



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO 464 OF 2015

OSCAR OCHIENG.....1ST PLAINTIFF

RACHAEL AYIKO.....2ND PLAINTIFF

=VERSUS=

PRILCSCOT COMPANY LIMITED.....1ST DEFENDANT

JUDGMENT

1. On 2/7/2007, the plaintiffs on one part and the defendant on the other part entered into an off plan house purchase agreement pursuant to which the defendant agreed to erect and complete a development project on Land Reference Number 7149/52 situated in Syokimau, Machakos County. The development project was to consist of various residential maisonettes, together with pathways, driveways and related utilities (Elan Park Estate). Under the off plan house purchase agreement, the defendant agreed to sell and the plaintiff agreed to purchase one such maisonette, described as Unit Number 161 Phase II, Elan Park Estate, at a purchase price of Ksh 3,900,000. The plaintiffs paid a sum of Ksh 1,000,000 in tandem with Clause 4.1 of the agreement for sale. Balance of the purchase price was to be paid on completion date which was agreed to be 30/3/2008.

2. The plaintiffs contend that the defendant breached the said agreement in the sense that it failed to execute construction works as agreed. As a consequence, the plaintiffs, through a plaint dated 26/5/2009 initiated this suit seeking the following orders:

- a) Specific performance of the said agreement.**
- b) All necessary and consequential accounts, directions and inquiries.**
- c) General damages for breach of contract**
- d) Costs of the suit**
- e) Further or any other relief which this honourable court may grant.**
- f) Interest on (a), (b) and (c) above at court rates**

3. In response, the defendant filed a statement of defence dated 1/7/2009. On an application by the plaintiffs, the defendant's defence was struck out on 16/11/2009 by Khamoni J on the ground that it was a sham. Consequently, this suit was heard before me as a formal proof on 25/7/2017.

4. PW 1 Oscar Ochieng (1st plaintiff) adopted his witness statement dated 11/11/2011 and filed on 14/11/2011 in which he stated that, together with his wife (the 2nd plaintiff) they entered into an off plan house purchase agreement with the defendant pursuant to which the defendant agreed to develop Elan Park Estate and sell to them a maisonette designated as Unit Number 161 Phase II at a purchase price of Ksh 3,900,000. They paid the agreed deposit of Ksh 1,000,000. Balance was to be paid upon completion. The defendant breached the agreement in the sense that he failed to make good the terms of the agreement. He produced all the documents indexed in the list of documents filed on 19/6/2010, among them, the material agreement for sale dated 21/7/2007. He urged the court to grant them the prayers specified in the plaint. In cross-examination, he stated that at the time of signing the agreement, construction of the Estate was ongoing, and he saw Unit Number 161 under construction. He further stated that the current market rent for a 3 bedroom maisonette in the Estate is Kshs 40,000.

5. PW 2 Benard Gachoka testified that he is a registered valuer. He received instructions from the Plaintiffs through their advocates, to

proceed to Elan Park Estate to inspect and return the market value of a typical unit that is similar to maisonette Number 161. He confirmed that indeed he went to the ground. He perused the sale agreement and relying on clause 3.1 of the agreement he inspected a typically similar unit developed by the defendant on the same piece of land and under the same scheme. He further testified that he used the sales comparable approach, an approach which derives value by comparing the sales value of recently sold properties and by making appropriate adjustments. He assessed the market value of house Unit Number 161 assuming successful completion based on the sample house at Ksh. 14,000,000. He assessed probable monthly rent at between Ksh 45,000 and Kshs 55,000 as at the time of his testimony. He produced the valuation report as an exhibit. He stated that he was paid Ksh. 45,000 as valuation fees and produced the invoice and receipt as exhibits. He further stated that he was paid Ksh 10,000 as court attendance fees and produced a receipt.

6. In cross-examination, he testified that the limiting conditions alluded to in his valuation report are records at lands office which were not available. He further stated that he did not have development plans but relied on brochures.

7. The defendant did not lead any evidence at formal proof. Parties filed written submissions.

8. Counsel for the plaintiff submitted that the plaintiffs had proved that there was a valid and specifically enforceable agreement for sale and a notice to the defendant to complete the sale. Counsel urged the court to grant the reliefs sought in the plaint. Counsel relied on the following three cases;

i. Malindi Land Case No. 146 of 2013 Mohamed Ali Shosi v Mohamed Swaleh

ii. KitaLe ELRC Land Case No. 43 of 2014 Kennedy Simiyu Wekesa v Anna Nanjala Mukhebi

iii. Sudbrook v Eggle Tome. The times July 15, 1982.

9. In written submissions dated 15/11/2017, the defendant's counsel submitted that the defendant still holds title in the suit property and that all rights and privileges ensuing from the suit property should be enjoyed by the defendant. On the plaintiff's prayer for *mesne* profits, Counsel submitted that the same are not payable because the defendant is not in any way in wrongful occupation of the suit property. He added that the agreement for sale was not completed because of breach by both parties and because the suit property has not been transferred to the plaintiff, the remedy of *mesne* profits is not available.

10. On the plaintiff's prayer for specific performance, Counsel for the defendant submitted that for one to succeed in a claim of specific performance, the claimant must demonstrate that he had fully met his obligations under the agreement or that he was willing to fulfill his bargain. Counsel contended that the plaintiffs had not complied with clause 4.2 of the agreement for sale which required them to have paid balance of the purchase price on the completion date.

Determination

11. I have considered the plaintiff's pleadings and evidence. I have also considered the parties' submissions at formal proof. It is to be remembered that the defendant's defence was struck out. Much of the written submissions by the defendant are moot because the plaintiffs' claim stands unchallenged by reason of lack of defence. The defendant was in law permitted to lead expert evidence focusing on elements of formal proof only but elected not to do so.

12. The plaintiffs seek two principal prayers: (i) an order of specific performance; and (ii) an award of general damages for breach of contract. Both pleas are undefended because the defence was struck out.

13. This court's jurisdiction to grant an order of specific performance is guided by common law principles. An order of specific performance decrees the due completion of a contract in its proper form. As a common law rule, the court will not decree specific performance where, if at trial, evidence is tendered to the effect that the vendor is unable to convey the land. This rule is informed by the philosophy that it is the essence of the remedy of specific performance that the purchaser should obtain the land.

14. Secondly, an order of specific performance is an equitable remedy and is granted at the discretion of the court. This discretion is governed by certain principles. For instance, the remedy will not be granted if its enforcement will entail great hardship or if the vendor's title is in doubt or if its enforcement would entail protracted or difficult litigation.

15. Lastly, the essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract.

16. At page 3 of the defendant's written submissions, the defendant submits as follows:

“Accordingly, the defendant still holds certificate of lease for the entire property in its name.”

17. In view of this submission, and in the absence of any defence and evidence which would make the court decline to exercise its discretion to grant the equitable remedy of specific performance, the court will grant the prayer for specific performance.

18. The plaintiff has also sought general damages. It is settled law that indeed, in appropriate cases, general damages for breach of contract can properly be awarded in addition to an order of specific performance. In the present case, the agreed purchase price was Kshs 3,900,000. The plaintiffs paid the agreed deposit of Kshs 1,000,000. The balance of Kshs 2,900,000 was not tendered in court at the time of initiating this suit. I would have had no hesitation in assessing and awarding general damages to the plaintiffs had they tendered balance of purchase

price at the time of filing this suit. In my view, having found that the plaintiffs are entitled to an order of specific performance, and in view of the fact that the plaintiff's did not tender in court or to the defendant the balance of the purchase price at the time of filing this suit, I am of the view that this is not a suitable case in which the court should decree general damages in addition to the order of specific performance. I say so taking into account that the unit the plaintiffs are getting is now valued at Kshs 14,000,000 and they are getting it at the contractual price of Kshs 3,900,000.

19. The upshot of the above findings is that judgment is entered in favour of the plaintiffs against the defendant in terms of prayers (a) and (d) of the plaint. The plaintiffs shall deposit in court balance of purchase price (Kshs 2,900,000) within 60 days from today and the court shall release the money to the defendant. In the event of default by the plaintiffs, the award herein shall stand vacated and the suit herein shall stand dismissed with no orders as to costs. Parties shall be at liberty to move the court for enforcement orders in tandem with common law practice governing specific performance decrees.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Mugo advocate for the Plaintiff

Ms Simiyu advocate for the Defendant

Halima-Court clerk