



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 81 OF 2013

AZIZA KIPSANG MOHAMMED PLAINTIFF

VERSUS

ALI JUMA ABDULAHI..... DEFENDANT

MODE OF PROCEEDING First Track

JUDGMENT

1. The Plaintiff filed this suit seeking a claim for;
 - i. Specific performance of the sale agreement dated 2.10.12 and an order that L.R. E. Bukusu/S. Kanduyi/8772 be transferred to the plaintiff forthwith.
 - ii. Damages for breach of contract.
 - iii. Costs of this suit.
 - iv. Any other remedy this honourable court deems fit to grant.
2. The defendant was duly served but failed to enter appearance within set time lines. The plaintiff thus set her suit down for hearing exparte. In her oral evidence, she told court that on September 2012, the defendant was looking for someone to buy his land. She was introduced to the defendant by Fatuma Wafula and she expressed her interest to buy the said land. They negotiated the price and agreed the price at Kshs. 400,000/=. Consequently she did an official search and found the land free from any encumbrances. She produced the search as Pex. 1.
3. The defendant availed to her his pin certificate and copy of ID which the plaintiff produced as Pex. 2 & 3 and passport size photograph as Pex. 4. On 2.10.12 they drew the sale agreement at Fatuma's house and proceeded to produce the sale agreement as Pex. 5. She paid the first deposit of Kshs. 200,000/= and cleared the balance in one installment. The balance of Kshs. 200,000/= was taken to the defendant in cash by Fatuma and Ibrahim to Nairobi. The defendant sent to execute transfer forms which the plaintiff produced as Pex. 6. The plaintiff was told there was caution on the land hence transfer could not be effected.
4. The plaintiff sent the said Fatuma and Ibrahim to Nairobi to ask the defendant to remove the caution but the defendant denied placing the caution. Instead the defendant sent a note that he had changed his mind not to sell the land. The note was produced as pex. 7. The plaintiff reported the matter to the police who advised her to place a caution on the title. She produced copy of her caution form presented as pex. 8. Later her advocate did a demand letter to the defendant which she produced as

pex. 9. The plaintiff learnt it was the defendant's son who had placed the caution. To dated she has not received her money or title deed. However she is using the land. She urged the court to grant her an order to get title to this land and also be awarded costs.

5. FATUMA WAFULA RAJAB testified as PW2. She lives in Bungoma town and is a businesswoman. The defendant approached her to help him get a buyer for his land. She got the plaintiff who was interested in purchasing the land. When the parties were ready in October, they called their witnesses and entered into a written sale agreement. Kshs. 200,000/= was paid on execution and the balance Kshs. 200,000/= was taken to the defendant in Nairobi by PW2 and the defendant's brother. PW2 said she saw the defendant execute the transfer form and the agreement acknowledging receipt of the money. The plaintiff informed the witness of existence of a caution on the title. Later PW2 went back to the defendant in Nairobi asking him to sort out the matter. She again saw the defendant write Pex.7. The Plaintiff closed her case at this juncture.

6. Mr. Wanyama advocate for the plaintiff filed written submissions which I have had the opportunity to peruse and need not reproduce its contents here. The submissions contain a summary of the evidence on record which I have already summarized in the preceding paragraph. The question this court seeks to determine is whether the plaintiff has proved her case within the standards provided in civil case so as to be entitled to the orders sought as the suit was not defended.

7. From the documentary evidence availed by the plaintiff, it is clear there was an agreement of sale of land measuring 0.05 ha comprised in parcel no. E. Bukusu/S. Kanduyi/8772 between the defendant and the plaintiff (pex.5) on 2nd October 2012. The agreement was witnessed by six people. The plaintiff also produced as pex. 6 which were executed transfer form and letter of consent from the chairman Kanduyi Division Land Control Board dated 11th December 2012 giving consent to transfer land to the plaintiff. The plaintiff produced as pex. 1, a copy of official search for title E. Bukusu/S. Kanduyi/8772 showing it was duly registered in the defendant's name and free from all/any encumbrances. The defendant had made available copies of his pin certificate, ID and passport size photograph produced as pex. 2,3 and 4 respectively.

8. The plaintiff has not said or demonstrated to this court whether she presented these documents in possession to the land registrar for purposes of registration and the reason the registrar declined to act on them. Instead her evidence is that she was told there was a caution registered on this title hence transfer in favour could not be effected. She does not disclose who gave her this information. She did not endeavor to avail to this court current official search done on the title to show there is existing caution placed by the defendant or his representative. PW2 attempted at alluding the caution was placed by the defendant's son known as Roy Mohammed Juma but there is nothing to support this averment. I find therefore the allegation of caution placed on title E. Bukusu/S. Kanduyi/8772 is not substantiated by the evidence on record.

9. The plaintiff went ahead to register a caution on this land pex. 8 (a) caution form (b) receipt paid on 23rd January 2013 on basis of a note she received written by the defendant (pex. 7).

The note in my is questionable as it is not even signed by the defendant who purportedly authored it. The note was not copied to the land registrar therefore it is my finding that it did not also bar the plaintiff from presenting the documents to the registrar to enable her acquire title in her name. Furthermore the plaintiff admits she is in occupation and use of the land. The defendant or his representative has not made any attempts to bar her from using the land otherwise she would have said so.

10. I do not find from the evidence presented by the plaintiff any fault by the defendant in performing his obligations under the agreement between them. It is a requirement of law that he who alleges must prove and that standard in civil law must be on a balance of probabilities. Sections 107, 108 and 109 of the Evidence Act deals with proof of facts. Section 107 (i)

“Who ever 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 exists.

107 (2) when a person is bound to prove the existence of any fact, it is said the burden of proof lies upon that person.

108; The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all was given on either side.”

Similarly in Miller Vs. Minister of Pensions [1947] 2 ALL E.R 372, Lord Denning said,

“It must carry a reasonable degree of probability not so high as required in criminal cases. If the evidence is such that the tribunal can say; 'We think it is more probable than not; the burden is discharged. But if the probabilities are equal then it is not.”

11. The plaintiff has not specified any breach occasion to her by the defendant. In conclusion, I find the plaintiff has failed to prove her case on a balance of probability. The claim in my view was premature and or brought against the wrong party therefore fails and its hereby dismissed. Since the suit was not defended, there is no order for costs made.

DATED, SIGNED and delivered this 30th day of September, 2014 .

A. OMOLLO

JUDGE.