



**Kinuthia v Kitonyi (Environment & Land Case 225 of 2018)
[2024] KEELC 3840 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 225 OF 2018
EK WABWOTO, J
MAY 13, 2024**

BETWEEN

STEPHEN NDUNGU KINUTHIA PLAINTIFF

AND

OBADIAH MUTISYA KITONYI DEFENDANT

JUDGMENT

1. The Plaintiff came to this court *vide* a plaint dated 16th April 2018 wherein he seeks the following reliefs: -
 - a. An order for specific performance of the Agreement for Sale dated 24th June 2009 in the following terms
 - i. That the Defendant does enforce the Decree for eviction given on 26th March 2013 within sixty (60) days
 - ii. That upon availability of vacant possession on the parties do complete the sale within thirty (30) days
 - b. Any further or other relief this Honourable Court may deem fit to grant.
 - c. Costs of this suit.
2. The suit was contested by the Defendant who filed a statement filed a statement of defence and counter claim dated 8th June 2018. The Defendant denied the contents of the plaint save for few admissions.

The Plaintiff's case

3. The Plaintiff averred that the Defendant is the registered proprietor of the property known as L. R. No. 209/12100 (Grant No. I.R 64002) situated in the Ngong Road area of Nairobi County and that



- by an Agreement for Sale dated 24th June 2009 the Defendant agreed to sell to the Plaintiff the suit property for Kshs. 15,000,000/- upon terms set out in the Agreement.
4. It was averred that the property is currently occupied by squatters/trespassers. Accordingly, it is a term of the Agreement that completion of the sale will be thirty (30) days after eviction of these occupants by the Vendor. On execution of the Agreement the Plaintiff paid to the Defendant Ksh. 500,000 in accordance with the terms of the Agreement.
 5. It was also averred that It was a term of the Agreement that an amount of Ksh 4,500,000 would be paid on the Defendant's account upon the following conditions: -
 - a. That a charge be created on the suit property to secure the amount of Kshs. 5,000,000/- (Special Condition C)
 - b. That upon execution of the Charge, Kshs. 4,500,000 be disbursed to cater for the following expenses Land rent Shs. 1,979,622/- Rates Shs. 776,910/- Agents commission Shs. 750,000/- Eviction charges Shs. 400,000/- Related expenses Shs. 593,468/- Shs. 4,500,000/-
 6. It was further averred that in breach of the agreement and in spite of many requests, the Defendant refused to execute the charge in compliance with special condition C of the agreement between the parties and thereby frustrating the process.
 7. The Plaintiff averred that the Defendant initiated eviction proceedings *vide* ELC 615 of 2009 *Obadiab Kitonyi =Versus= Morris Odhiambo & Another* and later filed ELC No. 307 of 2011 *Obadiab M. Kitonyi =Versus John Michael & 4 Others*. It was contended that the he was never notified of the outcome of the case and when the his lawyer inspected the court file, he found out that a decree for eviction had indeed been given on 26th March 2013 though no eviction has been undertaken thus frustrating the Plaintiff who had made payment to the tune of Kshs. 1,391,500/=.
 8. The Plaintiff contended that he has been ready and willing to complete the sale but Defendant has refused and neglected to enforce the eviction order which is a pre-requisite for the availability of vacant possession.
 9. At the trial, the Plaintiff testified as PW1 and the sole Plaintiff's witness. He adopted his witness statement dated 16th April 2018 and a bundle of documents of the even date in his evidence in chief.
 10. In cross-examination, he stated that the property was sold for Kshs. 15,000,000/= but he paid close to Kshs. 1,400,000/=. He stated that the agreement required him to make payment by instalments and that the key aspects for the implementation of the agreement was eviction of squatters. He also stated that some conditions were largely dependent on vacant possession being obtained. He conceded on not fulfilling some conditions of the agreement. He also stated that he fulfilled the terms of the agreement captured at Condition "J" and that he had various correspondences showing that he had paid money through the lawyer. He also confirmed having a schedule of all payments made.
 11. On further cross examination, he denied that the sale was not successful because the Vendor declined to execute some documents to change the property. He also stated that some payments were subject to the eviction which did not happen.
 12. When re-examined, he stated that the Defendant had a duty to implement the decree. The eviction charges were Kshs. 400,000/= which he paid and had itemised the payments made on paragraph 19 of the document. He also stated that the Vendor was to evict the persons in occupation of the property and that the same was clearly stated in the agreement. He further stated that the original title of the property was handed over to him and he placed a caveat against the it.



The Defendant's case

13. The Defendant's case is set out in his statement of defence and counterclaim together with the Defendant's witness statement dated 8th June 2018 and his oral testimony tendered in court. In his defence, he admitted the existence of ELC 307 of 2011 Obadiah M. Kitonyi vs John Michael & 4 Others for the purpose of eviction. He also admitted that the suit property was currently occupied by squatters. Save for those admissions he denied the other averments made by the Plaintiff.
14. In his counterclaim he sought for the Plaintiff to surrender the title deed of the suit property IR No. 209/12100 as the Plaintiff had failed to perform his obligations as per the sale agreement and hence making it null and void.
15. During trial, he adopted his witness statement dated 8th June 2018 in his evidence in chief.
16. On cross-examination, he stated that the agreement did not make a provision for the 10% deposit and that all it stated was that the Defendant was to be paid Kshs. 500,000/= in cash. He also stated that the Plaintiff gave him Kshs. 400,000/=. He conceded that it was his duty to evict the squatters as per the sale agreement and that he had not evicted them. He also admitted that there was an eviction order given by the court.
17. When re-examined, he stated that he was paid Kshs. 500,000/= and later Kshs. 910,000/= by the Plaintiff. He also stated that he was paid a total of Kshs. 1,300,000/=. He further stated that he had filed a counter claim and he was willing to pay back the sum advanced.

The Plaintiff's submissions

18. The Plaintiff filed written submissions dated 24th January 2024 and submitted on the following issues: -
 - i. Whether the agreement for sale dated 24th June 2009 is valid.
 - ii. Whether the Plaintiff has honoured his obligation under the Agreement.
 - iii. Whether the Defendant has honoured his obligation under the Agreement.
 - iv. Whether the Plaintiff provided sufficient funds for the provision of vacant possession.
 - v. Whether the Plaintiff is entitled to an order for specific performance as prayed for in the plaint.
 - vi. Who should bear the cost of the suit.
19. It was submitted that the sale agreement was duly signed by both parties and duly attested by their respective Advocates. It was also submitted that the Defendant had admitted to receiving Kshs. 910,000/=. Counsel also submitted that Section 3(3) of the *Law of Contract Act* stipulates in mandatory terms that no suit shall be brought upon a contract for disposition of an interest in land unless the contract upon which the suit is founded is in writing, is signed by all the parties thereto and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. It was also submitted that there was no allegation by the Defendant in his defence and oral testimony that there was fraud and coercion in respect to execution of the agreement. The case of *National Bank of Kenya Ltd =Versus= Pipe Plastic Samkolit (K) Ltd & Another* (2001) eKLR was cited in support.
20. As to whether the Plaintiff has honoured his obligation under the agreement, it was submitted that the agreement had two obligations; pre completion and post completion obligations which were primarily predicated upon eviction of the illegal occupants by the Defendant and delivery of possession



by the Defendant. It was further submitted that the Plaintiff had honoured his obligation under the agreement as follows; that he had made payment for Kshs. 500,000/= a further payment of Kshs. 400,000/= and Kshs. 910,000/= which had been admitted by the Defendant during cross-examination.

21. The Plaintiff submitted that save for eviction charges, the payment by the Plaintiff for the other items listed under Special Condition C had not crystalized for two reasons; firstly that they were subject to the Defendant's approval/consent which was never provided for and secondly that land rent, rates were part of completion documents as provided for under Special Condition B and which completion could only be preferred 30 days after eviction of the illegal occupants by the Defendant as provided for under Clause 6 and Special Condition E. It was also submitted that the same situation obtains for the balance of the purchase price which was to be paid as provided under Special Condition I and had not crystalized since it was predicated upon exchange of the balance of the purchase price with completion documents as provided under Special Condition B.
22. Counsel submitted that the Defendant had not honoured the agreement and no plausible reasons were offered for the same. It was argued that the Defendant has failed to evict the squatters despite a decree for eviction in Milimani ELC No. 307 of 2011; *Obadiah Mutisya Kitonyi vs John Michael & 4 Others* and despite receiving Kshs. 910,000/= from the Plaintiff for execution expenses which is over and above Kshs. 400,000/= that was agreed upon by the parties under Special Condition C.
23. As to whether or not the Plaintiff is entitled to the order of specific performance and costs of the suit, it was the Plaintiff's contention that the Plaintiff is willing to complete the sale and that the contract is validly in force and as such the order of specific performance ought to be issued. Reliance was placed to the cases of *Gilbert Kimani Njumu vs Gideon Kipkoech Kiptisia* (2019) eKLR and *Caltex Oil (Kenya) Ltd =Versus= Evanson Njiri Wanjibia* (2009) eKLR.
24. In respect to the Defendant's counter claim, the Plaintiff submitted that the same is a red herring frivolously brought without any justification whatsoever. It was submitted that the same was in direct conflict with the express terms under Special Condition C of the Agreement which gave the Plaintiff the wherewithal to keep the title hence by seeking to compel the Plaintiff to surrender the title documents the Defendant is tantamount to inviting the Honourable Court to unduly re-write the terms of the Agreement. The court was urged to dismiss the counter claim with costs.

The Defendant's submissions

25. The Defendant's written submissions were dated 15th February 2024. The Defendant submitted on the following issues; whether the Plaintiff complied with the terms of the sale agreement, whether the sale agreement was competent of being complied with, whether it is mandatory to have the 10% in the sale agreement, whether the title being in the hands of the Plaintiff was fraudulent or legally held, whether the Plaintiff made payments with the Defendant's approval, whether the eviction was made as per the order of the court and whether the Plaintiff had the money to buy the property since he wanted the title transferred to him to charge the title to get money to pay the Defendant.
26. The Defendant submitted that the Plaintiff had admitted in his evidence that he had not paid as per the sale agreement. It was argued that the Plaintiff had failed to pay the sum of Kshs. 5,000,000/= as per the sale agreement. It was also argued that the sale agreement was incapable of enforcement due to the several contradictions it had.
27. In respect to the eviction order, it was submitted that the same was given to the Plaintiff but he was not willing to take possession leaving other trespassers to take possession and later filed this instant suit 6 years later.



28. It was argued that the sale agreement lacks completion date and neither did it set the date when the purchaser was to deposit the 10% deposit. It was also argued that the said agreement was unlawful and a classic case of fraud.
29. The Defendant also submitted that the subject property is about Kshs. 100,000,000/= and that the Plaintiff can't force the Defendant to sell the same at the Plaintiff's own terms.
30. The Defendant concluded his submissions by urging the court to dismiss the suit since he is willing to refund all the money paid by him. He also urged the court to allow his counter claim and award him costs of the suit.

Analysis and Determination

31. Having considered the pleadings, the testimony, the evidence and submissions of the parties, the following issues arise for determination:-
 - i. Whether the agreement for sale dated 24th June 2009 is valid.
 - ii. Whether there was breach of the sale agreement dated 24th June 2009 and if so, by which party.
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - iv. What orders should issue in respect to the Defendant's counter claim.This court shall now proceed to address all the issues sequentially.

Issue No. 1

Whether the agreement for sale dated 24th June 2009 is valid.

32. Section 3(3) of the *Law of Contract Act* Cap 23 provides as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless

 - a) The contract upon which the suit is founded.
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
 - b) The signature of each party, signing has been attested by a witness who is present when the contract was signed by such party”.
33. In the instant suit, there was evidence that the parties herein entered into a sale agreement dated 24th June 2009. The Defendant challenged that agreement on the reasons that the same was not enforceable as it was opaque and it had many contradictions.
34. The court has perused the sale agreement dated 24th June 2009 and noted that the same was executed by all the parties herein and there was no evidence of coercion or fraud prior to its execution. In view of the foregoing, it is the finding of this court that the said sale agreement is valid and binding as between the parties.



Issue No. II

Whether there was breach of the sale agreement dated 24th June 2009 and if so by which party.

35. In respect to the breach of the agreement, it was the Plaintiff's case that the Defendant was in breach of the agreement and in spite of many request, the Defendant refused to comply thereby frustrating the process. The Defendant on the other hand maintained that it was the Plaintiff who was in breach of the said agreement.
36. During trial, the Plaintiff stated in cross-examination that the key aspects to the implementation of the sale agreement was eviction of squatters. He also stated that some conditions largely depended on vacant possession being obtained. The Plaintiff also stated that the eviction did not happen and he did not fulfil some of those conditions. As for the Defendant he stated in his cross-examination that it was his duty to evict the squatters but he did not evict them yet there was an eviction order given by the court.
37. The *Black's Law Dictionary, 9th Edition* Page 213 which defines a breach of Contract as;
“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
38. Breach of agreement is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the agreement, or performs defectively, or incapacitates himself from performing.
39. Its trite that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to “substituted or secondary obligations” on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.
40. In this case, both parties have alleged that there was breach of contract of the sale agreement by the other party. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
41. In the instant case the court has perused the sale agreement that was produced in evidence, the court has also considered the evidence that was tendered. The agreement stipulated as follows:-
3. The purchase price is Kshs. 15,000,000/=
4. The purchaser will pay a deposit of Kshs. 5,000,000/= as follows:-



- (a) Kenya Shillings 500,000/= cash on execution of this Agreement (which Vendor hereby acknowledges)
- (b) Kenya Shillings 4,500,000/= as set out in Special Condition G of this Agreement.

5. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this Agreement”

The Special Condition “E” and “G” stipulated as follows:-

“E” “The Vendor shall evict the persons currently in occupation of the property and the Completion Date is Thirty (30) days from the date of such eviction.

Condition “G”-

“Pursuant to Clause 4(b) of this Agreement and subject to prior written approval/consent by the Vendor, the Vendor hereby authorizes the purchaser to incur expenditure on the property sold as outlined below:-

Land rent Kshs. 1,979,622/=

Rates Kshs. 776,910/=

Agents Commission Kshs. 750,000/=

Eviction charges Kshs. 400,000/=

Facilitation and related expenses Kshs. 593,468/=

42. The evidence tendered herein confirmed that the Plaintiff made payment of Kshs. 500,000/= cash and a further sum of Kshs. 400,000/= for eviction. The Plaintiff also made payment for a sum of Kshs. 910,000/= which was admitted by the Defendant during trial. The evidence on record confirmed that despite this payment being made, the Defendant did not execute the decree in respect to the eviction.

43. It is trite law that Courts cannot rewrite the terms of the agreement between the parties neither can they create a new contract between the parties and have to simply rely on the terms and conditions of the agreement as agreed between the parties while deciding a dispute between those parties. This was emphasized in the cases of *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

44. Parties should always be aware of the consequences and repercussions before entering into any agreement. Parties should not merely enter into agreements with the sole purpose of not honouring them. In the circumstances it is the finding of this court indeed the Defendant was in breach of the agreement between the parties.



Issue No. III

Whether the Plaintiff is entitled to the reliefs sought in the plaint

45. The Plaintiff sought for an order of specific performance of the agreement of sale dated 24th June 2009. In respect to specific performance it is worth noting that the remedy of specific performance is an equitable remedy which is granted where it is demonstrated that the Plaintiff has done all that he was expected to do under the contract or that he is ready and willing to perform his part. In *Gurdev Singh Birdi & Another Vs Abubakar* (1997) eKLR the Court of Appeal held as follows:-

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England, fourth Edition a Plaintiff seeking the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication and which he ought to have performed at the date of the writ in the action...”.

46. The evidence adduced herein clearly confirmed that the Plaintiff discharged his obligations as per the sale agreement, and in the circumstances, the remedy of specific performance as prayed for by the Plaintiff is the most equitable and legally sound remedy to be issued in the case. The Plaintiff is clearly entitled to an order of specific performance.

Issue No. IV

What orders should issue in respect to the Defendant’s counter claim.

47. The Defendant filed a counter claim dated 8th June 2018 seeking for the Plaintiff to surrender to him the title deed of the suit property I.R 209/12100 as the Plaintiff failed to perform his obligation as per the said agreement hence making it null and void.

48. A counter claim is just like a suit and ought to be proved to the required standard. The Court has carefully perused the Defendant’s counterclaim dated 8th June 2018. It is evident that the same was not accompanied and or supported by any affidavit.

49. Order 7 Rule 5 of the *Civil Procedure Rules* stipulates as follows:-

“The defence and counter claim filed under Rule 1 and 2 shall be accompanied by:-

a. An affidavit under Order 4 Rule 1(2) where there is a counter claim.”

50. The provision of Order 7 Rule 5 are couched on mandatory terms and in view of the foregoing this court finds that the counter claim filed by the Defendant is unmeritorious and the same is hereby dismissed. The court cannot grant the relief sought in the counter claim.

Final orders

51. In conclusion, it is the finding of this court that having carefully analysed the evidence that was adduced herein, the Plaintiff has been able to prove his case to the required standard. The Plaintiff’s suit and the Defendant’s counter claim are therefore disposed of as follows:-



- a. An order of specific performance is hereby issued in respect to the agreement for sale dated 24th June 2009 in the following terms: -
 - i. That the Defendant is hereby directed to enforce the decree for eviction given on 26th March 2013 within sixty (60) days from today.
 - ii. That upon compliance with Order (a) (i) above, the parties do complete the sale within thirty (30) days thereafter.
- b. The Counter claim by the Defendant is dismissed.
- c. Each party to bear own costs of the suit and counter claim.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MAY 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Midenga for the Plaintiff.

N/A for the Defendant.

Court Assistant; Caroline Nafuna.

