 to by a witness who was present when the contract was signed by such party.”

18. The sale agreement complies with the formal requirements outlined in Section 38 of the Land Act, as it is in writing, signed by the parties, and properly attested. The agreement clearly states the purchase price, payment terms,

and completion obligations. The Court is therefore satisfied that a valid and enforceable contract exists.

19. The second issue concerns whether the Plaintiff performed, or was willing to perform, his obligations under the contract. The agreement expressly states that a sum of Kshs. 3,000,000/= was paid at the time of execution as part payment of the purchase price. Although the contract permitted the inclusion of the banker's cheque number, this section was left blank. Notwithstanding this omission, the Defendants are recorded in the agreement as having acknowledged receipt of the said amount. The balance of the purchase price of Kshs. 1,000,000/= was to be paid upon completion of the transfer, thereby indicating that the obligations of the parties were structured to be performed upon completion.
20. The agreement contains a default clause providing that any party that breaches the terms of the agreement, rendering it incapable of completion, shall pay to the other party 20% of the purchase price as liquidated damages and where the breaching party is the vendor, such payment shall be in addition to a refund of any sums already paid.
21. This clause was clearly intended to provide a contractual remedy in the event of breach. However, it does not expressly oust the jurisdiction of the Court to grant equitable relief, particularly in contracts involving land which is unique in nature.

22. The Court is called upon to determine whether specific performance can issue.

23. In the matter at hand, there is a valid and binding agreement, part payment has been made and acknowledged, and the subject matter is land which is unique and cannot be adequately compensated in damages. The Defendants, having been duly served, did not challenge the claim or demonstrate any impediment to completion. The Court is therefore satisfied that this is an appropriate case for the grant of specific performance.

24. The Court is also mindful that the Applicant must fulfil his reciprocal obligation to pay the balance of the purchase price. In the circumstances, the Court finds it appropriate to grant conditional specific performance as follows:

a) An order of specific performance is hereby issued compelling the Defendants to execute all the necessary transfer documents in respect of the suit property within thirty (30) days from the date hereof.

b) The execution and completion of the transfer in favour of the Applicant shall be conditional upon the Applicant depositing the outstanding balance of Kshs 1,000,000/= in Court within thirty (30) days from the date hereof.

c) In default of compliance by the Defendants, the Deputy Registrar of this Court is hereby authorized to execute all necessary documents to

effect transfer of the suit property to the Applicant.

d) The Plaintiff is awarded costs of the suit.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL, 2026.

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**HON. T. MURIGI
JUDGE**

IN THE PRESENCE OF:

In the absence of the parties
Ahmed- Court assistant