



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC CASE NO. 59 OF 2012

HENRY MWANGI GATAI.....1st PLAINTIFF

SAMUEL MWAURA MUNGAI.....2nd PLAINTIFF

VERSUS

MARGARET WANJIKU GODWIN.....1st DEFENDANT

AND

SHEZAD JALALDIN FAZAL.....1ST INTERESTED PARTY

CAROLINE WAITHERA MWANGI.....2ND INTERESTED PARTY

JUDGEMENT

By way of *Plaint* dated **6th February, 2012**, the Plaintiffs herein have come to Court seeking for various declarations;-

- a) Specific Performance of the Sale Agreement dated 18th August, 2011 and entered into between the Plaintiffs and the Defendant.*
- b) A permanent injunction to issue restraining the Defendant whether by herself, servants agents and or otherwise from disposing off in or any way interfering with the Plaintiffs rights to L.R No. 13084/5, situated in Karen, Nairobi.*
- c) Any other remedy that this Honourable Court may deem just in the circumstances.*
- d) Costs of the suit at Court rate.*

The Plaintiffs pleaded that they entered into a Sale Agreement on **18th August 2011**, with the Defendant for the purchase of the parcel of land known as **LR No.13084/5**, situated in Karen within Nairobi County (hereinafter referred to as **"the suit property"**). The Plaintiffs contended that they complied with all of the provisions of the Sale Agreement and pursuant to Clause 7 thereof the Completion Date was set at 90 days. They pleaded that the agreement provided that the 90 days were to lapse on **18th November 2011**.

However, prior to the completion date and without terminating the Sale Agreement, the Defendant proceeded to enter into another Sale Agreement with the Interested Parties on **21st November 2011**. The Plaintiffs contend that the subsequent Sale Agreement was *void ab initio*, and have sought this Court to order for Specific performance.

The Defendant entered appearance and pleaded that the Sale Agreement of **18th August 2011**, was cancelled as the Plaintiff failed to pay the balance of the purchase price and as such an order of Specific performance ought not be granted. The Interested Parties were joined in the suit vide a court Order issued on **7th March 2012**.

The Plaintiff's Evidence

The Plaintiffs called three witnesses. **PW1** and **PW2**, the 1st and 2nd Plaintiffs, **Mr. Henry Mwangi Gatai** and **Mr. Samuel Mwaura Mungai** respectively and **PW3 Mr. Amos Kiarie Njoroge** who was the Advocate who acted for the Plaintiffs in the Sale Agreement dated the **18th August 2011**, between the Defendants and themselves. All the three witnesses adopted their respective witness statements filed in Court.

PW1- Henry Mwangi Gatai, testified that they sought to buy the suit premises jointly with **PW2**, after they were informed by the Sales Agent that the property was available for sale. However despite filing a Witness statement the sales Agent unfortunately passed on before giving evidence. They were informed that the property was been sold at **Kshs.11,000,000/=**. Consequent thereto, they did put an offer to that effect and the Defendant through her Advocate **Messrs. Wangari Mwanzia**, increased the purchase price to **Kshs.12,000,000/=**. That notwithstanding, upon reaching a consensus the parties signed the Sale Agreement dated **11th August, 2011**.

Clause 4 of the Agreement provided that the Plaintiffs pay the deposit of **Kshs.2,000,000/=** which amount was acknowledged by the Defendant's Advocates. Thereafter, the Defendant's Advocates requested for a further payment of **Kshs.5,000,000/=** on account of the purchase price, which amount was paid to the Defendant's Advocates and official receipt attendant thereto, issued.

On the **7th November 2011**, the Defendant's Advocates(**Messrs. Wangari Mwanzia**) wrote to the Plaintiffs Advocates(**Kimani Kiarie Advocates**) seeking to be paid the balance of the purchase price in the sum of **Kshs.5,000,000/=** on account that the Defendant needed to complete another transaction by **14th November 2011**. In the same letter, it was acknowledged that the completion date for the transaction was scheduled for **18th November 2011**. The said letter at paragraph 2 stated:- For purposes of clarity I wish to rehash that bit of the letter in this judgement.

"The completion date for this sale is on the 18th November, 2011....."

The Plaintiffs Advocates responded to the said letter on **15th November 2011**, informing the Defendant's Advocates that they were ready to complete the transaction but they needed the completion documents. The letter elicited no response and further reminders were sent vide the letters dated **18th November 2011**, **21st November 2011** and **13th December, 2011** respectively.

On the **4th December 2011**, **PW1** received a call from **PW2** informing him that he had met unknown persons on the suit premises who informed him that they had also purchased the property. Consequently the Plaintiffs registered a caveat on the suit property on **6th December 2011**, to safeguard their interests. On **12th January 2012** the Plaintiffs Advocates received a letter from the Defendant's Advocates stating that the Plaintiffs had been unable to complete the transaction hence they were refunding the amount of **Kshs.7,000,000/=** as per Clause 10 of the Sale Agreement. Clause 10 provided;

"If the sale shall not be completed on the completion date due to no fault of the purchasers, the purchasers shall be refunded the deposit by the vendor together with all interest earned thereon"

In his testimony, **PW2-Samuel Mwaura Mungai**, corroborated most of the testimony by **PW1**. He further added that on **4th December 2011**, he visited the suit property together with his family, where he found the unknown persons (Interested Parties). The Interested Parties informed him that they had purchased the property at **Kshs.13,000,000/=**. The next day, he visited his Advocates offices and on Counsel's advise a caveat was registered over the suit property and it exists till to-date. On cross examination, **PW2** confirmed that **Kshs.7,000,000/=** had been refunded, that he met the Interested Parties in the property and that the last time he was in the property there was no activity therein.

PW3 - Amos Kiarie Njoroge, testified that he is an Advocate of the High Court of Kenya. He confirmed having received instructions to act for the Plaintiffs in the purchase of the suit property from the Defendant. He confirmed that the parties executed the Sale Agreement on **18th August 2011**. He confirmed that a deposit of **Kshs.2,000,000/=** was paid and a top-up of **Kshs.5,000,000/=** was equally paid. Thereafter it was agreed that the Defendant's Advocate ensure that all Completion Documents were in order for the Completion date.

Numerous correspondences and phone calls were addressed and placed respectively to the Defendant's Advocate in relation to the Completion Date. However they elicited no response. After a period of time had lapsed the Defendant's Advocate finally called **PW3** back and confirmed that the completion documents were ready save for the transfer which was expected from the U.K via DHL.

Upon enquiring about the sale to the Interested Parties, he was informed that the sale the Interested Parties were referring to related to a different property and not the suit property.

On cross examination, **PW3** affirmed his testimony during examination-in-chief. He also pointed out that the purported sale to the Interested Parties was done during the pendency of the Sale Agreement between the Plaintiffs and the Defendant and as such the latter sale to the Interested Parties was illegal. He also testified that the Sale Agreement envisaged a deposit of **Kshs.2,000,000/=** and not **Kshs.7,000,000/=** and the Plaintiff was eager to purchase the property hence the enhanced deposit. Further thereto, it was his testimony that the search by the Interested Parties was undertaken before the Completion Date had lapsed, and Agreement between the Defendant and the Interested Parties was dated **21st November 2011**.

The Defendants's Evidence

The Defendant called one witness **DW1 , Ms Wangari Mwanzia** who was her Advocate in the transaction. She adopted her witness statement. It was her testimony that she drafted the Sale Agreement dated **18th August 2011**, between the Defendant and the Plaintiffs. She further testified that by consent of the parties the purchase price was pegged at **Kshs.12,000,000/=**. It was her testimony that since the Plaintiffs did not pay the balance of the purchase price by the completion date, she was instructed by the Defendant to draft another sale Agreement in favour of the Interested Parties which was dated **21st November 2011**, executed and the money paid on the same day. Thereafter on the **11th January 2012**, she made a refund of **Kshs.7,000,000/=** to the Plaintiffs through their advocates, (PW3 Law Firm's account). She confirmed that all the completion documents were given to the Interested Parties to effect transfer into their names. In totality she stated that specific performance could not be granted as the completion documents had already been issued to the Interested Parties.

On cross-examination, **DW1** confirmed the completion date as **18th November 2011**, having made a refund of **Kshs.7,000,000/=**, issuing no notice to terminate the agreement between the Plaintiffs and the Defendant. She also testified that the search conducted by the Interested Parties was undertaken on **16th November 2011**, two (2) days prior to the Completion Date lapse. She further affirmed that the suit property had not been transferred to the Interested Parties as the Plaintiffs had placed a Caveat on the property.

The Interested Parties Evidence

The 1st Interested Party, **Shezad Jalaldin Fazal**, testified that, jointly with the 2nd Interested Party, they

entered into a Sale Agreement with the Defendant in favour of the suit property on **21st November 2011**. This culminated from undertaking of due diligence, search conducted on **16th November 2011** and was satisfied there were no encumbrances on the property. Consequently he made the full payment of the purchase price of **Kshs.13,000,000/=** by way of funds transfer. He testified that they presented the documents for registration on **14th December, 2011**. However, the same could not be registered as there was a caveat registered by the Plaintiffs on the **6th December 2011**.

On cross-examination, the witness testified that he became aware that the property had been sold to Plaintiffs on **4th December 2011**. However, he paid stamp duty and or presented the documents for registration. It is noteworthy to note that he was unable to explain why he declared a lower amount of the purchase price on the transfer from which resulted in payment of less stamp duty. Thereafter the parties filed their respective submissions.

The Plaintiffs submissions

The Plaintiffs submitted that the contract had not been terminated and rightfully the Plaintiffs were entitled to Specific Performance. Counsel quoted the case of **Openda Vs Ann(1984) KLR 208 and Francis Mwangi Mucheru Vs Hannag Mnura Kiarire Civil Appeal No. 194 of 1997** on the principles of grant of Specific Performance. Which this Court has looked into and find no necessity to reproduce them here.

The Defendant submissions

The Defendants submitted the completion date was **16th November 2011** and not **18th November, 2011** as claimed by the Plaintiffs. It was Counsel's submission that the amount of **Kshs.7,000,000/=** having been refunded, the agreement was unenforceable for lack of consideration. In support, he cited the case of **Charles Mwirigi Miriti...Vs...Thananga Tea Growers Sacco Ltd (2014) eKLR**. On specific performance, Counsel cited 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 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 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.”

It was their prayer that the claim for specific performance was untenable.

The Interested Parties' Submissions

Counsel submitted that the completion date was **15th November 2011**, and not **18th November 2011** as alluded to by the Plaintiffs and time was of the essence. He cited the case of **Purple Rose Trading Limited...Vs... Bhanoo Shashikant JAI (2014) eKLR**, with regards to variation of a contract and that a contract can only be varied in writing by consent of both parties as enunciated in **Kenya Breweries Ltd....Vs....Kiambu General Transport Agency Ltd, Civil Appeal No 9 of 2000 (2000) EA 398**. He further submitted that the Interested Parties were bonafide purchasers for value without notice, and the court could not remake the contract on behalf of the parties. He cited authorities in support which the Court has looked at and finds no necessity to rehash them here.

The Court has carefully considered the pleadings and the submissions of Counsels and makes the following rendition. The issues for determination are as follows:-

a) Is the sale agreement dated 18th August 2011 enforceable?

b) Is the Plaintiff entitled to an Order of specific performance?

c) Are the Interested Parties bonafide purchasers for value without notice?

a) Is the sale agreement dated 11th August 2011 enforceable?

From the onset it is imperative to lay down when the completion dated for the Sale Agreement dated **18th August 2011** fell due. The Plaintiffs alluded that it was **18th November 2011**, as rightfully also captured on the letter dated **7th November 2011** addressed to the Plaintiffs by the Defendant's advocates. The Defendant despite acknowledging this in the letter have submitted that the Completion date was **16th November 2011**, and the Interested Parties have calculated the same and concluded its **15th November 2011**. The Court does not see the need to deviate from the agreement between the Plaintiffs and Defendants that 90 days from the calendar was **18th November 2011**. As for the calculation by the Interested Parties the same is shy by a day, tentatively bringing it to **16th November 2011**.

Having said that, was the Sale agreement dated **18th August, 2011** enforceable? In my view it is a resounding yes! The completion date was **18th November 2011**. The Defendant advocate were to furnish the Plaintiffs advocates with the completion documents by that date, however that was not the case, a look at **Clause 10**, it provided that;

"If the sale shall not be completed on the completion date due to no fault of the purchasers, the purchasers shall be refunded the deposit by the vendor Together with all interest earned thereon"

In my view the completion was frustrated through no fault of the Plaintiffs as they were ready and willing to proceed save for the unavailability of the completion documents. After the lapse of the 90 days, the Defendant entered into a sale agreement with the Interested Parties. The timing was just suspect as they had already undertaken a search even before the **18th November 2011**. However that notwithstanding, I find that it would cause grave hardship to the Interested Parties if this court were to grant specific performance on two reasons, one the contract did not provide for specific performance upon default and two they had already paid consideration for the suit property and the remedy available to the Plaintiff was refund of the deposit which sums were already refunded. They Plaintiffs are entitled to interest.

b) Is the Plaintiff entitled to an Order of specific performance?

In the case of ***Reliable Electrical Engineers Ltd(supra)***, the Court held 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. 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 inadequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant."

The Court's findings resonate with the above passage, the Contract between the Plaintiffs and the Defendants was terminated on completion on **18th November 2011**. The consideration was refunded on

11th January 2012, and hence there was no valid contract capable of been enforced by way of specific performance. What was left was the payment of interest, to which the Plaintiffs did not address as requested in the Defendants letter dated **3rd February 2012**. In any event, this Court finds that it would cause much hardship to the Interested Parties whom are now the owners of the suit property.

c) Are the Interested Parties bonafide purchasers for value without notice?

The Court of Appeal in Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in Black's law Dictionary 8th Edition as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”

It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”.

Having now considered the available evidence the Court is satisfied that the evidence tendered by the Interested Parties supports a credible finding that they were bonafide purchasers of the suit premises for value. The Court therefore finds that the Plaintiffs are not entitled to an order of specific performance and/or permanent injunction. However, the Plaintiffs are entitled to payment of damages in the tune of **Kshs.5,000,000/=** given that the sale agreement was terminated due to no fault of their own but the vendors fault.

Having now carefully considered the available evidence, the Court finds and holds that the Plaintiffs have not proved their case on the required standard in terms of prayers No.(a) and (b) of the Plaint dated **6th February 2012**. The said prayers are consequently disallowed. However, the Plaintiffs are entitled to payment of damages in the tune of **Kshs.5,000,000/=** by the Defendant herein. Further the Plaintiffs are entitled to costs of the suit and interest thereon payable by the Defendant herein.

It is so ordered.

Dated, Signed and Delivered at Thika this **9th** day of **February 2018**.

L. GACHERU

JUDGE

In the presence of

M/S Momanyi holding brief for Mr. Wasonga for Plaintiffs

Mr. Lumumba holding brief for Mr. Moger for Defendant

Mr. Ali for 1st Interested Party

2nd Interested Party

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

9/2/2018