



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 522 of 2009

DUNCAN WAITHAKA NDEGWA.....1ST PLAINTIFF
JACKLINE NYAGUTHI GITHINJI.....2ND PLAINTIFF
VERSUS
SIGAL INVESTMENTS LIMITED.....DEFENDANT

J U D G M E N T

The Pleadings

1. The Plaintiffs herein **Duncan Waithaka Ndegwa and Jackline Nyaguthii Githinji** commenced this suit by way of a plaint dated 13/10/2009 and filed in court on 14/10/2009 in which the Plaintiffs jointly and severally pray for judgment against the Defendant for the following **ORDERS:-**

(i) *A declaration that the Plaintiffs are the bona fide purchasers for value of LR No. 1160/114 from the Defendant and are entitled to an order of specific performance of the contracts of sale.*

(ii) *An order of specific performance to issue directed to the Defendant to surrender the original title to LR No. 1160/114 to the Chief Land Registrar and execute all the necessary papers to facilitate transfer of LR No. 1160/114 to the Plaintiffs' separately as per the contracts of sale dated 22nd July 1998 and 8th September 1998 respectively.*

(iii) *And or in the alternative an order be issued directed to the Chief Land Registrar to facilitate transfer of Land Reference 1160/114 to the Plaintiffs with or without the Defendant's original title by use of a certified copy of the title in possession of the Land Registrar.*

(iv) *That in the event of refusal by the Defendant to execute the necessary transfer papers the Deputy Registrar of this court, do execute all the necessary transfer papers to give effect to prayer number (ii) herein above.*

(v) *That the original title to LR No. 1160/114 be and is hereby deemed to have been surrendered to the Chief Land Registrar for purposes of effecting the orders sought herein above.*

(vi) *An order of permanent injunction do issue restraining the Defendant its servants and/or agents or anybody acting through or claiming through it from selling, offering for sale, parting with possession or in any other manner interfering with LR No. 1160/114.*

(vii) *General damages for breach of contract and mesne profits.*

(viii) *That the Defendant do pay the Plaintiffs the costs of this suit and interest.*

2. The facts of this case as per the plaint are that the Defendant who was at all material times the registered proprietor of a parcel of land known as LR No. 1160/114 (hereinafter called the suit land) entered into separate Sale Agreements with the Plaintiffs on divers dates between July and September 1998 for the purchase of two unencumbered portions of the suit land from the Defendant for a consideration of Kshs. Four Million (Kshs.4,000,000.00) each making an aggregate sum of Kshs.8,000,000/= for the two parcels.

3. The Plaintiffs aver that it was a cardinal term of the Agreement for Sale dated 22/07/1998 and 08/09/1998 respectively that upon payment of the said consideration, the Defendant would facilitate subdivisions of the land into six parcels of one acre each to facilitate transfer to the Plaintiffs, among other buyers. The Plaintiffs say that even after payment of the entire purchase price of Kshs.8,000,000.00 to the Defendant, payment of which was acknowledged by the Defendant, the Defendant declined to facilitate issuance of separate titles to the Plaintiffs to complete the transaction and has continued to dilly dally over the same since then, hence these proceedings.

4. It is the Plaintiffs' case that the Defendant's refusal to transfer the suit land to them after receiving due consideration is a flagrant breach of the Agreements for Sale, is oppressive, fraudulent, illegal and highhanded. The Plaintiffs have particularized the breach, illegality and fraud on the part of the Defendant as follows:-

(a) *The Defendant received and acknowledged payment of purchase price but refused to facilitate the transfer of the suit property to the Plaintiffs.*

(b) *The Defendant has persistently and for a period of over ten (10) years declined and/or refused to transfer the suit property to the Plaintiffs.*

(c) *The Defendant has acknowledged receipt of full consideration from the Plaintiffs but has declined to transfer the property subject matter of this suit.*

(d) *The Defendant intends to dispose of the suit property to other unsuspecting buyers or third parties to the detriment of the Plaintiffs.*

(e) *The Defendant has flagrantly breached the terms of the Sale Agreement dated 22nd July 1998 and 8th September 1998 respectively by refusing to facilitate subdivision and transfer of the suit property to the Plaintiffs.*

(f) *The Defendant has refused and/or neglected to perform its part of the obligations under the Sale Agreements of 22nd July 1998 and 8th September, 1998.*

(g) *The Defendant intends to offer for sale the disputed suit premises to deprive the Plaintiffs of their accrued proprietary rights.*

(h) *The Defendant has refused to surrender the original title to the Registrar for Registration of the transfer to the Plaintiffs.*

and that as a result of the above breaches, illegalities and frauds, the Plaintiffs have been thoroughly prejudiced and inconvenienced and have suffered losses as they have not been able to develop the suit land even ten years after paying for the same.

5. The Plaintiffs have asked the court to order for specific performance and to issue an order of injunction to restrain the Defendant, its agents and/or servants from selling, disposing and/or in any other manner parting with possession of the suit land to any one else other than the Plaintiffs and to declare that the Plaintiffs are the bona fide purchasers for value of the suit land and to order the Defendant to pay general damages for breach of contract plus mesne profits.

6. The two Agreements for Sale, which are similar in many material respects save for the date and the description of the suit land form part of the annexures in these proceedings. Both of these Agreements contain the following highlights:

(i) *Purchase price – Kshs. Four Million only*

(ii) *Property – Nairobi LR No. 1160/659 (original No. 1160/640/7 measuring 0.4240 hectares*

(iii) *completion date – a date as mutually agreed by the parties at the time of executing the Agreement.*

(iv) *Possession – the property was sold with vacant possession and Vendor agreed to give the Purchaser access to the property.*

(v) *Payment – the sum of Kenya Shillings Two Million was acknowledged paid at the time of execution of the Agreement while the balance thereof of Kenya Shillings Two Million was to be paid on or before the Completion Date.*

(vi) *Vendor was to point out to the Purchaser all survey beacons or to replace any missing or damaged beacons*

(vii) *Purchaser was to pay all registration fees and stamp duty to cover transfer but each party to pay its own legal costs*

(viii) *Purchaser was to provide all the transfers to be executed by the Vendor*

(ix) *Vendor was to provide the Purchaser with all the original title documents, the relevant consents to transfer and any other documents that may be required to facilitate registration of the transfer.*

7. There is also among the bundle of documents on the file copy of Transfer dated 15/06/2009 duly executed by the Defendant under its Common Seal in the presence of the Defendant's Director and Secretary (photographs of both are annexed) namely M/s Langat Vitalis Kiprotich and Wilson K. Kiprotich on the one hand and Duncan Waithaka Ndegwa on the other hand. The Transfer is duly witnessed by Ochieng' Opiyo A, Advocate. This Transfer relates to LR No. 1160/659 (original Number 1160/640/7) and it is to the 1st Plaintiff.

8. The Defendant did not file any defence to the Plaintiff's claims despite having been served with Summons to Enter Appearance. So the case proceeded to formal proof on the 15/02/2010.

The Evidence

9. The 1st Plaintiff testified on oath as PW1. He stated that he entered into agreements with the Defendant for purchase of the suit land from the Defendant. He produced as PExhibit 1 an extract of the title which shows at entry No. 30 that the suit land was transferred to the Defendant herein for Kshs.10,000,000/= on the 04/12/1995. Under Entry No. 31 is a Certificate of Subdivision by the Town Clerk of Nairobi City Commission approving the suit land into sub-plots A & B only. This was done on 14/10/1997. On the same 14/10/1997, a transfer was made to Ulrich Schneider of LR No. 1160/641 (original 1160/114/2) vide CT IR 74659.

10. The 1st Plaintiff also produced the duly executed Transfer dated 15/06/2009 in which the Defendant was transferring all that parcel of land situate in the city of Nairobi of the Republic of Kenya containing by measurement Nought Decimal Four Two Four Nought (0.4240) hectares or thereabouts known as Land Reference Number 1160/659 (original Number 1160/640/7 together with the buildings and improvements erected or being thereon (if any) to the 1st Plaintiff for the sum of Kenya Shillings Four Million only, the receipt of which is acknowledged by the Vendor as Proprietor as Grantee.

11. The 1st Plaintiff went on to state that after he had paid the full purchase price to the Defendant, but that the Defendant reneged on its undertakings under the Agreement for Sale, an action that forced the Plaintiff to apply for orders of interlocutory injunction for the preservation of the suit land. Such orders were granted by this court's ruling dated 28/11/2009. Though by the ruling of this court dated 28/11/2009 the Defendant was required to deposit the original title into court, for safe custody the Defendant is yet to deposit the said original Certificate of Title into court in clear contempt of this court's orders. The Plaintiff also testified that the subdivisions of the suit were done way back in 1996 and before the Agreements for Sale were entered into.

12. In their written submissions dated 22/02/2010 and filed in court on the same day, counsel for the Plaintiff has submitted that the Plaintiff met the standard of proof on a balance of probabilities and should therefore be granted judgment as prayed in the plaint. Counsel also submits that the Defendant has been deliberate in its failure and/or neglect to complete the Transfer.

The Issues

13. On the 19/01/2010, the Plaintiff's counsel filed the following Statement of Issues for determination by this court:-

1. *Is the Defendant the registered proprietor of Land Reference No. 1160/114 situate in Karen area of Nairobi measuring 7.5 acres or thereabouts.*

2. *Did the Defendant enter into sale agreement with the Plaintiffs and or around the year 1998 for the sale of the said Land Reference No. 1160/114.*

3. *Did the Plaintiffs pay the agreement consideration for the part parcels of Land Reference No. 1160/114 to the Defendant.*

4. *Has the subdivision of the Land Reference No. 1160/114 been approved by the Nairobi City Council.*

5. *Did the Defendant honour its part of the sale agreement with the Plaintiff in relation to the Land Reference No.*

1160/114 in Karen area in Nairobi.

6. *Are the Plaintiffs entitled to the reliefs sought in the plaint including costs of the suit.*

14. Counsel for the Plaintiff says that the Plaintiff has proved all the issues set out for determination as above shown and that the Plaintiff is therefore entitled to the reliefs sought.

The Law

15. Counsel for the Defendant relied on a number of authorities to support the Plaintiff's case on the various issues filed in court on 19/10/2010, and in particular for an order of specific performance. Counsel submits that land in this country is a pet subject and that anyone who owns or acquires land holds it close to this chest. In **Gharib Suleiman Gharib –vs- Abdulrahman Mohammed Agil – Civil Appeal Number 112 of 1998**, the three Judges of the Court of Appeal (Gicheru, Omolo and Owuor JJA) held at page 6 of their judgment that –

*“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will do more perfect and complete justice than an award of damages. And in contracts relating to the sale and purchase of land, the passage in **Volume I of the Twenty-Seventh Edition of Chitty on Contracts at page 1284 paragraph 27-004** quoted by the learned trial Judge in his judgment is apt and bears our repeating it here:*

“The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him.”

16. The evidence placed before the court in this case shows that there was a valid Agreement of Sale dated 22/07/1998 duly executed by both parties in the presence of Ochieng' Opiyo Advocate. The evidence also shows that there is a duly executed transfer dated 15/06/2009 in respect of the Agreement for Sale dated 22/07/1998. Both of these documents comply with section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya as amended by Act No. 21 of 1990 and Act No. 2 of 2002. Section 3(3) of the Law of Contract Act reads:-

“3(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 by a witness who is present when the contract was signed by each party

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting implied or constructive trust.”

17. There is no doubt in my mind that the 1st Plaintiff in this case can not possibly buy a similarly sized property in the same location at the same purchase price today. Real estate property values have risen so sharply in the last ten (10) years that it would be a mere dream to expect the Plaintiff to use his Kenya Shillings Four Million to buy a similar piece of land in the open market today. Damages would thus not be adequate compensation in the circumstances and the only satisfactory remedy in this case is specific performance.

18. In the earlier case of **Openda –vs- Ahn [1984] KLR 208**, another Court of Appeal decision the court held, inter alia, that –

“A condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale.”

19. The 1st Plaintiff herein has demonstrated that he has paid the entire purchase price in this case. Under the Agreement dated 22/07/1998, the Defendant acknowledged payment of Kenya Shillings Two Million (Kshs.2,000,000/=) in part payment of the purchase price of Kenya Shillings Four Million. The transfer dated 15/06/2009 shows that the Plaintiff had by that date, paid the entire Kenya Shillings Four Million (Kshs.4,000,000.00), and this entitles the 1st Plaintiff to specific performance of the Agreement dated 22/07/1998. The Defendant has not come to court to say why it could not complete the transfer, nor has it denied that the full purchase price of Kenya Shillings Four Million (Kshs. 4,000,000.00) has been fully tendered by the 1st

Plaintiff. The Plaintiff in this case has thus done all that was required of him.

20. Counsel for the Plaintiff also relied on **Alice Wangui Gichuka –vs- Mwenjera Gichuka – Nairobi HCCC No. 943 of 1989** in which Ojwang J granted orders for vacant possession and further ordered the Registrar of the High Court to effect all the necessary documents to give effect to the order of specific performance.

21. As far as the 2nd Plaintiff's case is concerned, the court has not been given any evidence to show payment of the price consideration in respect of the Agreement of Sale dated 08/09/1998. Although the 1st Plaintiff stated that the Plaintiff's paid Kshs.8,000,000.00 for the two plots, there is evidence only of the payment made by the 1st Plaintiff and which evidence is acknowledged by the Defendant in the duly executed Transfer dated 15/06/2009.

22. The court also finds that the 2nd Defendant did not verify the averments in the plaint dated 13/10/2009 and filed in court on 14/10/2009. In the Verifying Affidavit sworn by the 1st Plaintiff on 13/10/2009, the 1st Plaintiff says that he has the authority of the 2nd Defendant to swear the affidavit on her behalf. Such authority is not exhibited on the file. Order 1 Rule 12 of the Civil Procedure Rules requires that such authority shall be involving signed by the party giving it and shall be filed in the case. The Plaintiffs herein did not comply with this rule.

Conclusion

23. The sum total of what I have said above is that the Defendant has no answer to the 1st Plaintiff's case. Accordingly, I enter judgment for the 1st Plaintiff against the Defendant in terms of prayers (i), (ii), (iii), (iv), (v) and (vi) of the plaint. In view of the order for specific performance, prayer number (vii) cannot be granted. The 2nd Plaintiff's claim was not proved yet suit is accordingly dismissed with no order as to costs.

24. The Plaintiff shall have the costs of this suit and interest thereon at court rates.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of May, 2010.

**R.N. SITATI
JUDGE**

Read and delivered in the presence of:-
Mr. Mulei for Njuguna (present) For Plaintiffs
No appearance For Defendant
Weche – court clerk