

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 652 OF 2014

ALLAN SIANG'ANI WALWEPLAINTIFF

VERSUS

JOSEPH ODONGO MASAYI MWANZADEFENDANT

JUDGEMENT

The plaintiff's case is that, by virtue of an agreement dated 21ST July, 2009 the defendant sold to the plaintiff 0.30 Ha to be curved from N/W/MAYONI/17 at a consideration of Ksh. 70,000/= which sum the defendant acknowledged receipt in full. That the defendant has dishonoured the terms of the said agreement by not availing and transferring the bought portion to the plaintiff despite the plaintiff numerous demands for the same and the defendant still persist in that denial at the plaintiff detriment. That plaintiff claims against the defendant is for an order of specific performance directing the defendant to curve 0.30 Ha from N/W/MAYONI/17 and award the same to the plaintiff by signing the relevant transfer forms and attending land control board or refund the sum of Ksh. 70,000/= plus interest at the commercial rate as from 21ST July, 2009. The plaintiff prays for judgment against the defendant for:-

1. An order of specific performance awarding the plaintiff 0.30 Ha curved from N/W/Mayoni/17 or refund of Ksh. 70,000/=
2. Cost.
3. Interest at the commercial rate from 21ST July, 2009 until payment in full.
4. Any other relief the court deems fit and just to grant.

The defendant denies that he defaulted to comply as agreed and state that it is the plaintiff who failed to honour their agreement. He admits that he did enter into the sale agreement and the plaintiff paid the full purchase price. However he did not transfer the land to the plaintiff as the subdivision was of 1acre instead of $\frac{3}{4}$ acre as agreed. He has now sold the land to a third party who is now in possession. He wants to refund the said money.

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 enforceable. 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 that by an agreement made on 21ST July, 2009 the plaintiff purchased from the defendant a portion of land from the defendant's land parcel No. N/W/MAYONI/17 at a consideration of Ksh. 70,000/= . It is a finding of fact that, the plaintiff paid the purchase price in full. The issue now for determination is whether the sale of a portion of land parcel No. N/W/MAYONI/17 was valid. I have perused the sale agreement on record which is the primary document in this matter and I find that the acreage is 0.03 Hectares. The same has been signed by the plaintiff and witnesses. I find that the contract is valid. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. Be that as it may, the defendant has sold the said land to a third party who is not party to this suit. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to refund the sum of Kshs. 70,000/= plus interest at court rates from the date of filing this suit.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE