



REPUBLIC OF KENYA
IN ENVIRONMENT AND LAND COURT AT KAJIADO
ELC CASE NO. 785 OF 2017
MAGDALENE NYOKABI GUANDAI.....PLAINTIFF
VERSUS
CHARLES MAATO METIAKI.....1ST DEFENDANT
DANIEL MAKE METIAKI.....2ND DEFENDANT

(As defendants jointly sued as the representatives of the estate of Mitiage Ole Selemo Lekeyi)

JUDGEMENT

By a Plaint dated the 21st June, 2017, the Plaintiff prays for judgment against the Defendants in the following terms:-

- a. A declaration that the Plaintiff is the legal and beneficial owner for value of all that parcel of land equivalent to 50 acres being KAJIADO /OLOOLOITIKOSHI /KITENGELA /2704 also known as KAJIADO /KITENGELA /2704.
- b. An order of specific performance of the agreement dated 19th December, 1989 to compel the defendants to duly carry out the transfer of the suit property KAJIADO /KITENGELA /2704.
- c. In the alternative an order that the Deputy Registrar of the High Court Environment and Land Court in Kajiado do sign the transfers and the application for Land Board Consent and all other relevant documents necessary to enforce the transfer of KAJIADO/KITENGELA/2704 in favour of the plaintiff.
- d. Cost of the suit.

The Defendants filed a Defence dated the 7th August, 2017 where they averred that land parcel number KAJIADO/ OLOOLOITIKOSHI/2704 also known as KAJIADO/ KITENGELA/ 2704 hereinafter referred to as 'the suit property', is legally registered in the name of MITIAGE OLE SELEMPO LEKEYI (deceased). They confirm being lawful heirs to the suit property and administrators to the estate of MASITOI ENE SIMINTEI MUSUNKU (deceased) who had been the administrator and sole beneficiary of the estate of MITIAGE OLE SELEMPO LEKEYI. They state that the Plaintiff is a stranger to them, has never been occupation of the suit land and has no legal or equitable claim over it. They further state that upon learning of the caution placed on the suit property, they moved the Land Registrar, Kajiado to lift it but the decision is yet to be rendered. Further, that the Sale Agreement dated the 19th December, 1989 cannot be enforced for lack of consent from the Land Control Board as required under the Land Control Act. They insist the Plaintiff cannot derive any benefit as she did not comply with her contractual

obligations. They contend that their deceased father did not default on his obligations as the agreement required the Plaintiff to make further payments to facilitate application for consent to transfer and the remedy for specific performance is only available to the party who has complied with her obligations under the contract. They reiterate that the Plaintiff is guilty of laches as the Defendants have been in open and uninterrupted use of the suit property for 27 years, and they have acquired the land through adverse possession.

The Plaintiff filed a reply to Defence where she reiterated her claim and stated that she took possession of the suit property, fenced it, cultivated it for many years even long before the placement of the caveat but she abandoned the prospects of farming after she experienced losses when her fence was destroyed for grazing purposes by the pastoralists community including the Defendants. She insists the acquisition of the consent from the Land Control Board was a condition set out in the Sale Agreement and that she honoured her obligation and the Defendants are estopped from reneging on the same. She reiterates that the alleged usage of the land for more than 27 years has not extinguished her claim for specific performance as she secured her rights with the caution/ caveat and therefore the right to adverse possession cannot accrue.

The matter thereafter proceed to full hearing.

Evidence of the Plaintiff

PW1: MAGDALENE NYOKABI GUANDAI KABIRU who is the Plaintiff herein stated during her examination in chief that she sued the children of Mitiage Ole Selempo Lekeyi (deceased) who sold her land. She adopted her witness statement dated the 21st June, 2017 as evidence in court and testified that the deceased sold her fifty (50) acres of land and they entered into a Sale agreement dated 19th December 1989 where the purchase price was Kshs. 13,000/= per acre which amounted to Kshs. 650,000. She produced the said Sale Agreement as her exhibit in Court. She presented various payments she had made in respect of the suit land to wit: 3rd October, 1989 for Kshs. 5000 and averred that by the time they were executing the Sale Agreement, she had already Ksh. 187,000/= and later had to pay Ksh. 150,000/=; and 313,000/= before transfer, while she was expected to pay 50,000/= after the transfer.

She produced her bundle of documents as exhibit P '1 – 3", as proof of purchase of the suit land. It was her evidence that after executing the sale agreement, the suit land was to be subdivided to enable her get her 50 acres, and the vendor requested her to pay Ksh. 150,000/= which she did. She confirmed that after the consent she paid Ksh. 150,000/= through Kenya Commercial Bank which was to facilitate subdivisions. She contended that she adhered to the terms of the Sale Agreement and made various payments, and on 11th October, 1990 the deceased requested her to build him a house which she constructed for Kshs. 6,153.70 and produced a receipt to that effect. She claims that after paying for the land, the vendor failed to adhere to the terms of the Sale Agreement as he failed to obtain the consent of the Land Control Board. When she followed up on the title, the vendor became elusive and an Advocate advised her to register a caution to secure her interests. She registered a caution over the suit land on 25th September, 1999 which she produced in court. She obtained forms from the Land Control Board and transfer forms and signed her part but the deceased declined to cooperate, yet she had been shown the land and fenced as well as cultivated it. She explained that on 29th March, 2016, she received a letter from Kajiado Land Registrar directing her to remove the caution but she objected to it. The said Land Registrar summoned them to the Land Registry, where the parties agreed they knew her and the Registrar advised them to resolve the matter amicably but they failed to do so. She denied ever being drunk but explained that from 1997 she was unwell and bedridden for 10 years which culminated in her closing the clinic and it took her 10 years to recuperate and recover fully. During that period, her father was in touch with the vendor and family and he paid them kshs. 50, 000 on her behalf but did not have documents to prove it. In cross-examination she confirmed that the Sale Agreement was dated 19th December, 1989 and by that time she had paid Ksh. 187,000/= She stated that she had an advocate who drafted the Sale Agreement and that the vendor acknowledged orally and not in writing the receipt of the money in his bank account. She contended that the vendor wanted more money to cater for the subdivision which she paid, with the consent for subdivision being issued on 14th November, 1989 before the Sale Agreement. She confirmed

that her father facilitated the purchase of the building materials and as at the date of registering the caution, she had paid Ksh. 450,000/= leaving a balance of Ksh. 200,000/=. She reiterated that she did not obtain consent for this transaction, with the last payment being made in 1994. Further, that from 1994 to 2016, due to her ill health, her father followed up with the vendor and she had fenced the suit land but people have been grazing thereon. It was her testimony that she last visited the suit land four years ago and only acted in April 2016 to recover it. She insisted she had fenced and cultivated the land, but the last time she visited it, the barbed wire had been removed therefrom. She reiterated that out of the Ksh. 650,000/= purchase price she paid Ksh. 618,000/=.

At re examination she reiterated that she was given the bank account numbers after the Sale Agreement. Further, that the vendor used the money to open the bank account and also picked money but did not sign acknowledgement.

The Plaintiff thereafter closed her case.

Evidence of the Defendants

DW1 CHARLES MAATO adopted his witness statement dated the 7th August, 2017 as evidence in court. He confirmed that his mother inherited his father's property. He averred that he was 17 years when the plaintiff and his parents were doing the land transaction. He denied ever seeing the sale agreement between his father and the plaintiff. He claimed the father told him that he met the Plaintiff in a pub as they were both drunkards. He testified that from 1989 and 1990, his father used to send him to collect money from the plaintiff but she chased him away and contend that the money they were paid was only Kshs. 10,000 when he went with his mother and sister. Further, that in 1994, the plaintiff never paid them anything but threw Ksh. 2,000/= but he did not take it and she chased him away with insults. He contended that the Plaintiff registered a caution over the suit land at the Kajiado Lands Registry. He testified that after his father had died in 2005, they went to look for the Plaintiff to pay the balance of the purchase price, but found she had moved. He confirmed that he did not know the exact amount of the balance, and when they went to the Land Registry, the Land Registrar advised them to resolve the matter amicably, but they could not since the Plaintiff wanted the land which they had inherited and fenced in December, 2017. He insisted the land had never been cultivated nor fenced. He confirmed knowing the Plaintiff as a purchaser of the suit land but his father told him she had not paid the full purchase price of Kshs. 650, 000 as had been agreed upon. He however confirmed he did not know the amount of money his father had received from the Plaintiff.

In re examination he confirmed he was 17 years at the time his father entered into the transaction but they never used to discuss the transaction with his father and neither did he tell him how much money he had received from the Plaintiff. He reiterated that the Plaintiff had never stepped on the suit land and did not know where it was as there are the ones who use it. He further stated that he did not know if his father had a bank account or not.

DW2 DAVID MARK METIAKO who is the 2nd Defendant herein adopted his witness statement as evidence in court. He stated that his elder brother was sent to collect schools fees from the Plaintiff twice, in 1989 when he was 14 years. He confirmed that he was in boarding school when his father and plaintiff were transacting our land. He testified that in 1993, his brother told him the Plaintiff had not given him money. Further, that his father cancelled the transaction in 1992 since the plaintiff was not paying the purchase price as agreed. He did not know whether his father received any more money from the plaintiff from 1992. He confirmed his father started selling land to pay his school fees but got sick in 1995, and when they tried looking for the Plaintiff, after their father had cancelled the transaction, as they wanted her to pay the balance of the purchase price, they did not find her. He insisted the plaintiff used to pay their father in the pub but he does not know how much money was paid, although the father used to come home with the money. He denied seeing a fence on the suit land. It was his evidence that when they went to the Land Registrar over the cautions, he advised them to look for the plaintiff but they could not find her until 2016 when she showed up. They however did not resolve the issue at the Land Registry. In reexamination he confirmed seeing some pay slips from Kenya Commercial Bank during the transactions but not the Sale agreement.

The Defendants thereafter closed their case.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the pleadings filed herein including the exhibits produced and upon hearing testimonies from all the witnesses as well as considering submissions of the parties herein, the following are the issues for determination:

- Whether or not the Contract between the Plaintiff and the deceased was valid and if so did the Plaintiff perform her part of the bargain.
- Whether or not the plaintiff is entitled to orders of specific performance.
- Who should bear the costs of the suit.

The fulcrum of the suit revolves around the Plaintiff's claim that she purchased the suit land from the deceased and even had a Sale Agreement dated the 19th December, 1989 to that effect. She further produced various receipts as evidence of payment of the purchase price. The Defendants' contended that the Sale Agreement could not be enforced for lack of consent from the Land Control Board as required under the Land Control Act and insisted the Plaintiff could not derive any benefit as she did not comply with her contractual obligations. Further, that the Plaintiff only had a remedy to obtain a refund of the purchase price. However, in cross examination DW1 and DW2 confirmed they were young when their father entered into the transaction with the Plaintiff and did not know how much money had been paid to him as purchase price. DW1 even confirmed that he used to go to the Plaintiff to get monies.

As to whether or not the Contract between the plaintiff and the Vendor was valid and if so did the Plaintiff perform her part of the bargain? As per the evidence presented above as well as the exhibits produced, I note that there was a Sale Agreement between the deceased and the Plaintiff. Further, that the Plaintiff paid the purchase price over a period of time. As per the Sale Agreement it was clearly indicated that the balance of the purchase price was to be paid after the transfer was effected which in the current scenario was not to be since the deceased failed to sign the Application for consent as well as transfer forms. From the evidence it is clear the Plaintiff paid Kenya Shillings Six Hundred and Eighteen Thousand (Ksh. 618,000/=) to the deceased leaving a balance of Kenya Shillings Thirty Two Thousand (Ksh. 32,000/=). The Defendants witnesses who were the sons to the deceased all confirmed that the Plaintiff was making some payments to their father but could not recall the balance of the purchase price to be paid. From the evidence presented, it is clear that that the plaintiff was indeed paid the purchase price for the suit land but it is the deceased who frustrated the contract. The Plaintiff relied on the case of **Akash Himaltlal Dodhia- vs- Dorothy Margaret Wanjiku Kungu & Chief Land Registrar Nairobi ELC Case No. 1577 of 2014** where the Court found that the agreement for the sale of the suit property between the Plaintiff and the 1st defendant was valid, to support her arguments. It was the Plaintiff's contention that she had been unwell for a long time and her left her father to follow up on the transaction including constructing a house for the deceased. She submitted that she should not be punished due to her health conditions having performed her part of the obligation as far as the sale transaction was concerned. It is against the foregoing that I find that there was indeed a valid contract between the Plaintiff and the deceased. Further, that it is the deceased who breached the contract despite receiving most of the purchase price.

As to whether or not the Plaintiff is entitled for orders of specific performance? I note there was a Sale Agreement governing the transaction between the Plaintiff and the vendor who is now deceased. The Plaintiff presented evidence on the payments she effected both in cash and through bank deposits, which payments were not controverted by the Defendants. DW1 and DW2 confirmed that their father had received payments from the Plaintiff but were not privy to the balance of the purchase price. The Plaintiff obtained application for consent and transfer forms but the deceased declined to sign his portion despite agreeing to effect the transfer to enable the Plaintiff pay him the balance of the Kshs. 50,000. Since the deceased frustrated the contract, it was the Plaintiff's evidence that she was forced to register a caution over the suit land to protect her interests. It was the plaintiff's submission that the deceased estate cannot

benefit twice by having her money for such a long time and having possession of the subject matter. She referred to the cardinal principle of equity that state that “Equity looks at the intent rather than the form. She insisted that the Sale Agreement was a valid contract, which cannot be avoided.

The Defendants on the other hand insisted the Sale Agreement was void for want of consent from the Land Control Board. They relied on the cases of: **KARIUKI VS KARIUKI (1983) eKLR 225; DANSON MUNIU NJERU –VS- WILLIAM KIPTARBEI KORIR & 6 OTHERS (2014) eKLR and DAVID SIRONGA OLE KUKAI –VS- FRANCIS ARAP MUGE & 2 OTHERS (2014) eKLR** to support their argument that without the Consent of the Land Control Board, the Sale was void. They submitted that the remedy of specific performance is an equitable remedy available only where the party seeking it had complied with all the conditions of the contract. Further, that the contracts must be valid and in compliance with all the legal requirements and the court cannot enforce an invalid, unlawful as well as a contract that offends any mandatory statutory provisions. They insist the Plaintiff did not comply with the terms of the Sale Agreement dated the 19th December 1989 and failed to provide proof of the bank statements of the monies she paid into Kenya Commercial Bank and acknowledgments signed by the vendor. I however disagree as the bank statement could only be available to the deceased who was the holder of the account and not the Plaintiff. The Defendants contended that the plaintiff was not entitled to the remedy of specific performance since she had not obtained consent of the land control board and that her claim is time barred as she instituted her suit after 12 years. The Defendants insist they have been in open and continuous, uninterrupted occupation and usage for the last 22 years and that the Plaintiff could not indicate when she last visited the suit land. They insist the Plaintiff has never been in occupation of the suit land and cannot be granted any special or general damages in respect of the transaction that is void. They relied on the Court of Appeal decision in the case of **KARIUKI –VS KARIUKI** (supra) where it was found that no general or special damages can be awarded and the only remedy available is the recovery of any money or consideration paid in the course of the transaction under section 7 of the Land Control Act. Further, for a refund, it has to be considered alongside the law on limitation of actions and relied on the case of **SIMIYU –VS- WATAMBAL (1985) KLR 852** where the Court of appeal stated that any right to recovery of the purchase price would be subject to the law.

Section 6 (1) (a) of the Land Control Act provides that:

‘ (1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.’

Based on these legal provisions, and in relying on the facts above, I find that the agreement for the sale of a portion of 50 acres from the suit land, made in December, 1989 was void as no consent of the land control board was obtained within six (6) months from the date of the said agreement. In the circumstances, the Plaintiff’s claim for specific performance cannot stand.

Insofar as the Sale Agreement is void, I find that the Plaintiff is not estopped from demanding a refund of the purchase price she had paid to the deceased, from the deceased estate as he is the one who breached the contract by failing to transfer the suit land to her. I however note that she did not demand for the refund of the purchase price in her pleadings but in prayer (d) of the Plaint, she pleaded that ‘ any other or further relief that this honourable court may deem just and fair to grant.’ I find that the Plaintiff indeed paid a purchase price of Kshs. 618,000 and in relying on the case of **MOSES MARANGU & ANOTHER Vs ESTHER NTHIRA & OTHERS Civil Appeal No. 95 of 2009 at Nyeri**, where the Court ordered for the refund of the consideration paid even if the same was not pleaded. In relying on the doctrine of equity, which is a Constitutional principle, I find that the Plaintiff is indeed entitled to a refund of the purchase price, which she had paid to the deceased, from his estate.

On the issue of costs, I find that since the Plaintiff has been inconvenienced, she is indeed entitled to costs and will award the same to her.

In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and proceed to make the following order:

- a. The 1st and 2nd Defendants, who are representatives of the deceased estate, do refund to the Plaintiff Kshs. 618,000 inclusive of interest, within the next ninety (90) days from the date hereof;
- b. The amounts stated in (a) above to attract interest from 1994 to date, at court rates
- c. The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Ngong this 3rd day of October, 2018.

CHRISTINE OCHIENG

JUDGE