



**Osir v Olima (Environment and Land Case E044 of 2022)  
[2024] KEELC 120 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE E044 OF 2022  
LC KOMINGOI, J  
JANUARY 25, 2024**

**BETWEEN**

**MILDRED OSIR ..... PLAINTIFF**

**AND**

**HELLEN ACHIENG' OLIMA ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 16<sup>th</sup> May 2022, the Plaintiff claims that she entered into a sale agreement with the Defendant on 14<sup>th</sup> July 2017 for the sale of two parcels of land Kajiado/Kaputiei North/15688 and Kajiado/Kaputiei North/15689 for a consideration of kshs 1,300,000 and kshs 1,500,000 respectively. Following this agreement, the Plaintiff paid Kshs 1,630,000 towards the purchase but the Defendant failed/ neglected to effect that transfer; refused to refund the amount paid by the Plaintiff and declined to have the dispute settled amicably. The Plaintiff thus sought the following orders:
  - a. Specific performance of the sale agreement dated 17<sup>th</sup> July, 2017 and entered between Plaintiff and the Defendant in respect to Kajiado/Kaputiei North/15688.
  - b. A refund of kshs 330,000 with interest from 17<sup>th</sup> July, 2017 in respect to Kajiado/Kaputiei North/15689.
  - c. Any other remedy/relief this court deems just in the circumstances.
  - d. Costs of the suit.
2. The Defendant in her Defence and Counterclaim dated 13<sup>th</sup> July 2022 admitted having entered a sale agreement with the Plaintiff where she paid Kshs 650,000 and Kshs 750,000 as deposit for Land Parcels Kajiado/Kaputiei North 15688 and Kajiado/Kaputiei North 15689 respectively. She however, contested the allegation that she breached the agreement claiming that it was the Plaintiff who terminated the transaction through a letter dated 28<sup>th</sup> May 2019. Therefore, the agreement having



been rescinded could not be performed adding that she has been ready and willing to refund money paid by the Plaintiff. However, the Plaintiff has been unwilling to engage and continued to illegally hold on to the original title documents thus the Defendant was unable to dispose of the suit properties to third parties in order to refund the Plaintiff's money. She thus sought for dismissal of the Plaintiff's suit and seeks;

- a. An order compelling the Plaintiff to forthwith release to the Defendant titles on LR No Kajiado/Kaputiei North/15688 and Kajiado/Kaputiei North/15689.
  - b. Costs of the suit.
3. The Plaintiff in her Reply to the Defence and Defence to the counterclaim reiterated contents of the Plaintiff and prayed for striking out of the Counterclaim.

### **Evidence of the Plaintiff**

4. PW1, Mildred Osir adopted her witness statement as part of her evidence in chief and produced eighteen (18) documents as exhibits which were marked as P. Exhibits 1-18 respectively.
5. On Cross examination she confirmed that her previous advocate Messrs Ajiambo Luande & Co. Advocates acted for both parties in the sale transaction and vide a letter dated 27<sup>th</sup> July 2017, the advocate confirmed receipt of the original title deeds from the Defendant. She also confirmed that the application for consent to Land Control Board for LR No. Kajiado/Kaputiei North 15688 was signed by both her and the vendor and pointed out that the completion period was ninety (90) days after signing of the agreement and the same had not been extended. She went on to acknowledge that through the letter dated 28<sup>th</sup> May 2019, she sought a refund of the purchase price and the letter dated 5<sup>th</sup> July 2019 confirmed that the transaction had collapsed. She also confirmed that her previous advocate through a letter dated 16<sup>th</sup> February 2021 stated that she would not release the title documents without a refund of the purchase price.
6. On re-examination the Plaintiff confirmed that Kshs 650,000 and Kshs 750,000 was paid on 14<sup>th</sup> July 2017 upon execution of the sale agreement. She indicated that Clause 11 of the agreement stipulated 14 days as the period for refund if the transaction failed to go through. She stated that she was more interested in the parcel of land than refund of the purchase price.

### **Evidence of the Defendant**

7. DW1, Hellen Achieng Olima adopted her witness statement as part of her evidence in chief and produced twenty three documents as exhibits which were marked as D. Exhibit 1-23 respectively. She confirmed having executed the sale agreement dated 14<sup>th</sup> July 2017 and adhered to her obligations including issuing their advocate with the original documents as well as duly signed consent and transfer documents. However, the agreement was rescinded by the Plaintiff when she sought a refund of the purchase price. She noted that the completion period was within ninety (90) days and the same was never extended. She sought release of the title documents to enable her sell the properties and refund the purchase price.
8. On cross examination she stated that the money paid was deposit of the parcels and the balance was to be paid upon completion and that she signed all the necessary documents. However, on 28<sup>th</sup> May 2019 she received a letter asking for refund within 14 days and the agreement was thus rescinded. She confirmed that she has not refunded the money because the Plaintiff has refused to avail the original documents.



9. On re-examination she stated that having given the advocate all completion documents, she could not explain why the advocate did not lodge the documents for transfer. She added that she was willing to refund the purchase price upon release of her documents.
10. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiff's Submissions**

11. Counsel for the Plaintiff submitted that there was a valid contract between the Plaintiff and the Defendant as per Section 3(3) of the *Law of Contract Act* and that the letter dated 28<sup>th</sup> May 2019 which sought a refund of the purchase price was written out of frustration due to the Defendant's laxity in completing the transaction. But since the Kshs 1,630,000 was not refunded by the Defendant, then the contract was still valid until all the requirements were fulfilled as set by Clause 15 of the agreement. As such, the Plaintiff was entitled to an order of Specific Performance as prayed citing *Godfrey Ngatia Njoroge vs James Ndung'u Mungai* [2019] eKLR together with costs since she has always been ready and willing to complete the transaction.
12. Counsel also submitted that the Plaintiff's case satisfies the requirements for an order of Specific Performance as a valid contract exists between the parties. It is further submitted that there exists no alternative remedy that can better aid the plaintiff to be returned to the position she would have been if the defendant had not committed the wrongful act. She urges that the Counter claim be dismissed with costs.

### **The Defendant's Submissions**

13. Counsel submitted that the agreement was rescinded by the Plaintiff vide a letter dated 28<sup>th</sup> May 2019 where the Plaintiff indicated that she was no longer interested in the transaction and asked for a refund within 14 days. This rescission was accepted by the Defendant vide a letter dated 12<sup>th</sup> June 2019. The issue of rescission was reiterated by the Plaintiff in the letters dated 5<sup>th</sup> July 2019, 7<sup>th</sup> August 2019 and 15<sup>th</sup> February 2021. As such, the agreement was terminated and the Plaintiff was not entitled to an order of specific performance as was held in *Gurdev Singh Birdi and Marinder Singh Ghatora as Trustee of Ramgharia Institute of Mombasa vs Abubakar Madbbuti* [1997] eKLR Counsel added that the Plaintiff had also not upheld her obligations since she had not finished paying the balance of the purchase price within the 90 days completion period, thus going against time is of the essence doctrine. Reference was made to *Elijah Mbatah vs Madinvest Company Ltd* [2018] eKLR and Court of Appeal cases of *Gurdev Singh Birdi (supra)* and *Gatere Njamunyu v Joseck Njue Nyaga* [1983] eKLR.
14. Counsel went on to submit that the Defendant had issued the Plaintiff's counsel with all necessary completion documents and duly executed consents and the letter dated 27<sup>th</sup> July 2017 stating the contrary was misleading, adding that the Plaintiff in her testimony confirmed to have received all the completion documents. The Plaintiff then lodged the consent on 1<sup>st</sup> August 2018, eighteen (18) months after execution of the agreement which was contrary to the stipulated six months period as per Section 8(1) of the *Land Control Act*. As such, this voided the transaction as was held by the Court of Appeal in *Peter Waweru Waititu v Cyros J. Karanja* (2007) eKLR, and the Plaintiff additionally rescinded the agreement. The Plaintiff was thus barred from claiming specific performance and the Defendant's counterclaim should be allowed with costs.

### **Analysis and Determination**

15. I have considered the pleadings, evidence on record, the written submissions and the authorities cited. The issues for determination are:



- i. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
  - ii. Whether the sale agreement was rescinded by the Plaintiff;
  - iii. Who should bear costs of the suit?
16. It is not in contention that there was a sale agreement dated 14<sup>th</sup> July 2017 duly executed by the Plaintiff and the Defendant for sale of Land Parcels Numbers Kajiado/Kaputiei North/15688 and Kajiado/Kaputiei North/15689 for a consideration of Kshs 1,300,000 and Kshs 1,500,000 respectively. It is also not in contention that the Plaintiff only paid half the purchase price for both parcels at the time of the execution of the agreement.
17. On 14<sup>th</sup> July 2017 the Plaintiff and Defendant executed two sale agreements for the two parcels of land. The said agreements were attested by their advocate Ruth Caroline Ajiambo (as per the advocate's stamp on the agreements). Both parties acknowledge that payment of half the purchase price of each parcel was made on the day the agreement was executed.
18. The Defendant said that she shortly thereafter issued the advocate with completion documents which she had duly signed, as well as original titles for the said parcels. She produced as evidence marked as D. Exhibit 2 and 3 undated copies of application for consent and transfer forms as well as a letter dated 27<sup>th</sup> July 2017 from the advocate Ruth Ajiambo acknowledging receipt of the two original title deeds.
19. By a letter dated 27<sup>th</sup> May 2019, the Defendant's advocate sought an update from the Plaintiff's advocate on the progress of the transaction. In the letter dated 28<sup>th</sup> May 2019 the Plaintiff's advocate responded as follows:
- “...Kindly note that we have not moved further with the transaction because your client has never provided us with the letter of consent of the Land Control Board as stipulated in the sale agreement.
- We further advise that due to the laxity of your client, our client is now not interested in the transaction and is therefore requesting for a refund within fourteen (14) days of Kenya shillings One Million six hundred and thirty thousand (Kshs 1,630,000) that she has already paid to enable us release the original titles that are in our possession...”
20. In a letter dated 12<sup>th</sup> June 2019 the Defendant's advocate informed the Plaintiff's advocate that “... our client is negotiating with an interested buyer to the properties your client was buying and as soon as concrete agreement is reached, we shall revert back to you within appropriate professional undertaking on the amount claimed by your client for purposes of settlement.”
21. It is the defendant's contention that the plaintiff has not paid the full purchase price.
- However Clause 2 (b) of the sale Agreement provides that;
- “(b) The balance of the purchase price being Kenya shillings Six Hundred and Fifty Thousand (Kshs 650,000/=) shall be paid by the purchase to the vendor upon completion of this transaction, where upon the title's herein shall have been transferred in the purchaser's name.”
22. It is not in dispute that to date the Defendant has not refunded Kshs1,630,000/= being the deposit for the two parcels. The reason given is that she needed the title deeds in order to dispose of the suit properties. The fact that no refund was made within 14 days of the plaintiff's letter dated 28<sup>th</sup> May 2019 means the sale was not terminated.



23. I find that the plaintiff is entitled to an order of Specific Performance: Maraga J (as he then was) in *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR (also cited by the Defendant) held:

“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...”

24. It is not in dispute that the Defendant is still in possession of the two plots she has not disposed of them and are within reach.
25. The defendant’s claim that she could not refund the kshs1,630,000/= because she could not dispose of the suit properties without the original title deeds in my view does not hold water.
26. As a common law principle 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.

In the instant scenario the defendant is in possession of the suit properties and is able to convey one of them to the plaintiff.

27. According to *Halsburys Law of England* 4<sup>th</sup> Edition Paragraph 487 Volume 44 it is stated;

“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 implications and which ought to have been performed at the date of the writ in the action. However this rule only applies to terms 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.”

28. The upshot of the matter is that nothing prevents the defendant from conveying the suit property to the plaintiff.
29. In conclusion I find that the plaintiff has proved her case as against the defendant on a balance of probabilities. I find that she is entitled to an order of Specific Performance.
30. In essence the defendant’s Counter claim for release of both titles fails.
31. Accordingly Judgement is entered in favour of the plaintiff as follows:
- a. That an order of Specific Performance is hereby issued in respect of the sale agreement dated 14<sup>th</sup> July 2017 in respect of LR No. Kajado/Kaputiei North/15688. In essence the defendant is hereby ordered to effect transfer in favour of the plaintiff within Ninety (90) days from the date of this Judgement. In default the Honourable Deputy Registrar of this Honourable Court do execute the necessary documents to effect transfer.



- b. That the plaintiff is hereby ordered to release the original title deed in respect of LR No. Kajiado/Kaputiei North/15689 to the defendant and thereafter the defendant do refund Kshs330.000/= within Ninety (90) days from the date of this Judgement.
- c. That each party do bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

Mr. Chacha for Ms. P. Makori for the Plaintiff.

Mr. Ochanda for the Defendant.

