



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVIL SUIT NO. 553 OF 2017

GLADYS WANJIRU KAMAU.....PLAINTIFF

VERSUS

EDWIN NJERU GICHOVI.....DEFENDANT

JUDGMENT

By a **Plaint** dated **23rd May 2017**, the Plaintiff herein filed this suit against the Defendant seeking for orders:-

1. (a) Specific performance of the Contract.

(b) An order compelling the Defendant to present the application to the Land Control Board for Consent to transfer and in default the Deputy Registrar of this Honourable Court does sign the necessary application for consent to transfer to enable the Plaintiff present the same to the Land Control Board for consent to transfer.

2. Damages for breach of Contract.

3. Costs of this suit.

In her statement of claim, the Plaintiff averred that vide a **Sale Agreement** dated **10th February 2017**, the Defendant bound himself to sell **L.R Ruiru/Ruiru East Block 2/1045**, for a consideration of **Kshs.1,200,000/=**. That **Spousal Consent** was given and completion date was **30th April, 2017**. She contended that it was an implied term of the agreement that the Defendant would obtain the **Land Control Board Consent** to transfer the suit land before **30th April 2017**. She further averred that she has complied with her part of the agreement and is ready to complete payment as agreed.

She contended that the Defendant is in breach for failing to obtain the consent to transfer the suit land, taking several interested parties to the suit land with the object of selling it, refusing to give copies of essential documents for application to the **Land Control Board for Consent**. She further averred that despite giving the Defendant Notice to complete, he has failed to meet his part of the agreement.

Despite being served with Summons to Appear, the Defendant only filed a Notice of Appointment of advocates via **Olouch-Awino & Company Advocates**, but failed to file any Defence. The matter proceeded for formal proof hearing, wherein the Plaintiff gave evidence for herself and called no witness.

PLAINTIFF'S CASE

PW1 - Gladys Wanjiru Kamau, adopted her witness statement dated **10th February 2017**, and testified that she bought the suit property from the Defendant at a consideration of **Kshs.1.2 million**, and that she was to pay deposit of **Kshs.600,000/=**, so that the title could be discharged. That she paid the **Kshs.600,000/=** and an agreement was drawn and she signed it. She later paid **Kshs.200,000/=** on the **9th of March 2017** as evidenced by the agreement dated **11th March 2017**. It was her evidence that she was to go to the **Githurai Land Control Board for Consent** to transfer upon payment of the deposit and that all the consent including **Spousal Consent** were obtained. However the Defendant refused to pick her calls. It was her further testimony that she had a balance of **Kshs.400,000/=** which she was willing to pay and has deposited it in Court. She urged the court to allow her claim and produced her bundle of documents as **exhibit 3**.

The Court directed the Plaintiff to file written submissions to which it has now carefully read and considered together with the pleadings, the evidence adduced and the exhibits thereto and renders itself as follows:-

The Defendant failed to file any Defence and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove her case on the required standard

of balance of probability. See the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, and held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further in the case of 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.”

Taking into account the available evidence, the Court finds the issues for determination as follows:-

1. ***Whether the Plaintiff is entitled to the Order of Specific Performance as sought.***
2. ***Whether the Plaintiff is entitled to Damages for breach of Contract.***

1. Whether the Plaintiff is entitled to the Order of Specific Performance as sought.

Before this court determines whether it should award the Order of **Specific Performance**, it must first satisfy itself that the **Sale Agreement** that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Plaintiff has alleged that he entered into a sale agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. **Section 3 (3)** of the **Law of Contract Act** 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.

The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus meets the requirements of **Section 3(3)** of the **Law of Contract Act**. Further the 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”.

Granting of Orders of Specific Performance is discretionary and as such the Court should in deciding whether or not to grant the sought 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, where the Court held 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. The Plaintiff testified that she paid the purchase price as agreed. There is a further agreement executed which shows that the Plaintiff had paid an amount totaling to **Kshs. 800,000/=**. A further look at **Clause 4.2 (a)** of the agreement dated **10th February 2017**, shows that the balance of **Kshs.400,000/=** was to be paid upon the completion by the Defendant and the title having been registered in the Plaintiff's name. The willingness by the Plaintiff to fulfil her part of the bargain has been reinforced by her depositing the balance of the purchase price before this court. It is therefore evident that the Plaintiff has always been ready and willing to fulfil her part of the agreement having fulfilled that which was required of her at this stage. It was incumbent upon the Defendant to fulfil his part of the bargain as he is bound by the contract.

Further the Court has seen an official search that confirms that indeed the Defendant is the registered owner of the suit property. The Plaintiff has averred that she has been in possession of the suit land and has submitted that she even fenced the suit property. As already held by the Court, the evidence of the Plaintiff is not controverted and the same is therefore not challenged. That being the case, it would mean that compensation to the Plaintiff in terms of damages would not be adequate as land is a unique commodity and cannot always be equated to money. In this instant case 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 of Specific Performance will not prejudice the Plaintiff nor the Defendant at all since the Plaintiff has alleged that she is in possession of the said land.

Consequently the Court is satisfied that the remedy of **Specific Performance** is the proper order to be granted. The said prayer would only be achieved by allowing the Plaintiff's prayer that the Deputy Registrar of this Court should sign the transfer documents if the Defendant is not available to do so. For the above reasons, the Court allows prayer No.(b) as sought in the **Plaint**.

2. Whether the Plaintiff is entitled to Damages for breach of Contract.

The Court has already held and found that the Defendant failed to perform his part of the Contract as required and therefore he was in breach of the said Contract. In the case of **Peter Umbuku Muyaka ...Vs... Henry**

Sitati Mmbasu [2018] eKLR, the Court stated that;

“A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at Pg.589 and 590 the law is stated to be that:-

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

30. The Halsbury's Laws of England, Third Edition Vol. II, defines nominal damages as follows:

“ 388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom , or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss , but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved”

The Plaintiff in this instant having failed to state the damages she had suffered is entitled to a nominal damage of **Kshs.200,000/= only**

Having now carefully considered the available evidence and the exhibits thereto, the Court finds that the Plaintiff has discharged her duty of proof of her case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendant in terms of prayers No.1(a) & (b) and 2 and is awarded **Kshs.200,000/=** as damages for breach of Contract with costs of the suit to be borne by the Defendant.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of December 2019.

L. GACHERU

JUDGE

18/12/2019

In the presence of

Mr. Asige for Plaintiff

No appearance for Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE

18/12/2019