



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 123 OF 2014

PHOEBE NYAMBURA THIONG'O.....PLAINTIFF

-VERSUS-

JAMES KARIUKI MWANGI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By her Complaint dated 27th May, 2014 as filed herein on 9th June, 2014 Phoebe Nyambura Thiong'o (*the Plaintiff*) prays for:

(a) *An order directed to the Defendant to specifically perform the contract dated 17th February, 2012 by transferring ¾ acre out of LR No. Nyeri/Warazo/490 to the Plaintiff and in default, the Deputy Registrar of this court be directed to sign all necessary papers to effect the transfer of the said ¾ acres out of LR No. Nyeri/Warazo/490 to the Plaintiff and the production of the original title deed be dispensed with.*

(b) *In the alternative and without prejudice to the above, the Defendant be and is hereby ordered to pay the Plaintiff the sum of Kshs.503,000/- plus interest at court rates from 17th February, 2012 until payment in full.*

2. Those prayers arise from the Plaintiff's contention that she entered into an agreement with the Defendant dated 17th February, 2012 whereby the Defendant agreed to sell and the Plaintiff agreed to buy the said ¾ acres out of LR No. Nyeri/Warazo/490 (*the suit property*) at the price of Kshs.560,000/-.

3. But in his statement of Defence dated 4th August, 2019 as filed herein on 19th August, 2019, James Kariuki Mwangi (*the Defendant*) avers that the Plaintiff could not take the actual possession of the suit property due to interference from his family members.

4. The Defendant admits that the Plaintiff has always been willing to perform her obligations under the contract but asserts that he could not procure the consent to transfer the land as his family members had already lodged an objection with the Land Control Board at Narumoru.

PLAINTIFF'S CASE

5. The Plaintiff testified as the sole witness in her case. Testifying as PW1, the Plaintiff told the court she is a businesswoman based in Mombasa. PW1 told the court they entered into a Sale Agreement with the Defendant on 17th February, 2012 wherein the Defendant agreed to sell ¾ acres of his land at the sum of Kshs.560,000. Before purchasing the land, PW1 conducted a search and established that the Plaintiff was the registered owner of the land.

6. PW1 testified that she paid a total of Kshs.503,000/- to the Defendant receipt whereof the Defendant acknowledged but the Defendant refused to transfer the land as agreed. When PW1 tried to put up a house on the land, the Defendant demolished the same.

THE DEFENCE CASE

7. The Defendant equally testified as the sole witness in his case. Testifying as DW1, the Defendant told the court he had first leased the land to the Plaintiff before entering into an agreement to sell ¼ acre of the land to her at the sum of Kshs.200,000/-.

8. DW1 told the court that subsequently on 17th February, 2012, they entered into another agreement in which he agreed to sell another ½ acre to the Plaintiff. The total purchase price for the ¾ acres was Kshs.560,000/-. The Plaintiff then paid the sum in instalments and had paid a total of Kshs.420,000/-. DW1 however told the court that later on in August, 2012, he called the Plaintiff and informed her that he was unable to sell the land due to opposition from his

siblings. DW1 offered to refund the deposits so far paid.

ANALYSIS AND DETERMINATION

9. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence placed before the court. I have similarly perused and considered the submissions as filed by the parties herein.

10. The Plaintiff prays for an order of specific performance compelling the Defendant to perform the contract executed between themselves dated 17th February, 2012 by transferring ¾ acres out of all that parcel of land known as Nyeri/Warazo/490 to the Plaintiff. In the alternative the Plaintiff prays for an order compelling the Defendant to refund the sum of Kshs.503,000/- paid to himself pursuant to the said agreement together with interest at court rates until payment in full.

11. It is the Plaintiff's case that by a written agreement dated 17th February, 2012, the Defendant agreed to sell the ¾ acres of land to herself at a consideration of Kshs.560,000/-. It is also the Plaintiff's case that pursuant to the said agreement, she did pay to the Defendant the sum of Kshs.503,000/- leaving a balance of Kshs.57,000/- which was to be paid upon execution of the transfer of the suit property.

12. The Plaintiff told the court that it was an express term of the said agreement that she would take vacant possession of the said portion of land immediately upon execution of the sale agreement and that she has always been ready and willing to meet her obligations under the contract.

13. The Plaintiff further told the court that in breach of the Sale Agreement, the Defendant had failed to procure the consent of the Land Control Board, to give her vacant possession of the portion of land and/or to execute the transfer thereof. It is the Plaintiff's case that when she tried to take possession of the land by commencing some construction thereon, the Defendant destroyed the same.

14. In his Statement of Defence dated 4th August, 2014, the Defendant by and large admitted the Plaintiff's claim save that he blamed his failure to proceed with the transaction on reasons that were beyond his control. In particular, the Defendant told the court that he was unable to conclude the transaction due to hostility that he faced from his family. He told the court his family had gone to the extent of lodging an objection with the Land Control Board and hence he was unable to get consent to sub-divide the land and transfer the same to the Plaintiff.

15. It was the Defendant's case that out of the total purchase price of Kshs.560,000/- he had only received Kshs.420,000/- after which he called the Plaintiff and notified her of the opposition he was facing from his family. On cross-examination, however, the Defendant conceded that he had in his pleadings admitted receiving the sum of Kshs.503,000/- from the Plaintiff.

16. From the material placed before me, it was not in dispute that the parties herein entered into the agreement dated 17th February, 2012. By that agreement produced by the Plaintiff as PExh. 1, the Defendant agreed to sell to the Plaintiff a portion of land measuring ¾ acres which was to be excised from the Defendant's parcel of land being LR No. Nyeri/Warazo/490.

17. While clause 4 of the Agreement stipulated that *"the portion is being sold with vacant possession"*, the Plaintiff testified that the Defendant breached the agreement by failing to give her vacant possession. The Defendant as we have seen does not deny that. It is his case that he failed to do so because his family objected to the sale transaction.

18. Again while the Defendant in his testimony before the court contended that he had only received Kshs.420,000/- and not Kshs.503,000/- as stated by the Plaintiff, a perusal of his pleadings reveals that he admitted receiving the sum of Kshs.503,000/- from the Plaintiff toward the purchase price. As it were, parties are bound by their pleadings and the Defendant is so bound. In any event, the Plaintiff availed bank statements and Mpesa transactions between herself and the Defendant in support of her position that she paid the sum of Kshs.503,000/- to the Defendant.

19. In the circumstances herein, I am persuaded that the Plaintiff has proved her case on a balance of probabilities. The remedy of specific performance sought by the Plaintiff is however discretionary and one that ought to be granted only where damages cannot afford a complete remedy. In the matter before me, it is apparent that the Defendant never relinquished possession of the suit land. Consent from the Land Control Board was not obtained and the transfer documents were not executed. In addition, there was a

balance of Kshs.57,000/- towards the purchase price which was yet to be paid. I am therefore not persuaded that the remedy of specific performance would be justified.

20. Accordingly, I hereby enter judgment for the Plaintiff as sought in the alternative Prayer No. (b) of the Plaint dated 27th May, 2014.

21. The Plaintiff shall also have the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.

In the presence of:

Mr. Waweru Macharia for the Plaintiff

Mr. James Kariuki – the Defendant in person

Court assistant - Wario

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J. O. OLOLA

JUDGE