



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURT

ELC CASE NO. 1022 OF 2015

MICHAEL MBOGO WAMBUGU.....PLAINTIFF

-VERSUS -

EMBAKASI RANCHING COMPANY LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff herein filed and/or commenced the instant suit vide Plaintiff dated the **15th October 2015**, whereby the Plaintiff seeks the following reliefs;

i. There be a Declaration that the Plaintiff is the lawful, exclusive owner/allottee of the plot known as F171 situate in Ruai, within the Embakasi Ranching Scheme.

ii. A permanent Injunction does issue against the Defendant, servant and/or employees from trespassing,, alienation, damaging, evicting the Plaintiff jointly and/or severally from plot F171, situate in Ruai within the Embakasi Ranching Scheme and/or destruction of any part of the developments thereon and/or otherwise, howsoever from interfering with the said plot all together.

iii. The Defendant does facilitate the processing the title for plot number F171, situate in Ruai within the Embakasi ranching scheme that it allocated to the Plaintiff.

iv. Costs of the suit.

2. Following the filing of the subject suit, the Plaintiff extracted the summons to enter appearance and the Plaintiff, which were then served upon the Defendant, in terms of the affidavit of service sworn on the 19th August 2019, though filed on the 20th August 2018.

3. It is imperative to note that even though the Defendant herein, was duly served with summons to enter appearance and plaintiff, same however did not deem it fit and/or appropriate to enter appearance and/or file a statement of defense.

4. Pursuant to and as a result to the failure by the defendant to enter appearance and/or file the Statement of Defense, the Plaintiff herein requested for Interlocutory judgment vide the Request dated the 19th August 2019. However, the request for judgment, was not endorsed and correctly so, because the Reliefs sought vide the Plaintiff, did not contain a liquidated claim, to warrant such a Request, whatsoever..

5. Be that as it may, the Plaintiff was directed and/or ordered to fix the matter for formal proof and thereafter prove the case, in accordance with the provisions of the law, requiring that in the absence of a defense, such matter be set down for formal proof, to enable the concerned Party, in this case, the Plaintiff to tender Evidence.

Evidence by the parties

Plaintiff's case

6. The Plaintiff in the subject matter testified as PW1, whereupon the Plaintiff intimated that Plot No. F171, [hereinafter referred to as the

suit property], initially belonged to and was allocated to one Johnson Musyoka Lavu, who thereafter entered into a land sale Agreement with the Plaintiff, culminating into the execution of the land sale agreement made on the 13th September 2000.

7. It was the Plaintiffs further testimony that upon the execution of the land sale Agreement and after paying the vendor the agreed purchase price, the vendor took the Plaintiff and introduced same to the Defendant, with a view of formalizing the transfer of the share to and/or in favor of the Plaintiff.

8. The Plaintiff further testified that when same was introduced to the Defendants organization, the Defendant required that the Plaintiff do pay the sum of Kes.8, 000/=, to facilitate *inter-alia* issuance of the non-member certificate, to enable the Plaintiff herein to be recognized, as a legitimate owner of the Land in question, in lieu of the Member certificate, which had been issued in favor of the vendor.

9. The Plaintiff further testified that pursuant to the request, (details in terms of the preceding paragraph), he indeed made a payment and same were duly acknowledged and receipted, by none other than the Defendant herein and thus confirming the knowledge and concurrence of the Defendant, as pertains to the transaction between the vendor and the Plaintiff herein.

10. Further the Plaintiff averred that upon making the payments as requested by the Defendants, same was thereafter allowed to take possession over and in respect of the suit property.

11. However, the Plaintiff avers that despite entering upon and taking possession of the suit property, the Defendant herein latter turned their back on him and started interfering with the development activities over and in respect of the suit property.

12. It was the Plaintiffs further testimony, that as a result of the frequent interference with his activities, over and in respect of the suit property, he was constrained to file and/or lodge the instant suit.

13. On the other hand, the Plaintiff also testified that simultaneously with the filing of the suit, same also filed an Application for temporary injunction to stop the offensive activities and threatened destruction by the Defendants and/or the Defendants agents and/or servants. In this regard, the Plaintiff procured and obtained an order of temporary injunction, which was issued on the 29th October 2015.

14. Nevertheless, the Plaintiff further stated that despite the grant of the orders of temporary injunction, the Defendant herein, proceeded to and caused destruction to the developments and/or buildings, which the Plaintiff had erected and/or otherwise constructed on the suit property.

15. Finally, the Plaintiff pointed out that even though he is the legitimate owner of the suit property, the Defendant, has since barred and/or prohibited the same from entering upon and/or continuing with the development over the suit property. In this regard, the Plaintiff therefore sought for the Reliefs at the foot of the Plaintiff.

Defendant's case

16. As pointed out elsewhere herein before, the Defendant did not enter appearance and/or filed Statement of Defense. In this regard, no evidence was therefore offered and/or tendered on behalf of the defense.

Issues for determination

17. The Plaintiff's case herein revolves around the purchase and thus acquisition of ownership rights over and in respect of the suit property. In any event, it is only the Plaintiffs evidence which is on board.

18. Having reviewed the pleadings filed as well as taking into consideration the witness statement, which was adopted by the Plaintiff as evidence in chief and the subsequent oral evidence tendered in court, I am of the view that the following issues are appropriate and relevant for determination

- i. Whether the suit property was lawfully sold to and thus belongs to the Plaintiff.
- ii. Whether the Plaintiff is entitled to Specific Performance/transfer of the suit property.
- iii. Whether the Plaintiff's rights over and in respect of the suit property merits protection under the law.

Issue number 1

Whether the suit property was lawfully sold to and thus belongs to the Plaintiff.

19. From the documents tendered by the Plaintiff, it is common ground that the suit property fell within the Embakasi ranching scheme, belonging to and registered in the name of the Defendant.

20. It is also common ground that the Defendant herein, had members, who were issued with share certificates and which thus enabled each member to be allocated a designated plot, corresponding with the share certificate.

21. Be that as it may, the Plaintiff tendered evidence that one Johnson Musyoka Lavu, hereinafter referred to as the vendor, was the allottee

and thus owner of the suit property. In this regard, the plaintiff tendered a copy of the vendors membership certificate.

22. On the other hand, the Plaintiff also adduced evidence that the vendor, who was a legitimate member of the Defendant, was keen to sell and in this regard the vendor and the Plaintiff entered into and executed a land sale agreement dated the 13th September 2000, whereby the vendor transferred his rights and shares as pertaining to the suit property to and/or in favor of the Plaintiff.

23. Besides, the Plaintiff also adduced evidence that after the entry into and execution of the sale agreement, the vendor introduced the Plaintiff to the Defendant, whereupon the Defendant demanded from the Plaintiff the payments of various sums of monies amounting to an aggregate of Kenya shillings 34, 000/-, for various reasons, including the issuance of a nonmember certificate.

24. Though the vendor had not been issued with a certificate of title, over and in respect of the suit property, the Defendant confirmed and authenticated that same was the legitimate Owner thereof, on account of the membership certificate, which effectively conferred rights in favor of the vendor.

25. Similarly, by virtue of having been the legitimate owner, premised on the membership certificate, the vendor was thus conferred with lawful rights, to sell, alienate and/or dispose of same in favor of the Plaintiff. In this regard, the sale agreement which was ratified by the Defendant, upon issuance of the non member certificate therefore vested upon the Plaintiff lawful rights over the suit property.

26. In view of the foregoing and taking into account, that the sale transaction between the vendor and the Plaintiff, received the sanction and concurrence of the Defendant, it is therefore my finding that the suit property was lawfully sold to and thus belongs to the Plaintiff herein.

Issue number 2

Whether the Plaintiff is entitled to Specific Performance/transfer of the suit property.

27. The Defendant herein having sanctioned ,approved and/or otherwise ratified the sale agreement between the vendor and the Plaintiff and having thereafter levied charges against the Plaintiff, on account of issuance of the non member certificate, the Defendant herein is now bound by the Representations made to and/or in favor of the Plaintiff.

28. In any event, the Plaintiff herein has performed all the obligations placed upon him, including the payments of the full purchase price in favor of the vendor, as well as the payments of the levies that were demanded by the Defendant, to facilitate the transfer of the suit property to the Plaintiff.

29. Having complied with all the obligations that were expected of him and which were founded on the *inter-alia* the Representations by the Defendant that same was willing to transfer the suit property to the Plaintiff, the Defendant cannot now renege and/or run away from the legitimate expectation that has accrued in favor of the Plaintiff.

30. I similarly hold the view, that having extracted levies from the Plaintiff, culminating into the issuance of the non member certificate, relating to the suit property herein, the Defendant is now estopped to contend that the Plaintiff herein is not the lawful owner of the suit property .In this regard, the Plea of Estoppel would suffice.

31. At any rate, to the extent that the Plaintiff has fully performed what was expected from him, as far as the purchase and transfer of the suit property concerned, the Plaintiff is certainly, entitled to completion of transaction by way of transfer of the suit property in his favor.

32. On the other hand, the Defendant having *hitherto* made representations based on *inter-alia* receipt and acknowledgement of various levies, as well as issuance of the non-member certificate, same ought to be compelled to complete and effectuate the transaction by way of processing the title and issuance of same to the Plaintiff.,

33. In the premises, I hold the humble opinion that this is a case where an order for specific performance, ought to issue, against the Defendant, who by conduct and actions have *hitherto* made representations to the Plaintiff, but are now seeking to frustrate the contract. Suffice it to say, that specific performance intervenes in such situations, to enable the completion of the transaction.

34. To vindicate the foregoing position, I take guidance from and do adopt the holding in the decision in the **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR**, where the honourable court held as hereunder;

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

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. Even where a contract is valid and enforceable, specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

Issue number 3

Whether the Plaintiff's rights over and in respect of the suit property merits protection under the law.

35. I have pointed out, that the Plaintiff herein entered into a lawful sale agreement with the vendor, who was a lawful share holder in the Defendant's organization and who held ownership of the suit property .For clarity, the Defendant herein did not dispute and/ or contest the vendors Title, whatsoever.

36. Having bought, purchased and/or acquired rights over the suit property, the Plaintiff herein is entitled to benefit from and/or partake of the rights attendant to the suit property.

37. In any event, even though the suit property, is still registered in the name of the Defendant, the fact that the Plaintiff owns the share which confers ownership to the suit property, is by itself sufficient to attract protection and by extension, intervention of the Honourable Court.

38. Consequently, I find and hold that the Plaintiff's rights over and in respect of the suit property, (*which was lawfully sold*) ought to and should thus attract vindication.

Costs

39. Pursuant to the provisions of Section 27 of the Civil Procedure Act, Chapter 21, Laws of Kenya, costs follow the event and in this case, the event is that, the Plaintiffs case is meritorious. In this regard, the order that commends itself as pertains to cost, is that the Plaintiff is entitled to same.

Final disposition

40. In conclusion, the Plaintiff has proved his case on a balance of probabilities and same is thus entitled to judgment. Consequently, Judgment be and is hereby entered in terms of prayers 1, 2 and 3 of the Plaint dated **15th October 2015**.

41. The Plaintiff herein shall have the costs of the Suit.

42. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT MILIMANI.

In the Presence of;

June Court Assistant

1. Onyango advocate for the Plaintiff.