



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 182 OF 2015**

**MARY AKWAM NYANTINE Suing as the Legal Administrator of the Estate of**

**THOMAS NYANTINE BIOTO-Deceased.....PLAINTIFF**

**VERSUS**

**FLORENCE NYARONGE**

**GEORGE NYANDUSI NYARONGE (Sued as the Legal Administrators of the estate of**

**HENRY M. GISEGE –Deceased).....DEFENDANTS**

**JUDGMENT**

**INTRODUCTION**

1. The Defendants are the widow and son of Henry Mokuia Gisege - deceased. The Plaintiff filed suit against the Defendants claiming that he entered into a land sale agreement with the deceased on 8<sup>th</sup> March 2008, whereby he agreed to buy a portion of land parcel number WANJARE/NYAMBUNWA /124 measuring 25 feet by 100 feet at an agreed price of Kshs. 380,000/=. He paid a deposit of Kshs. 200,000/= but the deceased died before the sale was completed. The deceased's family requested him to make a further payment of Kshs. 40,000/= to enable them meet the deceased's funeral expenses. It was agreed that this amount would be considered as part of the purchase price. It is therefore the Plaintiff's case that he paid a total of Kshs. 240,000/= leaving a balance of Kshs. 140,000/=. The Defendants had promised to conclude the sale and transfer the suit property to the Plaintiff but they have failed to do so. The Plaintiff therefore seeks an order of specific performance to have the suit property transferred to his name. In the alternative, he seeks a refund of Kshs. 240,000/= together with interest from November 2008.

2. The Defendant filed a Statement of Defence dated 11<sup>th</sup> June 2015 denying the Plaintiff's claim. They claim that they only learnt of the sale agreement between the Plaintiff and the deceased after the deceased had died.

3. Thereafter the case was set down for hearing and both parties testified and called their witnesses. The original Plaintiff testified before my brother Justice Mutungi on 19.7.2019. He later died on 15.3.2019 and he was substituted with his widow and the Administrator of his estate Mary Akwam Nyantine. The plaint was subsequently amended on 24.10.2019 to reflect the name of the new plaintiff. The defendants testified on 15.2.2021.

**PLAINTIFF'S CASE**

4. The original Plaintiff (Thomas Nyantine Boito) who testified as PW1 stated he entered into a sale agreement with Henry Mokuia Gisege - deceased on 8<sup>th</sup> March 2008 whereby the said Henry Gisege agreed to sell him a parcel of land measuring 100 feet by 25 feet at an agreed purchase price of Kshs. 380,000/=. He paid Kshs. 200,000/=. He later learnt that the deceased had died and he attended a meeting on 22<sup>nd</sup> April 2008 at the home of the deceased where his family members requested him to give them some money to enable them cater for the funeral expenses of the deceased. He stated that he gave the deceased's family the sum of Kshs. 35,000/= which they agreed would be considered as part of the purchase price. He later gave one Ruth Mokuia (one of the deceased's widows) the sum of Kshs.5,000/=. He subsequently learnt that the Defendants had obtained a Grant of Letters of Administration in respect of the estate of the deceased but they were unwilling to complete the sale. He sent a demand letter to the 1<sup>st</sup> Defendant but she did not respond.

5. Ruth Bosibori Mokuia testified as PW2. She told the court that the deceased was her husband. She was aware that he had sold the suit property to the Plaintiff on 8.3.2008 at an agreed purchase price of Kshs. 380,000. She said that she was a witness to the said sale agreement

and she was aware that the Plaintiff had paid a deposit of Kshs. 200,000/=. She confirmed that the Plaintiff paid them Kshs. 35,000 when the deceased died and she received a further sum of Kshs. 5,000 from the Plaintiff. She was of the view that the plaintiff was within his rights to claim the sum of Kshs. 240,000/= which he had paid to the deceased's family.

6. Upon cross-examination she said the Defendants were not present at the time of the sale. She confirmed that the family of the deceased had received a sum of Kshs. 40,000 from the Plaintiff. She told the court that the sum of Kshs. 140,000/= was still outstanding.

7. Peter Nyakeyo Gisege who testified as PW3 stated that he was the brother of the deceased and that he was aware that his late brother had sold a parcel of land to the Plaintiff. He corroborated PW2's testimony that the Defendants were not present when the deceased entered into the sale agreement with the Plaintiff. He told the court that he was present when the Plaintiff paid the sum of Kshs. 200,000 but he was not present when the sum of Kshs. 40,000 was paid.

## **DEFENDANT'S CASE**

8. The 1<sup>st</sup> Defendant testified as DW1. She told the court that she was the widow of the late Henry Gisege who died on 15<sup>th</sup> April 2008. She stated that before his death, her husband had bought land parcel no. WANJARE/NYAMBUNYWA/124 measuring 50 feet by 100 feet and they took possession thereof. She stated that after her husband's death she applied for a Grant of Letters of Administration vide Kisii HC Succession Cause No. 440 of 2008. She obtained a Grant which was subsequently confirmed. She then had the suit property transferred to her by way of transmission. She said that she was not aware that her late husband had sold their land to the Plaintiff as he never informed her of the sale. She only learnt of the sale agreement in 2008 when she was shown the same by the Plaintiff.

9. The 2<sup>nd</sup> Defendant George Nyandusi Mokuia testified as DW2. He stated that he was the son of Henry Gisege –deceased. He testified that he was not at home when his late father entered into the sale agreement with the Plaintiff as he was away in Nairobi where he was working at the time. He told the court that he only learnt about the sale during his father's funeral. He said that his father died one month after the purported sale and he was surprised that his father had not informed him about the sale as he often consulted him about his transactions. Upon cross-examination he stated the he doubted the authenticity of the sale agreement as it had some alterations with respect to the parcel number which was altered from parcel 125 to 124. He confirmed that his mother (PW1) was in occupation of the suit property.

10. At the end of their testimonies, the parties were granted time to file their written submissions. The Plaintiff filed his submission on 12<sup>th</sup> March 2021, while the Defendant filed his on 17<sup>th</sup> March 2021.

## **PLAINTIFF'S SUBMISSIONS**

11. Learned counsel for the Plaintiff submitted that the Plaintiff entered into a valid sale agreement with the 1<sup>st</sup> Defendant's late husband over the suit property and the Defendants had not proved that the said sale was fraudulent. It was his further submission that the said agreement did not suffer any defect, mistake or illegality and it was therefore enforceable. He therefore urged the court to grant the order of specific performance. He relied on the case of **Thrift Homes Limited v Kenya Investment Limited (2015) eKLR**.

## **DEFENDANT'S SUBMISSIONS**

12. On the other hand, learned counsel for the Defendants submitted that the deceased had no authority to sell the suit property as the 1<sup>st</sup> Plaintiff had contributed to the purchase of the same. It was his submission that it was not clear from the sale agreement whether the deceased sold parcel no. 125 or 124 as the advocate who drafted the said sale agreement was not called as a witness. He further submitted that the Plaintiff had not paid the full purchase price as the balance of Kshs. 140,000 remained unpaid 13 years after the sale and therefore the order of specific performance could not be granted as the sale was never completed. He submitted that the Plaintiff's only recourse was for the balance of the amount paid to the deceased's 2<sup>nd</sup> wife Ruth Mokuia (PW2).

## **ISSUES FOR DETERMINATION**

1. Whether there was a valid sale agreement in respect of parcel number WANJARE/NYAMBUNYWA/124 between the plaintiff and Henry Gisege –deceased.
2. Whether the plaintiff is entitled to an order of specific performance.

## **ANALYSIS AND DETERMINATION**

13. It is not in dispute that the Plaintiff entered into a sale agreement with the deceased in respect of the suit property. The Plaintiff produced a copy of the sale agreement signed by both parties as Plaintiff's exhibit 1. Even though there appears to be some alteration in the parcel number, it is clear that the parties are aware of the land parcel in dispute. The sale agreement indicates that the agreed purchase price is Kshs. 380,000/=. In his evidence, the Plaintiff stated that he had paid a deposit of Kshs. 200,000/= to the vendor followed by an additional amount of Kshs.40,000 which he paid to the vendor's family after the vendor's death. This leaves a balance of Kshs. 140,000/= which remains unpaid to date.

14. In the case of **Thrift Homes Limited v Kenya Investment Limited (2015) eKLR**, the court held that

**“Specific Performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of Specific Performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality.”**

15. In the instant case the sale agreement, though not illegal is deficient as the purchase price or contract sum was not paid in full nor has the Plaintiff indicated his willingness to pay the same.

In the case of **Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhbuti Civil Appeal No.165 of 1996** quoted in the case of **Thrift Homes Limited** (supra) the Court of Appeal observed as follows:

**“When the appellants sought the relief of specific performance of the sale of the respondent’s property...they must have been prepared to demonstrate that they were ready and willing to perform all the terms of the agreement which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the agreement. It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver to the respondents the balance of the purchase price of the suit property as stipulated in the agreement. There was however no express stipulation nor indication in the agreement that time was of essence in the agreement....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. Indeed a plaintiff must show that he performed all the terms of the contract which he has undertaken to perform whether expressly or by implication and which he ought to have performed at the date of the writ in the action..”**

26. At paragraph 11 of the Plaintiff, the Plaintiff set out the particulars of breach of contract by the Defendants, but he has cleverly avoided to state whether he honoured his part of the bargain. It is also not lost to me that he has at paragraph 14 of the Plaintiff included an alternative prayer for a refund of the sum of Kshs. 240,000 being the consideration so far paid with interest from November 2008. This shows that he recognizes that his prayer for specific performance is not well-founded.

17. In the circumstances it would be unjust, inequitable and unconscionable to require the Defendants to part with possession of the suit property 13 years after the sale agreement was signed when its market value has significantly appreciated and when it is clear that the Plaintiff had only paid part of the agreed purchase price.

18. In view of the foregoing, I find and hold that the Plaintiff is not entitled to an order of specific performance.

19. Having said that, it would be unconscionable for the Defendant to keep both the amount they were paid as part payment of the purchase price as well as the suit property. In the circumstances, I find that the Plaintiff has proved her case on the alternative prayer for a refund of the purchase price. I therefore enter judgment for the Plaintiff on the alternative prayer and make the following final orders:

a. Kshs. 240,000 being a refund of the purchase price in respect of land parcel number WNAJARE/NYAMBUNWA/124 together with interest at court rates from the date of filing suit until payment in full.

b. The Defendants shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**