



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 570 OF 2017

JANE WAMBUI & ROBERT KAGUNYA KAMAU

(Suing as the Administrators of the Estate of EMMA

WANGUI KAMAU-Deceased).....PLAINTIFFS

VERSUS

BENARD HERMAN KARANJA.....1ST DEFENDANT

TELEPOSTA PENSION SCHEMNE TRUSTEES.....2ND DEFENDANT

JUDGMENT

By a Plaint dated **18th May 2017**, the Plaintiffs herein sought for Judgment against the Defendants Jointly and Severally for the following Orders;-

a) An order of Specific Performance to compel the 1st Defendant to do all that is necessary to facilitate the transfer of plot Number Thika Municipality Block 9/301, from the 2nd Defendant to the Plaintiffs and or in the alternative the 2nd Defendant be ordered to transfer the said subject plot into the names of the Plaintiffs.

b) Mesne profits

c) Costs of this suit

d) Any other or further relief that this Court may deem fit to grant.

The Plaintiffs averred that by an agreement dated **15th February 2006**, the Defendant sold the suit property to **Emma Wangui Kamau at a consideration of Kshs.3,800,000/=** . That on the said date the Deceased paid a deposit of **Kshs.500,000/=** and was to pay the balance thereof as per the terms of the said agreement. That the suit property was to be transferred directly to the Deceased by the 2nd Defendant as the 1st Defendant was purchasing the said plot from the 2nd Defendant. Further that the Deceased paid to the 1st Defendant a total sum of **Kshs. 3,800,000/=** for which the 1st Defendant acknowledged in writing .

That despite several promises , the 1st Defendant has failed to facilitate the transfer of the suit property by the 2nd Defendant . That the Plaintiffs have learnt that the 1st Defendant wants to renege on the sale agreement and fails to transfer the suit property to the Administrators of the Deceased and they are thus seeking an order of specific performance.

The suit is contested and the 2nd Defendant filed a statement of Defence dated **5th June 2018**, and denied all the allegations made in the Plaint. That it sold the suit property to the 1st Defendant and signed a transfer in his favour. It denied signing any agreement with the Deceased and did put the Plaintiffs to strict proof . It was contended that the Plaintiffs suit is misconceived, frivolous and vexatious and discloses no cause of action.

The 1st Defendant filed his Defence dated **13th July 2018**, on **18th July 2018**, and denied all the allegations made in the Plaint . That the 1st Defendant was led to believe that he had capacity to sell the suit property whereas the same was not registered in his name. That the sale agreement to effect transfer directly from the 2nd Defendant, who was not a party to the Contract, was flawed and or erroneously so indicated and he thus could not transfer whereas, he was not the registered owner. That the sale agreement collapsed due to the fact that the 1st Defendant could not effect transfer of the property in issue as he was not the registered owner and at the time of the completion of the transaction being ninety(90)days, had lapsed before compliance . That the suit as filed is bad in law and vexatious.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for herself and closed her case and the Defendant called 2 witnesses

PLAINTIFFS' CASE

PW1 Jane Wambui Kamau adopted her witness statement dated **6th May 2019** as her evidence in Court. She further produced the list of documents as Exhibits 1 to 6 and further produced the valuation report as an exhibit. She testified that the sale agreement was clear and the same was drawn by an Advocate. That the payment was not done in three months and that there was no notice and the vendor continued to receive the money. Further, that the 2nd Defendant were involved from the beginning and they are the ones who drew the sale agreement and the monies were paid to the Advocate representing **Tele Posta** and the receipts were issued in her mother's name.

That the 1st Defendant was going to buy the suit property from the 2nd Defendant. That the sale agreement dated **18th..... 2006** talks of purchase price of **Kshs.3.8million**. That another agreement dated **15th January 2006**, and the purchase price was **Kshs.3.3million**. That the vendors Advocate are given as **Kale Maina & Company Advocates** and there was no any other Advocate. That she is relying on an agreement dated **16th August 2006** and another one dated **26th September 2006** and **11th November 2006** the 2nd Defendant has not been mentioned anywhere. That the two agreements are dated **2006** and the case was filed on **31st May 2017**, though she did not seek the leave of Court to file the same out of time. That the completion was not done within 90 days and the agreement did not talk of notice to be given in case of non compliance.

That she was not present when the agreements were signed. Further, that the agreement dated **15th February 2006**, has two parts in the signature section and the 2nd Defendant has not signed anywhere and there is no direct agreement between the 2nd Defendant and her mother nor did her mother pay any monies to the 2nd Defendant. That **Kale Maina Advocate** was responsible for registering the transfer. That she has annexed a letter dated **21st September 2012**, that shows that the process was ongoing at the time. That they filed the suit in **2017** and they got frustrated in **2012** and 6 years had not passed. That in the casual agreement dated **16th August 2016**, **Tele Posta** was involved in the agreement and **Kale Maina Advocates** were acting for both the Defendants. That the sale is subject to **Law Society of Kenya Conditions of Sale** and there is a condition for default in the LSK Condition of sale. That **Emma**(Deceased) does not owe Teleposta any monies. She urged the Court to register the property in their name.

DEFENCE CASE

DW1 Bernard Herman Karanja adopted his witness statement dated **13th July 2018**. He produced his list of documents as Exhibit 1. He admitted that he entered into an agreement with **Emma** and **Teleposta** did not sign the agreement. That they did not inform **Teleposta** because they would have refused. That in the agreement between him and **Teleposta**, their Advocate was **Kale Maina Advocate** and the property was to be transferred in his name. That the said Advocate did not explain to him that he could not transfer the suit property to **Emma**. That the Advocate informed him that he could not transfer the suit property to him, as he was selling it to **Emma**. That he paid **Teleposta**, who gave the documents to **Kale Maina** and he did not inform the 2nd Defendant that he was selling the property,

That he was allocated the plot because he had worked for Teleposta which was the plot he was residing on. That **Kshs.3.8 million** was paid to him in cash and he has not given any money back to Teleposta. That the agreements signed between him and **Teleposta** and him and **Emma** were drawn by **Kale Maina Advocate**, and the transfer and registration was to be done by him. That he would transfer the portion of undeveloped land to the Plaintiffs who are the Administrators of the **Estate of Emma** as they had agreed with **Emma** that he could retain the portion that holds the main house. That he can transfer the land, so long as they allow him to retain that portion that holds the main house as he has nowhere to take his family. That he was only to give Emma the vacant portion

2nd DEFENDANTS CASE

DW2 Peter Kipyegon Rotich testified that he is the Administrator and Trust Secretary of 2nd Defendant. He adopted his witness statement as his evidence in Court. He produced the list of documents as Exhibit 2. That they were never informed that the plot had been sold to **Emma**. That they gave the documents to **Kale Maina Advocate** and expected him to transfer and register the property to the 1st Defendant.

That the suit property has never been in the name of the 1st Defendant, and they were only supposed to transfer it to the purchaser. That **Kale Maina Advocate** did not have any authority to enter an agreement on behalf of the 2nd Defendant. That vide a letter dated **8th December 2004**, they offered the property to the 1st Defendant for sale and the schemes lawyer was **Kale Maina** and any action he did was on behalf of the 1st Defendant. That the property was paid in full by Bankers cheque, but the suit property is still registered in the 2nd Defendants name and therefore it is a necessary party.

The parties filed thereafter written submissions which the Court has carefully read and considered. After considering the Pleadings by the parties, the evidence adduced and the relevant provisions of law, the Court finds that the issues for determination is ***whether the Plaintiffs are entitled to the orders sought.***

The Plaintiffs have sought for an order of Specific Performance. The Court must first determine whether there was a valid and enforceable Contract between the parties and also whether the sale agreement that the parties seek to rely on have the requirements of Contract as per the provisions of **. Section 3 (3) of the Contract Act which** provides that;

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Having carefully perused the sale agreements produced as Exhibits by the Plaintiffs the Court has noted that the same are in writing and are signed by the parties. The said agreements thus met the requirements of **Section 3(3)** of the **Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. Therefore, the court confirms that the same is a valid sale agreement, which is enforceable by the parties. See the case of *Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991*, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

Granting of specific Performance is discretionary and as such, the Court in deciding whether or not to grant the orders should look at the merits of the case based on a case to case basis and whether there is an adequate alternative. Further, the same cannot be granted if the Contract is illegal. See the Case of *Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR*, wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid 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 when 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 when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

It is the 1st Defendant’s contention that he did not have any authority to enter into the agreement as the suit property had not been registered in his name. A party can either have a beneficial interest over a property or the party can have an interest by being the registered owner of the property. In this instant case, there are two agreements that were entered into between the Deceased Emma and the 1st Defendant . One is the one dated **18th January 2006**, which indicates that the 1st Defendant had agreed to sell to the Deceased the suit property . Further the agreement dated **15th February 2006**, noted that the 1st Defendant did note that the 2nd Defendant is the registered owner of the suit property and that whereas the same was to be allocated to the 1st defendant, he had agreed to sell the same to **Emma Wangui (Deceased)** at the agreed price . A further perusal of the said agreement reveals that all conditions were covered with regards to what was required of the parties. Therefore, the Courts finds and holds that there was no illegality.

As the 2nd Defendant is not claiming any rights to the suit property, there is no hardship that would be occasioned to the 1st Defendant who had entered into a Contract and he is bound by the terms of the said Contracts. Consequently the Court finds and holds that the Plaintiffs have availed sufficient evidence to enable the Court exercise its discretion in their favour and grants the orders of Specific Performance.

The Plaintiffs have also sought for Mesne Profits. **Mesne Profits** are special damages that must be specifically pleaded and proved. The Plaintiffs did not specifically plead the same and are therefore not entitled to the said orders . See the case of *Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) eKLR*, where the Court of Appeal held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

For the above reasons, the Court finds and holds that the Plaintiffs are entitled to the Orders of **specific performance** as sought.

On costs, costs usually follow the events and the Plaintiffs being the successful parties are entitled to the costs of the suit. However, the costs would be borne by the 1st Defendant.

Having considered the available evidence and the written submissions, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally as follows;

1. That An order of Specific Performance be and is hereby made compelling the 1st Defendant to do all that is necessary to facilitate the transfer of plot Number Thika Municipality Block 9/301 from the 2nd Defendant to the Plaintiffs and or in the alternative the 2nd Defendant be and is hereby ordered to transfer the said subject plot into the names of the Plaintiffs.

2. That the Costs of this suit will be borne by the 1st Defendant

3. Any party is at liberty to apply.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy