



**Kweyu & another v Chore & 2 others (Environment & Land Case 4 of 2019 & 81 of 2018 (Consolidated)) [2024] KEELC 3474 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3474 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 4 OF 2019 & 81 OF 2018 (CONSOLIDATED)  
DO OHUNGO, J  
APRIL 30, 2024**

**BETWEEN**

**MARY AWINO KWEYU ..... PLAINTIFF**

**AND**

**LAWRENCE MMATA CHORE ..... 1<sup>ST</sup> DEFENDANT**

**MELISA MUHONJA MMATA ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 81 OF 2018**

**BETWEEN**

**MELISSA MUHONJA MMATA ..... PLAINTIFF**

**AND**

**LAWRENCE MMATA CHORE ..... 1<sup>ST</sup> DEFENDANT**

**MARY AWINO KWEYU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Mary Awino Kweyu (hereinafter Mary) filed ELCC No. 4 of 2019 against Lawrence Mmata Chore (hereinafter Lawrence) and Melisa Muhonja Mmata (hereinafter Melisa) as first and second defendants respectively on 22<sup>nd</sup> January 2019 through plaint dated 22<sup>nd</sup> January 2019. She averred in the plaint that Lawrence was the registered proprietor of the parcel of land known as Butso/17938 (the suit property) which he charged in favour of Kenya Women Microfinance Bank Ltd as security. That on 30<sup>th</sup> August 2018, Lawrence entered into a sale agreement with Mary pursuant to which Mary



- purchased the suit property and all the developments thereon at a consideration of KShs 30,000,000 which Mary fully paid.
2. Mary further averred that Lawrence through connivance with Melisa failed or refused to transfer the suit property to her. She averred that she was seeking specific performance of the agreement and in the alternative, if the court deems that specific performance cannot issue, a refund of the purchase price plus contractually agreed damages. Mary therefore prayed for judgment against Lawrence and Melisa for:
    - a. An Order for specific performance be issued compelling the Defendants herein (particularly the 1<sup>st</sup> Defendant) to cause the whole of land parcel number Butsotso/Shikoti/17938 be transferred to the Plaintiff who is to hold unto it as the absolute owner and further compelling the Defendants to yield vacant possession of the said land parcel number Butsotso/Shikoti/17938 to the Plaintiff.
    - b. The 1<sup>st</sup> Defendant to pay the Plaintiff mesne profits at the rate of Kshs 250,000/- per month with effect from December 2018 until the date when vacant possession of land parcel number Butsotso/Shikoti/17938 is given to the Plaintiff.
    - c. Costs of this Suit.
    - d. Interest on items “b” and “c” above from the date of filing this suit till payment is made in full.
    - e. Other alternative (and/or further) relief as this Honourable Court may deem fit and just to grant.
  3. Lawrence filed a statement of defence through which he admitted paragraphs 1 to 9 of the plaint. He averred that the agreement was null and void for being in breach of Section 6 of the *Land Control Act* and that the suit was sub-judice since there was in existence another case being ELCC No. 81 of 2018. He urged the court to dismiss the suit with costs.
  4. Melisa also filed a statement of defence through which she averred that no spousal consent was obtained in respect of the transaction comprised in the sale agreement and that it was in breach of Section 6 of the *Land Control Act*. She equally raised the issue of pendency of ELCC No. 81 of 2018 and urged the court to dismiss the suit with costs.
  5. Earlier, Melisa had filed ELCC No. 81 of 2018 against Lawrence and Mary as first and second defendants respectively through plaint dated 15<sup>th</sup> November 2018. She averred that she was Lawrence’s wife and that the parcel of land known as Butsotso/Shikoti/17938 (the suit property) was matrimonial property. That the sale agreement dated 30<sup>th</sup> August 2018 was entered into without her spousal consent. She therefore prayed for judgment against Lawrence and Mary for:
    - a. An order be issued declaring the Agreement dated 30<sup>th</sup> August 2018 in respect of sale of land parcel Butsotso/Shikoti/17938 null and void for lack of spousal consent by the Plaintiff.
    - b. An order of injunction restraining the 1<sup>st</sup> Defendant from transferring land parcel Butsotso/Shikoti/17938 to the 2<sup>nd</sup> Defendant in furtherance of the Agreement dated 30<sup>th</sup> August 2018.
    - c. An order of injunction be issued restraining the Defendants jointly from undertaking any dealings on the title in respect of land parcel Butsotso/Shikoti/17938 in furtherance of the Agreement dated 30<sup>th</sup> August 2018.



- d. An order of injunction be issued restraining any disposition over the land parcel No. Butso/ Shikoti/17938 and unlimited access and use of this land by the Plaintiff pending hearing and determination of this case.
  - e. Costs of this suit.
  - f. Any other relief that the Honourable court may deem just to grant.
6. Mary filed statement of defence through which she denied that the suit property was matrimonial property and averred that Melisa consented to the sale when she consented to the suit property being charged in favour of Kenya Women Microfinance Bank Ltd. She prayed that the suit be dismissed with costs.
  7. The two suits were consolidated for hearing and determination and ELCC No. 4 of 2019 selected as the lead file, pursuant to a ruling delivered on 4<sup>th</sup> July 2019.
  8. There was no appearance by Lawrence and Melisa at the hearing despite evidence of service being availed.
  9. Mary testified as PW1 and adopted her witness statement dated 22<sup>nd</sup> January 2019. She also produced copies of the documents listed as item numbers 1 to 8 in her list of documents dated 22<sup>nd</sup> January 2019, a copy the document in her further list of documents dated 1<sup>st</sup> April 2022 and copies of the documents listed as item numbers 1 to 12 in her third list of documents dated 3<sup>rd</sup> May 2022.
  10. Mary reiterated the contents of her plaint in her aforesaid witness statement. She further stated that Lawrence confirmed to her that Melisa consented to the suit property being charged in favour of Kenya Women Microfinance Bank Ltd. That she entered into the sale agreement with Lawrence and that she fully paid the purchase price of KShs 30,000,000 in December 2018 by remitting part of it to Kenya Women Microfinance Bank Ltd to settle Lawrence's loan and by paying the other part to Lawrence. That upon fully paying the purchase price, she was entitled to take possession of the suit property which had 12 rental apartments constructed on it and to start receiving the monthly rental income of KShs 250,000. That despite full payment, Lawrence and Melisa who were husband and wife refused to give her possession and conspired to keep her from acquiring the suit property by filing ELCC No. 81 of 2018 and claiming absence of spousal consent.
  11. Geoffrey Musalani (PW2) adopted his witness statement dated 22<sup>nd</sup> January 2019. He stated that Lawrence told him that he wanted to sell the suit property by private treaty to repay a bank loan and instructed him to get for him a buyer. That Lawrence promised to pay him commission of 5 per cent and that he put Mary in touch with Lawrence after which Mary and Lawrence reached an agreement and signed the sale agreement dated 30<sup>th</sup> August 2018. PW2 added that he also signed the agreement as a witness.
  12. Both the plaintiff's and defence cases were then closed. Directions were given that parties file and exchange written submissions. Only Mary filed submissions. She argued that the primary reliefs that she seeks are specific performance by way of transfer of the suit property to her as well as vacant possession and mesne profits at KShs 250,000 per month. That in the event that the court deems her undeserving of the primary reliefs, the court should award her a full refund of the sum of KShs 30,000,000 being the purchase price plus KShs 9,000,000 being the contractually stipulated penalty.
  13. Mary further argued that in his statement of defence, Lawrence admitted paragraphs 1 to 9 of the plaint. That although Lawrence sought to have her denied the remedy of specific performance on the singular ground of the alleged absence of consent of the Land Control Board, at the time of instituting



ELCC No. 4 of 2019 the six month period for applying for the consent had not elapsed. She added that since Lawrence did not offer any evidence, his statement of defence remained unsubstantiated. Further, that Melisa also failed to prosecute her claim in ELCC No. 81 of 2018. Mary added that since she testified and called PW2, their testimonies remain uncontroverted. Accordingly, she urged the court to grant her the primary reliefs and that only if the court finds compelling and justifiable reasons for denying her the primary reliefs should the court award the alternative of KShs 39,000,000 plus interest and costs.

14. I have considered the parties' pleadings, evidence, and submissions. The only issue for determination is whether the reliefs sought should issue.
15. From the onset, it will be recalled that there was no appearance by Lawrence and Melisa at the hearing despite evidence of service being availed. It follows therefore that Melisa did not prosecute her ELCC No. 81 of 2018. Consequently, ELCC No. 81 of 2018 is dismissed.
16. Equally, both Lawrence and Melisa did not offer any evidence to challenge Mary's case in ELCC No. 4 of 2019. In his statement of defence, Lawrence admitted the averments at paragraphs 1 to 9 Mary's plaint. He thus admitted that he is the proprietor of the suit property and that the suit property has 12 apartments with a monthly rental of KShs 250,000.
17. Lawrence did not offer any evidence to controvert Mary's case that on 30<sup>th</sup> August 2018, she entered into a sale agreement with Lawrence pursuant to which she purchased the suit property and all the developments thereon at a consideration of KShs 30,000,000 which she fully paid. Mary produced the agreement and I note that Lawrence referred to the agreement at paragraph 4 of his statement of defence. His bone of contention with the agreement was that it was in breach of Section 6 of the Land Control Act. The said section does not however apply in a vacuum. Lawrence needed to adduce evidence to show that the transaction concerned agricultural land and that the Land Control Board for the land control area or division in which the suit property is situated did not give its consent in respect of the transaction within six months of 30<sup>th</sup> August 2018. I am satisfied that Lawrence and Mary entered into the sale agreement dated 30<sup>th</sup> August 2018.
18. The sale agreement dated 30<sup>th</sup> August 2018 is specific at clause 1 thereof that the consideration which Mary was to pay was KShs 30,000,000. Mary testified that she fully paid the amount. Her testimony is not controverted. The agreement states at clauses 2 and 3 that Mary paid KShs 5,000,000 on 30<sup>th</sup> August 2018 and that the balance of KShs 25,000,000 was to be paid by 31<sup>st</sup> December 2018. Among the exhibits that Mary produced was an affidavit which Lawrence swore and filed on 24<sup>th</sup> December 2018 in Kakamega HC Petition No. 61 of 2018, a case which he filed against the Director of Public Prosecution and others. He deposed at paragraphs 5 and 15 of that affidavit that Mary fully paid him the sum of KShs 30,000,000. He was in fact offering to refund it fully. I am therefore satisfied that Mary fully paid the purchase price of KShs 30,000,000.
19. Mary sought specific performance of the agreement dated 30<sup>th</sup> August 2018. That would mean that this court orders transfer to her of the suit property. In the circumstances of this case, specific performance is not available for the reason that Mary's case is that the suit property was charged in favour of Kenya Women Microfinance Bank Ltd. A perusal of the copies of the title deed dated 12<sup>th</sup> November 2014 and the certificate of official search dated 4<sup>th</sup> September 2018 confirm that the suit property was charged in favour of Kenya Women Microfinance Bank Ltd on 23<sup>rd</sup> April 2015. Consequently, Kenya Women Microfinance Bank Ltd which is not a party to these proceedings has a valid proprietorship interest in the suit property. Mary did not produce any certified copy of the register or certificate of search showing discharge of the charge. An order of specific performance cannot issue without giving Kenya Women Microfinance Bank Ltd a hearing.



20. Pursuant to paragraphs 21 and 22 of Mary's plaint and prayer (e) thereof, Mary sought judgment, in the alternative, for KShs 30,000,000 being a refund of the purchase price and KShs 9,000,000 being the contractually stipulated penalty in terms of clause 11 of the agreement. I have perused clause 11 of the agreement and I note that Mary and Lawrence expressly agreed that any party in breach of the agreement would pay to the other general damages of thirty percent of the purchase price over and above other remedies including a refund of the purchase price. Thirty percent of KShs 30,000,000 is KShs 9,000,000. I am persuaded that Mary is entitled to the sum of KShs 9,000,000 since Lawrence did not complete the agreement.
21. In the result, I dismiss ELCC No. 81 of 2018. I enter judgment in favour of Mary Awino Kweyu against Lawrence Mmata Chore for KShs 30,000,000 (Thirty Million) being a refund of the purchase price and KShs 9,000,000 (Nine Million) being general damages in terms of clause 11 of the sale agreement. I also award Mary Awino Kweyu costs and interest. The costs shall be paid by Lawrence Mmata Chore and Melisa Muhonja Mmata.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF APRIL 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Balusi for the Plaintiff

No appearance for the First Defendant

No appearance for the Second Defendant

Court Assistant: M Nguyayi

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