



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 368 OF 2015

NANCY WANJIKU KARIOKI.....PLAINTIFF

VERSUS

JOHN MAINA GACHII..... DEFENDANT

JUDGMENT

Nancy Wanjiru Karioki (*hereinafter referred to as the plaintiff*) sued **John Maina Gachii** (*hereinafter referred to as the defendant*) claiming that the defendant sold her a 2500 square foot of land within the parcel of land known as Mutirithia Self-help Group Plot No. 6H at an agreed consideration of Kshs.410,000 (Four Hundred and Ten Thousand), which amount the defendant acknowledged. The defendant instructed the Mutirithia Self-help Group to transfer the land to the plaintiff. She was to take vacant possession of the full Plot but the defendant refused. The plaintiff states that the defendant intends to fraudulently deprive her of her portion of land.

The plaintiff issued a demand notice but the defendant has refused to vacate.

The plaintiff prays for a declaratory order holding that the plaintiff purchased the whole parcel of land as sold to her by the defendant. She prays for an order of vacant possession. Last but not least, a permanent injunction restraining the defendant jointly and/or severally from interfering with the plaintiff's peaceful occupation and user of the suit land.

The defendant filed defence denying that the sale was for the entire plot but for only a portion owned from the said plot at an agreed sum of Kshs.410,000 and states that he is occupying the unsold portion.

When the matter came for hearing, **PW1 adopted** her statement dated 27.9.2015 and produced her National Identity Card, the account number, copy of the Mutirithia Self-help Group certifying that Nancy Wanjiru Karioki is the registered proprietor of half "50 x 50" share which consists of 2500 square feet. She further produced a demand letter addressed to the defendant by Cheluget & Company Advocates on her behalf.

The gist of the plaintiff's evidence is that she bought a 50 x 50 plot from the defendant. On cross examination by Mr. Kirwa, she states that she paid Kshs.400,000 by banker's cheque and Kshs.10,000 in cash. The agreement was written by an advocate.

PW2 was the secretary, Mutirithia Self-Help Group. She states that on 29.4.2015, the defendant introduced the plaintiff and informed them that he wanted to sell her the portion of land which had no debt. They went to the advocate who did the agreement. They went back to her office and she issued a certificate to the plaintiff. The defendant sold his whole portion measuring "50 x 50". On cross examination by Kirwa, she confirmed that the defendant sold "50 x 50".

PW3 was Rev. Joel Gatimu Kariuki witnessed payment of Kshs.410,000 to John Maina Gachii in respect to the sale of the suit land. The plot in dispute is only "50 x 50". On cross examination by Mr. Kirwa, he states that the land was not valued but was sold as a whole for Kshs.410,000.

PW4, Fiona Barticho, the Assistant Chief, Kapsoya Sublocation, in Kapsoya Location states that the defendant agreed that he sold the plaintiff a 50 x 50 Plot for Kshs.410,000 as consideration. The land had no title deed but she was given a share certificate. The defendant sold the whole land. On cross examination by Mrs. Kibichy, she states that she was not aware of any development on the land.

PW5, Edwin K. Kibor the Chief, Kapsoya Location states that the plaintiff went to his office with the complaint that she bought the defendant's land and the defendant agreed that he sold the plaintiff the land. He produced the Minutes of the meeting.

PW6 was Kipng'eno Misoi, the advocate from the firm that did the agreement states that the defendant sold the plaintiff the whole land and

not a portion. The land was sold without development. The defendant was to pull down the development being a mud house with iron sheets' roof.

DW1, John Maina Gachii states that the suit land is "50 x 50". He was selling a portion of "50 x 50" that is "25 x 25" ft. as per the sale agreement. He was not selling the whole land because he has a family. He has a house on the portion. He produced the original agreement. He produced a demand letter and photographs of the house on the suit portion of land. The whole land is 1/8 and that he sold a 1/16. He is ready to refund her the money since he has nowhere to go.

The gravamen of the plaintiff's submissions is that the agreement is binding to both parties as there was a willing seller and willing buyer and consideration was paid in full.

The gravamen of the defendant's submissions is that the defendant intended to sell a portion of "50 x 50" and therefore, measuring half and not the entire portion. The defendant intended to sell "25 x 25". The defendant submits that there was no meeting of minds.

I have considered the evidence on record, submission by the plaintiff and counsel for defendant and do find that the main issue to be determined is whether there was a meeting of the minds between the defendant and the plaintiff. The plaintiff states that she was buying the whole land measuring "50 x 50" whilst the defendant states that he was selling a portion of the land and not the whole land. According to the defendant, he was selling "25 x 25".

I have looked at paragraph 2 of the agreement wherein it was agreed that:

"AND WHEREAS the Vendor has purchasers interest over all that parcel of land known as MUTIRITHIA SELF HELP GROUP PLOT NO. 6H measuring 2500 Square feet and WHEREAS the Vendor is desirous of selling a portion thereof measuring 50 x 50 feet, the whole of the said portion to the purchaser AND WHEREAS the Purchaser has agreed to purchase the same at an agreed total consideration of Kenya shillings Four Hundred and Ten Thousand Only (Kshs.410,000)."

The land in dispute is referred to as parcel of land and yet the same is not registered. The proper term is "that portion of land". The agreement has many errors because the land in dispute is indescribable. The parties described the land as Mutirithia Self Help Group Plot No. 6H measuring 2500 square feet.

The agreement states that the Vendor was desirous of selling a portion thereof measuring "50 x 50" feet. This in itself is contradicting as "a portion "50 x 50" is less the whole land and yet the agreement provides that a portion is 50 x 50.

The agreement further stated that "the whole of the said portion" to the purchaser. The agreement does not make legal sense and appears to have two minds. One mind is selling a portion of "50 x 50", the other mind is buying the whole portion of "50 x 50".

PEX.4, the share certificate issued by Mutirithia Self Help Group indicates that the plaintiff is registered proprietor of "**half 50 x 50**" which consists of 2500 square feet. This again is contradictory as half 50 x 50 is "25 x 25" and is 1250 square feet. Mr. Misoi Advocate states that the agreement had errors and I do agree that the agreement had very grave and abundant errors to the extent that it is not comprehensive as it has two interpretations. The same applies to the share certificate. Mistake by the advocate who drafted the agreement cannot be visited on either party.

The upshot of the above is that I do find the agreement dated 29.4.2015 null and void. I do order the defendant to refund the plaintiff Kshs. 410,000 with interest at court rates from the date of this judgment. Orders accordingly.

Dated and delivered at Eldoret this 13th day of September, 2019.

A. OMBWAYO

JUDGE