



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 862 OF 2012

LYDIA AKELO OCHUKA.....PLAINTIFF

VERSUS

CECILIA MWIKALI KALOKI.....1ST DEFENDANT

PHINAS MUNYOKI.....2ND DEFENDANT

JUDGEMENT

By an amended Plaint dated the 5th June, 2013, the Plaintiff prays for orders against the Defendants jointly and severally for:

- i. An order of specific performance directing the 1st Defendant to transfer the suit property to the Plaintiff being Plot No. A 434 DANDORA PHASE 1.
- ii. In the alternative to prayer (i) above, that the Defendants be ordered to refund to the Plaintiff the full purchase price paid being Kshs. 1,400,000/- but as per the current prevailing market rate of the property with interest.
- iii. An order restraining the 1st Defendant from alienating, parting in possession of the whole or part, altering the dimensions, boundaries and or any improvement thereon or in any manner whatsoever dealing with Plot No. A434 Dandora Phase 1, pending hearing and determination of this suit.
- iv. An order for payment of damages incurred by the Plaintiff as shall be proved during the hearing.
- v. Interest
- vi. Interest in (ii) and (iii) above at court rates from the date of payment.
- vii. Costs of the suit.

The Defendants never filed their respective Defences despite being duly served. The matter proceeded for hearing on 1st November, 2018.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that she purchased Plot No. A434 Dandora Phase hereinafter referred to as the 'suit plot' from the 1st Defendant. She paid a total of Kshs. 1,400,000 as purchase price to the 2nd Defendant who also signed the Sale Agreement dated the 15th February, 2011 on behalf of the 1st Defendant. She explained that the 1st and 2nd Defendants were together when the Sale Agreement was signed. Further, that the 1st Defendant gave authority in the presence of an Advocate that she was to transfer the purchase price to the 2nd Defendant. It was PW1's testimony that her husband signed the said Sale Agreement on her behalf but the 1st Defendant declined to transfer the suit plot to her. The 1st Defendant denied selling the suit plot to her. She reported matter to the Police and the 2nd Defendant has been charged with a criminal offence which matter is still pending in court. It was PW1's testimony that she had suffered damages, as she was unable to attend to her business while following up on the suit plot. She produced the Sale Agreement, Copy of Power of Attorney, Bank Statement etc to prove her claim

Both the Plaintiff and the 1st Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Plaintiff, Exhibits and Submissions including hearing the testimony of the Plaintiff's only witness, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought various orders including specific performance, refund of purchase price, injunction, special damages as well as costs and interest. The Plaintiff as PW1 admitted that it is her husband Nicholas Okello who executed a Sale Agreement dated the 11th February, 2011 on her behalf for the purchase of the suit plot. She confirmed effecting the payments through RTGS and Mpesa, which she produced in her evidence. It was the Plaintiff's testimony that the 1st Defendant gave a Special Power of Attorney to the 2nd Defendant to undertake the transaction on her behalf. However, a keen perusal of the Special Power Of Attorney which she produced as an exhibit indicates it was actually donated to her by the 1st Defendant. She however did not adduce any evidence to confirm that the 1st Defendant instructed the 2nd Defendant to undertake the transaction on her behalf. I note the Defendants never filed any pleadings to controvert the Plaintiff's averments and further never brought any witnesses to adduce evidence to the contrary. Despite the Plaintiff paying the full purchase price to the 2nd Defendant as evidenced by the proof of payments, the 1st Defendant declined to give the Plaintiff vacant possession of the suit plot. The Plaintiff averred that she reported the matter to the Police culminating in the 2nd Defendant being charged but the matter was still pending in court. The Plaintiff's main prayer is for specific performance and in the alternative refund of the purchase price she had paid including interest. Based on the evidence presented as well as the documents produced as exhibits and in relying on the case of **Nabro Properties Ltd V Sky Structures & 2 Others (2002)** eKLR where the Court of Appeal found that a party is entitled to specific performance where they are ready to comply with their part of the Agreement, I find that since the Plaintiff paid the full purchase price, she is indeed entitled to specific performance. I note the Plaintiff never took possession of the suit plot, which belonged to the 1st Defendant, after paying the full purchase price. However, since there was no evidence that the 2nd Defendant was acting on the instructions of the 1st Defendant and neither that the 1st Defendant participated in the transaction herein, I hold that the Plaintiff is entitled to a full refund of the purchase price including interest from the 2nd Defendant.

On the prayer for damages, it was the Plaintiff's testimony that she was unable to focus on her business as she was pursuing the issue of transfer from the 1st Defendant. In the case of **Samuel Kanogo Ritho V John Mwangi Kariithi & Another (1988)** eKLR, the Court held that in all cases where a Court has jurisdiction to deal with an application for specific performance, it shall be lawful for the same court to award damages.

Based on the analysis of the evidence before me, I find that since the Defendants have failed to transfer the suit plot to the Plaintiff who had incurred losses when she was following up on the transfer of the same to her name, she is indeed entitled to special damages.

As for the issue of injunction, I note the 1st Defendant is still the proprietor of the suit plot and since I have made a finding that the Plaintiff is entitled to a refund of the full purchase price with interest, I will decline to grant an order for injunction against the Defendants.

On the issue of costs, since the same generally abides the outcome of a suit, I will grant it to the Plaintiff.

In the circumstances, I enter judgement for the Plaintiff against the Defendants in the following terms:

- a) The 2nd Defendant be and is hereby directed to refund to the Plaintiff Kshs. 1,400,000/= as purchase price for plot No. A 434 DANDORA PHASE 1, including interest at court rates from 10th February, 2011, within 60 days from the date hereof in default execution to issue
- b) The Plaintiff be and is hereby granted special damages amounting to Kshs. 500,000
- c) The costs of the suit are awarded to the Plaintiff
- d) Interest at Court rates is awarded on (a) , (b), and (c) until payment in full.

Date signed and delivered in open court at Kajjido this 1st day of July, 2019

CHRISTINE OCHIENG

JUDGE