



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 46 OF 2015

EDWARD KINYUA NYAGUTHII.....PLAINTIFF

-VERSUS-

ESTHER MUTHONI KARAYA.....DEFENDANT

JUDGMENT

1. By a plaint dated **5th February, 2015** and amended on **13th February 2015**, the plaintiff herein, Edward Kinyua Nyaguthii, filed the suit herein to *inter alia* compel the defendant to fulfill the terms of the sale agreement executed between him and the defendant on 24th October, 2014.
2. The plaintiff's case is that despite having paid the full purchase price of the parcel of land he was buying from the defendant, the defendant failed to full her obligation under the sale agreement of giving him possession of the portion he had bought and providing him with the documents required to transfer the portion he bought to him and/or of transferring the portion he bought to him.
3. Vide the statement of defence she filed on 25th March 2015, the defendant admitted having entered into an agreement for sale of two acres of land to the plaintiff from the parcel of land known as Euaso Nyiro/Suguroi Block V/700 but denied having breached her obligations under the sale agreement executed between herself and the plaintiff.
4. Terming the plaintiff's suit scandalous, frivolous, vexatious and an abuse of the process of the court, the defendant avers that in compliance with the agreement executed between her and the plaintiff, she executed all the documents required to effect transfer of the portion she sold to the plaintiff and did everything she was legally and contractually supposed to do to vest the portion she had sold to the plaintiff.
5. The defendant blames the plaintiff for having lodged the current suit on what she terms frivolous and spurious grounds instead of lodging the documents she had executed for him at the lands registry for registration of a title in his favour.
6. For those reasons, the defendant case urges the court to dismiss the plaintiff's suit with costs to her.

EVIDENCE

The Plaintiff's case

7. When the suit came up for hearing, the plaintiff informed the court that the defendant had refused to transfer to him the exact portion she had shown to him at the time they entered into the sale agreement hereto.
8. Upon being cross examined by counsel for the defendant, the plaintiff admitted that the plaintiff executed all the documents required to transfer the portion he had bought on the day they executed the sale agreement and that upon execution of the transfer forms, they agreed that Janzam Lands Consultants and Surveyors would process the title deed on his behalf. He complained that contrary to what he had been shown, during survey, he discovered that he was being given a different portion from the one he had been shown when he entered into the agreement of sale with the plaintiff.
9. Concerning the allegation in the demand letter dated 19th November, 2014 and his witness statement that the defendant had refused to give him possession of the portion he bought, he explained that he thought that the land did not belong to the defendant.
10. He acknowledged that he has filed a caution to restrict dealing with the suit property.

11. In re-examination, he admitted having signed all the documents required to transfer the portion of the suit property he had bought at the time they executed the sale agreement hereto but maintained that at the time of subdivision of the suit property to enable him get his portion, he discovered that his portion was different from the portion he was shown during the time of entering into the sale agreement.

The defence case

12. On her part, the defendant reiterated her contention that she met all her obligations under the agreement executed between herself and the plaintiff and maintained that she neither refused to transfer the portion she sold to the plaintiff nor failed to fulfill her obligations under the sale agreement.

13. She urged the court to order the plaintiff to take the portion she sold to him and to pay her the cost of the suit.

14. Upon being cross examined by the plaintiff's counsel, the defendant stated that the plaintiff agreed to purchase the portion shown to him by the surveyor and that all the documents signed between herself and the plaintiff were signed on the day they executed the sale agreement.

15. At close of hearing, parties to this suit filed submissions which I have read and considered.

16. From the pleadings filed in this matter and the submissions made in respect thereof, I find the sole issue for the court's determination to be whether the plaintiff was justified in bringing this claim against the defendant.

17. With regard to that issue, on behalf of the plaintiff, it is pointed out that before instituting the suit herein, the plaintiff issued the defendant with a demand letter alleging breach of the terms of the agreement entered into between them.

18. Faulting the defendant for having failed to respond to the issues raised in the demand letter, the plaintiff explains that the defendant had dilly-dallied and delayed in seeking the consent to subdivide the suit property with a view of transferring the portion he had bought to him.

19. Terming the apprehension of the plaintiff that the defendant had refused to fulfill her contractual obligation genuine, the plaintiff faults the defendant for having failed to respond to his demand letter.

20. Despite the evidence adduced in court having confirmed that the portion bought by the plaintiff is still available for transfer to him, the plaintiff urges the court to, nevertheless, grant him the prayer for specific performance subject to him causing the removal of the caution to enable transfer of the suit land to himself.

21. The plaintiff is also said to be entitled to the costs of the suit because the defendant had delayed in taking the necessary steps to have the suit property transferred to the plaintiff immediately after executing the contract of sale thus necessitating the filing of this suit.

22. On behalf of the defendant, it is reiterated that the plaintiff's claim is scandalous, frivolous, vexatious and unnecessary because the allegations contained in the demand letter issued by the plaintiff and the plaint filed herein are false.

23. It is pointed out that through his testimony adduced in this case, the plaintiff departed from his pleaded claim which was that the defendant had refused to give him possession of the portion he had bought and/or failed to transfer the portion to him and urged a different claim to wit the allegation that the portion shown to him during execution of the agreement of sale was different from the one shown to him during survey.

24. Based on the provisions of **Order 2 Rule 6(1)** of the Civil Procedure Rules which prohibits parties from making an allegation of fact, or raising any new ground of claim inconsistent with a previous pleading of theirs in the same suit; it is submitted that the plaintiff's suit ought to be dismissed on account of that departure from his pleadings.

25. On account of the evidence produced in this suit which shows that the defendant fulfilled her contractual obligations under the agreement signed between herself and the plaintiff, the court is urged to dismiss the plaintiff's suit with costs to the defendant and to order the withdrawal or removal of the caution or prohibitory order lodged against the suit property to enable the defendant to transfer it to the beneficiaries, the plaintiff included.

26. On whether the plaintiff was justified in bringing the current suit against the defendant, upon considering the evidence adduced in this case, I find and hold that the plaintiff instituted this suit without any reasonable cause to do so. I say this because, the evidence adduced in this matter shows that the defendant had fully met her contractual obligations under the agreement signed between the plaintiff and her.

27. The upshot of the foregoing is that the plaintiff's suit is found to be unmerited and is dismissed with costs to the defendant.

Dated, Signed and Delivered at Nyeri this 16th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendants

Court assistant - Esther