



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 671 OF 2014

CYRUS KIMAMO WARUI

(suing as the Attorney of Johnson G. Kariuki Gathigi).....PLAINTIFF

VERSUS

MARY WANGECHI KAMARA

(suing as legal representative of the estate of Charles Mwaniki Kamara (deceased)....DEFENDANT

JUDGMENT

A. THE PLAINTIFF'S CASE

1. By a plaint dated 23rd October, 2006, the Plaintiff sought the following reliefs against the Defendant:

(a) An order for the cancellation of the sub-division of the land Title No. Aguthi/Gatitu/248 (now extinguished) or alternatively the resultant sub-divisions Title No. Aguthi/Gatitu/3663 and Aguthi/Gatitu/3664 be amalgamated.

(b) An order for specific performance of contract, requiring or compelling the Defendant to specifically transfer equivalent of land Title No. Aguthi/Gatitu/248 (now extinguished) as now comprised in the resultant sub-divisions thereof of Title No. Aguthi/Gatitu/3663 and Title No. Aguthi/Gatitu/3663 or the amalgamated parcel thereof to the Plaintiff.

(c) An order for permanent injunction restraining the Defendant, his agents, servants from selling, transferring, charging, building or developing, sub-dividing or in any way disposing of, entering and or committing any other acts of waste and or interfering with the Plaintiff's possession in Title No. Aguthi/Gatitu/3663 and Aguthi/Gatitu /3664 (previously Title No. Aguthi/Gatitu/248).

(d) Costs and interest.

(e) Any other relief the Honourable court may deem fit to grant.

2. The Plaintiff pleaded that by a sale agreement dated 30th March, 1993 he purchased Title No. Aguthi/Gatitu/248 (*Parcel 248*) from the Defendant and paid the full purchase price for it. It was further pleaded that although the Defendant signed a transfer form in his favour and obtained the consent of the Land Control Board for the transaction, he thereafter fraudulently sub-divided *Parcel 248* into Title Nos. Aguthi/Gatitu/3663 and 3664 before the Plaintiff could lodge the transfer documents for *Parcel 248* for registration.

3. The Plaintiff contended that the Defendant's said action amounted to breach of contract, breach of trust and fraudulent conduct hence the suit. It was further pleaded that the Defendant had caused both *Parcels 3663* and *3664* to be registered in his name upon sub-division.

B. THE DEFENDANT'S CASE

4. The Defendant filed a defence dated 16th January, 2007 in which he denied the Plaintiff's claim in its entirety. The Defendant pleaded that, in any event, it was the Plaintiff who was in breach of the sale agreement dated 30th March, 1993 by failing to pay the balance of the purchase hence he had only himself to blame for his predicament.

C. THE SUMMARY OF EVIDENCE AT THE TRIAL

5. When the suit was set down for hearing on 12th July, 2021 only the Plaintiff and his witnesses attended court. The Defendant did not attend the hearing despite service of a hearing notice. The Plaintiff called 3 witnesses in support of his case and produced the documents in his list of documents as exhibits. It was the Plaintiff's case that after the parties signed the sale agreement dated 30th March, 1993 he paid the entire purchase price for Parcel 248 in consequence whereof the Defendant obtained consent of the Land Control Board and signed a transfer form to facilitate transfer. The Defendant also handed possession of Parcel 248 to the Plaintiff at the material time.

6. It was the Plaintiff's evidence that due to financial constraints, he did not immediately lodge the transfer documents for registration and that when he eventually did, he was notified by the Land Registrar Nyeri that Parcel 248 was no longer in existence since it had been subdivided by the registered owner to create Parcels Nos. 3663 and 3664. The Plaintiff, therefore, contended that it was the Defendant who was in breach of the sale agreement hence the need for an order for specific performance.

D. THE ISSUES FOR DETERMINATION

7. The court has considered the pleadings, evidence and material on record. The court is of the opinion that the following issues arise for determination in this suit:

(a) Whether it was the Plaintiff or the Defendant who was in breach of the sale agreement dated 30th March, 1993.

(b) Whether the Plaintiff is entitled to the reliefs sought.

(c) Who shall bear costs of the suit.

E. ANALYSIS AND DETERMINATION

(a) Whether it was the Plaintiff or the Defendant who was in breach of the sale agreement dated 30th March, 1993

8. The court has considered the Plaintiff's submissions on this issue. It is evident from the material on record that the parties had entered into a written agreement dated 30th March, 1993 for the sale of Parcel 248. The material further shows that the Defendant obtained consent of the Land Control Board and that he signed a transfer form to facilitate transfer to the Plaintiff. The evidence on record further shows that the Defendant afterwards created a road over Parcel 248 by sub-dividing it into Parcel Nos. 3663 and 3664 for reasons which are unclear from the record.

9. The Plaintiff's oral and documentary evidence was not challenged at the trial since the Defendant's personal representative did not attend court for trial. There is no evidence on record to demonstrate that the sale agreement was ever rescinded, repudiated, or affected by any of the factors which may vitiate an otherwise valid contract. The Defendant did not tender any evidence to support the allegation that it was the Plaintiff who was in breach of the sale agreement. Accordingly, the court is inclined to accept the Plaintiff's evidence that it was the Defendant who was in breach of the sale agreement dated 30th March, 1993.

(b) Whether the Plaintiff is entitled to the relief sought

10. The court has considered the evidence and submissions on record on the issue. The Plaintiff essentially seeks to obtain registration of the suit properties through specific performance upon cancellation of the sub-division of Parcel 248. An order for specific performance may issue in favour of a litigant who has demonstrated that he has already performed, or that he is ready and willing to perform, his part of the agreement. The material on record shows that the Plaintiff has performed his part of the agreement by making payment of the purchase price.

11. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd* [2006] eKLR, the court made the following pronouncement on specific performance:

“The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable. In this respect, damages are considered an adequate alternative remedy where the claimant can readily get the equivalent of which he contracted for from another source...”

12. Since the Defendant has failed to tender evidence to demonstrate that the Plaintiff was in breach of the agreement or that the sale agreement was invalid or suffered from any legal infirmity, the court is satisfied that the Plaintiff is entitled to the reliefs sought in the plaint including an order for specific performance of the sale agreement. However, once the Plaintiff succeeds on prayers (a) and (b) of the plaint, it shall not be necessary to grant the injunction sought in prayer (c) to restrain the Defendant from dealing with the suit properties since he will no longer be the registered owner.

(c) Who shall bear costs of the suit

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). Accordingly, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Oversees Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit.

F. CONCLUSION AND DISPOSAL

14. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his case against the Defendant to the required standard. Accordingly, judgment is hereby entered for the Plaintiff against the Defendant in the following terms:

- (a) An order for cancellation of the sub-division of Title No. Aguthi/Gatitu/248 is hereby granted and the said parcel be restored into the land register as it existed prior to its sub-division.
- (b) An order for specific performance is hereby made requiring the Defendant to transfer Parcel No. Aguthi/Gatitu/248 to the Plaintiff within 30 days from the date hereof.
- (c) In default of the Defendant's compliance with Order No. (b) above, the Deputy Registrar of the court shall sign and execute all forms and documents necessary to facilitate the transfer of the suit property to the Plaintiff.
- (d) The prayer for a permanent injunction in terms of prayer (c) of the plaint is hereby declined.
- (e) The Plaintiff is hereby awarded costs of the suit.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM. IN THE PRESENCE OF:

MR. MAHINDA FOR THE PLAINTIFF MR. OMBONGI FOR THE DEFENDANT

CA- Carol

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Y. M. ANGIMA

JUDGE