



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC NO. 317 OF 2011**

**HELLEN WANJIRU MWANGI.....PLAINTIFF**

**- VERSUS -**

**THE ADMINISTRATORS TO THE ESTATE OF**

**JASON ATINDA OUKO.....DEFENDANT**

**JUDGEMENT**

**Background.**

1. The suit property relates to a parcel of land measuring five (5) acres( suit property) which was to be hived off from LR No.3589/6 measuring 87.5 acres which was owned by Jason Atinda Ouko who died on 2<sup>nd</sup> February 1996(Deceased). The deceased entered into a sale agreement with the Plaintiff on 15<sup>th</sup> October 1976 in which the Plaintiff agreed to purchase the suit property at Kshs.105,000/=.
2. The deceased begun the process of subdividing his property in order to transfer the portion sold to the Plaintiff and other purchasers but as at the time of his demise, the process was not complete but the suit property had been designated as LR.3589/45. Grant of letters of administration of the estate of the deceased were issued to the administrators on 22<sup>nd</sup> May 2006. On or around 27<sup>th</sup> November 2010, the administrators of the estate of the deceased wrote to all purchasers asking them to cease any further construction and sale of their respective portions and demanded that each purchaser produces documents to prove purchase so as to facilitate processing of title deeds.
3. The Plaintiff forwarded documents to the administrators of the estate of the deceased who then passed them over to their lawyers who started corresponding with the Plaintiff's lawyers. It is this exchange of correspondence which prompted the Plaintiff to file this suit in which she claims the following reliefs:-

1. **A permanent injunction restraining the Defendant whether by themselves, their successors in title, beneficiaries, servants and or agents from interfering with the proprietorship of the Plaintiff's land known as LR No 3589/45 nor her quiet enjoyment and occupation by herself, tenant licensees or lessees of LR 3589/45 or in any manner whatsoever dealing with the suit property other than in procuring registration of the Plaintiff as the registered proprietor of LR No.3589/45.**
2. **A declaration that the Defendant Estate is liable to complete the sale and purchase transaction to the Plaintiff herein by obtaining registration of the Plaintiff as the registered proprietor of LR NO. 3589/45.**
3. **A mandatory injunction directed at the Defendant to complete the sale and purchase transaction to the Plaintiff herein by obtaining registration in the Plaintiff as the registered proprietor of LR No.3589/45.**
4. **The sum of Kshs.39,160/=**
5. **Interests on 4 above at court rates.**
6. **Costs of this suit.**

**Plaintiff's Case.**

4. It is the Plaintiff's evidence that she entered into a sale agreement with the deceased through an agent called House & Estates. The agreement was entered into on 15<sup>th</sup> October 1976. The purchase price was Kshs.105,000/=. A deposit of Kshs.10,000/= was to be paid to the

agent upon execution of the agreement and the balances was to be paid to M/s Daly & Figgis Advocates who were to keep the amount as stakeholders until the completion of the transaction .

5. On 5<sup>th</sup> July 1979 , the Plaintiff paid kshs.15,000/= to M/s Daly & Figgis Advocates. A further payment of Kshs.40,000/= was made to M/s Daly & Figgis Advocates on 28<sup>th</sup> September 1981. In or around 1993, the deceased asked the Plaintiff to pay the balance of the purchase price directly to his account at Standard Chartered Bank, Moi Avenue, Nairobi and not to /s Daly & Figgis Advocates. The Plaintiff then deposited three banker's cheques into the deceased's account on 21<sup>st</sup> October 1993,31<sup>st</sup> May 1994 and 11<sup>th</sup> July 1994 for Kshs.50,000/=, Kshs.12,000 and kshs.17,160/= respectively.

6. The Plaintiff later received a letter dated 4<sup>th</sup> November 1995 from the deceased's advocate inviting her to a meeting which was to be held on 25<sup>th</sup> November 1995. She attended the meeting and was later given copies of the minutes from that meeting. After the demise of the deceased, the Plaintiff with other purchasers instructed the firm of S. Mauncho Advocate to call for a meeting with the advocate of the deceased's family to map out a strategy of procurement of titles. The Plaintiff later received a letter from the administrators of the estate of the deceased calling for proof of purchase of the suit property. The Plaintiff responded through her advocates but when the defendant's advocate doubted her ownership documents, she decided to file this suit to protect her interest in the suit property.

7. The Plaintiff testified that the deceased's property was subdivided and deed plans were processed and she was given a copy of the deed plan for her plot which was designated as LR No.3589/45 measuring 2.029 hectares. The plaintiff states that she has overpaid for the suit property by Kshs.39,160/= for which she seeks a refund from the defendant.

#### **Defendant's case.**

8. The case of the estate of the deceased was presented by Aaron Tafari Ouko, one of the administrators of the estate. He contends that LR No.3589/45 which is being claimed by the Plaintiff does not exist and that the deceased's property has never been subdivided as alleged by the Plaintiff and that the agreement which the plaintiff has is suspect and questionable as the Plaintiff has not provided a complete agreement.

9. The Defendant further contends that the Plaintiff did not comply with the terms of the agreement and that payment was cleared several years after execution of the agreement.

#### **Analysis and determination.**

10. I have gone through the evidence adduced by the Plaintiff as well as that of the Defendant. I have also gone through the submissions filed by the parties herein. There is really no serious contention as to whether the Plaintiff and the deceased entered into a sale agreement. The agreement was signed on 15<sup>th</sup> October 1976. The Plaintiff was put into possession by the deceased pending conclusion of the sale. The Plaintiff was in possession of the suit property until the demise of the deceased. For two decades, the deceased did not question the occupancy of the Plaintiff. For a decade after the demise of the deceased, his family did not question the occupation by the Plaintiff. They started questioning the Plaintiff's documents after ten years following the demise of the deceased.

11. The Defendant has no cogent reason for doubting the agreement entered into between the Plaintiff and the deceased. In any case, the Defendants have concealed that the agreement is valid in their submissions. The only issues which emerge for determination are as follows: -

- a. Whether the deceased varied the agreement dated 15<sup>th</sup> October 1976 .**
- b. Whether the Plaintiff breached the agreement rendering it unenforceable.**
- c. Whether the plaintiff's suit is statute barred.**
- d. Is the Plaintiff entitled to the reliefs in the Plaintiff?**

#### **Whether the deceased varied the agreement dated 15<sup>th</sup> October 1976.**

12. The agreement of 15<sup>th</sup> October 1976 was clear that Kshs.10,000 deposit was to be paid to the agent who drew the agreement upon execution of the same. The balance of the purchase price was to be paid to M/s Daly & Figgis Advocates. There is evidence that the Plaintiff made two payments to M/s Daly & Figgis Advocates. The first payment of Kshs.15,000 was made on 5<sup>th</sup> July 1979 and the second payment of Kshs.40,000/= was made on 28<sup>th</sup> September 1981.

13. The Plaintiff's evidence is that in or around 1993, the deceased asked her to pay the balance directly to him through his account at Standard Chartered Bank, Moi Avenue Branch, Nairobi. The reason for the deceased asking her to do this is that the deceased was not receiving any money from the firm of M/s Daly & Figgis Advocates. The evidence of the Plaintiff is corroborated by the affidavit of Fackson Wainaina Kagwe, an advocate who was instructed by the deceased in 1994. Prior to the time Mr Kagwe was instructed, the deceased's Advocate was M/s Daly & Figgis Advocates. The deceased having made up his mind to leave the firm of M/s Daly & Figgis Advocates, the Plaintiff had no choice than comply with the Deceased's instructions. Even if the variation was not in writing, the Plaintiff had no option other than to comply with the deceased's wishes. Evidence is clear that soon thereafter, the deceased engaged the firm of Kagwe & Co. Advocates. I therefore find that it is the deceased who varied the terms of the contract. The Plaintiff would not have insisted on making payments to the firm of m/s Daly & Figgis Advocates when the deceased did not want to deal with the said firm.

### **Whether the Plaintiff breached the agreement rendering it unenforceable.**

14. The Defendant submitted that the agreement between the Plaintiff and the deceased is unenforceable because of breach on the part of the Plaintiff. The Defendant submits that the Plaintiff did not complete payment of the purchase price as per the agreement and that therefore the agreement cannot be enforced. While dealing with the first issue, I found that it is the deceased who asked the Plaintiff to pay the remaining balance to his account directly. This is because he did not want to proceed with his lawyers M/s Daly Figgis advocates. whereas I agree with the decision in the case of Bomas Motor Mart Ltd Vs Family Bank Ltd (2009) e KLR that a written agreement cannot be varied by an oral agreement, the situation in the current suit is distinguishable. The deceased had made up his mind to leave his previous Advocates. When he engaged a new advocate, he gave clear instructions to the new Advocates that the Plaintiff had cleared paying for the suit property. There is therefore no contention as to completion of the purchase price.

15. The Defendant attempted to demonstrate that the Plaintiff did not complete payment of the purchase price as the deceased did not have an account to which the money paid by the Plaintiff would have been deposited. It is important to note that the deceased's account was at Standard Chartered Bank Moi Avenue Branch, Nairobi. The payments by the Plaintiff to the deceased's account were made between October 1993 and July 1994. The Defendant's lawyer wrote a letter addressed to Standard Chartered Bank, Kenyatta Avenue Branch seeking to know whether an account in the name of the deceased existed there. The Bank wrote back and stated that there was no account existing at the branch.

16. The inquiry was directed at the wrong branch. Had the inquiry been directed to Standard Chartered Bank Moi Avenue, then that will have been a different issue altogether. It is common knowledge that in 1993/1994, local banks had not inter-linked their branches. There is therefore no way one branch could answer a query on-behalf of another branch when it had no records regarding the accounts of the other branch.

17. The Plaintiff has demonstrated that she not only cleared the balance of the purchase price but she also paid other monies which was to go towards processing of title documents. I therefore find that there was no breach of the agreement on the part of the Plaintiff which would have rendered the agreement unenforceable.

### **Whether the Plaintiff's suit is statute barred.**

18. The Defendant submitted that the Plaintiff's suit is statute barred. The Defendants argued that a person cannot bring a suit to enforce a contract after expiry of 7 years or to recover land after expiry of 12 years. It is important to note that the Plaintiff was put in possession by the deceased in 1976. Until the demise of the deceased, he was trying to process title for the Plaintiff. On 1<sup>st</sup> September 1993, the deceased wrote a letter addressed to the Ministry of lands seeking consent to transfer the suit property to the Plaintiff. Though an issue arose during cross examination that the deceased had not signed this letter, it was incumbent upon the Defendant to bring the alleged unsigned letter which their lawyer received from the Plaintiff's lawyer. Without this unsigned letter being produced for purposes of contradicting the one produced by the Plaintiff, I find no basis in the allegation which was raised in cross-examination.

19. The deceased had acknowledged the Plaintiff's claim to the suit property in writing. After the demise of the deceased, his administrators again acknowledged the Plaintiff's claim to the suit property in writing on 27<sup>th</sup> November 2010. This acknowledgement constituted a fresh accrual of the cause of action and the issue of the suit being statute barred does not arise. I therefore find that the Plaintiff's suit is not statute barred.

### **20. Is the Plaintiff entitled to the reliefs in the Plaintiff.**

#### **a. Specific performance.**

21. There is clear evidence that the Plaintiff met all that was expected of her under the agreement of 15<sup>th</sup> October 1976. She completed paying Kshs.105,000/= for the purchase of the five acres. The deceased had subdivided his land and there is evidence that he obtained a final approval in respect of twelve (12) sub-plots. Among the twelve (12) sub-plots which were granted a final approval, is the Plaintiff's plot which became known as LR NO.3589/45. The Plaintiff was given deed plan No.165204. What was therefore remaining is the registration process. The Plaintiff is the one in possession of the suit property. The Defendant does not dispute this fact. In fact one of the administrators of the estate of the deceased who testified in this case acknowledged the fact that the Plaintiff is the one in possession.

22. In the case of Gurdev Singh Birdi & Another vs Abubakar Madhbuti [1996] eKLR Justice Gicheru J A (as he then was) stated as follows:

**It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:**

**“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.**

**Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.”**

23. As the Plaintiff has demonstrated that she did all that was expected of her under the agreement, I find that she is entitled to the remedy of specific performance.

**b. Permanent injunction.**

24. The Plaintiff moved to court when the administrators of the Defendant started to dispute her claim to the suit property. The administrators started doubting that there was full payment of the purchase price or that there was sub-division. During the hearing, the witness who testified on behalf of the Defendant stated that the Plaintiff is only occupying about one acre only. He went on to deny that the administrators had threatened to evict the purchasers. He only said that the purchasers panicked after the administrators started fencing off those spaces which were not occupied.

25. It is clear that the Plaintiff purchased five (5) acres. Even if she has only occupied about one acre, the remaining four (4) acres belong to her and the Defendant cannot purport to fence the same. I therefore find that the Plaintiff is entitled to a permanent injunction.

**c. Refund of Kshs. 39,160/=**

26. The Plaintiff's evidence is that she overpaid by Kshs.39,160/= . She contends that the purchase price was Kshs.105,000/= but that she ended up paying 144,160/= hence the difference of Kshs.39,160/= . In the Plaintiff's witness statement, she has stated that she paid the purchase price together with other monies for processing title documents. She cannot therefore turn around and seek the same amount on account of over payment. I therefore find that she is not entitled to refund of Kshs.39,160/=.

**Disposition**

27. From the analysis herein above, I make the following final orders:-

(a) **A declaration that the Defendant Estate is liable to complete the sale and purchase transaction to the Plaintiff herein by obtaining registration of the Plaintiff as the registered proprietor of LR NO. 3589/45.**

(b) **A mandatory injunction directed at the Defendant to complete the sale and purchase transaction to the Plaintiff herein by obtaining registration in the Plaintiff as the registered proprietor of LR No.3589/45.**

(c) **A permanent injunction restraining the Defendant whether by themselves , their successors in title, beneficiaries , servants and or agents from interfering with the proprietorship of the Plaintiff's land known as LR No 3589/45 nor her quiet enjoyment and occupation by herself , tenant licensees or lessees of LR 3589/45 or in any manner whatsoever dealing with the suit property other than in procuring registration of the Plaintiff as the registered proprietor of LR No.3589/45.**

(d). **Costs of the suit to be paid by the Defendant.**

**Dated, Signed and Delivered at Nairobi on this 30<sup>th</sup> day of September 2020.**

**E.O.OBAGA**

**JUDGE**

In the virtual Presence of : -

M/s Mumbi for Mr Muturi for Plaintiff

M/s Gachomba for Defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**