Kimani & another v Gichui & another (Environment & Land Case 1081 of 2016) [2023] KEELC 303 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1081 OF 2016

JO MBOYA, J

JANUARY 26, 2023

BETWEEN

DANIEL KAMUNYU KIMANI ..... 1ST PLAINTIFF

GEORGE WANYOIKE NGURI ..... 2ND PLAINTIFF

AND

PAUL K GICHUI ..... 1ST DEFENDANT

WEMBLEY VILLAS LTD ..... 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiffs' filed and commenced the instant suit vide Plaint dated the September 6, 2016 and in respect of which the Plaintiffs sought for various reliefs which were outlined and articulated at the foot of the Plaint.

2. Subsequently, the Plaintiffs' sought for and obtained leave to file an amended Plaint. In this regard, the Plaintiffs' thereafter proceeded to and filed an amended Plaint dated the November 15, 2017.

3. Vide the amended Plaint dated the November 15, 2017, the Plaintiffs' herein have sought for the following reliefs;

    i. A Declaration that the 1st and 2nd Plaintiffs are the bona-fide and legal owners of Plots No 029 and 028 respectively situated at Ruiru off Thika/Nairobi highway.

    ii. That an order of Eviction, demolishing or vacant possession to be rendered by the Defendants and to allow the Plaintiffs peaceful occupation and possession thereof.

iii. That in the alternative to (a) and (b) above, the Defendants be compelled to refund the entire Purchase price paid by the Plaintiffs plus all accumulated value of the 2 Plots to be subjected to valuation of plots 029 and 028 in Land Parcel LR 7418/21.

iv. Cost and Interests of the suit.

v. Any other Relief that this Honorable court may deem fit and just.

4. Upon being served with the summons to enter appearance and Plaint, the Defendants duly entered appearance and thereafter filed a statement of defense. For clarity, the statement of defense was filed on the January 8, 2018.

5. Upon close of pleadings, the subject matter was fixed for hearing and indeed the same proceeded for hearing on various dates. For clarity, the Plaintiffs' case was heard on the February 26, 2019, whereupon the 1st Plaintiff herein testified on his own behalf and on behalf of the 2nd Plaintiff.

6. Suffice it to point out that though the 1st Plaintiff testified on the February 26, 2019, same was however re-examined on the July 20, 2020 and thereafter the Plaintiffs' case was closed.

7. On the other hand, the Defendants' case was heard on the September 23, 2022, whereupon the 1st Defendant testified, on his own behalf and on behalf of the 2nd Defendant. For coherence, upon his testimony, the Defendants' case was closed.

8. In view of the foregoing, it is evident that the respective Parties only called one witness a piece.

Evidence By The Parties:

a. Plaintiffs' Case:

9. The Plaintiffs' case revolves around the evidence tendered by Daniel Kamunyi Kimani who testified as PW1.

10. It was the testimony of PW1, that same entered into a sale agreement on the January 7, 2008, whereupon the 1st Defendant sold unto him plot number 029, situate within LR No 7418/21 for the sum of KES 420, 000/= only.

11. Further, the witness added that same proceeded to and paid the entire purchase price to and in favor of the vendor, namely, the 1st Defendant herein.

12. Additionally, the witness testified that the 2nd Plaintiff also entered into and executed a sale agreement over and in respect of Plot number 028, situate on LR No 7418/21 with the same 1st Defendant. For clarity, the witness added that the purchase price was agreed upon between the 2nd Plaintiff and the vendor in the sum of KES 450, 000/= only.

13. Furthermore, the witness stated that the 2nd Plaintiff also proceeded to and paid the entire purchase price, which was duly received and acknowledged by the vendor. For clarity, the witness, averred that thereafter, the 2nd Plaintiff was issued with a Receipt to confirm the payment of the Purchase price.

14. Be that as it may, the witness testified that on or about August 2016, same visited the plot which he had bought with the intention of developing the said plot. However, the witness averred that during the visitation same found that the plot had been developed by persons unknown to him.

15. On the other hand, the witness also testified that the development which had been done on his Plot, also extended to the 2nd Plaintiff's Plot. In this regard, the witness testified that same reached out to and duly informed the 2nd Plaintiff of the incidence.

16. It was the further testimony of the witness that thereafter both himself and the 2nd Plaintiff visited the Defendants' Offices, with a view to seeking clarification over the issue of the suit Plots and the impugned developments thereof.

17. Nevertheless, the witness added that upon visitation to the Defendants' offices, the Defendants were uncooperative and hence the efforts to solve the issue was futile. In addition, the witness stated the attempt to sort out the issue did not materialize.

18. Other than the foregoing, the witness referred to the witness statement dated the September 6, 2016 and same sought to adopt the contents thereof. In this regard, the contents of the witness statement dated the September 6, 2016, (which have been reproduced herein before) was duly adopted and constituted as the evidence in chief of the witness.

19. Other than the witness statement, the witness also referred to the List and Bundle of Documents and same sought to produce the said Documents as exhibits, for and on behalf of the Plaintiffs.

20. Suffice it to point out that the request by the witness to produce and rely on the named documents was not objected to. Consequently the named documents were produced as Plaintiffs Exhibits.

21. On cross examination, the witness testified that same bought the named Plot in the year 2008. However, the witness added that same visited the named Plot in August 2016 and it is then when he found and established that there was an existing development standing on the named Plots.

22. Furthermore, the witness stated that at the time of buying the named Plot, the land was already sub-divided. However, the witness added that same did not know whether there was an approved subdivision scheme.

23. Other than the foregoing, the witness testified that at the time of entering into the sale agreement, the 1st Defendant herein was the owner if the Plot.

24. Besides, the witness admitted and acknowledged that currently there is an hotel built on both Plots. For clarity, the witness clarified that the Hotel stands on both Plots, namely, Plots Numbers 028 and 028, respectively.

25. Finally, the witness stated that when same asked the 1st Defendant about the transfer of the Plot, the 1st Defendant responded by stating that the Plots were small and hence no titles could be issued in respect thereof.

26. With the foregoing testimony, the Plaintiffs' case was closed.

b. Defendants' Case:

27. The Defendants' case revolves around the evidence tendered and adduced by Paul Kariuki Gichuhi. For clarity, same testified as DW1.

28. It was the evidence of the said witness that on or about the January 7, 2008, same entered into and executed sale agreements with the Plaintiffs herein. In this regard, the witness pointed out that a sale agreement was entered into with the 1st Plaintiff over and in respect of Plot number 029, whereas a sale agreement was entered into with the 2nd Plaintiff in respect of Plot number 028.

29. Furthermore, the witness testified that the two named plots were to excised from LR No 7418/21, situated at Ruiru along Nairobi – Thika High Way.

30. In addition, the witness testified that at the time of execution of the sale agreements, it was clear to the Plaintiffs herein that the Defendants were in the process of obtaining the requisite sub-divisions and change of user approvals from the relevant authorities, inter-alia, the Ministry of Lands and the Local Authority.

31. Be that as it may, the witness further testified that efforts to obtain the requisite approval for the sub-division and change of user was not successful. In this regard, the witness added that the approvals were declined by both the Ministry of Lands and the relevant Local authority.

32. Besides, it was the testimony of the witness that the Ministry of Lands and in particular, the Department of Planning signaled conditions, which became difficult and quite onerous to comply with and or adhere to and hence the intended subdivision scheme was never approved.

33. Furthermore, the witness testified that as a result of the failure to procure and obtain the approval of the subdivision scheme, the intended sale and transfer of the named Plots to and in favor of the Plaintiffs was frustrated.

34. Additionally, the witness testified that thereafter same informed and alerted the Plaintiffs of the difficulties and obstacles, attendant to the intended transfer of the named Plots.

35. On the other hand, the witness has further averred that same also alerted and advised the Plaintiffs' of his willingness and readiness to refund the entire Purchase price, which had been paid by the Plaintiffs. In this regard, the witness referred to the Letter dated the April 13, 2015.

36. Other than the foregoing, the witness stated that given the failure to procure and obtain the approval of the sub-division scheme, same cannot therefore effect the intended transfer of the named Plots to the Plaintiffs.

37. Premised on the foregoing, the witness added that the claim by the Plaintiffs herein and essentially, the Claim for the transfer of the named Plots, would not be feasible or tenable.

38. Be that as it may, the witness alluded to his witness statement dated the May 29, 2018 and essentially invited the Honourable court to adopt and admit same as Evidence in chief.

39. In this regard, it is appropriate to state that the named witness statement, whose terms have been reproduced, was constituted and adopted as the witness' evidence in chief.

40. Other than the foregoing, the witness also referred to the List and Bundle of documents dated the April 16, 2018 and sought to produce the named documents. In this regard, the documents at the foot of the List dated the April 16, 2018, were produced and marked as exhibits D1 to D3, respectively.

41. Additionally, the witness also referred to the List and Bundle of Documents dated the April 10, 2019. For clarity, the said List of Documents contained one document.

42. In this respect, the witness sought to produce and rely on same. Suffice it to point out that the named document was thereafter produced and marked as exhibit D4.

43. On cross examination, the witness testified that same is indeed a director of the 2nd Defendant. However, the witness added that he could not recall/remember when the 2nd Defendant was incorporated.

44. Besides, the witness testified that the directors of the 2nd Defendant includes himself and other family members. For clarity, the witness pointed out that another director of the 2nd Defendant is Everlyne Njoki Kariuki.

45. Furthermore, the witness admitted and acknowledged that same entered into and executed the two sale agreements with the Plaintiffs herein.

46. In any event, the witness further stated that the two named Plots were to be curved out and excised from LR No 7418/21.

47. Other than the foregoing, the witness stated that at the time of the sale, the Plots had been subdivided and given numbers. For clarity, the witness pointed out that the Plots which were being sold to the Plaintiffs, were Plot numbers 028 and 029, respectively.

48. Furthermore, the witness testified that though the Mother title had been subdivided into 30 Plots, the subdivision scheme was never approved by the requisite authorities. In this regard, the witness maintained that the mother title remains un-subdivided to date.

49. Other than the foregoing, the witness admitted that at the time of entering into the sale agreements, the Plots had been sub-divided and beacons had been placed by a qualified surveyor.

50. Whilst under further cross examination, the witness had admitted that the Mother title in respect of LR No 7418/21 is registered in the names of himself and Everlyne Njoki Kariuki but that the sale agreements do not include the name of the said Everlyne Njoki Kariuki.

51. Other than the foregoing, the witness maintained that the sub-division arising out of the mother title had not been completed. For clarity, the witness stated that the sub-divisions were subject to obtaining the requisite approvals.

52. Besides, the witness herein acknowledged and confirmed that the Plaintiffs duly and fully paid the agreed purchase price. In any event, the witness conceded that upon the payment of the purchase price, the Plaintiffs were issued with the requisite certificates, which confirms that the payment were fully received.

53. Furthermore, the witness admitted that the purchase price over and in respect of the two named Plots were paid by the Plaintiffs within the named duration, which was 90 days from the date of the execution of the sale agreements.

54. Nevertheless, the witness also contended that despite the fact that the Plaintiffs duly paid the purchase price within the agreed timeline, same however did not conclude his part of the bargain within the same timeline.

55. Additionally, the witness testified that the failure to perform his part of the contract arose because the subdivision scheme was never approved by the relevant authorities. In this regard, the witness stated that the failure to effect the relevant transfers was not out of own volition, but was informed by the onerous and near difficult conditions that had been indicated by the planning authority.

56. Other than the foregoing, the witness stated that same was ready and has been ready to refund the purchase price which was paid by the Plaintiffs.

57. At any rate, the witness added that other purchasers, who had purchased the rest of the Plots have hitherto accepted and been paid refund of the purchase prices, attendant to their respective plots.

58. Finally, the witness herein stated that it is not true that it is himself who frustrated the completion of the contract between the Plaintiffs and himself.

59. On re-examination, the witness stated that the reasons attendant to the failure to complete the contract were well beyond his control. Indeed, the witness reiterated that the failure to conclude the contract was occasioned by the conditions which were give by the Department of planning.

60. Furthermore, the witness added that same informed and alerted the Plaintiffs of the difficulties that he was experiencing in getting the approval of the subdivision scheme.

61. Besides, the witness added that the conditions that had been proposed by the Planning Department would not have been easy to comply with, insofar as same would culminate into amalgamation of the various plots contrary to the original subdivision scheme.

62. Nevertheless, the witness added that same had the intention of completing the transaction/sale agreement, save that the transactions were frustrated by events beyond his control.

63. With the foregoing testimony, the Defendants case was duly closed.

Submissions by the Parties

a. Plaintiffs' Submissions:

64. The Plaintiffs' filed written submissions dated the October 31, 2022 and supplementary submissions dated the December 5, 2022. For clarity, the two sets of written submissions forms part of the record of the court.

65. Suffice it to point out that the Plaintiffs' have raised and amplified four salient issues for consideration by the Honourable court.

66. First and foremost, learned counsel for the Plaintiffs has submitted that following the entry into and execution of the sale agreements between the Plaintiffs and the Defendants, the Plaintiffs proceeded to and paid the agreed purchase price.

67. Furthermore, counsel for the Plaintiffs has submitted that the purchase price was duly paid and acknowledged by the Defendants.

68. Consequently and in the premises, learned counsel has added that upon the execution of the sale agreement and coupled with the payment of the agreed purchase price, the Plaintiffs herein acquired lawful and legitimate interests over and in respect of the suit Plots.

69. In the premises, counsel has therefore submitted that the suit plots lawfully and legally belonged to the Plaintiffs.

70. Secondly, learned counsel for the Plaintiffs has submitted that having duly paid the agreed purchase price, which was acknowledged by the Defendants, then the suit plots are held by the Defendants albeit on trust for the Plaintiffs.

71. To this end, counsel for the Plaintiffs has invited the court to invoke and apply the Doctrine of Constructive Trust and to find and hold that the named Plots are indeed held on Trust for the Plaintiffs.

72. To vindicate the submissions premised on the Doctrine of constructive trust, counsel for the Plaintiffs has invited the Honourable court to take cognizance of various cases *inter-alia*, *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR, *Macharia Mwangi v Davidson Mwangi Kagiri* (2016) eKLR and *Kiplagat Kotut v Rose Jebor Kipngok* (2019) eKLR, respectively.

73. Thirdly, learned counsel for the Plaintiffs has also submitted that having fully complied with the terms of the sale agreements and having therefore acquired lawful rights to the suit plot, the Plaintiffs are therefore entitled to an order of Specific Performance of the contract.

74. In respect of the submissions that the Plaintiffs are entitled to an order of Specific performance, learned counsel for the Plaintiffs has invited the Honourable court to apply the holding in the case of *Orion East Africa Ltd v Ite Farmers Cooperative Society Ltd* (2011)eKLR.

75. In a nutshell, learned counsel for the Plaintiffs has contended that the circumstances obtaining over and in respect of the instant matter warrants the grant of an order for specific performance in favor of the Plaintiffs.

76. Finally, counsel for the Plaintiffs has submitted that the subject matter is one such matter that requires the court to grant an order to compel and direct the Chief Government Valuer to proceed to the named plot and thereafter carryout and undertake valuation of the named plot and to report back to court.

77. In any event, learned counsel has contended that upon receipt of the valuation report, the court would thereafter proceed to decree and award the values authenticated vide the valuation report.

78. Additionally, counsel has submitted that such an approach is allowed and accepted under the law and in this regard, counsel has invited the court to borrow and apply the principle of structural interdict, otherwise, refered to as supervised jurisdiction.

79. Though learned counsel for the Plaintiffs appreciate that the principle structural interdict has been applied in constitutional petitions and more particularly, in Human rights litigation, counsel has nevertheless contended that the said principle is relevant to and applicable in Civil litigation.

80. Whilst persuading the court to apply the principle of structural interdict, learned counsel has cited and relied on the decision in the decision of *County Government of Kitui v Ethic & Anti-Corruption Commission* (2019)eKLR.

81. Premised on the foregoing submissions, counsel for the Plaintiffs' has therefore implored the Honourable court to find and hold that the Plaintiffs case has been duly proved and hence same ought to be granted as prayed.

b. Defendants' Submissions:

82. The Defendants' filed written submissions dated the December 2, 2022, and same has raised four pertinent issues for due consideration and determination.

83. First and foremost, counsel for the Defendants has submitted that the impugned sale agreement/ contracts were entered into between the Plaintiffs on one hand and the 1st Defendant on the other hand. For clarity, it has been pointed out that the 2nd Defendant was never a Party to the impugned sale agreements.

84. Based on the fact that the 2nd Defendant was never privy nor party to the sale agreements, it has been submitted that the suit against the 2nd Defendant is therefore misconceived and legally untenable.

85. In this respect, learned counsel for the Defendants has invited the court to take cognizance of the Doctrine of Privity of Contract and to thereby find and hold that no claim can lie or be enforced against the 2nd Defendants, whatsoever.

86. In support of the foregoing submissions, counsel for the Defendants has invited the Honourable Court to take cognizance of the holding in the case of *Mark Otanga otiende v Dennis Oduor Aduol* (2021)eKLR.

87. Secondly, learned counsel for the Defendants has submitted that though the 1st Defendant entered into the sale agreements over and in respect of the named plots, the sale agreements were frustrated by events and factors beyond the control of the 1st Defendant.

88. Additionally, counsel has submitted that though the 1st Defendant had caused the mother title in respect of LR No 7418/21, to be subdivided into various plots, two of which were sold to the Plaintiffs, however, the sub-division scheme was never approved by the relevant authorities.

89. Premised on the failure to attract and accrue approval from the Ministry of Land and the relevant local authority, learned counsel submitted that the intended transfer of the named plots to the Plaintiffs herein, was frustrated and thus rendered impossible.

90. To this end, learned counsel for the Defendants has therefore submitted that the sale agreement/ contract hence became incapable of completion on the basis of frustration.

91. Thirdly, learned counsel for the Defendants has submitted that the claim/prayer for specific performance, which has been ventilated vide the Plaintiff's submissions, is not legally tenable.

92. In particular, learned counsel has submitted that following the failure to procure and obtain the requisite approval of the subdivision scheme, the mother title in respect of LR No 7418/21, was never subdivided and remains intact to date.

93. In addition, counsel has further submitted that specific performance will also not be possible insofar as the named plots, which are being claimed by the Plaintiffs are non-existent and thus incapable of transfer.

94. Furthermore, learned counsel has also submitted that following the failure to obtaining the requisite approval of subdivision of the mother title, the Defendants' thereafter proceeded to and developed the mother title by constructing a hotel thereon.

95. In the premises, it has been submitted that an order for Specific performance, in the manner sought by the Plaintiffs in the submissions, would therefore occasion grave hardship and unfathomable inconvenience.

96. In this regard, counsel has submitted that an order of specific performance cannot therefore issue in the obtaining circumstances.

97. To buttress the submissions relating to impracticability of an order for specific performance, learned counsel has cited and relied on the decision in the case of *Amina Abdul Kadir Hawa v Rabinder Nath Anand & Another* (2012)eKLR and extracts from *Chitty on Contracts*, 28th Edition, Vol 1 (London Suite & Maxwell 1999), respectively.

98. Fourthly, counsel for the Defendant has submitted that the claim based on constructive trust, was neither pleaded nor proved by the Plaintiffs. Similarly, counsel has added that no Evidence was tendered to that effect.

99. To the contrary, learned counsel for the Defendants has submitted that the Plaintiffs' claim in respect of the amended Plaint was based on Breach of the sale agreements, which were entered into and executed with the 1st Defendant and the consequential failure to effect transfer.

100. In the premises, counsel has contended that there was never a plea or claim that the Defendants herein held the suit property or any portion thereof, constructively on trust for the Plaintiffs.

101. Additionally, counsel for the Defendants has also submitted that the claim/prayer that the court does issue a structural interdict is misconceived and misplaced.

102. In any event, learned counsel has contended that the Plaintiffs had the occasion, opportunity and privilege to engage own valuer (whether registered or government valuer) to proceed and value (sic) the plots and thereafter to implead the monetary values of the resultant Plots.

103. However, counsel added that to the extent that the Plaintiffs failed and neglected to carryout and conduct a valuation, same cannot now seek to involve the Honourable court to help them out in proving their case.

104. Consequently and in view of the foregoing submissions, learned counsel for the Defendants has submitted that the Plaintiffs claim ought to be dismissed.

105. Notwithstanding the foregoing, counsel for the Defendants pointed out that the 1st Defendant herein has always been ready and willing to refund the purchase price that was paid by the respective Plaintiffs.

106. In this regard, counsel for the Defendants has expressly alluded to the readiness by the 1st Defendant to refund the purchase price in terms of paragraph 25 of the written submissions.

107. In addition, counsel has stated that the 1st Defendant's willingness to refund the purchase price paid by the Plaintiffs herein was equally signaled to the court and the Plaintiffs on the 26th February 2019.

108. In the premises, counsel reiterates that the 1st Defendant is still willing and ready to refund the purchase price with interest, provided that the interests is circumscribed to the timeline when the willingness was signaled to the Plaintiffs.

Issues For Determination

109. Having reviewed the amended Plaint dated the November 15, 2017, together with the Witness statement, Bundle of Documents and having also reviewed the statement of Defense and the incidental documents filed therewith; and having taken into account the oral evidence adduced by the respective witnesses; and having considered the written submissions filed on behalf of the Parties, the following issues do arise and are worthy of determination;

    i. Whether the Plaintiffs herein have a Legitimate claim as against the 2nd Defendant or otherwise/ Whether there was Privity of Contract.

    ii. Whether the Plaintiffs herein are the Bona fide and Legal owners of plots number 028 and 029 respectively.

    iii. Whether the Plaintiffs herein are entitled to Specific Performance

    iv. Whether the Defendants hold the suit property on Trust for the Plaintiffs or better still whether the Doctrine of Constructive Trust is applicable in respect of the subject matter.

    v. Whether the Plaintiffs are entitled to Refund of the purchase price together with accumulated value of the two Plots.

Issue Number 1; Whether the Plaintiffs herein have a Legitimate claim as against the 2nd Defendant or otherwise/ Whether the Doctrine of Privity of Contract applies.

110. From the testimony of PW1, it is evident and apparent that both the 1st and 2nd Plaintiffs entered into and executed sale agreements dated the January 7, 2008, respectively.

111. In any event, the two sale agreements, were duly produced before the court as part of the Plaintiffs exhibits.

112. Having examined and perused the two sets of the sale agreements which were produced by and on behalf of the Plaintiffs herein, it is clear and explicit that the sale agreements were entered into between the Plaintiffs on one hand (who were the Purchasers) and one Paul K Gichuhi of Wembly Villas Ltd, on the other hand.

113. For clarity, the preamble of the sale agreements which were produced in evidence before the court clearly signaled and indicate that the vendor over and in respect of the sale agreements was one Paul K Gichuhi and not otherwise.

114. Additionally, at the execution section of the agreement, the details of the vendor are clearly spelt out and stipulated. Suffice it to reiterate that the named vendor was one Paul K Gichuhi.

115. Other than the foregoing, it is also evident that the sale agreement was signed by the said Paul K Gichuhi, in his personal capacity as the vendor.

116. For completeness of record, I beg to state and underscore that the named purchasers also signed the sale agreements and their respective signatures were duly attested by a named advocate.

117. In view of the foregoing observation, what becomes clear is that the impugned sale agreements were executed between the Plaintiffs on one hand and the 1st Defendant on the other hand.

118. Suffice it to point out that the 2nd Defendant herein is not named as a vendor in the sale agreement. In this regard, it is therefore imperative to underscore that the 2nd Defendant was therefore neither privy nor party to the sale agreement.

119. In any event, the only clause of the sale agreement that alludes to the 2nd Defendant is clause 18 thereof, but which clearly depicts the role that the 2nd Defendant was to play in the impugned transaction.

120. Premised on the foregoing considerations, I come to the conclusion that the 2nd Defendant was never a party to the sale agreement and in any event, it was dully admitted that the 2nd Defendant was not the registered owner of the mother title, namely, LR No 7418/21.

121. Having not been a Party to the sale agreement, the doctrine of privity of contract therefore precludes any claim being mounted against or by the 2nd Defendant, arising from the impugned sale agreements.

122. To this end, it is appropriate to take cognizance of the holding in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, where the court stated as hereunder;

> 'In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In Dunlop

Pneumatic Tyre Co Ltd V Selfridge & Co Ltd [1915] AC 847,Lord Haldane, LC rendered the principle thus:

> " My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
>
> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation v Lengetia Ltd (*supra*), KENYA National Capital Corporation Ltd v Albert Mario Cordeiro & another (*supra*) and William Muthee Muthami v Bank of Baroda, (*supra*).
>
> Thus in Agricultural Finance Corporation v Lengetia Ltd (*supra*), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:
>
> > "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

123. Additionally, the meaning, tenor and relevance of the doctrine of privity of contracts was also underscored in the case of *City Council of Nairobi & Another v Nairobi City Water & Sewerage Company Ltd* Civil Appeal No 206 of 2008 (2016)eKLR, where the court stated and observed as hereunder;

> 36. In the appeal before us, the contract was between the appellant and the 1st respondent. The appellant and the 1st respondent failed to identify any agreement or contract by which the 2nd respondent undertook to take over the appellant's liabilities. The appellant did not adduce evidence to the effect that the 2nd respondent was a party vide the exceptions to the doctrine of privity of contract; for example, it did not demonstrate the existence of:
>
> i. a collateral contract to the one in question in which the 2nd respondent was a party;
>
> ii. an agency relationship in which the 2nd respondent transacted on behalf of the appellant;
>
> iii. a trust by which the 2nd respondent contracted on behalf of the appellant; and
>
> iv. an express provision or implied term in the contract made for the benefit of the 2nd respondent.
>
> In the circumstances of this case, the 2nd respondent was a third party to the contract. The appellant and the 1st respondent failed to identify any agreement or contract by which the 2nd respondent, undertook to take over the appellant's liabilities. We, therefore find in the circumstances of this case, there is no privity of contract between the 1st respondent and the 2nd respondent.

124. Premised on the foregoing considerations, it is my humble view and considered opinion that the sale agreements herein, can only confer rights, interests and obligations against the parties thereto.

125. Consequently and given that the 2nd Defendant was neither privy nor party to the impugned sale agreements, same cannot therefore be impleaded nor sued by the Plaintiffs. In this regard, the suit as against the 2nd Defendant is clearly misconceived and legally untenable.

126. In a nutshell, I come to the conclusion that the suit as against the 2nd Defendant does not disclose any reasonable cause of action or otherwise. Simply put, the Plaintiffs' claim against the 2nd Defendant are pre-mature and Misconceived.

Issue Number 2; Whether the Plaintiffs herein are the Bona fide and Legal owners of Plots number 028 and 029 respectively.

127. It is common ground that the Plaintiffs herein entered into the sale agreements dated the January 7, 2008, respectively and in respect of which the Plaintiffs were buying the two named plots.

128. There is also no gainsaying that following the execution of the sale agreements, the Plaintiffs paid the entire purchase price and which payments were duly acknowledged and confirmed by the 1st Defendant.

129. Nevertheless, evidence was tendered by the 1st Defendant that at the time of entering into the sale agreements, same had subdivided the mother title, namely, LR No 7418/21 into 30 plots.

130. Furthermore, the 1st Defendant also tendered evidence that even though the mother plots had been subdivided into plots, the subdivision scheme was subject to approval by the Ministry of Land and the relevant authorities/county government.

131. Be that as it may, evidence was further tendered that despite best efforts to procure the requisite approvals, the department of planning signaled conditions which became onerous to the 1st Defendant and hence the requisite approvals were neither given nor granted.

132. In this regard, the 1st Defendant produced exhibits D1, D2 and D4, respectively, to indicate the nature of conditions that were stipulated.

133. Additionally, the 1st Defendant also tendered evidence that arising from the onerous conditions that were prescribed by the Department of Planning, the Mother title in respect of LR No 7418/21, was ultimately not subdivided.

134. In any event, the evidence of DW1 that Alluded to the Fact that the mother title in respect of LR No 7418/21 was never subdivided, was neither controverted nor challenged.

135. In short, the totality of the evidence before the court denotes that plots numbers 028 and 029 are indeed non-existent.

136. Be that as it may, the Plaintiffs herein have impressed upon the court to find and hold that same are the lawful and Bona fide owners of the named Plots.

137. In the premises, the question that does arise is whether the named plots are in existence and if not, whether the court can make the declarations relating to non-existent Plots.

138. In my humble view, the fact that LR No 7418/21 was never subdivided means that the Plaintiffs herein cannot legally contend to have acquired lawful title to and in respect of Plots numbers 028 and 029.

139. Consequently and in the premises, I am not able to make a declaration that the Plaintiffs herein are the lawful and bona fide owners of the named plots, which plots are in any event, non-existent.

140. Nevertheless, even assuming that the named plots were in existence (which is not the case), a declaration that the Plaintiffs are the Bona fide and Legal owners of the said Plots, would only accrue or arise upon the issuance of the requisite certificate of title.

141. However, in respect of the subject matter, the Plaintiffs herein admittedly did not procure or obtain the requisite certificate of title, over and in respect of the named. For clarity, none was ever tendered or adduced before the court.

142. Premised on the foregoing considerations, it is my finding and holding that the plea of declaration that the Plaintiffs are the bona fide and legal owners of the named Plots is neither feasible nor legally tenable. See the provisions of Section 24 and 25 of the *Land Registration Act*, 2012.

143. In addition, it is also imperative to take cognizance of the holding of the court of appeal in the case of *Wreck Motors Ltd v The Commissioner of Land & another* (1997)eKLR, where the court stated and observed as hereunder;

> " Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok v Justice Moijo ole Keiwua & 4 Others, Civil Application No NAI.60 of 1997 (unreported). Sections 23(1) of the Registration of Titles Act reads as follows:-
>
> "Section 23 (1)
>
> The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

Issue Number 3; Whether the Plaintiffs herein are entitled to Specific Performance

144. Learned counsel for the Plaintiffs' has vide his written submissions implored the court to order and decree specific performance of the sale agreements, which were entered into and executed between the Plaintiff on one hand and the 1st Defendant on the other hand.

145. In any event, counsel has further submitted that once the court decrees an order of specific performance, the court has jurisdiction to direct the Defendants to demolish the structures and developments standing on the named plots and to hand over vacant possession of the plots to the Plaintiffs.

146. To vindicate the submissions relating to specific performance, learned counsel for the Plaintiffs has cited and relied upon the holding in the case of *Orion East Africa Ltd v Ite Farmers Cooperative Society Ltd* (2011)eKLR.

147. Nevertheless, what is important to take cognizance of is that the plea for specific performance is only being introduced, urged and raised for the first time vide the written submissions and not otherwise.

148. Suffice it to point out that the Plaintiffs herein did not implead a claim for specific performance in the body of the amended Plaint or at all. For clarity, an application for Leave to amend the Plaint and implead inter-alia, Specific performance was dismissed vide ruling rendered on the July 28, 2022.

149. Consequently and in the premises, the question that then arises is whether the Plaintiffs herein can procure and obtain a relief which was neither pleaded nor contained in the body of the operative pleadings.

150. In my humble view, Parties are bound by their pleadings. Consequently, a Party cannot without amendment, seek to adduce evidence in respect of an issue that was not pleaded nor contained in the pleadings.

151. In the same vein, a Party cannot be at liberty to ventilate submissions pertaining to and/or concerning a claim which was not pleaded in the manner prescribed by and under the law.

152. To underscore the significance and importance of pleadings, it is imperative, appropriate and apt to adopt, restate and reiterate the holding of the Court of Appeal in the case of *IEBC v Stephen Mutinda Mule* (2013) eKLR, where the honourable Court of Appeal restated the law as hereunder;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

153. In view of the foregoing considerations, the elaborate and erudite submissions by counsel for the Plaintiffs, pertaining to and advancing the plea of specific performance are indeed misconceived.

Issue Number 4; Whether the Defendants hold the suit property on Trust for the Plaintiffs or better still whether the Doctrine of Constructive Trust is applicable in respect of the subject matter.

154. Other than the plea for specific performance, learned counsel for the Plaintiff has also made extensive submissions on the doctrine of constructive trust.

155. To this end, learned counsel for the Plaintiffs contended that upon the entry into and execution of the sale agreements, the Plaintiffs paid the entire purchase price in the manner agreed upon.

156. In any event, learned counsel has also contended that the payment of the full purchase price was admitted and acknowledged by the Defendants.

157. Premised on the foregoing, counsel has therefore contended that to the extent that the Plaintiffs duly performed their part of the bargain, it behooved the Defendant to also perform their part.

158. However, because the Defendants did not perform their part of the bargain, despite receipt of the purchase price, it must be deemed that the named plots are being held by the Defendants albeit on trust for the Plaintiffs.

159. In short, the counsel for the Plaintiffs has implored the court to invoke and apply the doctrine of constructive trust, taking into account the obtaining circumstances and given that the Plaintiffs performed their part of the bargain.

160. Whereas in appropriate cases, the court maybe obliged to invoke and apply the doctrine of constructive trust, it must be noted that prior to and before the invocation of the said doctrine, there must be sufficient pleadings before the honourable court.

161. Additionally, the Party seeking to invoke and rely on the doctrine on constructive trust is also obligated to place before the honourable court cogent and sufficient material and evidence from which the honourable court can imply or infer the existence of such trust.

162. Surely, the court cannot be invited to invoke and apply the doctrine of constructive trust in the absence of the requisite pleadings and without any scintilla/ iota of evidence having been adduced or tendered.

163. To this end, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of *Kazungu Fondo Shutu & another v Japheth Noti Charo & another* (2021)eKLR, where the court stated and observed as hereunder;

> 31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:
>
> > "The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."
>
> 32. The onus to prove existence of a trust lay squarely on the appellants. Section 107 of the *Evidence Act* further provides that:
>
> > "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."

164. Notwithstanding the foregoing, it is also established, elementary and hackneyed that submissions by Parties or their advocates, no matter how well researched, cannot take the stead or position of evidence.

165. In respect of this matter, it is imperative to recall that PW1 merely testified about entry into and execution of a sale agreement on the January 7, 2008 and how he went to the named Plots in August 2016 and found that the plots had been developed.

166. Additionally, he proceeded to and testified pertaining to the efforts that he and the 2nd Plaintiff took to resolve the dispute with the Defendants.

167. However, no evidence was tendered by PW1 to the effect that the Defendants herein held plots numbers 028 and 029 (which are non-existent) albeit on trust for himself and that of the 2nd Plaintiff.

168. Be that as it may, even the amended Plaint which was filed by and on behalf of the Plaintiffs, also did not allude to, or better still, implead constructive trust.

169. In view of the foregoing, can learned counsel for the Plaintiffs now file an elaborate and expansive written submissions to agitate that which was neither pleaded nor amplified in the evidence of the Parties.

170. Without belaboring the point, the answer to the named question is found in the decision in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the court stated as hereunder;

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

171. Clearly, the Plaintiffs herein cannot be allowed to smuggle in or sneak, a prayer and/or claim courtesy of written submissions. In my humble view, such an approach is inimical to the established principles of the law.

Issue Number 5; Whether the Plaintiffs are entitled to refund of the Purchase price together with accumulated Values of the two Plots.

172. It is common ground that the Plaintiffs herein entered into and executed sale agreements with the 1st Defendant. For clarity, the entry into and execution of the impugned sale agreements are not disputed.

173. Additionally, there is also no dispute that upon the entry into and execution of the impugned sale agreements, the Plaintiffs duly paid the full/entire purchase price to the 1st Defendant.

174. Nevertheless, the plots which were the subject of the sale agreements were neither transferred nor registered in favor of the Plaintiffs.

175. However, despite the fact that the contracts at the foot of the sale agreement did not materialize, the 1st Defendant herein did not refund or pay back the monies at the foot of the sale agreements.

176. Additionally, the 1st Defendant continues to hold the monies which were paid to himself and at the foot of the sale agreements to date.

177. Consequently and in the premises, the question that then arises is whether the 1st Defendant ought to refund the purchase prices that were paid unto him and if so, on what terms.

178. To this end, it is appropriate to state and underscore that the 1st Defendant has signaled his readiness and willingness to refund the purchase prices(s). However same contends that the payment of interests should be circumscribed to the time when he notified the Plaintiffs of his willingness to refund the monies.

179. In respect of the foregoing observation, it may be appropriate to reproduce the submissions of counsel for the Defendants.

180. For convenience, paragraph 25 of the said submissions are reproduced as hereunder;

> 25. Upon termination of the contract the 1st defendant through his lawyers informed the plaintiffs of the frustration of the contract sometime in 2015 and even offered to refund the purchase price but the plaintiffs did not respond to those letters. The Isi defendant has therefore all along been ready and willing to refund the purchase price to the plaintiffs. During trial the 1st defendant confirmed that it was ready to refund the purchase price and even after the consent recorded in court on 2819/20 the 1st defendant refunded each plaintiff the purchase price paid but they refused to accept the money and returned the cheques issued.

181. Arising from the except hereof ,it is apparent that the 1st Defendant is still keen and ready to refund the monies paid at the foot of the said agreement. In this regard, refund is conceded.

182. In the premises, the only issue that remains outstanding and due for determination relates to the rate of and the duration for which interests ought to be decreed and paid.

183. According to the 1st Defendant, interests ought to be payable only up to and including the year 2015, when same alerted and informed the Plaintiffs about his inability to complete the contracts, based on inter-alia, none approval of the subdivision scheme.

184. In addition, the 1st Defendant also contends that he has variously offered to refund the purchase price and in this regard same has invited the court to the remarks ventilated before the court on February 26, 2019.

185. However, despite the expression of readiness and willingness to refund the purchase prices, it is common ground that the 1st Defendant did not go the extra mile to refund the purchase price(s).

186. In the alternative, if there was any endeavors to do so, but which was rebuffed by the Plaintiffs, then the 1st Defendant was at liberty to apply to and thereafter deposit the purchase price(s) in court. See Order 27 of the Civil Procedure Rules 2010.

187. In my humble view, the 1st Defendant has held onto and continued to hold onto the purchase prices that were paid at the foot of the impugned sale agreements to date, despite being aware that the contracts had become impossible to perform.

188. Consequently, it is evident and apparent that the 1st Defendant has benefited and continues to benefit from the various amounts that were paid at the foot of the sale agreements.

189. In the premises, it is only just, mete and reasonable that the refund do attract Interests at court rate (14% p. a) w.e.f April 2008, taking into account clause 7 of the impugned sale agreement.

190. For clarity, the sale agreement was to be concluded within 90 days from the date of execution and failure of which, the 1st Defendant ought to have taken remedial/ corrective measures.

191. It is imperative to state and underscore that the award of Interests is calculated to indemnify the beneficiary of the decree as against the inflationary tendencies, (the fall in the purchaser power of money over time), that may have accrued or occurred between the time when the monies in question were paid out to (sic) date of refund.

192. To buttress the gist and the necessity to award Interests, it is apt and appropriate to take cognizance of the holding of the court in the case of *Highway Furniture Mart Limited v Permanent Secretary Office of The President & another* [2006] eKLR, where the court stated and observed as hereunder;

> " The Justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In Later v Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:
>
> > "In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest".
>
> (See also the Uganda case of *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175).

193. In a nutshell, the circumstances of the instant matter calls for an award of Interests prior to and before the filing/commencement of the suit, to foster due compensation arising from the deprivation by and at the instance of the 1st Defendant.

Final Disposition

194. Having analyzed and evaluated the various perspectives, that were outlined in the body of the Judgment, it is now appropriate to surmise the Judgment and make the dispositive orders.

195. In view of the considerations alluded to and enumerated herein before, I come to the conclusion that the Plaintiffs herein have proved their claim, albeit on the specific aspect of Refund only.

196. Consequently and in the premises, Judgment be and is hereby entered in favor of the Plaintiffs in the following terms;

i. The Plaintiffs' shall be entitled to Refund of the Purchase price(s) paid to and in favor of the 1st Defendant. For clarity, the 1st Plaintiff shall be entitled to refund of KES 420, 000/= only whilst the 2nd Plaintiff shall be entitled to refund of KES 450, 000/= only.

ii. The Plaintiffs' shall be entitled to Interests at court rates (14% pa) WEF April 2008 to date of full Payment/Refund.

iii. Plaintiffs' claim against the 2nd Defendant be and is hereby struck out.

iv. Plaintiffs' be and are hereby awarded costs of the suit and the same shall be borne by the 1st Defendant.

197. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. George Mwangi for the Plaintiffs.

Ms. Kimani h/b for Mr. J M Njenga for the Defendants.