



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 808 OF 2017

NANCY WANJIRU WATHIRU.....PLAINTIFF

VERSUS

ELIJAH NJUGUNA GIKAMBA.....DEFENDANT

JUDGMENT

By a **Plaint** dated **30th October 2017**, the Plaintiff herein brought this suit against the Defendant for orders that;

a) Specific Performance that the Defendant does alienate and transfer 1(one) acre from land parcel Kiambu/Munyu/1273 also known as Plot 4558 in Munyu Settlement Scheme into the Plaintiffs name.

b) That in the alternative to prayer (a) above, the Chairman of the Kilimambogo Land Control Board be authorized to issue the consent to sub divide and transfer 1 (one) acre from land parcel Kiambu/ Munyu/ 1273 also known as PLOT 4558 in Munyu Settlement Scheme notwithstanding the absence of ELIJAH NJUGUNA GIKABA,

c) That further the Honourable Court be pleased to issue an order directing the Executive Officer of this Honourable Court to execute all the necessary vesting transfer forms and the Land Control Board Forms on behalf of ELIJAH NJUGUNA GIKABA in respect of land parcel Kiambu/ Munyu/ 1273 also known as Plot 4558 in Munyu Settlement Scheme,

d) Costs of the suit

e) Any other relief this Court deems fit and just to grant

In her statement of Claim, the Plaintiff averred that the Defendant was the registered owner of the suit property and by an agreement dated **4th May 1988**, the Defendant sold to the deceased **Patrick Waithiru Muhoro** one acre which was to be excised from the suit property and put him in possession pending the finalization of grant of consents for subdivision and transfer into the vendors favour. She averred that notwithstanding repeated requests from the said **Patrick Waithiru Muhoro(Deceased)**, the Defendant has neglected and refuses to take any steps towards the completion of the agreement upto the death of the said **Patrick** who died but had performed all his obligations.

Further that when the Defendant refused to perform his obligation, the deceased caused to be lodged a caution on the suit land as the Defendant's actions are malicious and unlawful calculated to cause intolerable harm to the Plaintiff and the whole Estate of the Deceased.

Despite being served with Summons to Enter Appearance, the Defendant failed do so nor file any Defence. The matter proceeded for formal proof hearing, wherein the Plaintiff gave evidence and called no witness

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PW1 Nancy Wanjiru Waithiru the Plaintiff herein adopted her witness statement and testified that the deceased **Patrick Waithiru Muhoro** was her late husband and that he passed on in **2014**. Further that that upon his demise, she filed a **Succession Cause No.223 of 2015**, in which she is the Administrator of the Estate. She further adopted her list of documents as exhibits.

She testified that the suit land belongs to **Elijah Njuguna Gikaba**, the Defendant herein who sold it to her husband but also sold the land to another person. Further that the suit land originally belonged to the Defendant's mother and after **Succession Cause**, the Defendant got the land and was supposed to transfer it to the deceased but he failed to do so. She further testified that her portion is one acre which is to be excised from the suit land. She urged the Court to allow her prayers as sought.

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove her case on the required standard

of balance of probability. See the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyoro.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, and held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason

only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further in the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The issue for determination before this court then is whether the Plaintiff is entitled to the Order of Specific Performance as sought. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Plaintiff has alleged that her late husband entered into a contract of sale with the Defendant for the purchase of the suit property. To this effect the Plaintiff has produced a Grant of letters of Administration confirming that indeed she is the Administrator of the Estate of **Patrick Waithiru Muhoro**. Further that the same was reduced into writing and signed by all the parties. **Section 3 (3) of the Contract Act** provides that;

3(3) 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.

The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3)** of the **Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is 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”.

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 unenforceable. 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.”

As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. 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. The Plaintiff has further averred that out of the suit property, the Defendant was to excise 1 acre and the same was the portion that was to be transferred to the Plaintiff. As stated the Plaintiff's evidence remains uncontroverted and in the absence of any evidence to prove the contrary, it is this Court's finding that the Defendant has obligation to complete hi obligations under the sale agreement.

This Court has perused the sale agreement and has noted that the same provided for consideration of the sale of the suit land and the addendum which confirmed that the purchaser had indeed completed payment of the purchase price and completed his obligation under the agreement.

It was therefore incumbent upon the Defendant to fulfil his part of the bargain as he is bound by the contract. Further the Court has also seen the official search that proves that the Defendant is the registered owner of the suit property and this Court therefore finds that in the absence of any vitiating factor, the Defendant is obligated to fulfil his obligations and if he fails to, then this Court must then provide a remedy by allowing the Plaintiffs prayer of having an officer of this Court sign the relevant documents.

It is this Court's further finding that compensation to the Plaintiff in terms of damages would not be adequate as land is a unique and cannot be equated to anything else. In this instant case therefore, damages may not be an appropriate remedy and as such **Specific Performance** is the best way to ensure that justice has been served. The award of Specific performance will not prejudice the Plaintiff nor the Defendant at all and consequently the Court finds the same prayer merited.

Having now carefully considered the available evidence and the exhibits thereto, the Court finds that the Plaintiff has discharged her duty of proof of his case on the required standard of balance of probabilities. For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in terms of prayers No.(a), (c) and (d) of the Plaint. In prayer No(c), the Court directs the Deputy Registrar of this Court to sign all the relevant documents to facilitate the specific performance ordered by prayer No.(a) above.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

M/S Muhia holding brief for Muturi Njoroge for Plaintiff

No appearance for Defendant

Jackline - Court Assistant.

L. GACHERU

JUDGE

8/11/2019