

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 79 OF 2010

GLADYS MORANDE ONKWARE PLAINTIFF

VERSUS

STEPHEN KEOYO OKERO DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 29th March 2010 seeking; an order of specific performance enjoining the defendant to execute documents to effect the subdivision of and transfer of the portion of all that parcel of land known as LR No. North Mugirango/Boisanga/1592(hereinafter referred to as “**the suit property**”) which is occupied by the plaintiff to the plaintiff and in default, the Deputy Registrar to execute the documents aforesaid. In her plaint dated 26th March 2010 the plaintiff averred that by a written agreement dated 29th April 2000 the defendant sold to her a portion of all that parcel of land known as LR No. North Mugirango/Boisanga/1592 (the suit property) measuring 1acre at agreed price of Kshs. 100,000.00 which amount the plaintiff paid in full to the defendant.
2. The plaintiff averred further that pursuant to the said agreement and not otherwise, the defendant proceeded in the month of June 2005 to obtain the consent of Ekerenyo Land Control Board to subdivide the suit property into two portions so that he may transfer the portion that was sold to the plaintiff, to the plaintiff. The plaintiff averred further that despite the fact that the defendant obtained the said consent, the defendant has refused, failed and/or ignored to subdivide the suit property and to cause the portion that was sold by the defendant to the plaintiff to be transferred to the plaintiff. It is on account of the foregoing that the plaintiff was left with no alternative but to bring these proceedings seeking an order of specific performance against the defendant. The plaintiff has averred that despite demand and notice of intention to sue that was served upon the defendant, the defendant has refused, neglected and/or failed to execute the necessary documents to effect the subdivision of the suit property and to transfer the portion that the defendant had sold to the plaintiff, to the plaintiff. The defendant was served with summons to enter appearance but failed to enter appearance. The defendant did not therefore defend this suit.
3. When this suit came up for formal proof on 30th July 2013, the plaintiff gave evidence and called no witness. In her evidence, the plaintiff testified that on 29th April 2000 the plaintiff and her late husband, David Omariba purchased from the defendant a portion of the suit property measuring 1½ acres at a consideration of Kshs. 220,000.00. The plaintiff testified further that following the said agreement for sale, the defendant handed over vacant possession of the said portion that was purchased by the plaintiff and her said husband to them and they fenced the same. The plaintiff testified that by the time her said husband died in the year 2001 he had paid to the defendant a sum of Kshs. 120,000.00 leaving a balance of kshs. 100,000.00 which was paid in full to the defendant by the plaintiff. The plaintiff testified that upon receipt of the full purchase price, the defendant applied to the land control board for consent to subdivide the suit property so that he can transfer to the plaintiff the portion thereof that he had sold to the plaintiff and her deceased husband. The plaintiff testified further that the land control board approved the transaction and issued the necessary consent to the defendant. The plaintiff testified that the defendant has however failed and/or refused to subdivide the suit property and to have the portion that was sold by the defendant to the plaintiff transferred to the plaintiff.
4. The plaintiff urged the court to grant an order of specific performance to compel the defendant to subdivide the suit property and have the 1 ½ acre portion thereof that was sold by the defendant to the plaintiff to be transferred to the plaintiff. The plaintiff produced in evidence a copy of the

agreement for sale that was entered into between the the plaintiff and the plaintiff's deceased husband with the defendant for the purchase of the said 1½ acres of the suit property. The plaintiff also produced in evidence a copy of the letter of consent of the land control board dated 16th June, 2005 that was issued to the defendant authorizing the subdivision of the suit property into two portions. After the close of the plaintiff's case, the plaintiff's advocate Mr. Masese requested for leave to put in written submissions which he duly filed on 20th September 2013. I have considered the plaint filed herein, the evidence tendered by the plaintiff and the plaintiff's advocate's written submissions.

5. I am satisfied from evidence on record that the plaintiff has proved her claim against the defendant on a balance of probability. The plaintiff has proved that she entered into an agreement for sale with the defendant for the purchase of 1½ acres of the suit property. The plaintiff has tendered in evidence a copy of the agreement for sale to that effect. The plaintiff has also produced in evidence a copy of the consent of the land control board that was issued to the defendant to enable the defendant to subdivide the suit property and cause 1½ acres thereof to be transferred to the plaintiff. The plaintiff has proved that the portion of the suit property that was sold to the plaintiff by the defendant is clearly marked on the ground and that it was duly fenced by the plaintiff's deceased husband. The plaintiff stated and proved that the said parcel of land is at the moment under the use of the defendant. An order for specific performance is a discretionary remedy. In the case before me, I have no evidence that the defendant would have any difficulty in performing the agreement that he entered into with the plaintiff and her deceased husband. I have no basis therefore to exercise my discretion against granting the order of specific performance.
6. I have noted however that in her plaint, the plaintiff had pleaded that the defendant sold to the plaintiff a portion measuring 1 acre of the suit property while in her testimony she testified that the defendant sold to her and her deceased husband a portion measuring 1 ½ acres of the suit property. The agreements that the plaintiff tendered in evidence also supported this contention. The law is clear that a party is bound by his or her pleadings. The plaintiff did not amend her plaint to plead that the total acreage of the suit property that was sold to her by the defendant was 1½ acres and not 1 acre so as to be in line with the evidence that she tendered in court. I am unable therefore to order specific performance of the agreement that was referred to in evidence. The order that I would give would have to be in consonant with the plaintiff's pleadings.
7. I therefore enter judgment for the plaintiff against the defendant as prayed in the plaint dated 26th March 2010. I hereby order the defendant to execute all documents necessary to have the suit property subdivided and a portion thereof measuring 1 acre transferred to the plaintiff within forty five (45) days from the date of service upon the defendant of a copy of this judgment and the decree extracted therefrom. In default of the defendant to execute the said documents, the Deputy Registrar of this court shall be at liberty to execute the same. The Deputy Registrar shall only execute the said documents upon proof being tendered through an affidavit of service that the defendant was duly served by the plaintiff with the judgment and decree issued herein. The plaintiff shall have the costs of this suit.

Delivered, dated and signed at Kisii this 6th day of June, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Okenye h/b for G. Masese for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE
