



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

E.L.C NO. 104 OF 2017

FREDRICK KORIR.....PLAINTIFF

VERSUS

SOIN UNITED WOMEN GROUP

(Sued through Eunice Towett,

Jane Mwolomet, Lucio Chebocho.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 30th August 2017 the Plaintiff seeks the following orders from this Court:-

(a) An order of specific performance

(b) An order directing the Defendant to obtain the relevant consents required in order to transfer the subject parcel of land and to execute all the relevant transfer documents and hand them over to the Plaintiff for purposes of registration.

(c) The Defendants be compelled to receive the balance of the purchase price.

(d) An order directing the Deputy Registrar of this Honourable Court to sign all the relevant forms and applications to be signed for purposes of obtaining the relevant consents required to transfer the subject parcel of land and also sign all the relevant transfer forms to effect the transfer.

(e) Costs of the suit.

(f) Any other relief that this Honourable court deems fit and just to grant

Plaintiff's case

2. The Plaintiff alleges that he jointly with Alfred Kipkemoi Cheruiyot (deceased) purchased the parcel of land known as Bomet Trading Centre L.R No. 8939/15 now registered as Bomet Township/41(the "suit premises") in the name of the Defendant. The Plaintiff alleges that he and the deceased jointly entered into an agreement with the Defendants on the 16th of April 2009 for the sale of the parcel of land known as Bomet Trading Centre L.R No. 8939/15/Bomet Township for a consideration of Kshs. 2,700,000/-.

3. The Plaintiff alleges that they paid the sum of Kshs. 2,400,000/- upon execution of the said sale agreement. It is the Plaintiff's contention that the balance of Kshs. 300,000/- was to be paid after the Defendants had effected the transfer of the suit premises. The Plaintiff alleges breach of contract on the part of the Defendant for failing to avail all the completion documents as agreed and failure to give vacant possession of the suit premises.

4. The Plaintiff alleges that he gave the Defendants money to finance the processing of the title deed but they converted the money into their own personal use. He further alleges that he has made attempts to have the dispute mediated through the office of the Assistant chief and

Assistant County Commissioner to no avail, as the Defendant has contemptuously ignored the same.

5. Despite being served with Summons to enter Appearance and a Hearing Notice, the defendants neither entered Appearance nor attended court and the suit proceeded ex-parte.

Issues for determination

6. Having perused the Plaintiff's pleadings and submissions, the following issues arise for determination:-

- (a) Whether there was a valid Agreement for sale of land.
- (b) Whether the Defendant breached the Sale Agreement.
- (c) What remedies are available to the Plaintiff?
- (d) Who should bear the costs?

Analysis and determination

i. Whether there was a valid Agreement for sale of land

Section 3 (3) of the Law of Contract Act provides as follows:-

(3) 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 to by a witness who is present when the contract was signed by such party

7. In his testimony PW 1 stated that on 16th April 2009 he bought land parcel No. Bomet Trading centre L.R No. 8939/15/Bomet Township No. 41 measuring 0.0465 HA from Soin Limited Women Group for the sum of Kshs. 2,700,000/- jointly with Alfred Kipkemoi Cheruiyot (now deceased) .

8. The Plaintiff produced the agreement for sale dated 16th April 2009 between Soin United Women Group (the Vendor) and Alfred Kipkemoi and Fredrick Korir (jointly as the Purchaser) in respect of Bomet Trading Centre L.R No. 8939/15 measuring approximately 0.0465 HA. I note further that the said agreement has been signed by 3 officials of the Vendor namely Eunice Towett, Jane Mwolomet and Lucio Chebochok. The agreement is also executed by the Purchasers Alfred Kipkemoi and Fredrick Korir. The signatures of the Vendor and the Purchaser are all attested to by one K.N. Cheruiyot; an advocate of the High Court of Kenya.

9. The Plaintiff also produced a letter dated 23rd June 2017 from Messers Kibet K. Co. Advocates (advocates for the purchasers) demanding that the Vendor delivers up vacant possession of the suit premises. He produced a response to the said letter from Keter Nyolei & Company Advocates dated 29th June 2017. In the said response, the Vendor admits the existence of the agreement for sale but states that the purchaser breached the same by failing to pay the consideration. The letter further states that the land is no longer available for sale. I find that this letter is corroborative evidence illustrating that a sale agreement was entered between the parties.

ii. Whether the Defendant breached the Agreement for Sale

10. The contention by the Vendor's advocate that the Plaintiff failed to pay the consideration thereby necessitating the rescission of the contract in his letter aforementioned to be less than candid. At best, this is an afterthought. I find it necessary to reproduce a clause from the sale agreement which points to what the parties agreed to:

AND WHEREAS

The parties have herein agreed at a consideration of Kshs. 2.7 Million (Two Million Seven Hundred Thousand). The purchasers paid to the vendor on the date herein Kshs. 2.4 Million (Two Million Four Hundred Thousand), the Vendor acknowledged the receipt on the execution herein . The balance of Kshs. 300,000 (Three Hundred Thousand) shall be paid after the transfer of ownership to the purchasers have been effected. (Emphasis mine)

11. PW1 testified that he paid the sum of Kshs 2.4 million, the Vendor having admitted the agreement as valid. The balance as per the agreement was to be paid after the transfer. The Defendants having failed to fulfil their obligations under the agreement, cannot be heard to

say that the agreement is rescinded.

12. Based on the foregoing evidence and the defendants' conduct, it is my finding that there was a valid sale agreement between the parties and that the Plaintiff paid to the Defendants the sum of Kshs. 2,400,000/- as consideration for the same. The agreement for sale provided for the following obligations on the part of the Vendor:

Clause 3:

That the Vendor shall give vacant possession of the aforesaid land parcel immediately on the execution herein.

Clause 4:

That the Vendor undertakes to do all in its ability to procure and have relevant consent required for the transfer.

13. In my view the failure to complete the sale was occasioned by the Defendants. The Plaintiff testified that they were ready and willing to complete the sale but the Defendants failed to avail the completion documents. The plaintiff, in his testimony, expressed his willingness to pay the balance of the purchase price. It is therefore my finding that the Defendants having failed to fulfil their obligations under the Agreement for Sale, were in breach of contract.

iii. What remedies are available to the Plaintiff

14. The Plaintiff prays inter alia for an order of specific performance of the agreement dated 16th April 2009 as well as mesne profits from May 2011. I shall consider each of these prayers under its own head.

Specific Performance

15. On this issue I am guided by the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR** where the learned Maraga J (as he then was) stated as follows:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled 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 unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. 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 where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

16. Nambuye J (as she then was) in the case of **Amina Abdul Kadir Hawa v Rabinder Nath Anand & another [2012] eKLR** considered the issue of specific performance and observed as follows:-

“ The first relief to be considered is the plea for specific performance. Extracts from Halsbury Laws of England 3rd edition Vol36 paragraph 444 have the following observation:-

“A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract...”

(At paragraph 450)...”The plaintiff must all show performance by him of all terms of the contract which he has under taken to perform whether expressly or by implication and which he ought to have performed at the date of the commencement of the action...”

Reference was also made to extracts from chitty on contracts the 28th Edition Volume 1 London sweet &Maxwel 1999. In chapter 28 Pr.027 There is observation that:-

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within the group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary... discretion but one to be governed as far as possible by fixed rules and principles...” (paragraph 028)...specific performance may be refused on the ground that the order will cause severe hardship to the defendant where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the defendant can put himself into a position to perform by taking legal proceedings against a third party.... Severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which affect the person of the defendant rather than the subject matter of the

contract and for which the claimant is in no way responsible... But it will not be refused merely because the vendor finds it difficult on a rising market to acquire alternative accommodation with the proceeds of the sale, nor because compliance with the order expose the defendant to risk (of whatever nature)...”(paragraph 032) the conduct of the party applying for relief is always an important element for consideration. Thus specific performance may be refused if the claimant fails to perform a promise which he made in order to induce the defendant to enter into the contract but which is neither binding, contractual, nor because it relates to the future operative as a misrepresentation”

(ii) The afore set out principles have been construed and applied by case law assessed herein namely “union Eagle limited versus Golden Achievement Limited” (Supra) and “Nabro Property Limited Versus Sky Structures Limited and 2 others (supra). There is agreement that in order for the relief of specific performance to be availed to the claimant the following guiding principles or parameters should be met or demonstrated to exist:-

(a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs.

(b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can withhold it and award damage instead.

(c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.

(d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to course hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.

(e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.”

17. The Plaintiff has tendered evidence to show that they fulfilled their obligations under the contract by paying Kshs. 2,400,000/- to the Vendor. The balance of Kshs 300,000/- was to be repaid upon transfer of the suit premises. Indeed the Defendants acknowledged receipt of the sum of Kshs. 2,400,000/- by executing the said agreement for sale.

18. The Plaintiff went further to pay rates over the suit premises as well as survey fees. In the submissions of Mr. Ochany, learned counsel for the plaintiff, he alleges that the Plaintiff paid Kshs. 151,000/- in survey and physical planning fees, Kshs 58,673 in payment of rates and that they offered the Defendant Kshs. 50,000/- for processing of title meaning in total they had paid a total cost of Kshs. 259,673/-.

19. The Defendants did not tender any evidence to show that they complied with any terms of the contract. They neither gave vacant possession and nor did they avail the relevant completion documents to facilitate the transfer of the suit premises to the Purchasers.

20. I note that a greater part of the consideration was paid to and has been with the Defendant since April 2009, which is almost a decade ago. In the meantime, it is the plaintiff’s testimony that the Defendants proceeded to lease out the suit premises to third parties thereby depriving the plaintiff of its occupation and use. The Defendants are therefore having their cake and eating it.

21. As previously stated an order of specific performance is based on the existence of a valid and enforceable contract. It is my finding that the justice of this matter, based on its peculiar circumstances, shows that the Plaintiff is entitled to an order for specific performance. Damages would in my view not be an adequate remedy.

Mesne Profits

22. I note that the Plaintiff did not specifically pray for mesne profits in the Plaint dated 30th August 2017. However, in their submissions, counsel for the Plaintiff submits that the Defendant leased out the land to one Charles Chebusit and has been obtaining profit from the same. In light of this, he submits that he is entitled to mesne profits.

23. In the the plaintiff’s Application dated 6th September 2017, the Plaintiff avers that the Defendant has rented out the suit property to a third party and they have continued to enjoy the fruit of the suit property denying the same to the Plaintiff/Applicant despite having already sold the same to him.

24. PW1 in his testimony stated that he planned to build 2 shops and residential house. He states that if he had built the same he would have rented them out for a total of KShs. 200,000/-.

25. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

26. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-

13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

27. The Court of Appeal in the case of **Attorney General v Halal Meat Products Limited [2016] eKLR** considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

28. The court in the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR** had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In Bramwell vs. Bramwell, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The Black’s Law Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession between (2) two dates.” The Concise Oxford English Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

"..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raisingare the same issues already in court. Your clients notice of termination of leaseis therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

"Because a claim for 'Mesne profits' is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes..."

29. The Court of Appeal in the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR** was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows:-

"We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."

30. The Learned Nyamweya J in the case of **Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR** stated as follows with regard to mesne profits:-

"This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

a. For the possession of the property.

b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.

c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-

i. The delivery of possession to the decree-holder

ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or

iii. The expiration of three years from the date of the decree, whichever even first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry."

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

31. It is my humble opinion that the Plaintiff has not tabled evidence before this court to enable the court make a determination on the same.

32. It is noteworthy that clause 5 of the sale Agreement also provides another remedy for breach. The clause reads as follows:-

5.THAT any party who is in breach of this agreement shall pay to the injured party 50% of the purchased price over and above all other remedies.

33. I have carefully considered the pleadings, evidence and the plaintiff’s counsel’s submissions and come to the conclusion that the Plaintiff has proved his case on a balance of probabilities.

34. Accordingly, I enter judgment for the plaintiff and make the following final orders:

(a) That the plaintiff is entitled to an order for specific performance

(b) The Defendant shall obtain the relevant consents required in order to transfer the subject parcel of land and execute all the relevant transfer documents and hand them over to the Plaintiff for purposes of registration within 45 days failing which the Deputy Registrar of this Honourable court shall execute all the relevant documents to effect transfer of the suit property to the plaintiff.

(c) The Defendants shall receive the balance of the purchase price within 30 days. The said amount of Kshs. 300,000 shall be deposited in the defendants account. Should the defendant fail to avail their account details, the said amount shall be deposited in court for their collection.

(d) The costs of the suit Shall be borne by the Defendants.

Dated, signed and delivered at Kericho this 30th day of August, 2018.

.....

J.M. ONYANGO

JUDGE

In the presence of:

1. Mr. Chelule for Mr. Ochanyo for the Plaintiff

2. N/A for the Defendant

3. Court assistant – Rotich