



**Nyambura v Mohamed (Environment & Land Case 19 of 2014)
[2022] KEELC 2823 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 19 OF 2014**

EO OBAGA, J

MAY 18, 2022

BETWEEN

MARION LEAH NYAMBURA PLAINTIFF

AND

ALI JAMA MOHAMED DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendant in which she sought the following reliefs:-
 - a) A declaration that the Plaintiff is the sole legal owner of the suit property which is that land known as: Title No. Soy/Soy Block 10/843 and the Defendant has no claim whatsoever over the said land and a temporary eviction order be issued against the Defendant.
 - b) A permanent injunction as against the Defendant, his agents, servants and/or any persons claiming through him from entering upon, putting up any structures or in any other ways alienating or interfering with the plaintiff's peaceful possession of that land known as: Title No. Soy/Soy Block 10/843
 - c) Costs and interests of this suit.
 - d) Any other further order that this Honourable court deems fit to grant.
2. The Defendant filed a defence and raised a counter claim in which he sought for a declaration that she is the lawful owner of all that land comprised in title No Soy/Soy Block 10/843 and that the Plaintiff's purported purchase of the said land was unlawful and irregular. He also prayed for costs.

Plaintiff's case

3. The Plaintiff's case is that on 25th September, 2013, she entered into a sale agreement with Peter Kiplangat Kenduiywa for the purchase of LR No Soy/Soy Block 10/843 (suit property) at a



consideration of Kshs 550, 000/= she paid the entire purchase price. The vendor had purchased the suit property in 2011 from one Jason Onger Mirumbi in whose name the title to the suit property remains. The said Jason Onger Mirumbi however surrendered the original title to the suit property as well as the application for consent and consent of land control board to Kenduiywa who handed over the said documents to the Plaintiff.

4. The Plaintiff took possession and found an incomplete mud walled house with an incomplete pit latrine. The vendor told her that he was the one who was building the structures. She embarked on completing the incomplete pit latrine. On 21st December, 2013, the Defendant came to the suit property accompanied by the area assistant chief and Police officers. The defendant attempted to evict her but she remained put.
5. Later on, the Plaintiff received a copy of land resolution agreement between the Defendant and Kenduiywa. In this agreement, the Defendant and Kenduiywa agreed that Kenduiywa was to refund the Defendant the Kshs 300,000/= he had paid for the aborted purchase of the suit property. The refund was to be made on or before 30th June, 2014. It had also been agreed that both the Plaintiff and the Defendant were not to occupy the suit property until Kenduiywa refunded the Kshs 300,000/= to the Defendant.

Defendant's case

6. The Defendant testified that on 28th July, 2013, he entered into sale agreement with Peter Kiplangat Kenduiywa for the purchase of the suit property. The agreement was executed before the Assistant Chief Soy Sub location. The purchase price was Kshs 550,000/= The Defendant paid Kshs 300,000/= to the vendor. The balance of Kshs 250,000/- was to be paid after six months. The vendor put him in possession. He found an incomplete pit latrine and a three roomed mud walled house.
7. The Defendant was later informed that there were people frequenting the suit property and inspecting the same. He decided to register a caution to protect his interest. He contends that he is not aware of any other person who claims ownership other than him. He later on went to the assistant chief who advised him to go and evict the second buyer. When he went to evict the Plaintiff, the Plaintiff became arrogant. He now prays that the court compels the vendor to take the balance so that the land can be registered as his.

Analysis

8. After conclusion of the hearing, the parties were directed to file written submissions. The plaintiff filed her submissions on 25th January, 2022. The Defendant filed his submissions on 18th February, 2022. I have carefully gone through the evidence adduced by the plaintiff as well as that of the defendant. I have also considered the submissions by the parties herein. The issues which emerge for determination are firstly who between the Plaintiff and the Defendant is entitled to the suit property. secondly, whether the Defendant who had settled on a refund can turn round and claim that he be allowed to clear the balance so that the land can be his. Thirdly, who should meet the costs of this suit.
9. There is no contention that the registered owner of the suit property is Jason Onger Mirumbi. There is also no contention that Jason Onger Mirumbi sold the suit property to Peter Kiplangat Kenduiywa on 4th February, 2011 at Kshs 300,000/=. The said Jason Onger Mirumbi surrendered the original title deed to Peter Kiplangat Kenduiywa. Also surrendered were an application for consent of the Land Control Board and the consent of the Land Control Board. Over two and half years later, Peter Kiplangat Kenduiywa sold the suit property to the Defendant on 28th July, 2013 who paid a down payment of Kshs 300,000/= The balance of Kshs 250,000/ was to be paid at the end of December,



2013. The said Peter Kiplangat Kenduiywa did not surrender the original title as the Defendant had not cleared the balance of the purchase price.
10. In less than two months, precisely on 25th September 2013, the same Peter Kiplangat Kenduiywa sold the same suit property to the Plaintiff at the same price which he had sold to the Defendant. The difference was that the Plaintiff cleared the entire purchase price and was put in possession and was given all the original documents which Jason Mirumbi had given Peter Kiplangat Kenduiywa.
 11. When the Defendant realized that the same suit property which he was in the process of purchasing had been sold to the Plaintiff, he went and reported the matter to the Assistant Chief. The Assistant Chief without involving the Plaintiff made the Defendant and Peter Kiplangat Kenduiywa to record a settlement in which Peter Kiplangat Kenduiywa agreed to refund the Defendant his Kshs 300,000/= by 30th June, 2014.
 12. It is therefore clear that the Defendant having settled for a refund of the down payment he had made, he cannot go back and claim that he wants to clear the balance and have the suit property. when the Plaintiff purchased the suit property, she was not aware that the defendant was in the process of purchasing the same. In this regard, the Court of Appeal decision in the case of *Salome Warware – Vs- George Muna & another* (2015) eKLR where the court held that where two equities, are equal, the first in time prevails is distinguishable. In this case, the issue was allotment. Both parties had allotment letters and the first to be allotted had to carry the day.
 13. In the instant case, the defendant had not cleared the balance of the purchase price. Though the vendor sold the suit property to the Plaintiff before expiry of the time for clearing the balance had lapsed, the Defendant nevertheless went ahead to accept a refund from the vendor. He is therefore estopped from demanding that the agreement between the vendor and the Plaintiff was unlawful. As I have said hereinabove, the Plaintiff did not know that there was someone who was in the process of purchasing the same suit property. I therefore find that the suit property lawfully belongs to the Plaintiff to whom the court directed that she remains in possession until the case is heard and determined in a ruling delivered on 15th October, 2014.
 14. The Defendant having settled on a refund he cannot be heard to say that he now wants to clear the balance and have the property. the Defendant waived his right to the property the moment he agreed to take a refund. Had he not agreed to take a refund, he would have had a point in arguing that the vendor was wrong to sell the suit property to another before the period of clearance of the balance had lapsed.
 15. What the Defendant is seeking in so many words is an order of specific performance. Specific performance is a discretionary remedy. It cannot be given if circumstances show that there is a better remedy open to the Defendant. In this case, the Defendant had settled on refund. The remedy of specific performance is not open to him and in any case there is no evidence that he was able and willing to clear the balance in view of his quick agreement to take a refund.
 16. From the above analysis, it is clear that the Plaintiff has proved her case on a balance of probabilities. I allow her claim in the following terms:-
 1. A declaration is hereby given that the Plaintiff is the sole owner of the property known as Soy/Soy Block 10/843 and that the Defendant has no claim over it whatsoever.
 2. A permanent injunction is given against the Defendant, his agents, servants and or any persons claiming through him from entering upon, putting up any structures or in any other way alienating or interfering with the Plaintiff's peaceful possession of Soy/Soy Block 10/843.
 3. As the Defendant failed to prove his counter-claim, the same is dismissed.



4. The Plaintiff shall have the costs of the suit as well as the counter-claim.
5. In the interest of justice, I order that the caution which was registered against the title by the Defendant be removed forthwith.
6. To ensure that there is smooth transfer of the suit property to the plaintiff, the Plaintiff shall liaise with the original vendor Jason Onger Mirumbi in order for him to sign transfer forms and all requisite land control board consent at the cost of the Plaintiff within 30 days failing which the Deputy registrar of this Court shall sign the said documents on behalf of Jason Onger Mirumbi.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF MAY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Menjo for Plaintiff

E. OBAGA

JUDGE

18TH MAY, 2022

