



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 139 OF 2011
“FAST TRACK”

PRESBYTERIAN CHURCH OF EAST AFRICA –

PWANI PRESBYTERY 1ST PLAINTIFF

THE PRESBYTERIAN FOUNDATION 2ND PLAINTIFF

V E R S U S

JUMA JEFA MBOE 1ST DEFENDANT

SIDI CHENGO NGATO 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs claim is for an order for specific performance to compel the Defendants to execute a transfer in their favour of the property LR NO. 28405 CR. 49739 situated at Kawala Mariakani (**the property**) and in default the Deputy Registrar of this Court do execute the same. The Plaintiff then prayed for permanent injunction to restrain the Defendants or their agents from frustrating or curtailing the peaceful enjoyment by the Plaintiff of the property. Finally the Plaintiff did seek for any other relief that the Court may deem proper.
2. It is the Plaintiffs claim that between the years 2004 and 2006 they entered into various agreements with the Defendants whereby the Plaintiffs agreed to purchase from the Defendants various portions of land totaling 24.17 acres for a total of Kshs. 1,564,000/-.
3. The Plaintiffs pleaded that the Defendants in breach of that agreement failed or declined to transfer the property to them and hence why the Plaintiffs prayed for specific performance.
4. In their defence the Defendants denied that they were related to each other as had been pleaded in the plaint and also denied having contracted to sell land to the Plaintiffs.
5. The Plaintiff called three witnesses to prove this case. All those witnesses were able to testify that the Plaintiffs in the year 2004 entered into a contract with the Defendants to purchase the Defendants 5.3 acres of land. The consideration for that purchase was Kshs. 424,000/-. The Plaintiffs paid Kshs. 193,000/- on that day. The balance of Kshs. 231,000/- was paid to the 2nd Defendant in December 2004. The written agreements in relation to that transaction were produced before the Court. In acknowledging the payment of the balance of that transaction the

2nd Defendant confirmed in writing that she had received the whole balance of the purchase price. In that agreement she also confirmed that there would be no third party who would have an adverse claim in respect of the 5.3 acres of land.

6. It is important to note that the land which the Defendants contracted to sell to the Plaintiffs was at that time unadjudicated land.
7. In July, 2004 the Plaintiffs witnesses testified that the parties entered a further sale agreement whereby the Plaintiff's agreed to buy a further 19 acres of the Defendants land. Those 19 acres were adjacent to the 5.3 acres that the Plaintiffs had previously purchased. The price for the 19 acres was agreed at Kshs. 1,140,000/-. The Plaintiffs' witnesses produced before Court the agreement entered in respect of this transaction. There was also documentation produced which evidenced the payment made to the Defendants which totalled the amount of Kshs. 1,564,000/-. That amount was for the total of 24.17 acres. In this regard attention is drawn to the Plaintiffs exhibit No. 4.
8. The Defendants gave the Plaintiffs possession of the 24.17 acres on receipt of the total purchase price. On obtaining possession the Plaintiffs witnesses confirmed that the Plaintiffs developed a boarding school which is known as PCEA Girls' High School, Pwani. They confirmed that that school is presently running and that in this year the school will submit for the first time students for the final exams of Form four.
9. The land sold by the Defendants to the Plaintiffs as stated before was unsurveyed. The Plaintiffs witnesses stated that at their costs and with the agreement of the Defendants embarked on having the land surveyed and set apart for registration. In this regard the Plaintiffs obtained the services of Kiguru a Land Surveyor who carried out that work. The Plaintiffs produced before Court evidence of the payments they made to that land surveyor. On completion of this work, the land surveyor produced a deed plan being No. 307489.
10. The Plaintiffs stated that despite having made full payment of the

purchase price to the Defendants and despite having obtained possession of the land, the Defendants had failed to transfer ownership into the Plaintiffs name. That it is because of that failure that the Plaintiffs brought this action before Court. The Plaintiffs produced a copy of the Title documents of the property which shows that the property is presently registered in both the Defendants names. It is that title that the Plaintiffs now seek an order be made for specific performance of the transfer into their names.

11. The evidence for the Defendants was given by Anderson Thoya Mboe.

He is the brother of the 1st Defendant and the son of 2nd Defendant. He confirmed although it had been denied in the Defence that the 1st and 2nd Defendants are daughter and mother respectively. Although in evidence in chief he stated that the subject property had a dispute with persons called Pravin Patel and Peter Muasi he did not produce any evidence of such dispute. He also stated in evidence in chief that the Plaintiffs had undertaken to resolve that dispute but they had failed to do so. There was no evidence to sustain that statement bearing in mind that the Defendants had signed agreements undertaking that there was no third party having adverse claim over the land. He did however state that it was because of the existence of those disputes that the Defendants failed to transfer the property to the Plaintiffs.

12. On being cross examined this witness confirmed that the Defendants

did sign the agreements that were produced before Court. He even confirmed that he was a signatory to those agreements. He confirmed that the payments were made by the Plaintiffs as stated in those agreements. On that issue he stated **"Before signing we knew that we were signing to sell 24.17 acres for Kshs. 1,564,000/- I gave PCEA right to get shamba and that**

there was no one else who was going to dispute PCEA's right to get the land.” On the purchase price he said **“we got that money Kshs. 1,564,000/- but we got Kshs. 600,000/- the balance they said it was used for setting aside.”**

13. There are only two issues that I see presenting themselves for

consideration in this matter. Firstly it is whether the Defendants sold to the Plaintiffs 24.17 acres of the property. Secondly is whether the Plaintiffs are entitled to the orders of transfer of the property in their names.

14. On the first issue, the Plaintiffs have produced before court all the

agreements relating to the transaction which agreements were signed by both the Plaintiffs and the Defendants. As stated before the Defendants sole witness Anderson Thoya was also a signatory to those agreements. The Plaintiffs also produced sufficient evidence to prove that they made payments to the Defendants of Kshs. 1,564,000/- being the price for 24.17 acres. No evidence was produced by the Defendants to contradict the Plaintiffs evidence. I accordingly find that the Plaintiffs have proved on a balance of probability that the Defendants sold to them 24.17 acres of the land.

15. Having found in favour of the Plaintiff in respect of the 1st issue I find

that the Plaintiffs are entitled to the prayer for specific performance and will order that the property be transferred into their names.

16. In the book **“MODERN EQUITY”** by Hanbury & Martin 15th Edition at

page 694 the learned authors had this to say on specific performance-

“A decree of specific performance issues against the individual defendant. If that is within the jurisdiction of the Court and can be compelled personally to carry out his obligation, the Court may order him to do so ...”

The Court will grant the prayer for specific performance of the contract between the parties.

17. There is need to mention that the learned Counsel Mr. Onyango for

the Plaintiffs did inform the Court on 16th September 2013 and this was a statement from the bar that since the case was last in Court the Defendants or their agents had invaded the property and had put up certain structures thereon. Justice in my view would not be done on this case if the Court failed to address that issue. The Defendants through their witness having confirmed that their property was sold to the Plaintiffs and that there were no third parties having adverse claim over it, this Court will order that any structures put up by such parties and which do not belong to the Plaintiffs be demolished.

18. The Interested Party failed to attend the hearing and therefore failed to

prove his case.

19. In this Judgment I grant the following orders-

- a. **An order is hereby made compelling the Defendants to effect transfer in favour of the Plaintiffs and at their cost of Parcel L.R. No. 28405 South East Mariakani Township in Kilifi District forthwith. In default an order is hereby made authorizing the Deputy Registrar of this Court to sign all documents necessary for the purpose of effecting such a transfer. In this regard the Land Registrar is hereby ordered to dispense with the necessity of having the**

Original Title in order to carry out such a transfer.

- b. A permanent injunction is hereby issued restraining the Defendants, their servants, agents or anyone else claiming under them from entering, interfering or disposing of L.R. No. 28405 South East Mariakani Township in Kilifi District.**
- c. Where the Defendants, their servants, agents or anyone else having erected any structure on L.R. No. 28405 South East Mariakani Township in Kilifi District an order is hereby issued authorizing the Plaintiff's to carry out demolition at the costs of the Defendants of such structures. In that regard the O.C.S of the Police Station which is in the locality of that property that is L.R. No. 28405 South East Mariakani Township in Kilifi District shall give security to ensure that there is no breach of the peace.**
- d. The Defendants shall pay the Plaintiffs costs of this suit.**

Dated and delivered at Mombasa this 26th day of September, 2013.

MARY KASANGO

JUDGE