



**Obondo v Nyawara (Environment & Land Case 336 of 2014)
[2022] KEELC 15097 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 336 OF 2014
SM KIBUNJA, J
NOVEMBER 23, 2022**

BETWEEN

MARGARET AKINYI OBONDO PLAINTIFF

AND

DISMAS MICHEAL OMONDI NYAWARA DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit through the plaint dated the November 3, 2014 seeking for an order of specific performance to transfer of 0.25 acres from subdivision of parcel Uasin Gishu/Kimumu/47 to her, and costs. She averred that on the 6th December 1988, the defendant sold to her one acre from Uasin Gishu/Kimumu/47 and she paid the purchase price. The defendant caused the land to be subdivided into several parcels and transferred one of the parcels, Uasin Gishu/Kimumu/2144, measuring 0.35 hectares to her. That the parcel transferred to her was less in acreage by 0.125 acres than the one acre agreed under the sale agreement. She contacted the defendant who promised to transfer the 0.125 acres to her in due course since he had more parcels of land from the subdivision of Uasin Gishu/Kimumu/2154. However, the defendant has since refused to effect the transfer even though he was still the registered owner of various parcels subdivided from Uasin Gishu/Kimumu/47, including Uasin Gishu/Kimumu/2154, and hence this suit for an order of specific performance to compel the defendant to effect the transfer of 0.125 acres into her name, and costs.
2. The defendant filed his statement of defence dated the 2 November 5, 2014 admitting selling an acre of land to the plaintiff which was to be excised from Uasin Gishu/Kimumu/47 after planning and subdivision. The defendant contended that due to the creation of utilities like access road and way leaves, the sizes of the subdivided parcels were altered. He maintained that the plaintiff had initially agreed to the reduced acreage and even promised to remove the caution on the land, only to refuse the withdrawal after receiving her title. That the plaintiff's suit is premature and should be struck out with costs.



3. The plaintiff testified as PW1 and called Dickson Otiende Abor and Alfred K Nyairo, an advocate, who testified as PW2 and PW3 respectively. The defendant testified as DW1. The agreement of sale between the parties that was entered into on December 6, 1988 expressly stated that the defendant was the allottee of plot No Uasin Gishu/Kimumu/47, measuring 8 acres, and was selling to the plaintiff one acre for Kshs 50,000.00. The agreement further confirms that the defendant received Kshs 45,000.00 through banker's cheque dated December 5, 1988, and the balance of Kshs 5,000.00 was to be paid on or before 1st March 1989. The defendant agreed in his testimony that he received the whole purchase price. He further stated that he allowed the plaintiff to take possession of the suit property immediately, and that she later paid for the transfer and a title came out in her name for 0.35 Ha. parcel. He maintained that the rest of the land was taken to cater for the approximated 10-meter road of access. He agreed that the agreement of sale did not state that the road would come from the one acre he was selling to the plaintiff.
4. The learned counsel for the plaintiff and the defendant filed the submissions dated the June 22, 2022 and July 20, 2022 respectively, which the court has considered.
5. The following are the issues for the court's determinations;
 - a. Whether the plaintiff is entitled to more land than the 0.35 Ha. parcel transferred to her by the defendant under their agreement for sale.
 - b. Whether the plaintiff is entitled to the specific performance order sought.
 - c. Who pays the costs of the suit.
6. The court has carefully considered the pleadings, evidence tendered by both parties, the submissions filed by counsel and come to the following conclusions;
 - a. In the case of *Francis Wabiu Theuri v Monicah Njeri & 3 others* [2012] eKLR, the court held that;

“An order of specific performance is made on the basis of clear terms of a contract, as what is being requested to be performed are contractual obligations. It is also the case that specific performance, being an equitable remedy is discretionary and is not available to a party if there has been conduct on his part disentitling him to that relief.”

From the evidence on record, it is evident that at the time the defendant was entering into the agreement dated 6th December 1988, of selling one acre of Uasin Gishu/Kimumu/47 to the plaintiff, he was an allottee of the same. The copy of the green card produced as exhibit 4 confirms that the register of the said land was opened on the May 12, 1986 in the name of Settlement Fund Trustees as the proprietor, and the defendant became the registered owner on the December 7, 1988, a day after entering into the said agreement.
 - b. That it is not disputed that the plaintiff took possession of the one acre of land immediately after the agreement and fenced it. What I gather from the plaintiff's case is that she took possession and fenced off her one acre based on the boundaries pointed out to her by the defendant, and not based on the boundaries that were created after the land was surveyed and subdivided, which was on January 10, 2000. It is her evidence that a road of access already existed and it had not been agreed that it would be provided for from her one acre, as claimed by the defendant. The sketch map to the Mutation form of Uasin Gishu/Kimumu/47 prepared by Kennedy Kubasu, a licenced land surveyor on January 10, 2000, shows a 10 meter wide road



which cut across the original land parcel. This subdivision was being done by the defendant to enable him transfer the parcels he had sold to the plaintiff and others about two years earlier.

- c. The plaintiff stated that she has already sold the parcel that was transferred to her name and is now seeking for the quarter acre the defendant had not transferred to her. The defendant's advocate has in their submissions termed the plaintiff's claim as an abuse of the court process, since she only began complaining about the portion in 2014 after selling her parcel. In the case of *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] eKLR, the court held;

“Reference was also made to extracts from Chitty on Contracts the 28th Edition Volume 1 London Sweet & Maxwell 1999. In chapter 28 Pr 027 There is observation that:-

Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within the group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary... discretion but one to be governed as far as possible by fixed rules and principles...” (paragraph 028)...specific performance may be refused on the ground that the order will cause severe hardship to the defendant where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the defendant can put himself into a position to perform by taking legal proceedings against a third party.... Severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which affect the person of the defendant rather than the subject matter of the contract and for which the claimant is in no way responsible... But it will not be refused merely because the vendor finds it difficult on a rising market to acquire alternative accommodation with the proceeds of the sale, nor because compliance with the order expose the defendant to risk (of whatever nature)...” (paragraph 032) the conduct of the party applying for relief is always an important element for consideration. Thus specific performance may be refused if the claimant fails to perform a promise which he made in order to induce the defendant to enter into the contract but which is neither binding, contractual, nor because it relates to the future operative as a misrepresentation”

In the agreement of sale, the defendant as the vendor was to transfer the one- acre parcel of land, while the plaintiff as the purchaser, was to bear all the expenses for the transfer. The agreement had no completion date. However, from the entries on the green-card of the parent parcel, Uasin Gishu/Kimumu/47, the title document was closed on subdivision on the November 19, 2002. This was two (2) years after the surveyor did the subdivision, and four (4) years after the parties entered into an agreement of sale. Other than the parcel number Uasin Gishu/Kimumu/2154, that was transferred to the plaintiff on November 20, 2002, the subdivision also produced other parcels numbers 2145 to 2155. The defendant has not



disputed the plaintiff's assertion that parcel Uasin Gishu/Kimumu/ 2155 is still in his name as per the certificate of official search availed to the court.

- d. In view of the above, and remembering it is not the duty of the court to rewrite the agreement, but to interpret the one voluntarily entered into by the parties herein, the court finds that the acreage of the land the defendant sold to the plaintiff under the sale agreement of December 6, 1988 was one acre, while the parcel Uasin Gishu/Kimumu/2154, transferred to her was 0.35 Ha. The plaintiff had fully performed her part of the agreement by fully paying the defendant the purchase price for the one acre. That as the defendant has not availed any documentary evidence made subsequent to the 6th December 1988 agreement to confirm that the acreage of the land subject matter of the sale had been voluntarily reduced from one acre to 0.35 Ha., then the court finds that the plaintiff has established that he was in breach of the agreement. That if it was the intention of the parties that a portion of the one acre the plaintiff was buying from the defendant was to be utilized in providing for any road of access or wayleaves, then that would have been clearly provided for as a term in the sale agreement. In the absence of such a provision, then the plaintiff cannot be taken to be unreasonable in demanding from the defendant the remainder of the land, first by filing the caution against parcel Uasin Gishu/Kimumu/2155 on the April 3, 2014, and secondly filing this suit on the November 25, 2014.
- e. An order of specific performance sought by the plaintiff cannot be said to be likely to cause hardship to the defendant. Even if any hardship was to arise or is apparent, only the defendant can be held liable of it, as he deliberately failed to subdivide and transfer one acre of land to the plaintiff as agreed under the sale agreement of December 6, 1988. In the case of *Gurdev Singh Birdi & Narinder Singh Ghortora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR the court held that;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice.”

That as the defendant has not shown any willingness to transfer the portion of land that remained after transferring 0.35 Ha. to the plaintiff, then the court considers it just and equitable to grant the plaintiff the equitable relief of specific performance sought. The court takes judicial notice that one acre of land is equal to 0.405 hectare. That as the parcel Uasin Gishu/Kimumu/2154 transferred to the plaintiff is indicated to be 0.35 hectare, then the remaining portion is 0.055 hectare to make 0.405 hectare which is equal to one acre. Portions of land that are 0.35 hectare and 0.055 hectare are approximately equal to 0.865 and 0.136 acre respectively. The plaintiff has however sought for 0.25 acres which is more than 0.136 hectares that the court has found to be outstanding to complete one acre. The court cannot award the plaintiff more than she was entitled to under the sale agreement of December 6, 1988.

- f. The plaintiff, having succeeded in proving her claim against the defendant, is under section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya, entitled to her costs of the suit.
7. In conclusion I find that the plaintiff has proved her claim against the defendant to the standard required by the law of a balance of probabilities. The court therefore enters judgement against the defendant as follows;



- a. That the defendant is hereby ordered to transfer to the plaintiff a portion of 0.055 hectare [0.136 acre] of land from Uasin Gishu/Kimumu/2155, to make one acre as agreed under their sale agreement of December 6, 1988 within the next sixty (60) days.
- b. That in default of the defendant complying with order (a) above, the Deputy Registrar be and is hereby authorised to execute all necessary conveyancing documents to give effect to that order.
- c. The plaintiff is awarded costs of the suit.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF NOVEMBER 2022.

SM KIBUNJA, J

In The Presence Of;

Plaintiff : absent

Defendant: absent

Counsel : M/s Tuwei for plaintiff

Mr Ngigi for defendant

Wison .. Court Assistant.

SM KIBUNJA, J

ELC, MOMBASA

