



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.268 OF 2015

BEATRICE WANJIRU KAMURIPLAINTIFF

VERSUS

JOHN KIBIRA MUIRURI.....DEFENDANT

JUDGMENT

(Plaintiff having purchased land from the defendant while it was under a subdivision; the land transferred to the plaintiff being less than what the defendant had promised her; defendant later putting up a wall between their land curving out more land from the plaintiff's parcel; plaintiff suing to have the full entitlement of her land and arguing that the extra acreage should come from the defendant's land; no alternative solution offered by the defendant; judgment entered for the plaintiff; part of defendant's land to be hived off and added to the plaintiff's land so that the plaintiff acquires the full plot that she had purchased)

1. Through a plaint filed on 31 October 2015, the plaintiff pleaded that on 22 November 2011, she purchased from the defendant a plot measuring 50 X 100 feet, being a subdivision of the land parcel Nakuru Municipality/Block 22/3805 (Muguga), at an agreed purchase price of Kshs. 1,300,000/=. She averred that she paid the purchase price in full and was issued with a title deed for the land parcel Nakuru Municipality/Block 22/3990 (Muguga) purportedly measuring 0.047 Ha. She has averred that the actual ground measurement is however 0.036 Ha, equivalent to 43 x 88 feet, which she came to be aware of when a contractor she had engaged to develop the plot informed her. She has pleaded that she wrote to the defendant who claimed not to have any alternative plot to compensate the plaintiff, though the plaintiff contends that the defendant owns the neighbouring parcel of land measuring approximately 0.0549 Ha. In the suit the plaintiff wants specific performance of the agreement of 22 November 2011.

2. In his statement of defence, the defendant denied having changed the measurements on the ground and also denied being the owner of the land parcel Nakuru Municipality Block 22/3808 measuring 0.0549 Ha. He pleaded that the wall surrounding this plot was there even before the plaintiff purchased the suit land. He otherwise put the plaintiff to strict proof.

3. In her evidence, the plaintiff testified inter alia that when she purchased the plot, the defendant had the mother title and a sketch of how he was to subdivide the land. She was later issued with title to the land parcel Nakuru Municipality Block 22/3990 (Muguga) (hereinafter referred to as the suit land). She mentioned that in the sale agreement, the plot was described as measuring 0.05 Ha, though the title deed indicated 0.047 Ha. In the year 2014, she engaged an architect who measured the ground at 45 x 95 feet, but she had no problem with this, as the shortfall was not significant. However, the defendant put up a wall, and when they later measured the land, it was now 43 x 83 feet which put her in a fix because the

plans that she had made could not now fit what was left of the plot. She mentioned that she had by then already spent significant amounts of money to the National Construction Authority, National Environment Management Authority, payment for the bills of quantities, connection of water, building materials, and construction of an underground tank. He called the defendant who refused to compromise. She engaged an advocate who formally wrote to the defendant and the reply received was that the defendant had been misled by the surveyor and the defendant offered to refund some money back to the plaintiff as he had no more land. She testified that this is not true because the plaintiff owns the adjacent land being Nakuru Municipality Block 22/3993 and she produced the official search to prove as much. She stated that she is now helpless since she cannot develop the land as she had planned.

4. Cross-examined, she reiterated that she purchased the plot while it was still described in a sketch and no beacons had been placed though there were temporary markings to show the boundaries. There was however a fence which marked the boundaries of the mother title. Re-examined, she explained that the plot she bought bordered this fence and that she paid Kshs. 6,000/= for it to be maintained. The defendant however removed it and put up a wall that encroached into her land.

5. In his evidence, the defendant acknowledged having entered into the sale agreement referred to by the plaintiff. He stated that after the sale agreement, a mutation form was drawn and that he gave the plaintiff a copy of it, before she paid the balance, and issued her with title. He denied encroaching into her plot, and contended that the wall in issue was always there, having been built about 20 years ago, and was there when the plaintiff purchased her plot. He mentioned that he has sold all the other subdivisions and has no more land to give the plaintiff. Cross-examined, he acknowledged the sale agreement and admitted that there was a sketch attached to the sale agreement which identified the plots. What the plaintiff purchased was then identified as "Plot-A". He admitted owning the Plot No. 3993 though he stated that it belongs to his family. He insisted that he has no additional land to give the plaintiff.

6. I invited counsel to file submissions and they both did. I have taken note of these in arriving at my decision. I hold the following view of the matter.

7. It is common ground that the defendant sold to the plaintiff land that was described in the sale agreement as a 50 X 100 feet plot. It however seems that when the plaintiff prepared the mutation form for the subdivision of the mother plot, he had the plot sold to the plaintiff measured at 0.037 Ha, which was less than 50 x 100 feet (which would be about 0.05 Ha) that he had agreed to sell to the plaintiff. The title that he handed over to the plaintiff shows a measurement of 0.047 Ha, but it is apparent that this is not the measurement on the ground, which is 0.037 Ha, similar to what is in the mutation form. That forms the basis of the plaintiff's case, that what was sold to her is not similar to the title that has been given to her. The defendant principally blamed the surveyor who did the job, but I have little sympathy for him, for it is him (defendant) who signed the mutation form. He ought to have noted that the "Plot-A" being sold to the plaintiff was less than what he had promised to sell to her. Further, if indeed he thought the surveyor was to blame, he ought to have sued him as third party in this case, which he has not. My own view of the matter is that the defendant was aware that what had been measured for the plaintiff was less than what he actually sold to her.

8. The plaintiff in this suit wants the full plot that she purchased. She has pointed out that the defendant owns the adjacent land, a plot Nakuru Municipality/Block 22/ 3993, from which she can get the extra land. It actually does appear to me that the plot Nakuru Municipality Block 22/ 3993 owned by the defendant, was also carved out of the mother title and that the defendant reserved this portion for himself. If the land was measured as it had been sold to the plaintiff, a portion of the plaintiff's land would fall within this plot Nakuru Municipality/Block 22/ 3993. I can therefore connect with the reasoning of the plaintiff that this plot Nakuru Municipality/Block 22/3993 ought to be the plot from which she should get the full entitlement of what she purchased.

9. The defendant has raised a defence of not having any more land to give, and has really offered nothing to make amends to the plaintiff. As far as I can see, he has the plot Nakuru Municipality/Block 22/ 3993, and as I have mentioned, if the mutation was properly done, a portion of the plaintiff's land would have fallen within the plot Nakuru Municipality Block 22/3990, for the plaintiff to end up with land measuring

0.05 Ha. Because the defendant has no alternative solution, I will order that his land, comprised in the land parcel Nakuru Municipality/Block 22/ 3993, be subdivided and a portion of it added to the plot Nakuru Municipality/Block 22/ 3990 owned by the plaintiff, so as to make the plaintiff's land end up being 0.05 Ha. The costs of the mutation exercise, the formal subdivision, and preparation of new titles for both parcels of land will be shouldered by the defendant, and if the plaintiff pays for the same, the defendant must reimburse the plaintiff these sums or else the plaintiff will be at liberty to execute for the same.

10. I believe that once the plaintiff gets the full measure of land that she purchased, she can proceed with her developments as she had planned and I am thus not persuaded that she deserves to be paid any of the amounts that she mentioned to have expended in preparing to develop the land. I probably would have been moved to make an award of general damages for breach of contract but the plaintiff made no pleading on this and I will thus not make any such award.

11. The defendant will however shoulder the costs of this suit.

12. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kahono holding brief for Mrs. Mukira for the plaintiff.

Ms. Githae holding brief for Ms. Wanjiku Wamae for defendant.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU