



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 477 OF 2014

PENINA LYNET OLUMATIA.....PLAINTIFF

VERSUS

LUKAS ORENDE OPAKE

PROTUS OMBAKA SHITUBI.....DEFENDANTS

JUDGEMENT

PW1, the plaintiff testified that, at all material times to this suit the defendants were jointly and severally registered owners of all that parcel of land designated as land parcel number EAST WANGA/ISONGO/923 before its survey and subdivision into two portions namely land parcel numbers EAST WANGA/ISONGO/3812 and 3813 respectively. That by an agreement PEx1 dated the 9th November, 2004 the plaintiff purchased a portion of land measuring 1 acre from the 1st defendant which portion was to be created out of the defendants' title comprised in land parcel number EAST WANGA/ISONGO/923. That the plaintiff avers that she paid the agreed consideration of Ksh. 90,000/= in full and final payment. The plaintiff as a bonafide buyer of value was shown the purchased portion of land and she was allowed to possess it whereof beacons in form of sisal boundary markings were fixed on the ground by the defendants distinguishing her portion of 1 acre from the defendants' land on the lower right hand side of the said land. The plaintiff avers that she started utilizing/using her said land and that to date she is still in its possession and has done substantial developments which include:-

- (a) Constructing two semi-permanent houses.
- (b) Digging and constructing a pit latrine
- (c) Planted trees, potatoes, vegetables, bananas, maize, Napier grass, beans, yams, cassava e.t.c.
- (d) Erected a barbed wire fence around the said land.

The plaintiff avers that the value of the developments she has done on the said land cannot be quantified by far. That the plaintiff avers that the said sale was voluntarily without any force and that it was the implied term and mutual understanding of the said agreement that the 1st and 2nd defendants shall appear before the necessary land control board to transfer the said portion into her names. That it is the plaintiff's case that this has not happened as the defendants jointly and severally without any colour of right and justified cause have ganged up with intend to defraud the plaintiff secretly and fraudulently surveyed and subdivided land parcel number EAST WANGA/ISONGO/923 into two portions known as land parcel numbers EAST WANGA/ISONGO/3812 and 3813 registered in the names of the defendants respectively at the exclusion of the plaintiff. The plaintiff contends and maintains that the defendants by themselves through their authorized agents and servants are now threatening to evict her from the said land a move that is likely to render her landless, great loss and damage. That the plaintiff's claim against the defendants jointly and severally is for an order of cancellation of titles in land parcel numbers EAST WANGA/ISONGO/3812 and 3813 so that the same reverts to its original number and an order of specific performance that the defendants be compelled to appear before the land control board and sign all the relevant documents in favour of the plaintiff to create and transfer a portion of land measuring 1 acre in the names of the plaintiff from either the original number comprised in title number EAST WANGA/ISONGO/923 or from the new created numbers comprised in land parcel numbers EAST WANGA/ISONGO/3812 and 3813 and in default the Deputy Registrar of this court be authorized to sign them on behalf of the defendants. That the plaintiff's claim further against the defendants jointly and severally is for a permanent injunction restraining them from evicting the plaintiff or in any way interfering with the plaintiff's portion of 1 acre in the said land or the new title that would have been created out of the said land. PW2, corroborated the plaintiff's evidence.

The defendants failed to attend court during the hearing. In his statement of defence 1st defendant avers that he gave possession of the one acre portion of the land that the plaintiff had bought but denies the other contents and/or allegations by the plaintiff contained in the said paragraphs and further specifically denies any or the alleged developments that the plaintiff allegedly undertook on the said one acre portion bought, denies that the alleged developments on the said parcel of land. That after the land sale agreement for the one acre portion from land parcel East Wanga/Isongo/923 between the plaintiff and the 1st defendant, transfer thereof of portion bought was subject to consents from the

1st defendant's family members, the subject land being ancestral land but after all the family members of the 1st defendant became aware of the sale in the shortly thereafter they declined consents and the 1st defendant at the earliest opportunity informed the plaintiff of the same and his willingness to refund the purchase price which was declined by the plaintiff. The 1st defendant further avers that as a result the relevant land control board consents for sub-division and transfer of the one acre portion bought by the plaintiff were not obtained and the land sale agreement was frustrated in circumstances beyond the 1st defendant's control. The 1st defendant further avers, that the plaintiff on the onset after having knowledge that the consideration in respect of the said land sale agreement had completely failed as the requisite land control board consents had not been obtained in circumstances beyond the control of the 1st defendant, the only remedy she was entitled to and is still entitled to is a refund of the purchase price as was offered to him by the 1st defendant.

This court has carefully considered the evidence and the submissions herein. Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“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. 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.”

It is not in dispute at all material times to this suit the defendants were jointly and severally registered owners of all that parcel of land designated as land parcel number EAST WANGA/ISONGO/923 before its survey and subdivision into two portions namely land parcel numbers EAST WANGA/ISONGO/3812 and 3813 respectively. It is not in dispute that by an agreement dated the 9th November, 2004 the plaintiff purchased a portion of land measuring 1 acre from the 1st defendant which portion was to be created out of the defendants' title comprised in land parcel number EAST WANGA/ISONGO/923. It is not in dispute that the plaintiff did paid the full purchase price. It is a finding of fact that, the plaintiff has taken exclusive possession of a portion of land measuring 1 acre from the 1st defendant which portion was to be created out of the defendants' title comprised in land parcel number EAST WANGA/ISONGO/923, constructed a home thereon and has developed the same peacefully, openly, continuously and exclusively from the time of purchase to-date but the 1st defendant has refused to execute documents to facilitate the transfer of title. The issue now for determination is whether the sale of a portion of land measuring 1 acre from the 1st defendant which portion was to be created out of the defendants' title comprised in land parcel number EAST WANGA/ISONGO/923. I have perused the sale agreement on record which is the primary document in this matter. The same has been signed by the plaintiff and the 1st defendant. I find that the contract is valid and the plaintiff has also called her witness PW2 who was present and signed the contract. The jurisdiction of specific performance is based on the existence of a valid enforceable contract like this one. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order of cancellation of titles in land parcel numbers EAST WANGA/ISONGO/3812 and 3813 so that the same reverts to its original number and an order of specific performance that the defendants be compelled to appear before the land control board and sign all the relevant documents in favour of the plaintiff to create and transfer a portion of land measuring 1 acre in the names of the plaintiff from either the original number comprised in title number EAST WANGA/ISONGO/923 or from the new created numbers comprised in land parcel numbers EAST WANGA/ISONGO/3812 and 3813 and in default the Deputy Registrar of this court be authorized to sign them on behalf of the defendants.
2. An order of permanent injunction restraining the defendants from evicting the plaintiff or in any way interfering with the plaintiff's portion of 1 (one) acre in the said land or the new title that would have been created out of the said land.
3. Costs of the suit to be borne by the 1st Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE