Akal & another v Muigai & 2 others (Environment & Land Case 3440 of 1995) [2022] KEELC 2863 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2863 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 3440 OF 1995

JA MOGENI, J

JUNE 8, 2022

BETWEEN

CHARLES ODHIAMBO AKAL ..... 1ST PLAINTIFF

LINET ANYANGO ODHIAMBO ..... 2ND PLAINTIFF

AND

CAXTON CHEGE MUIGAI ..... 1ST DEFENDANT

JOB MOGENI OBANDA ..... 2ND DEFENDANT

NAIROBI CITY COUNCIL ..... 3RD DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 24/11/1995 the Plaintiffs herein sought for Judgment against the Defendants jointly and severally for the following orders: -

    a. An order compelling the Defendants to cause the Registration of the property UmojaII 450/4/B in the name of the Plaintiffs.

    b. An order restraining the 3rd Defendant from handing over the Documents of Title to any other person apart from the Plaintiffs.

    c. An order compelling the 3rd Defendant to surrender documents of title of the said property to the Plaintiffs.

    d. General damages.

    e. Costs of the suit.

    f. Any other just relief that the Court may deem fit to grant.

2. The suit is opposed. The 1st defendant entered appearance on 30/05/1996 and filed a defence dated 30/05/1996. The 2nd Defendant neither entered appearance nor filed any defence; however, the suit was withdrawn against him on 2/04/2003. The 3rd defendant entered appearance and filed a defence dated 20/05/2002. The suit proceeded by way of viva voce evidence and the Plaintiffs called two witnesses. PW1 and PW2 both testified on 21/07/2003. The matter was stood over until 20/01/2022 when the same was coming up for defence hearing. The 1st Defendant did not appear despite service.

Plaintiff's Case

3. The Plaintiffs pleaded that the 1st Defendant was the original allottee of property known as Umoja II Plot No. 450/B from the 3rd Defendant. By an agreement dated 5/05/1989, the 1st Defendant sold the said property to the 2nd Defendant and surrendered possession of the same. Subsequently, the 2nd defendant sold the suit property to the Plaintiffs in 1992 and handed over the documents pertaining to the said property and possession of the same.

4. The Plaintiffs aver that they have been paying to the 3rd defendant all the instalments for the purchase of the suit property and that by September 1994, they had paid up the amount in full.

5. It is their claim that in 1995, the 2nd defendant handed over the agreements of sale and powers of attorney duly executed by both the 1st defendant and the 2nd defendant vesting the property on the Plaintiffs. It is their contention that upon presentation of the aforementioned documents to the 3rd defendant, the 3rd defendant declined to transfer the property as they claimed that the same belonged to the 1st defendant. They averred that the 2nd defendant had not paid the 1st defendant in full and thus the suit property could not be transferred.

6. The Plaintiffs therefore aver that the acts of the defendants are wrongful as they are denying the plaintiffs the property that they have lawfully bought and paid for.

Evidence by the Plaintiff

7. PW1 – Charles Odhiambo Akal gave evidence in Court and stated that he knew the 2nd defendant, who is now deceased. That he approached him in 1992 and informed PW1 that he had some property to sell – the suit property in Umoja II. That the 2nd defendant informed him that he was selling the suit property because he had arrears at city council and the council wanted to repossess the same. It is House No. 450 B/B. He explained that he had bought the suit property from the 1st defendant and gave PW1 a plot card from the City council of Nairobi. The plot card was in the 1st defendant's name and Grace Nyambura. From the card, there was a deposit of Kshs. 2,000 that had been paid. It is PW1's contention that the 2nd defendant told him that the card was given to him by the 1st defendant at the time of the sale. He also gave PW1 a sale agreement (Ex. MFI 2) which show that the 1st defendant sold the plot to the 2nd defendant. The same was signed and witnessed.

8. It is PW1's evidence that he cleared Kshs. 14,229 arrears with the city council. He produced receipt no. 715351 dated 29/1/1992 for Kshs. 14,229. He avers that the arrears of the plot were from June 1989 to January 1992. PW1 gave evidence that he paid the money, and the receipt was issued in the 1st defendant's name. He contends that he produced various receipts after he entered into an agreement with the 2nd defendant and PW1's wife. The agreement (Ex. MFI 4) is dated 17/1/1994. A power of attorney dated 17/01/1994 (Ex. MFI 5) was also drawn where the 2nd defendant donated these powers to PW1 and his wife. PW1 avers that that was to enable them to process the title documents. The said power of attorney was registered and stamped on 27/1/1994. He further avers that the 1st defendant signed a power of attorney and sale agreement with PW1 and his wife. That the agreement is dated

28/09/1994 (Ex. MFI 6). The power of attorney was signed by the 2nd defendant to PW1 and his wife. It is dated 28/9/1994.

9. It was PW1's evidence that he paid Kshs. 40,618 and produced receipt 127711 dated 12/09/1994 (Ex. MFI 8). He subsequently produced various receipts (Ex. MFI 9 -21) being payment for survey fees, assignment and legal fees and payments towards the purchase of the suit property.

10. It is PW1's contention that he got a letter dated 13/09/1994 addressed to the 1st defendant c/o of the plaintiffs acknowledging the clearance of the loan in the amount Kshs. 40,618. It is his contention that after all these events, they got instructions from the city council that the 1st defendant had objected to the transfer of the house to the plaintiffs. That was when they instituted this suit against the defendants.

11. PW1 avers that he has a tenant living in the suit property and that he has been paying rates and tents and has been receiving receipts in the 1st defendant's name (Ex. MFI 22-23).

12. During cross examination, he testified that he bought the house from the 2nd defendant in 1992. He reiterated that they signed the agreement on 17/01/1994. That he paid Kshs. 50,000 in 1992 and was not in a hurry to have the papers done. That he paid the amount to the 2nd defendant in 1992 as the 2nd defendant was his relative and that he did not pay it on executing the agreement. He avers that he paid the loan as he did not want a burden over the property. He added that all the receipts were in the 1st defendant's name because at that time, there was a dispute as to the transfer to the plaintiffs. The 2nd defendant was in possession as he was living in the suit property, and he had evidence of ownership. He contends that he had two agreements because the first agreement with the 1st defendant was rejected, and they needed to have a sale agreement with the 1st defendant as the 2nd defendant was the plaintiff's agent in this regard.

13. Further, it is the Plaintiffs' evidence that the city council rejected his documents that contained the 2nd defendant's name and he was referred back to the 1st defendant. The reason was that the 1st defendant was the registered owner of the suit property. He avers that he did get an agreement from the 1st defendant, but he did not present it to the Council to date because of the objection from the 1st defendant. He admits that all the receipts were in the 1st defendant's name because the transfer had not been done.

14. During re-examination, PW1 contended that the power of attorney empowers him to effect the transfer and pay all debts with regard to the suit premises. This was similar to the one between the 1st and 2nd defendants. He reiterated that he got a letter from the city council dated 13/09/1994 addressed to the 1st defendant in care of PW1. It is his evidence that the 3rd defendant was aware that it was PW1 who was paying outgoings. That he disclosed his identity to them. The only reason they got the power of attorney was so that PW1 could effect change of name on the property. He avers that the 2nd defendant was aware that PW1 was a purchaser.

15. PW2 – Linet Anyango Odhiambo gave evidence in Court and averred that in 1990, the 1st defendant approached her husband (PW1) to buy House No. Umoja 450/B. She contends that the 2nd defendant was in arrears, and he also had a loan. It is her evidence that they cleared the outstanding loan and the arrears. That they later got a duly signed sale agreement and power of attorney (Ex. MFI 6 and 7). She added that her husband has been transacting all other issues regarding the house.

16. During cross examination, she testified that she went to view the house with the 2nd defendant as he had said that the house was his. She testified that the 2nd defendant gave them a sale agreement and a plot card (Ex. MFI 1 and MFI 2) confirming that it was sold to him. She contends that the 2nd defendant had not done the transfer to himself. She averred that they did not conduct a search. That they signed the

sale agreement with the 2nd defendant before Kamonde Advocate and that the 1st defendant was to go to the advocate's office later. It is her case that she first met the 1st defendant in court and believes that the signature on the agreement was his. She reiterated that they were buying the property jointly and that their claim is that since they bought the property, they should have it transferred to themselves.

17. It is her contention that they are still paying land rates in the 1st defendant's name. She further added that they paid the 2nd defendant Kshs. 50,000 and then paid Kshs. 40,618 as arrears. She averred that she was not issued with a receipt for the Kshs. 50,000. It is her evidence that she signed the sale agreement with the 1st and 2nd defendants respectively. That she saw the documents after they were registered. That there was no other document signed with the 2nd defendant before the sale agreement.

18. During re-examination, she testified that they first had an oral agreement with the 2nd defendant and then later signed a sale agreement dated 17/01/1994 (Ex. MFI 5). The said agreement was signed by the 2nd defendant so that the plaintiffs could transfer the property to themselves. In PWEx.MFI8, PW2 reiterated that they paid Kshs. 40,618 to offset the loan. With regard to MFI 13, she averred that they paid Kshs. 14,229 to offset rent arrears. Between 1992 and 1995, no one objected to them paying the monies to the city council.

19. With that evidence, the Plaintiffs closed their case.**

Defendants' Case

1st Defendant

20. The 1st Defendant entered appearance on 30/05/1996 and filed a defence dated 30/05/1996 wherein they pray that the Plaintiffs' suit be dismissed with costs and counterclaims that the plaintiffs are on the suit premises are knowingly in illegal occupation by virtue of fraud committed by the 2nd defendant and the plaintiffs.

21. The 1st Defendant avers that he is still the owner and the legitimate allottee of the suit property. It is his case that he entered into a sale agreement with the 2nd defendant, but the 2nd defendant fundamentally breached the said agreement and the same became void in so far as specific performance is concerned.

22. Further, the 1st Defendant contends that the power of attorney to vest the property in the 2nd defendant was obtained fraudulently more particularly by forging and imitating the 1st defendant's signature.

23. He avers that the Plaintiffs and the 2nd defendant did enter into a sale agreement of the suit property but the same is tainted with fraud in that the plaintiffs at the time of the alleged sale agreement knew or ought to have known that the 2nd defendant had forged the 1st defendant's signature in the agreement and therefore had no title to pass to the plaintiffs.

24. The 1st defendant contends that the 3rd defendant had the right to reject fraudulently obtained documents.

25. The 1st Defendant pleaded that the Plaintiffs and its tenant on the suit property are knowingly in illegal occupation by virtue of the fraud committed by the 2nd defendant and the plaintiffs as follows:

    i. The plaintiffs entered into a sale agreement with the 2nd defendant and presented the same to the Collector of Stamp Duties on 27/01/1994 but there is an alleged sale agreement between the 2nd defendant and the 1st defendant which was presented to the

Department of Lands much later that is 14/10/1994 which means that the plaintiff knew that the later documents was fraudulently obtained, and the 2nd defendant could therefore pass no title to the plaintiffs.

ii. The Power of attorney vesting the suit premises in the 2nd defendant from the 1st defendant was allegedly executed on 28/09/1994 BUT the Power of Attorney vesting the suit premises in the plaintiff was executed on 17/01/ 1994. The plaintiffs must therefore have participated in the glaring fraud of cooking up the Power of Attorney allegedly executed by the 1st defendant. The Power of Attorney by the 1st defendant ought to have been executed first.

26. The 1st defendant avers that he has on various occasions requested and demanded the plaintiffs to vacate the suit premises as he, his tenants and or agents are in unlawful and illegal occupation, but the plaintiffs has adamantly refused to comply out of which the 1st defendant has sustained great financial loss. Furthermore, they pray that the Plaintiffs' suit be dismissed with costs and for judgment against the plaintiff for: -

a. order evicting the plaintiffs, its servant and or agents from Plot No. 450/4/Type B Umoja II Nairobi.

b. Mesne profits from the date of the occupation until the Courts Orders on (a) above are granted.

c. Costs of the suit.

d. Any other relief that this Honourable Court may deem fit to grant.

27. The 1st defendant only filed his defense. He was directed to file his list of documents and trial bundle, but he has failed to do so.

28. The 1st defendant's counsel did not have a formal application to cease acting by the time the matter was coming up for defence hearing and when writing this judgment. The 1st defendant made an application to act in person on 2/11/2021 and was ordered to file a notice of appearance and file the requisite documents. This wasn't done to date.

2nd Defendant

29. The 2nd Defendant neither entered appearance nor filed any defence. The court learnt that the 2nd defendant is deceased and the case against him was withdrawn on 2/04/2003.

3rd Defendant

30. The 3rd Defendant entered appearance and filed a defence dated 20/05/2002 wherein they pray that the Plaintiffs' suit be dismissed with costs and interests thereon.

31. The 3rd Defendant denies the averments made in the plaint and avers that they are a misrepresentation of facts. They deny being privy to any contract if any between the plaintiffs and the 1st and 2nd defendant herein. They further contend that they have been wrongfully enjoined to the suit.

Evidence by the Defendants

32. During the defence hearing scheduled on 20/01/2022, the Defendants did not appear in Court to defend the suit. They also failed to adduce any evidence in court. Further the 1st defendant failed to appear in court to defend his matter and prosecute his counterclaim

Written submissions.

33. No written submissions were filed by the time of writing this judgment Analysis and Determination

34. Upon perusal of the pleadings, submissions filed herein including the exhibits produced and upon hearing the uncontroverted evidence of the plaintiff, the following are the issues for determination:

    1. Whether the Plaintiffs are entitled to the orders sought

    2. Who should bear the costs of this suit

1. Whether the Plaintiffs are entitled to the orders sought

35. The Plaintiffs have sought for orders as laid down in the Plaint dated 24/11/1995. To begin with, it is imperative to note that the Defendants failed to appear and thereby defend the suit in Court on 20/01/2022 when the matter was slated for defence hearing, despite service. The fact that the suit has not been defended means that the Plaintiffs' evidence remained unchallenged and uncontroverted. However, the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiffs are still required to prove their case on the required standard of balance of probabilities. See the cases of *Shaneebal Limited vs County Government of Machakos* (2018) eKLR and *Karuru Munyororo vs Joseph Ndumia Murage & Another*, Nyeri HcccNo. 95 of 1988.

36. To begin with, the Plaintiffs needed to satisfy the Court that indeed the sale of the suit property was valid and therefore subject to the orders sought which appear as an order of specific performance. The court must first determine whether there was a valid contract. The Plaintiffs allege that the 1st defendant entered into an agreement date 5/05/1989 wherein he sold the suit property to the 2nd defendant. The Court notes that this Agreement was dated 27/04/1989 and among the terms therein was that the completion date was set to be 15/05/1989. Subsequently, the Plaintiffs also alleged that the 2nd defendant then sold the suit property to them in 1992. The court notes that this sale agreement was entered into on 17/01/1994. The plaintiffs also produced a further sale agreement between the 1st defendant and themselves dated 28/09/1994 in which they allege that the same was as a result of their agreement with the 2nd defendant. This position was rejected by the 3rd defendant.

37. From the evidence adduced which stands uncontroverted, the agreement of sale between the 2nd defendant and the Plaintiffs was reduced into writing and signed by both parties. The Court has carefully perused the agreement of sale produced as Exhibit by the Plaintiffs and noted that the same is in writing and signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contain the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said agreement confirms that the same is a valid sale agreement which are enforceable by the parties. See the case of *Nelson Kivuvani vs Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, where the Court held that:-

> " The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or

implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract".

38. I therefore find that there was a valid contract. Article 40 of *the Constitution* guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

39. The 1st defendant acknowledged that the plaintiffs and the 2nd defendants did enter into a sale agreement but the same is tainted with fraud in that the plaintiffs at the time of the alleged sale agreement knew or ought to have known that the 2nd defendant had forged the 1st defendant's signature in the agreement and therefore had no title to pass to the plaintiffs. However, they failed to appear in court for hearing to defend the suit. Therefore, the averments in the defence remain as mere allegations.

40. Be that as it may, it is trite law that allegations of fraud must be proved. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR Tunoi JA stated that: -

> " It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts"

41. The 1st defendant did not adduce evidence to support this allegation and to specifically plead fraud. There was no forensic report to support the 1st defendant's allegation that his signature was forged and that the plaintiffs ought to have known the same. The court finds that the defendants did not prove existence of fraud in those particulars listed by the 1st defendant. Additionally, I find that no cogent evidence has been proffered to prove collusion on the part of the plaintiffs and 2nd Defendant. I opine that it cannot be said that the plaintiffs and 2nd Defendant have participated in a fraudulent enterprise.

42. From the record, the 1st and 2nd defendant entered into a memorandum of agreement for sale dated 5/05/1989. Among the terms therein was that the completion date was set to be 15/05/1989. I will be guided by the case of *William Kazungu Karisa vs Cosmus Angore Chanzera*, (2006) eKLR where it was held that:-

> " The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them.....However, when a specific date is mentioned, then times becomes of essence and completion must be within that date as it becomes a condition which goes to the root of the contract".

43. The 1st defendant also avers that the sale of the suit property was void as the 2nd defendant failed to complete payment of the purchase price. The court notes that there was no evidence adduced to prove this allegation. Moreover, there was no record indicating that a completion notice had been issued to the 2nd defendant. In *Bernard Alfred Wekesa v John Muriithi Kariuki & 2 Others* HCCC Nairobi

1059 of 1995 [2000] eKLR Kasanga Mulwa J (as he then was) made the following observation as to the purpose of a completion notice:

> " The completion notice is important in such a transaction as it puts the purchaser on guard as to the consequences of non-compliance of the notice and it also gives the vendor a right of action against the purchaser."

44. Therefore, the Court finds that the 2nd defendant was passing a good title.

45. In the Court of Appeal decision in the case of Kariuki –Vs Kariuki it was held that a purchaser of land where land is yet to be transferred to him has a remedy for the recovery of any money or consideration paid in the course of the transaction under section 6 of the *Land Control Act*. However, in this present suit and in light of the plaintiffs' un-controverted evidence, too much time has already passed therefore there is no doubt in my mind that an order of specific performance would be more ideal.

46. Therefore, in a case such as this one where the parties have reduced their agreement in writing, the duty of the Court is to look at the agreement itself and give appropriate remedy. The plaintiffs say that the 3rd defendant refused to transfer the suit property in the plaintiffs' names as they had paid the purchase price in full. Additionally, I did not find any evidence of fraud and misrepresentation on the part of the plaintiffs as alleged by the 1st defendant. Furthermore, the 1st defendant did not appear in court to defend his counterclaim against the Plaintiffs or provide any evidence on fraud and misrepresentation.

47. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiffs seeks to rely on, meets the requirements of a contract of sale of land. The Court has already held and found that there was a valid sale agreement as per section 3(3) of the contract Act.

48. In *Mangi v Munyiri & Another* [1991] eKLR it was held that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief.

49. In addition, in *Openda v Ahn*, [1984] KLR 208 the Court of Appeal held inter alia that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such persons as he directs at the time and place of completing the sale.

50. The granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case-to-case basis and whether there is an adequate alternative. See the Case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR, wherein Justice Maraga (as he then was) stated that:- "Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well 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 enforceable. 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 when damages are inadequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

51. As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the Court has found that the said agreement has not been vitiated by any factors or allegations or form of illegality that have been alluded to. The 1st defendant has alleged that he is still the registered owner of the suit property and alluded that the plaintiffs and the 2nd defendant colluded on acts of fraud, but they did not appear in court to defend the suit or call any evidence to controvert the evidence by the plaintiffs.

52. In deciding whether or not to grant the order of specific performance the Court should be careful not to order the grant of specific performance where it will cause severe hardship to the Defendants. This Court has been provided with evidence regarding the proprietorship of the suit property. As it stands, it was the Plaintiffs evidence that the 1st defendant is the registered proprietor of the suit property. That they have been in possession of the suit property since 1992. That they have a tenant on the suit property and have been collecting rent. They also testified that they had been paying the rates and rent regarding the suit property. The 1st defendant never raised any queries with the city council regarding that. In that regard, therefore this Court can grant an order of specific performance compelling the defendants to deliver the necessary documents to effect the transfer of the suit property to the plaintiffs. The award of Specific performance will not prejudice the Plaintiff nor the Defendants at all. Consequently, the Court is satisfied that the remedy of Specific performance is the proper order to be granted.

53. Based on the facts as presented, the Court finds that the Plaintiffs have proved on the required standard of balance of probabilities that they did pay Kshs. 50,000.00 and Kshs. 14,229.00 being arrears with the city council being payment towards the purchase price of the suit property.

54. On the prayers for general damages, the Court finds that the Plaintiffs never furnished the court with evidence on the damages they had suffered. Over and above that, in this instant case, damages may not be an appropriate remedy and as such Specific Performance is the best way to ensure that justice has been served. I will decline to award prayer (d).

Who should bear the Costs of the Suit

55. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiffs being the successful litigant are entitled to the costs of the suit.

56. From the circumstances and evidence provided, I find that the Plaintiffs have proved their case on a balance of probabilities and proceed to make the following orders:-

    a. An order be and is hereby issued compelling the Defendants to cause the Registration of the property UmojaII 450/4/B in the name of the Plaintiffs.

    b. An order be and is hereby issued restraining the 3rd Defendant from handing over the Documents of Title to any other person apart from the Plaintiffs.

    c. An order be and is hereby issued compelling the 3rd Defendant to surrender documents of title of the said property to the Plaintiffs.

    d. I award the Plaintiff the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2022.

.....

MOGENI J

Judgement read in virtual court in the presence of:

..... For the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

Mr. Vincent Owour- Court Assistant.