



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 2069 OF 1999

MOSES NDUNGU MUNGAI..... PLAINTIFF

VERSUS

TERESIA WAITHIRA MUIRURI.....DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 18th October 1999 and filed on 28th October 1999 in which the Plaintiff sought for judgment to be entered against the Defendant as follows:

- (a) Specific performance be ordered against the Defendant to transfer to the Plaintiff the parcel of land known as Land Reference No. 7240/8 (hereinafter referred to as the “suit property”);
- (b) In the alternative to the above, the Defendant be ordered to transfer to the Plaintiff 44.181 acres out of the suit property;
- (c) In the event that the Defendant fails to execute the necessary documents of transfer, the Deputy Registrar of the High Court be authorized to execute the same on behalf of the Defendant;
- (d) Costs of the suit; and,
- (e) Any further or better relief that this Honourable Court may deem fit to grant.

Pleadings

In his Plaint, the Plaintiff stated that the Defendant is the registered proprietor of the suit property. He added that by a written agreement dated 20th July 1995 between him and the Defendant (hereinafter referred to as the “Sale Agreement”), the Defendant agreed to sell to him the suit property at a fixed price of Kshs. 4,950,000/-. He further stated that upon execution of the Sale Agreement, the Defendant gave the Plaintiff possession of the suit property which he proceeded to subdivide into small plots which he sold to interested purchasers. He stated that he paid the Defendant a sum of Kshs. 2,900,000/- towards the purchase price. He further stated that in January 1997, the Defendant sought to amend the Sale Agreement by reducing the acreage to be transferred to the Plaintiff to 44.181 acres, which he agreed to. He further stated that the Defendant has since refused or failed to transfer to the Plaintiff 44.181 acres out of the suit property to enable him to obtain the title deed.

The Defendant duly entered appearance and filed her Statement of Defence dated 5th December 1999 and filed on 8th December 1999 in which she admitted that the Plaintiff had taken possession of the suit property but denied the assertion that the same has been subdivided into small plots and sold to interested purchasers. She further asserted that the Plaintiff breached the Sale Agreement after which she retook possession of the suit property from him. She denied having received Kshs. 2,900,000/- from the Plaintiff towards the purchase price of the suit property but admitted that she was given Kshs. 2,100,000/- by the Plaintiff as part payment for the suit property. She added that she was willing and ready to refund this sum to the Plaintiff less 25% deposit as per paragraph 9 of the Sale Agreement.

Evidence

The Plaintiff (PW1) testified that he is in the business of buying farms, subdividing them and selling them. He said that he met the Defendant who was selling the suit property and he entered into the Sale Agreement with her in the year 1995. He said that he was to purchase the entire parcel of 49 acres for Kshs. 4,950,000/-. He testified that he paid a total of Kshs. 2,300,000/- and produced copies of the cheques for that amount. He further testified that he and the Defendant went to the Land Control Board in Thika where they were granted consent to transfer the suit property. He however mentioned that he had agreed to a portion of 5.35 acres to be excised out of the suit property and be given to the son of the Defendant, leaving 44.181 acres for him. He sought for the court to transfer to him the remaining 44.181 acres of the suit property as the Defendant had refused to do so. He admitted that he still had a balance of the purchase price to pay off but noted that he was ready and willing to settle it.

The second witness, PW2, Edward Mau Ribiru, stated that in 1997 he was working as the General Manager of a company called Okoa Development Company Ltd and the Plaintiff was his employer. He testified that he knew the suit property which he said was bought by the Plaintiff, the then Managing Director of Okoa Development Company Ltd. He further stated that the suit property was bought from the Defendant. He confirmed that the suit property was reduced by about 5 acres which was given to the Defendant's son, leaving the Plaintiff with about 44 acres of the suit property.

Issue for Determination

There is one issue arising for determination in this suit and this is whether or not to issue an order of specific performance compelling the Defendant to transfer the suit property to the Plaintiff in accordance with the Sale Agreement.

Determination

While the Defendant did not attend the hearing of this suit, she did file a Defence which the court is entitled to rely on. The Defendant admitted to having entered into the Sale Agreement with the Plaintiff, thereby agreeing to sell the suit property to the Plaintiff for the sum of Kshs. 4,950,000/-. This position has been conceded by the Plaintiff. However, the parties are not in agreement as to the reason why the sale transaction fell through and further the amount of money that the Plaintiff paid to the Defendant towards the purchase price. The Plaintiff claims that the Defendant merely refused to transfer to him the suit property yet he had already paid to her part of the purchase price amounting to Kshs. 2,300,000/-. However, it was the position of the Defendant that she failed to transfer the suit property to the Plaintiff for the reason that the Plaintiff failed to honour the Sale Agreement which required him to pay up the entire purchase price for the suit property by latest 31st December 1995. According to the Defendant, this led to her terminating the Sale Agreement pursuant to paragraph 9 which leads to the Plaintiff forfeiting 25% of the deposit paid at execution of the Sale Agreement. In his testimony, the Plaintiff failed to address this issue. However, in my finding, I am guided by paragraph 1.5 of the Sale Agreement which did in fact set out that the final balance amounting to 2,650,000/- was to be paid by the Plaintiff to the Defendant on or before 31st December 1995. The Plaintiff admitted that he did not comply with this clause but stated that he is ready and willing to pay this amount.

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. Where the party seeking the order of specific performance has performed his

contractual obligations, the court will oblige him. In the case of **Stephen Kibet Malakwen vs. Benson Gateca Mbugua [2014] eKLR** the court held that where there is a valid agreement and the plaintiff has met his obligation and the defendant has failed to perform its part of the obligation the court will not hesitate to grant the orders of specific performance. However, as I have observed above, in this case, the opposite is true, it is the Plaintiff who failed to perform his obligations to pay the purchase price for the suit property as agreed in the Sale Agreement. In these, circumstances, the Plaintiff is undeserving of this order. He has not come to court with clean hands and cannot therefore enjoy and equitable remedy.

However, it is admitted by both parties that the Plaintiff did indeed pay a portion of the purchase price to the Defendant. The Plaintiff has demonstrated that he paid a total of Kshs. 2,300,000/- while the Defendant admitted to having received Kshs. 2,100,000/-. The Defendant stated in her Defence that she is ready and willing to refund this amount less 25% of the deposit paid on execution of the Sale Agreement. Accordingly, in line with the Plaintiff's prayer for any further or better relief that this Honourable Court may deem fit to grant, I hereby order the Defendant to refund to the Plaintiff the sum of Kshs. 2,300,000/- paid to her less 25% of the deposit paid at execution of the Sale Agreement. Each party shall bear their own costs.

DELIVERED AND SIGNED AT NAIROBI THIS 1ST

DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE