



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 108 OF 2017

(FORMERLY NYERI ELC NO. 143 OF 2015)

PETER MWANGI KIMANI & 38 OTHERS.....PLAINTIFFS

VERSUS

VIRGINIAH WAIRIMU NJOROGE T/A MWOKE UNITED....1ST DEFENDANT

STEPHEN MWANGI MAINA.....2ND DEFENDANT

JOSEPH NDUNGU KAMAU.....3RD DEFENDANT

FRANCIS KARIANJAH NJOROGE.....4TH DEFENDANT

ESTATE OF JAMES KAMAU NJOROGE.....5TH DEFENDANT

JUDGMENT

By an **Originating Summons** dated **8th May 2015**, the Plaintiffs brought this suit against the Defendants for determination of questions that:-

1. Whether the Honourable Court should make an order of Specific performance compelling the 1st, 2nd, 3rd, 4th and 5th Defendants or in default, the Registrar of this Honourable Court to take all the steps necessary, including transfers and subdivision, to vest the various portions from the said Land Titles Ruiru/Kiu Block 2/4565, Ruiru/Kiu Block 2/4566, Ruiru/ Kiu Block 2/4706 & Ruiru/ Kiu Block 2/4707 to the Plaintiffs in terms of the Plaintiffs various share ownership Certificates.

2. Costs of this Application be provided for.

In his Supporting Affidavit, **Peter Kimani Mwangi** the 1st Plaintiff herein averred that on various dated between **2006** and **February 2015**, they entered into land transactions for purchase and transfer of land pending processing of titles with the 1st Defendant's land buying Company. It was his contention that the 19th and 20th Plaintiffs entered into an agreement dated **5th October 2012**, for the purchase of the said properties as per Certificate **No. 8 in annexure PMK1q** as evidenced in **annexture PMK2**. He averred that the **16th and 17th Plaintiffs** entered into an agreement with the 1st Defendant for the purchase of the one of the parcels as evidenced by **annexture PMK3**. He also averred that all the Plaintiffs have vacant possession of their plots in terms of their agreements or certificates having paid various amounts being purchase price and or transfer fees as evidence of transactions.

He further averred that said the parcels of land were to be hived off from Land **References Ruiru/Kiu Block 2/4565**, registered in the name of the 2nd Defendant, **Ruiru/Kiu Block 2/4566** registered in the name of the 3rd Defendant, **Ruiru/Kiu/Block 3/4707**, registered in the name of the 4th Defendant and **Ruiru/Kiu Block 2/4706** registered in the name of **James Njoroge** and the same are still registered in their names as evidenced by the searches marked as **annexture PMK 9 a-d**. He contended that they are apprehensive that the 1st Defendant is not intent upon vesting titles in the said land to the Plaintiffs and is working in concert with the 2nd to 5th Defendants with an intention to defraud them of their properties.

The suit is contested and the 1st Defendant herein filed a **Replying Affidavit** and averred that the Plaintiffs are purchasers for value in respect of the suit properties. She further averred that the Plaintiffs bought their respective plots at different times some in the year **2007 to 2012** and were buying at variants costs and not uniform. She particularized history of the said land parcels as **Ruiru/Kiu/Block 2/47-7 measuring 0,42 ha** registered in the name of **Francis Kairianja Njoroge** who is alive and the process of transfer to the purchasers having began is conditional on them paying **Kshs.40,000/=** processing fee for the title. She contended that the purchasers purchased the plots in sizes of **40 by 60ft**, however the **County Government of Kiambu** had issued directives that no title would be issued to a portion of less than **50 by 100 feet** a fact which is beyond her control and that they had an agreement with the Applicants on how best they could procure it.

With regards to **Ruiru/Kiu Block 2/4706**, it was her contention that the same is registered in the names of **James Kamau Njoroge (deceased)**, and that his wife who is the Administrator of his Estate instituted a **Succession Cause No.P&A 25 of 2013**, in respect of his estate. However, the purchasers equally have to pay the agreed **Kshs.40,000/=** being registration transfer and title fees.

Further that **Ruiru/Kiu/Block 2/4566**, registered in the name of **Joseph Ndungu Kamau**, wherein she also averred that the Purchaser should also pay **Kshs.40,000/=**. She further averred that **Ruiru/Kiu Block 2/4565** is registered in the name of **Stephen Mwangi Maina**, who is now deceased but his wife has instituted **Nairobi P & A 1238 of 2014** for Letters of Administration. However, the purchasers too must pay the **Kshs.40,000/=** as title processing fees.

It was her contention that all the facts are within the knowledge of the Plaintiffs as they had met over the issue and instead of them paying the required **Kshs.40,000/=** the Plaintiffs chose to come to Court. She further contended that the Court should first order the Plaintiffs to meet their part of the bargain and if the titles are not issued, then they can come to Court. She alleged that this Court case is premature as she has not declined to procure or commence the issuance of the titles in favour of the Plaintiffs herein. She alleged that the delay was due to reasons beyond her control.

The matter was set down for viva voce hearing wherein the Plaintiffs called one witness and the Defendants also called one witness.

PLAINTIFFS CASE

PW1 - Peter Kimani Mwangi, the 1st Plaintiff herein testified that he has authority to plead and testify on behalf of the other Plaintiffs and adopted his affidavit sworn on **8th May 2015**, and list of documents dated **15th September 2015**. He testified that he bought the land from **Virginia Wairimu Njoroge**, the 1st Defendant and he was given a certificate of ownership and a receipt for payment in the year **2008**. It was his testimony that the title deeds were to be processed after 6 months. However they were not given the title deeds after the 6 months, though he had not paid any monies for acquisition of title deeds. That the other Plaintiffs were either the 2nd or the 3rd owners and that the transfer fees were paid to the original owners who were represented by **Virginia Wairimu**. It was his testimony that he was not aware of payment of **Kshs.40,000/=** as it was not part of the agreement. He further testified that **Virginia's** Affidavit was sworn in year **2015**, and that at the time of the agreements, the purchasers were only supposed to pay for title deeds. He confirmed having seen some title deeds dated **16th October 2015**, but none bore his name or the original owners. Further, although there was a Court Order stopping the said

transfers on **29th June 2015**, titles were still issued on **16th October 2015**. He urged the Court to compel the said **Viriginah** to transfer the property to them.

On cross examination he confirmed that he bought his land in the year **2008**, and he was then given ownership Certificate being plots No. 3 and 4 for **Block 4566** and the registered owner of the said block **4566** was **Joseph Ndungu Kamau**. He acknowledged that he did not know him, but he knew that he was alive. He acknowledged not having attended any Land Control Board for purposes of transfer, but he was to pay the transfer fees upon issuance of the title in his name though that agreement was verbal. He however confirmed that some members had paid for the same like **Lewis Kariuki Plaintiff No. 22**.

It was his testimony that he was not aware if some members had paid the **Kshs.40,000/=** and collected their title deeds. Further that he did not know if Plaintiff No.29 had his title deed as he had not told him if he had obtained it. He stated that he held a meeting with the other Applicants once and that further he did not know the value of the land at the moment. It was his testimony that the other Plaintiffs bought the suit land from the original owners and they only went to **Viriginah** for the transfers and that she was to pay for their transfers. He further testified that there was no communication on the payment of the **Kshs.40,000/=** and he acknowledged that the owner of **Ruiru Kiu Block 2/4566 Stephen Mwangi Maina** is deceased though he did not know him as they bought the land from **Viriginah**. He urged the Court to allow their prayers since they are enforceable.

On re-examination, he confirmed having seen the Court Order which had been received by the Land Registrar on **16th July 2015**, who acknowledged receipt of the same. He acknowledged further seeing the Defendant's Advocate's signature and that the Order was therefore served upon the Defendants. He further testified that he had not been asked to pay the stamp duty nor had he been asked for any other money including the **Kshs.40,000/=**. He told the Court that the **Kshs.40,000/=** came about after their meeting because at the meeting, there was no mention of **Kshs. 40,000/=**. Further that the title deeds were to come out after 6 months but they have not received them and when they tried to reach out to the Vendor, 1st Defendant, she declined to meet them and alleged that she had travel out of the country for 3 months.

DEFENCE CASE

DW1 - Viriginah Wairimu Njoroge adopted her Replying Affidavit and testified that she had sold the plots to the Plaintiffs which were in **Ruiru/Kiu/Block 2/4707**, which plot is the name of **Francis Karianja Njoroge**, who is her partner and is alive. She further testified that the other land was for **James Kamau Njoroge**, being **Ruiru/Kiu/Block 2/4706**, who is deceased. Further that the other land is for **Joseph Ndungu Kamau** being **Ruiru/Kiu/Block 2/4566**, who is her partner and still alive. Finally that the fourth parcel of land is **Ruiru/Kiu/Block 2/4565**, in the name of **Stephen Mwangi Maina**, who is the deceased.

It was her testimony that the families of the Deceased proprietor filed Succession Causes and that some of the Succession Causes have been finalized, and she is waiting to issue title deeds. However, Succession Cause in respective of the estate of **Stephen Mwangi Maina** owner of **Ruiru/Kiu/Block 2/4565** is underway. She produced her list of documents as exhibit 1.

It was her further testimony that she has transferred some of the plots to some purchasers such as **Benard Kimutai** and **Nancy Chelangat Kiru** who have sued her despite having their title deeds after having paid the **Kshs.40,000/=** for processing of the title.

She contended that the plots have been subdivided especially where the Succession Causes are over and that the Plaintiffs need to pay **Kshs.40,000/=** per plot for Physical Planning, Survey and Land Control Board fees. That the plots were being sold for between **Kshs.35,000/=** to **Kshs.45,000/=** but currently the plots are fetching between **2 million** and **2.5 million**. Further that other persons had also bought the same plots but are not Plaintiffs herein because they paid **Kshs.40,000/=** and obtained their title deeds.

On cross examination, she stated that the suit was filed in the year **2015**, but before the suit was filed, she

had not asked for the **Kshs.40,000/=**. It was her testimony that some of the Plaintiffs paid the purchase price in the year **2006** and by **2015**, the said purchasers had not seen their plots or gotten their title deeds for the suit properties. She acknowledged that the Plaintiffs had paid the full purchase price and that they had been allocated Certificates and therefore the plots are owned by the purchasers. It was her testimony that she only sells the plots but the title deeds are issued by the Lands office and she gave her reasons why the title deeds were not issued. She insisted that if the Plaintiffs were to pay **Kshs.40,000/=**, she would readily issue them with title deeds . She also alleged that Kiambu County had contended that subdivisions of plots of **40 by 60 feet** were not viable and that the County could only allow subdivision of **50 by 100 feet** only and thus it was difficult to get a parcel of land which was **40 by 60 feet**. She acknowledged seeing Mutation form for plot **No.4707** dated **29th September 2015**, which showed how the parcels of land were to be subdivided and availability of a Consent for subdivision of **plot No.4707** dated **8th September 2015**, and denied lying that the County Government of Kiambu had barred her from registering title deeds of **40 by 60 feet**. She told the Court that she went to the Land Control Board first and that she had obtained the consent to transfer the land. The 1st Defendant also did not have any document from Kiambu County Government denying her subdivisions of the parcels of land into plots of **40 x 60 ft**.

It was her testimony that each of the Plaintiff was required to pay **Kshs.40,000/=** for Survey fees, Physical Planning office, Land Control Board and preparation of title deeds. However she did not have any receipts from Physical Planning or other offices to show the fees demanded nor did she produce any evidence to show that the fees were demanded. She further acknowledged that the Sale Agreements did not show that the Plaintiffs would later pay the **Kshs.40,000/=** for Physical Planning since the said agreement was done verbally. Further that she did not know if there was an injunction to restraining her from dealing with the land and that she did not see the Court Order but alleged that her Advocate could have seen it. She further acknowledged that the Court Order had her Advocates stamp dated **16th July 2015**, and that the District Land, Registrar had also signed on **20th July 2015**.

On re-examination, she stated that the Court Order did not specify that they could not obtain title deeds and that she was never served with the said Court order. It was her evidence that the County Government of Kiambu was not issuing title deeds of **40 by 60ft** as the same were issued by the Lands office. Further that Mutations are issued by the Surveyor and Consents are issued by the Land Control Board. She testified that there were rumours that the County Government of Kiambu had barred titles of **40 by 60 feet** and that the directive had been issued to the Lands office. She confirmed that the Mutations were drawn by the lands office and the fees for **Kshs.40,000/=** is for Physical Planning, Survey fees and preparation of documents and consent from the Land Control Board. She further testified that when the purchasers pay the **Kshs.40,000/=**, she issues them with receipts and takes it to the Land Control Board. Further that she is the one that came up with the said costs. It was her testimony that one proprietor, **Stephen Mwangi Mwaura** died on **11th October 2009**, and there was nothing she could do after the said proprietors had died, since Succession Causes were to be filed by the families. She acknowledged that whoever pays the **Kshs.40,000/=** is normally issued with a title deed after her facilitation.

After *viva voce* evidence, the parties were directed to file written submissions which they duly complied.

The Court has now carefully read and considered the pleadings of the parties, the annexures thereto and the written submissions and finds the issues for determination are as follows:-

1. *Whether the sale agreements are valid.*

2. *Whether the Plaintiffs are entitled to orders of Specific Performance.*

1. Whether the Sale Agreements are valid.

For a Court to decide whether or not a contract for the sale is valid, it must first determine whether it meets the requirements as set out under **Section 3(3) of the Contract Act** which provides that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

This Court has looked at the sale agreements that has been produced

in evidence by the Plaintiffs and noted that the Sale Agreements contains the names of the parties, the description of the properties, the purchase price and the conditions thereto. A look at the said sale agreements confirms that the same are valid Sale Agreements which are enforceable by the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

Since all the above ingredients have been met in the instant sale agreements entered between the Plaintiffs and the 1st Defendant, the Court finds and hold that the **Sale Agreements** between the parties valid.

2. Whether the Plaintiffs are entitled to orders of Specific Performance.

Before a Court can grant order of specific performance, it needs to be satisfied that there was an enforceable Contract. As earlier noted, the Court did find and hold that there was a valid Contract and as such the same is enforceable.

This Court has perused the **Sale Agreements** that have been produced, and noted that the same are in writing and signed by all parties and further there was consideration. They thus met the requirements of **Section 3(3) of Contract Act**. Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of **Reliable Electrical Engineers Ltd....Vs...Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“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. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. 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. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

This Court has already held and found that there were valid sale agreements signed by the parties. Further the 1st Defendant has acknowledged that the Plaintiffs paid all the agreed considerations. Further the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to.

From the above case law, it is clear that the Court cannot grant an order of specific performance where it will cause hardship to the Defendants. This Court must therefore evaluate whether the Defendants will suffer any hardship in the grant for the said specific order. Further the Defendant had also alleged that the only reason that she cannot process the title deeds for the Plaintiffs is because the Plaintiffs have not paid the **Kshs.40,000/=**. This Court must therefore determine whether the 1st Defendant is owed the **Kshs.40,000/=**.

Having found that the same was valid and enforceable it would therefore mean that the parties are bound by the terms of their Contract.

See the case of ***Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999***, where the Court held that:-

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”

Though the 1st Defendant has testified that it was agreed that the Plaintiffs will pay **Kshs.40,000/=** before they are issued with the title deeds, there is no such an agreement and the Plaintiffs have refuted this claim. This Court has carefully perused the sale agreements and has not seen any such clause. Further in her evidence the 1st Defendant acknowledged that the said costs were calculated by her and that she only communicated this to the Plaintiffs when the suit was filed. This Court will also take note that some of the parties bought the suit land in 2006 and they bought the suit land between **Kshs.35,000/=** and **Kshs.45,000/=**. It would therefore be unconscionable to require them to pay a transfer fee of **Kshs.40,000/=** which was not part of the agreement. Parties are bound by the terms of their contracts and the Court cannot be seen to be rewriting the contract for the parties. See the case of ***National Bank of Kenya Ltd.. Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503***, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

This Court therefore finds that the Defendants are bound by the terms of the Contracts and as the Contracts herein did not provide for the payment of **Kshs.40,000/=** this Court cannot require the Plaintiffs to pay the same. However the Plaintiffs have acknowledged a sum of **Kshs.5,000/=** and the contracts provided that they will be required to pay the transfer fees this Court finds that the Plaintiffs are liable to pay the **Kshs.5,000/=** upon issuance of the title deeds .

Further it is trite that a Court will not grant an Order of specific performance if it will present difficulty. The 1st Defendant has alleged that the sizes of the plots bought were **40 x 60 ft** and the **County Government of Kiambu** had issued certain directives barring the transfer of the same. However in her re-examination DW1 acknowledged that the said allegations were rumours. Further she did not produce any evidence either by way of a letter or any other means to show that the said transfers were barred. On the contrary the DW1 has without mincing her words testified that she is in a position to transfer the suit land to the Plaintiffs if and only when they pay the **Kshs.40,000/=** transfer. It is thus clear to this Court that the allegations of being barred by the County Government of Kiambu are just excuses. DW1 did confirm that Succession Causes have been finalized and therefore there is nothing barring her from processing the title deeds. Even if there was a Court Order stopping any dealings over the suit properties, the said registered proprietors had already signed the contracts of sale and are therefore bound by the said Contracts. It is also not in doubt that there are other titles that have been processed and as testified by DW1 there is nothing preventing her from processing the other titles apart from the **Kshs.40,000/=** which

she imposed on her own. It would therefore mean that the processing of the title for the Applicants will not present any difficulties.

The Plaintiffs have sought an order of specific Performance and this Court has found that they performed their obligations under the Contract and it clear that the Defendants will not face any difficulties. The Court finds that the Plaintiffs are entitled to an Order of Specific Performance upon payment of **Kshs.5,000/=** for title deeds and any other Statutory payment.

Having now carefully considered the available evidence and the exhibits thereto together with the written submissions, the Court finds that the Plaintiffs have discharged their duty of proof on a balance of probabilities against the Defendants save for the two Plaintiffs who are already in possession of title deeds.

However, it is the duty of the 1st Defendant to ensure that all the completion documents are procured and that the Defendants should completes their part of the bargain.

Having now carefully considered the available evidence and having found that the Plaintiffs have proved their case on the required standard, the Court enters Judgment for the Plaintiffs against the Defendants in terms of **prayers No.1, & 2. Further the Court finds that the Plaintiffs will each pay the sum of Kshs.5,000/= for the title deeds or any other monies statutorily required.**

The said actions to be performed and completed by the 1st Defendant within a period of 90 days from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of October, 2019.

L. GACHERU

JUDGE

18/10/2019

In the presence of

Mr. Githinji for the Plaintiffs

M/S Kanja holding brief for Mr. Kanyi for the Defendants

Lucy - Court Assistant

Court – Judgment read in open court.

L. GACHERU

JUDGE

18/10/2019