



Mututu & another v Mwilu & another (Environment and Land Appeal E014 of 2022) [2024] KEELC 3590 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

**A NYUKURI, J
APRIL 29, 2024**

BETWEEN

COSMAS WAMBUA MUTUTU 1ST APPELLANT

JOSEPHINE MUENI NDETO 2ND APPELLANT

AND

HENRIETTA MUKII MWILU 1ST RESPONDENT

MORRIS MATHEKA KIMEU 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable C. C. Oluoch, Chief Magistrate, Mavoko Law Courts, delivered on 20th November 2019 in Mavoko Chief Magistrate Environment and Land Case No. 33 of 2019)

JUDGMENT

Introduction

1. This appeal was brought by Cosmas Wambua Mututu And Josephine Mueni Ndeto being a challenge against the judgment of Honourable C. C. Oluoch, Chief Magistrate delivered on 20th November 2019 in Mavoko Chief Magistrate’s Court Environment and Land Court Case Number 33 of 2019. In the impugned judgment, the learned trial magistrate allowed the respondents’ claim for a permanent injunction to restrain the appellants from trespassing on plot Number 33 Phase 1 Ngwata-2008 (suit property) as well as an order compelling the 1st appellant to transfer the said property to the respondents. The basis for that decision was the trial court’s finding that the respondents had approached the court with clean hands and had demonstrated willingness to pay the balance of the purchase price, having paid the same but which was returned to the appellants; and that they had been in occupation thereof for over seven years.



Background

2. The plaintiffs, who are the respondents in this appeal, jointly filed a suit against the defendants by way of a plaint dated 30th April 2015. They sought the following orders;
 - i. A permanent injunction do issue restraining the defendants either by themselves, their authorized agents, servants and/or employees from evicting, trespassing, entering, remaining and in any way dealing with parcels of land known as Plot Reference Number 33 at Phase 2 Ngwata 2008.
 - ii. That an order directing the 1st defendant to transfer all the parcel of land known as Plot Reference Number 33 at Phase 1 Ngwata-2008 in the plaintiff's name and in default, the Deputy Registrar to sign all transfer documents.
 - iii. Costs and interests of all items pleaded.
 - iv. Any other and/or further relief that thus honourable court deems fit to grant.
3. The plaintiffs averred that they bought the suit property, being Plot Reference Number 33 at Phase 1 Ngwata-2008 from the 1st defendant on 3rd February 2012. They stated that they took possession thereof and carried on developments thereon but that the defendants had refused to transfer the ownership of the suit property to them. It was the plaintiffs' claim that the defendants had trespassed into the suit property causing wanton destruction and have since threatened to evict the plaintiffs' tenants if they do not remit their monthly rents to them.
4. The suit was defended. The defendants filed a statement of defence dated 30th June 2015. They denied allegations of refusal to transfer the suit property to the plaintiffs and instead accused the plaintiffs of breach of contract. They claimed that the plaintiffs had failed to pay the balance of Kshs. 36,000/= on or before the completion date and for approximately two years with interest thereon.
5. The suit proceeded for hearing by way of viva voce evidence. Each side presented 2 witnesses. Pw1 was Henrietta Mukii Mwilu, one of the plaintiffs. She testified that together with Morris Matheka Kimeu and Hellen Mwendu Rendall, they purchased the suit property from the defendants at a price of Kshs. 3,200,000/= which was later revised to Kshs. 3,500,000/= with the completion date being either 120 days from 3rd February 2012 or 7 days after successful transfer of the suit property. She stated that she paid almost the entire price leaving a balance of Kshs. 36,000/=, which she paid to the parties' advocate, Kiget Advocate, on demand, but which amount was returned to her when the defendants refused to pick it. She also confirmed upon cross examination that the sale was for one half of the suit property and that the seller was to present the completion documents before payment of the balance. PW2, Morris Matheka Kimeu, further asked the court to confer them title to the suit property and further confirmed that they took possession of the suit property in October 2012.
6. The defendants on their part also acknowledged through DW1, Cosmas Wambua to have entered into a sale agreement with the plaintiffs on 3rd February 2012 and that when they demanded for the balance of Kshs. 36,000/= in 2013, one of the plaintiff's assaulted him. Dw1 also confirmed that his wife, the 2nd defendant, had received a call from Kiget advocate to collect the balance of Kshs. 36,000/= but declined to do so as it was after expiry of the date given. On cross-examination, he confirmed to have received over Kshs. 3,400,000/= and that he did not give the plaintiffs a copy of the allotment letter or the title deed. DW2, Josephine Mueni, on her part denied receiving a call from Kiget Advocate and also stated that her husband, DW1, had been assaulted by the PW1 when he attempted to demand for



- the balance. On cross-examination, she confirmed that DW1 had gone to ask for the payment when drunk and that she was ready to refund to the plaintiff what she could afford.
7. Upon hearing both sides, the learned magistrate entered judgment in favour of the plaintiffs against the defendants, finding that the defendant's act of rescinding the agreement was unjustified as the plaintiff had come to court with clean hands and demonstrated willingness to pay the entire purchase price. He granted the orders sought by the plaintiff against the defendants.
 8. Being aggrieved by the said judgment, upon obtaining leave of court to appeal out of time, the defendants who are the appellants herein, appealed against the same by a Memorandum of Appeal dated 26th April 2022. The grounds of appeal set out therein are as follows;
 1. The Learned Magistrate erred both in law and facts by finding and holding that the appellants should have transferred the suit property to the respondents after receiving more than 90% of the purchase price.
 2. The Learned Magistrate erred both in law and fact by finding that the respondents were entitled to the remedy of specific performance despite the fact that they had not paid the whole purchase price on time.
 3. The Learned Magistrate erred in law and in fact by not finding that the appellants were within their right according to the sale agreement to rescind the agreement.
 4. The Learned Magistrate erred in law and in fact by relying on inadmissible documentary evidence in form of a letter dated 8th May, 2014 from Kiget & Co. Advocates to find favour of the Respondents.
 5. The Learned Magistrate erred in law and in fact by holding that being in possession for over 7 years and the act of developing a property alone vests ownership rights on the developer, the respondents.
 6. The Learned Magistrate erred in facts by not finding that the respondents had breached the sale agreement.
 7. The Learned Magistrate erred in both law and facts when he ordered for the transfer of all that parcel of land known as Plot Reference Number 33 at Phase 1 Ngwata-2008.
 8. That the Learned Magistrate erred in issuing a permanent injunction restraining the defendants from evicting, trespassing, entering, remaining and/or in any way dealing with the parcel of land known as Plot Number 33 Phase 1 Ngwata-2008.
 9. The Learned Magistrate erred in entering judgement for the plaintiff against the defendants.
 9. Subsequently, the appellants sought the following orders;
 - a. That the appeal be allowed with costs;
 - b. That the decree from the judgment given on 20th November 2019 entering judgment for the plaintiffs against the defendants be set aside and there be substituted for it an order that the respondents do vacate the suit property within 30 days and the appellants be allowed to refund the purchase price less 10% as per the sale agreement.
 - c. Any such orders as this honourable court deems fit to make in the circumstances of the appeal.
 10. The appeal was canvassed by way of written submissions. On record are the appellants' submissions filed on 25th January 2023 and the respondents' submissions filed on 3rd October 2023.



Submissions by the appellants

11. Counsel for the appellants submitted that a court of law cannot rewrite the agreement between parties, and that by finding in favour of the respondents' the trial court rewrote the parties' agreement. Counsel argued that clause 7.1 of the sale agreement provided that if the purchasers failed to comply with the conditions of sale, the vendor would issue a 21 days' notice and be at liberty to rescind the contract if the breach was not rectified within the stipulated period. Reliance was placed on the cases of *Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited* [2014] eKLR and *Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd* [2017] for the proposition that it is not for the court to rewrite contracts for the parties.
12. Counsel further submitted that the remedy for specific performance was not available to the respondents since the circumstances of the case fell short of the principles and parameters set out in *Mina Abdul Kadir Hawa vs Rabinder Nath Anand & Another* [2012] eKLR and *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited*. It was their argument that the right to rescind the contract by the appellants is a statutory and common law remedy, hence ought to come first before the equitable remedy of specific performance.
13. It was also submitted that the sale agreement was for one half and not the whole of the suit property, and prayed that order 2 by the trial court be overturned as the court erred in ordering that the appellants do transfer all that piece of land known as Plot Number 33 Phase 1 Ngwata-2008 whereas the agreement dated 3rd February 2012 was for the sale of one half of the property known Title Reference Number 33 Phase 1 Ngwata-2008.

Submissions by the respondents

14. Counsel for the respondent submitted that the respondents were entitled to specific performance since they were able, ready and willing to comply with the terms of the contract. They cited two cases to support this argument namely; *L'Estrange vs F.Graucob Ltd* 1934 2 K.B 394 and *National Bank of Kenya Ltd vs Pipeplastic Samkolit Ltd & Prof Sam K. Onger* [2001] eKLR where sanctity of a contract and upholding of the terms agreed between parties was emphasized.
15. It was further submitted that the sale agreement was for one half of the suit property and the respondents conceded to the appeal only to the extent that only one portion of the suit property should be transferred to them.

Analysis and determination

16. The court has considered the appeal, the record and the parties' rival submissions. The grounds raised in appeal boil down to one issue, namely whether the respondents had met the threshold for grant of orders of specific performance. This court is alive to its duty as the first appellate court, which is to re-analyse, re-evaluate and re-assess the evidence presented before the trial court and make its own independent conclusions bearing in mind that it had no advantage of hearing or seeing the witnesses and give due allowance for that.
17. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.



18. Principles of specific performance are well settled. It is an equitable and discretionary remedy that can only be granted where damages may not be an appropriate remedy. A party seeking specific performance must demonstrate that they have complied with the terms of the contract or are willing to comply.
19. In the case of *Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhubuti* CA No. 165 of 1996, it was held as follows;
- It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed....a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication, and to which he ought to have performed at the date of the writ in the action.
20. Similarly, in the case of *Nabro Properties Limited & 2 others* [2002] 2KLR 300 the court took the position that;
- A party seeking specific performance must show and satisfy that it can comply and be ready and able, that a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant.
21. Equity will not suffer a wrong without a remedy and no one should benefit from their mischief. In *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* [2014] eKLR the Court of Appeal held as follows:-
- This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice.
22. In the instant matter, it is undisputed that the parties entered into a sale agreement for Plot Reference Number 33 at Phase 1 Ngwata-2008 for a consideration of Kshs. 3,500,000/= and the respondents paid a substantive amount of the purchase price leaving balance of Kshs. 36,000/= which they paid to the parties' advocate, Kiget Advocate on demand, but the appellants declined to receive. The 1st appellant indeed confirmed in his testimony that the 2nd appellant received a call from the said advocate to collect the balance but that she did not collect it because according to her, the same was paid late. Having considered this evidence, there is no evidence of when the demand letter dated 10th April 2014 from Wari & Company advocates for the appellants, was served on the respondent, for purposes of computing the 21 days period. The respondent's evidence that she received a demand letter on 4th October 2014 and deposited Kshs. 36,000/= the following day, was neither challenged nor rebutted by the appellants.
23. I have considered the agreement dated 3rd February 2012. The same provided for parties obligations. Clause 6 thereof provided for the obligation of the vendor, and stated that the vendor shall be deemed to have fulfilled his obligations under the agreement by furnishing the purchaser with the original title; executed transfer application; his national identity card; pin certificate, passport photographs; payment of rates and rent and other relevant documents. On the other hand, the respondent was to pay the consideration in the agreed time, although there was evidence parties varied the time lines. The appellant confirmed that they did not favour the respondents with completion documents. However, in the defence, the appellants confirmed that the respondents had occupied and developed the suit property. Considering that the respondents had demonstrated willingness to settle the balance of Kshs. 36,000/= which they delivered to Kiget Advocates even when the appellants had failed to



deliver completion documents, and the appellants had delivered vacant possession and allowed the respondents to develop the suit property, I have no doubt that the respondents are willing to settle the balance of Kshs. 36,000/= and denying the respondents a remedy of specific performance would be allowing the appellants to benefit from their mischief of refusing to collect the balance and refusing to release completion document when they allowed the respondents to develop the suit property. Therefore, in the circumstances of this case, the tenets of equity demand that the respondents herein ought to be granted specific performance.

24. For the above reasons, I find and hold that the trial court was correct in arriving at the finding that the respondents' willingness to settle the balance entitles them to an order of specific performance.
25. In the premises, the appeal fails and the same is hereby dismissed with costs to the respondent. As the respondents conceded to the fact that the portion sold to them was half of the suit property, the court substitutes the orders of the trial court with the following orders;
 - a. A permanent injunction do issue restraining the defendants either by themselves, their authorized agents, servants and/or employees from entering, trespassing, remaining and in any way dealing with the one half of the parcel of land known as Plot Reference Number 33 at Phase 1 Ngwata 2008, which is occupied by the plaintiffs as of the date of this judgement.
 - b. That an order directing the 1st defendant to transfer half of all the parcel of land known as Plot Reference Number 33 at Phase 1 Ngwata-2008 which is occupied by the plaintiffs as of the date of this judgement in the plaintiff's name and in default, the Deputy Registrar to sign all transfer documents.
 - c. The respondents to deposit in this court the balance of Kshs. 36,000/= due to the appellants within 30 days of this judgment for collection by the appellants, in default execution to issue.
 - d. I make no order as to costs.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Kioko for appellants

Ms. Mutuku holding brief for Mr. Munyao for respondents

Court assistant – Abdisalam

