



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 169 OF 2013

PETER GITHINJI NGUBIRU.....1ST PLAINTIFF

SAMUEL NJUE NGIRI.....2ND PLAINTIFF

OLANDA LORDVICUS SEBBIE WAMEYO.....3RD PLAINTIFF

FRANCIS NGANGA WANYOIKE.....4TH PLAINTIFF

VERSUS

SOLOMON IRERI GACHEWA.....DEFENDANT

JUDGEMENT

1. By a plaint dated 4th February 2013 and filed in court in 5th February 2013 and filed in court in 5th February 2013 the plaintiffs seek judgment against the defendant for:-

1. A permanent injunction restraining the defendants, by himself, his servant or agent from charging or transferring land parcel no. LR 1496/6 Kasarani to any person other than the plaintiffs.

2. The defendant be and is hereby ordered to surrender to the plaintiffs the original titles No. IR 53892 with respect to LR No. 14969/6 together with the approved subdivision plan, all relevant consents and approvals receipts and transfers with stamp duty duly paid, deed plans and clearance certificates.

3. The defendant do execute transfers for the subdivided plots in favour of the plaintiffs with such time as may be fixed by this honourable court and in default the Deputy Registrar of this honourable court do execute such transfer.

4. The defendant do bear costs of this suit.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance on 22nd May 2013 through the firm of M/s Mulondo Oundo Muriuki & Co. Advocates. He also filed a statement of defence dated 7th June 2013 and filed in court on 10th June 2013. He denies that he is in breach of the said agreements and states that he has always been willing to proceed with the subdivision of the property described as LR NO. 14969/6 Kasarani. He also filed his list of documents and a witness statement.

3. The plaintiffs filed a reply to defence dated 28th June 2013 and filed in court on 1st July 2013.

4. The matter came up for hearing on 1st October 2018. M/s Bosibori appeared holding brief for Mr. Mwaniki for the defendants. She told the court that Mr. Muriuki was not ready to proceed and he had put on application to cease acting for the defendant. I have gone through the court record and there is no such application. The court was of the view that no sufficient reasons had been advanced to warrant an adjournment. It directed that the hearing proceeds exparte. The 1st plaintiff gave evidence on his own behalf and that of the other plaintiffs. Thereafter the plaintiffs closed their case.

The matter was fixed for mention to confirm filing of written submission 1st November 2018.

5. On 1st November 2018 Mr. Ong'anda appeared for the defendant. He informed the court that parties were negotiating. He sought a

mention date. The matter was then fixed for mention on 13th February 2019. On the 13th February 2019, Mr. Kimani appeared for the plaintiffs and Mr. Ong'anda for the defendant appeared. They confirmed that parties were likely to reach a settlement. The court fixed the matter for mention on 9th April 2019. On the 9th April 2019, they sought more time and the matter was fixed for a further mention on 15th July 2019.

6. There was one other mention on 27th January 2020, whereby Mr. Maosa appeared the defendant. He sought time to put in more documents. The matter was fixed for mention on 14th May 2020 whereupon there was no attendance by parties or counsel. The court fixed mention on 7th December 2020 on this date Mr. Kimani for the plaintiffs appeared and sought a judgment date. The court then gave a date for judgment noting that the plaintiffs had closed their case way back on 1st October 2019 and the defendant had not sought to reopen the case.

7. It is the plaintiff's case that the defendant is the proprietor of the original title LR No. 14969/6 (IR NO. 53892). The same was transferred to the defendant by Kenya Commercial Bank Limited. That by agreements of sale dated 14th January 2000, 12th November 1999, 17th September 1999 and 22nd September 1999, the plaintiffs entered into agreements with the defendant for the sale of plots within Land Parcel Number 14969/6.

8. The plaintiffs paid their respective purchase price as stipulated in the sale agreements. They were put into possession of the suit property where they developed their respective plots and have been residing thereon.

9. It is the plaintiff's case that the defendant failed to discharge his contractual obligations by failing to obtain all necessary consents and approvals thus failing to transfer or process title in favour of the plaintiffs. The plaintiffs are apprehensive that the defendant's conduct is actuated by an intention or desire to charge or transfer the suit property to third parties to the detriment of the plaintiffs.

10. In paragraph 7 of the plaint, the particulars of breach of the said agreements by the defendant are given as:-

(a) Failed to obtain all necessary consent and approvals.

(b) Failed to comply with requirements of the relevant authorities to facilitate grant of the said consent and approvals.

(c) Failed or neglected to obtain approval of the proposed subdivision plan.

(d) Has failed or neglected to transfer or process titles in favour of the plaintiffs.

11. PW1 Peter Githinji Ngabiru, the 1st plaintiff, testified on 1st November 2018. He adopted his witness statement dated 28th January 2013. He had been authorized by the other plaintiffs to adopt their witness statements as part of the evidence on their behalf. He relied on the list of documents dated 4th February 2013. PW1 produced an instrument of transfer in favour of the defendant as exhibit P1. A sale agreement dated 14th January 2000 between him and the defendant as exhibit P2. A bundle of receipts confirming payment as exhibit P3. A copy of title for IR 53892, LR No. 14969/6 as exhibit P4, a demand letter as exhibit P5. PW1 told the court that he was buying a portion of the suit property. In addition, he produced three sale agreement in respect of the 2nd – 4th plaintiffs as exhibits P 6-8 respectively, copies of banking slips and acknowledgment notes as exhibit p9.

12. The defendant on his part admitted that he executed the said sale agreements. He stated in his defence that he applied for the approvals in the year 2000. That he was granted approval by the City Planning Department but he did not meet the conditions owing to the non existence of a sewer line in the area surrounding the property. Further that he did not breach the sale agreements. He prays that the plaintiff's suit be dismissed with costs.

13. The plaintiffs case has not been controverted. The defendant neglected and/or refused to attend court to defend this claim. In the absence of his testimony this court finds that he has been reluctant to transfer the respective portions to the plaintiffs who are in possession. It is the plaintiffs submissions that the defendant has failed to process titles in favour of the plaintiffs.

14. I have considered the pleadings, the evidence on record and the submissions filed on behalf of the plaintiffs. The issues for determination are:-

(i) Whether the defendant is in breach of the agreements of sale between himself and the plaintiffs.

(ii) Whether the plaintiffs are entitled to the reliefs sought.

(iii) Who should bear costs of this suit?

15. As stated earlier the plaintiffs' case is uncontroverted. The defendant does not deny that he executed the said sale agreements between himself and the plaintiffs. It is the plaintiff's case that the defendant was obligated to obtain all the necessary approvals but he did not. The approval for sub-division was granted by the Nairobi City Council on two conditions. The defendant is yet to comply with the two conditions. He neglected and/or refused to attend court or explain the difficulty he was having in complying with the said conditions. He has had enough time to comply since the year 2000.

16. It was a clear term on the said agreements that the defendant would obtain all necessary clearances and facilitate subdivision of the suit property and transfer to the plaintiffs. In the case of **Attorney General of Belize et al vs Belize Telecom Ltd & Another [2009] 1WLR 1980 at page 1993** citing Lord Person in **Trollope Colls Ltd vs North West Metropolitan Regional Hospital Board [1973] ICLR 601 at**

609, the court held thus:-

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear did far from ambiguity there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable”.

I am guided by the above authority in finding that the defendant was bound to fulfil clause 4 of the sale agreements. As he has not done so, I find that he is in breach of the respective sale agreements.

17. Having stated so, I find that the plaintiffs are entitled to the reliefs sought. The plaintiffs have demonstrated that each paid the full purchase price for their respective portions. They are entitled to an order of specific performance. In the case of **Andrew Karemi Kingori vs Joseph Waweru Njoroge [2018] eKLR**, the court held that:-

“...It should be noted that specific performance is an equitable remedy and as a rule of equitable remedies, is available at the court’s discretion. In this current case the plaintiff has established by his evidence that he performed his part on the bargain and therefore he is entitled to an order of specific performance.”

I find that the plaintiffs herein performed their part of the bargain and they are entitled to an order of specific performance.

18. It is the plaintiffs evidence that they are in possession of their respective portions of the suit property. I find that they are entitled to quiet possession and I will grant an injunction.

19. In conclusion, I find that the plaintiffs have proved their case as against the defendant on a balance of probabilities. I enter judgment in their favour as against the defendant as follows:-

(a) That an order of permanent injunction is hereby issued restraining the defendant by himself, his servants and/or agents from charging and transferring land parcel number LR 14969/6, Kasarani to any other person other than the plaintiffs.

(b) That the defendant is hereby ordered to surrender to the plaintiffs the original titles No IR 53892 with respect to LR NO 14969/6 Kasarani together with the approved subdivision plans all relevant consents and approvals, receipts and transfer with stamp duty duly paid, deed plans and clearance certificates.

(c) That the defendant is hereby ordered to execute transfer for the sub-divided plots in favour of the plaintiffs within one twenty (120) days from the date of this judgment in default the Deputy Registrar of this honourable court do execute such transfers.

(d) That the plaintiffs shall have costs by this suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of February 2021.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kimani advocate for the plaintiffs

No appearance for the defendant.

Phyllis - Court Clerk