REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 51 OF 2015

PAULINE AWINO OSINO.....PLAINTIFF

VERSUS

OMAR ALI BWERU.....1ST DEFENDANT

HASSAN CHARO.....2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 26th March 2015 and filed herein on 8th April 2015, Pauline Awino Osino(the Plaintiff) prays for Judgment against the 1st and 2nd Defendants jointly and severally for the following:-

> ***a) Specific performance by the Defendant by transferring the identified portion measuring 15 acres on Plot No. Chonyi/Bedzombo/Kitsoeni to the Plaintiff;***
>
> ***b) Costs of this suit and interest thereon at Court rates; and***
>
> ***c) Any other relief that this Honourable Court may grant.***

2. The said Prayers are premised on the Plaintiff's claim that on 25th July 2013 she entered into a Sale Agreement upon which the Defendants who own 45 hectares of land of all that parcel of land known as LR No. Chonyi/Bedzombo/Kitsoeni/744, were to sub-divide it and register a portion measuring 15 acres in the Plaintiff's name. The Plaintiff avers that it was a term of the agreement that the completion of the transaction was contingent upon the Defendants completing sub-division and transfer.

3. It is the Plaintiff's case that pursuant to the Agreement she paid a deposit of Kshs 750,000/- being 10% of the agreed purchase price of 7,500,000/- on 25th July 2013 by cheque and another Kshs 10,000/- in cash on 19th June 2014 but in breach of the Agreement, the Defendants have failed to sub-divide the land and obtain a separate title for the 15 acres sold to the Plaintiff thereby necessitating this suit.

4. In their Statement of Defence and Counterclaim filed herein on 24th April 2015, the Defendants deny the Plaintiff's claim and contend that the sub-division was to be done with payment of money from the Plaintiff but the Plaintiff has to-date refused to pay. In addition, the Defendants state that the completion date was within 90 days which has long passed and the Plaintiffs claim therefore has no basis.

5. In their Counterclaim, the Defendants urge the Court to declare that the contract entered into by the parties was terminated as a result of frustration and the evasive conduct of the Plaintiff. They further urge the Court to order the Plaintiff to pay damages for breach of the contract and what they term "related expenses". In addition, they claim for an unspecified special damages of money which they state the Plaintiff forced them to pay to third parties as agency fee, which money had not been agreed upon.

6. On 4th December 2017 when the matter came up for hearing, the Plaintiff called one witness and thereafter closed its case. The Defendants called no witness and I therefore fixed the matter for Judgment on 4th April 2018. As it were, on the date fixed for Judgment the same was not ready and notice was given that the same would be delivered on notice.

7. However, on or about 18th June 2018, M/s Ambwere T.S. & Associates Advocates filed an application dated 14th June 2018 under Certificate of Urgency seeking orders as follows:-

> ***1. That the application be certified urgent and service thereof be dispensed with in the first instance.***

2. That the Ex-parte proceedings herein be set aside, the Judgment pending be arrested till hearing and determination of the application and the entire suit and the Defendants herein be granted unconditional leave to defend the suit.

3. That costs of this application be in the cause.

8. When the application which was filed in a Skeleton File (as the main file was in chambers pending Judgment) was placed before me on 18th June 2018, I directed that it be fixed for hearing through the Court Registry. The said application subsequently came up for hearing inter-partes on 9th July 2018 after which I reserved my Ruling thereon for 27th September 2018. As it were, later the same day when the main file was produced it turned out that it was amongst the files whose Judgements were due for delivery on 19th July 2018.

9. After considering the application in the skeleton file, the Plaintiff's response thereto, the Court record as per the main file herein and the attendant delay in delivery of the Judgement, I decided to go ahead with the delivery of Judgment and accordingly issued notice to the parties to attend court today.

10. The basis for the application dated 14th June 2018 was that the matter herein proceeded for hearing without the participation of the Defendants who had filed a defence and appointed an Advocate on record. It was further contended that the law firm Ambwere T.S & Associates have always been on record and remain so for the Defendants. Further, it was argued that the said law firm had neither been served with a Notice of Change of Advocate nor a hearing notice when the matter came up for hearing before me and proceeded ex-parte.

11. Order 9 Rules 5 and 6 of the Civil Procedure Rules provides as follows:-

5". Change of Advocates"

A party suing or defending by an Advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

6. Service of notice of Change of Advocate

The Party giving the notice shall serve on every other party to the cause (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate Court…"

12. I have perused the record herein. It is apparent therefrom that on or about 24th April 2015, Messrs Ambwere T.S. & Associates Advocates were appointed by the two Defendants namely Omari Ali Bweru and Hassan Charo Ali as their Advocates on record herein. The record remained the same until the 12th day of July 2017 when a document dated the same day titled Notice of Change of Advocate was filed herein. The said Notice reads as follows:-

"***NOTICE OF CHANGE OF ADVOCATE***

TAKE NOTICE that OMAR ALI BWERU and HASSAN CHARO ALI has today appointed the firm of MURANJE & COMPANY ADVOCATES and AMBWERE T.S. & ASSOCIATES has ceased to represent them in this matter.

Henceforth their address for service for the purpose of this suit is care of MURANJE & COMPANY ADVOCATES, BELINDA HOUSE, GROUND FLOOR, OPPOSITE MALINDI LAW COURTS, and P.O. BOX 964-80200 MALINDI.

Dated at Malindi this 12th day of July 2017.

OMAR ALI BWERU HASSAN CHARO ALI

1ST DEFENDANT 2ND DEFENDANT

13. It was Mr. Ambwere Advocate's submissions before me that the notice is fictions and the existence of the said Muranje & Company Advocates was doubtful as the said Advocate could not be found at the given address.

14. I have considered the Notice as well as the record herein. While the format thereof may have deviated from the norm, I am persuaded that the same was not fraudulent. Despite the shortcomings in form and the absence of evidence that it was served upon Messrs Ambwere T.S. & Associates Advocates, it had the signatures of the two defendants and had their full backing.

15. I say so because there is no denial from the two defendants that they caused the Notice of Change to be filed on 12th July 2017. The said Notice contains a handwritten signature of the 1st Defendant and what appears to be a thumbprint of the 2nd Defendant. I say so because subsequently on 21st September 2017 when the parties appeared in the Registry for fixing of a hearing date, other than a representative of Messrs V.N. Okata & Company Advocates for the Plaintiff, there was one Riziki who represented Muranje & Company Advocates who were appointed by the Notice of 12th July 2017.

16. And I say so because on 4th December 2017 when the matter came up for hearing, Mr. Muranje Advocate himself appeared before me and told the Court that he had been so appointed but he had had certain difficulties in getting the original file from the former Advocate for the Defendants(namely Ambwere T.S. & Associates). The Learned Advocate further told the Court that he needed some time to consult but he was not entirely opposed to proceeding with the Plaintiff's case. Having noted that this was a 2015 matter and that the Defendant were present, I gave directions that the matter would proceed at 12.00 p.m

17. As the record would bear me out, when the matter was called at around 12.30 p.m. Mr. Muranje Advocate was not in Court and one of the Defendants informed the Court that their Advocate was coming. Having waited until around 12.40 p.m., the case proceeded and at the end the Defendants were invited by the Court to cross –examine the Plaintiff but they declined stating it was their Advocate Mr. Muranje who could ask questions. They further informed the Court that they had no evidence to offer and the Court therefore proceeded to close their case.

18. Arising from the foregoing, the claim that the Defendants were not served and were unaware of the hearing date is untrue. They were in Court with a different Advocate on 4th December 2017 and to turn around and file an application six months later through their former Advocate feigning ignorance of the proceedings is mischievous and unhelpful to them. As it were the issue of whether or not there was service of the Notice of Change upon their Advocate is one between them and their said Advocate. I do not think the same can be raised as a bar to proceedings with the Plaintiff who was not party to the issues they may have had with their said Advocates.

19. In the end, I did not find any merit in the application to have this Judgement arrested and for the proceedings taken herein to be set aside.

20. At the trial herein, PW1-Pauline Awino Osino testified that at all times material to this suit, the Defendants were the owners of Plot No. Chonyi/Bedzombo/Kitsoeni/744. PW1 testified that on 25th July 2013, she entered into a Sale Agreement in which the Defendant sold a 15 acres portion of their said land to PW1 at a consideration of Kshs 7,500,000/-. PW1 told the Court that it was a term of the said Agreement that the completion thereof was contingent upon the Defendants completing the sub-division and transfer of the portion which was to be excised from the larger parcel of which measures about 45 hectares.

21. PW1 testified that she paid a deposit of Kshs 750,000/- being 10% of the Purchase Price on the date of execution of agreement through a cheque No. 102808. In addition, she paid a sum of Kshs 10,000/- in cash to the 1st Defendant on 19th June 2014.

22. She told the Court that in breach of the said Agreement, the Defendant failed to sub-divide the land, failed to pay outstanding rates and to obtain valid clearance certificate and/or to do anything that would enable the parties to progress with the Agreement. Thereafter, PW1 learnt that the Defendants had entered into a separate sale agreement for a portion of the subject Plot with a third party and that the Defendants were continuing to offer the portion sold to the Plaintiff to other third parties.

23. In support of her case PW1 produced the Sale Agreement dated 25th July 2013(Pexh 1), a copy of the Cheque used in paying the deposit(Pexh 2), the Payment Voucher for the additional Kshs 10,000/-(pex 3) as well as various correspondences between the parties.

24. I have considered the Plaintiff's testimony and the evidence placed before me. I have also considered the Defendants pleadings on record.

25. As Maraga J.(as he then was) stated in ***Reliable Electrical Engineers(K) Ltd –vs- Mantrac Kenya Limited(2006)eKLR***:-

> ***"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 or 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."***

26. In the matter before me, it is not contested that the parties herein executed the Sale Agreement dated 25th July 2013. While the Defendants do not deny that they were to sub-divide their land LR No. Chonyi/Bedzombo/Kitsoeni/744 which measures approximately 45 hectares and to give an identified portion thereof measuring 15 acres to the Plaintiff, it is their case that the Plaintiff was the one to provide the funds for the sub-division and that the Plaintiff having failed to provide the said funds, the contract was frustrated as they were unable to proceed.

27. I have perused the Sale Agreement dated 25th July 2013(Pexh 1). Paragraph 1 thereof provides as follows:-

> ***"1. The sum of Kshs 750,000/-(Kenya Shillings Seven Hundred and Fifty Thousand Only) shall be paid as deposit on signing hereof. The balance of Kshs 6,750,000/-(Kenya Shillings Six Million Seven Hundred and Fifty Thousand Only) shall be paid on completion of the sub-division and upon the vendor obtaining the title, consent to transfer, signing of the transfer and obtaining a Title Deed in favour of the Purchaser."***

28. The foregoing paragraph clearly evinces the intentions of both parties when they executed the contract. The Purchaser was to pay the deposit and then sit back and wait for the Vendors to sub-divide the land and provide her with a title. The Vendors have not done so to-date and their contention that the Plaintiff was to provide funds for the sub-division and processing of the title is neither supported by facts nor the evidence placed before me.

29. As it were, there was no reason given why the deposit paid of Kshs 750,000/- could not be used to carry out the sub-division and/or processing of the title. That would lend credence to the Plaintiffs contention that the only reason the Defendants failed to proceed with their part of the bargain was for the reason that they had subsequently found suitors who were offering to pay more for the portion of land in question.

30. As was observed in the case of ***Reliable Electrical Engineers (K) Ltd –vs- Mantrac Kenya Ltd (supra***), an order of specific performance will not be ordered where there is an adequate alternative remedy. It would therefore not be considered for instance where the Claimant can readily get the equivalent of what she contracted for from another source.

31. As it were, land has a fixed location and it has been said no two pieces of land are alike. Each piece of land is unique and special and it is thus accepted as a general rule in equity that damages will not be adequate compensation to a purchaser of land.

32. In the circumstances of this case, I do not think that damages would put the Plaintiff in the position she would have been had the Defendant performed their obligations under the contract. Accordingly I do find merit in the Plaintiff's case.

33. Judgment is consequently entered herein for the Plaintiff as follows:-

a) An order of specific performance is hereby issued directing the Defendants to forthwith and in any event within 90 days from today transfer the identified portion of land measuring 15 acres to be excised from all that parcel of land known as LR No. Chonyi/Bedzombo Kitsoeni 744 to the plaintiff.

b) The Defendants' C0ounterclaim is hereby dismissed.

c) The Plaintiff shall have the costs of this suit and the Counterclaim.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE