



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.73 OF 2017

ANNE WANJIKU GATHUMBI..... PLAINTIFF

VERSUS

JOSEPH MWANGI MWAI.....DEFENDANT

JUDGEMENT

By a *Plaint* dated 15<sup>th</sup> February 2011, the Plaintiff *herein Anne Wanjiku Gathumbi*, has sought for various orders against the Defendant, *Joseph Mwangi Mwai*. The orders sought are:-

- a) *Mandatory injunction compelling Defendant to urgently and immediately execute the transfer and the special Power of Attorney of the Plot A –Allotment No.183889/44 and Plot B – Allotment No.183889/45.*
- b) *Mandatory injunction compelling Defendant to urgently and immediately hand over three certified copies of his Identity Card, three certified copies of PIN Certificate, and three recent passport size photos to the Plaintiff's Advocates..*
- c) *A permanent injunction to prevent the Defendant, his agents, servants and or employees from interfering with, alienating, dealing or in any way transferring Plot A–Allotment No.183889/44 & Plot B–Allotment No.183889/45.*
- d) *This Honourable Court do issue a vesting order compelling Defenant to urgently and immediately execute the transfer and the special power of attorney of Plot A–Allotment No.183889/44 and Plot B – Allotment No.183889/45 and in default of which the Deputy Registrar do execute the instruments in favour of the Plaintiff.*
- e) *Damages for breach of Contract.*
- f) *Costs of this suit.*
- g) *Interest on (c) and (d) above at court rates.*

The Plaintiff alleged in her claim that on 27<sup>th</sup> July 2014, the Defendant herein agreed to sell to her his two *unsurveyed plots* in *Thika Municipality* being *Plots No.A – allotment No.183889/44* and *Plot B – allotment No.183889/45* for a consideration of *Kshs.500,000/=*, wherein a Sale Agreement was executed to that effect. She also alleged that she paid the full purchase price in *three installments* of *Kshs.100,000/=* on 30<sup>th</sup> July 2010, *Kshs.200,000/=* on 6<sup>th</sup> August 2010 and a further *Kshs.200,000/=* on 19<sup>th</sup> August 2010, in which the Defendant acknowledged receipt of the said instalments. She further alleged that she paid *Kshs.337,041/=* as *Stand Premium* and *Land Rates* for the suit properties as the Defendant had never paid the above charges. It was her further allegation that in response to the Plaintiff's letter dated 2<sup>nd</sup> August 2010, the Commissioner of Lands confirmed vide a letter dated 10<sup>th</sup> August 2010 that the letters of Allotment to the Defendant were authentic. Further that on 18<sup>th</sup> August 2010, the Defendant made a *written undertaking* that he would sign all the necessary transfer documents when required to do so. However on 20<sup>th</sup> September 2010, after the release of all the balance of the purchase price, the Defendant maliciously and without colour of right changed his mind and refused to sign the transfer documents for the suit properties.

Therefore the said refusal and neglect to execute the transfer documents in favour of the Plaintiff was a *breach of the agreement for sale* and did put the Plaintiff to precarious position since the processing of the titles was underway and had reached an advanced stage. The particulars of breach of contract were enumerated in *paragraph 12* of the *Plaint*. The Plaintiff therefore prayed for an *Order of Specific Performance* of the said sale agreement to compel the Defendant to immediately execute all the documents for the transfer of *Plots A & B being No.183889/45 & 45* to the Plaintiff. The Plaintiff also averred that despite due *Notice* and *Demand* made to the Defendant expressing intention to sue, the Defendant has ignored and/or neglected to execute the transfer documents and thus this suit.

In his defence, the Defendant admitted to have entered into the said sale agreement but alleged that the said agreement was fraudulent and was intended to extort him since the purchase price was way below the value of the property. He further alleged that he did not execute the transfer documents because at the time of signing of the sale agreement, he did not understand the said document and he had no one to explain to him as he did not have an independent Counsel as is required by the law. He also averred that he did not execute the transfer documents after he realized that the transaction was fraudulent and was intended to extort from him. To him, the said botched sale was invalid and cannot be enforced. He urged the Court to dismiss the Plaintiff's suit.

The suit proceeded for hearing on **17<sup>th</sup> October 2017**, wherein the Plaintiff gave evidence for herself and called one witness. The Defendant though served with the **hearing Notice** on **2<sup>nd</sup> October 2017** failed to attend court. The matter proceeded *ex parte* in his absence.

### **The Plaintiff's Evidence**

**PW1 – Anne Wanjiku Gathumbi** the Plaintiff herein, adopted her witness statement which she signed on **15<sup>th</sup> February 2011**. She further testified that she purchased the two plots from the Defendant on **27<sup>th</sup> July 2010** and executed the sale agreement in issue. She produced the **sale agreement** as **exhibit No.1** in court. She also testified that as per **Clause No.3** of the said sale agreement, the **purchase price** was **Kshs.500,000/=** which she paid fully in three instalments. Further that when she carried out a search, she realized that the Defendant had not paid the land rates of **Kshs.337,041/=** which she duly paid. However, after the payments the Vendor refused to execute the transfer documents and so she was not able to effect transfer to her name. She therefore asked the court to order the Defendant to execute the transfer documents in favour of the Plaintiff.

**PW2 – Humphrey Kimani Njuguna**, the **Managing Director** of **Metro Cosmo Ltd**, told the Court that his Company deals with real estate specifically land matters. He also adopted his witness statement dated **15<sup>th</sup> February 2011** as his evidence in court. He testified that the Plaintiff herein appointed his Company to act for her in the sale transaction herein. That the Plaintiff and Defendant entered into a **sale agreement** on **27<sup>th</sup> July 2010**. He further testified that the purchase price was **Kshs.500,000/=** which the Plaintiff paid fully in **three instalments** of **Kshs.100,000/=**, **Kshs.200,000/=** and **Kshs.200,000/=**. That on every payment, the Defendant acknowledged receipt of the money. That upon receipt of the full purchase price, the Defendant gave an **irrevocable undertaking** that he would avail himself for execution of the transfer documents and any other documents relating to the transfer. However, the Defendant did not live to the said understanding. That the Commissioner of Lands confirmed to them that the letters of Allotment were authentic and the Plaintiff therefore paid the Stand Premium and Land Rates. However the Vendor became uncooperative and refused to sign the transfer documents. He therefore urged the Court to order the Registrar of Lands to transfer the piece of land to the Plaintiff even without the said execution of the documents by the Plaintiff. He also urged the Court to facilitate the purchaser to own the said parcel of land.

After the close of the Plaintiff's evidence, the Court directed the Plaintiff to put in **written submissions**, which were duly filed on **21<sup>st</sup> November 2017**, and she urged the Court to allow her claim. It was the Plaintiff's submissions that in light of the evidence adduced in court, the Defendant cannot claim that he was misrepresented in the transaction since he executed the sale agreement voluntarily and with full understanding that he was selling the said suit properties to the Plaintiff. The Plaintiff relied on the case of **Mawii...Vs...United States International University (1976) KLR**, where the Court held that:-

***“That a document written in the handwriting of the person to be charged may be construed as signed by him for the purpose of Section 3(3) of the Law of Contract Act. The court shall accept the prima-facie evidence of a handwriting of the party to be charged until it is proved otherwise”.***

It was her further submissions that the Defendant cannot claim that there was fraud in the transaction since he continued to receive the consideration completely and it was only when he was called upon to facilitate the transfer of the property that he feigned ignorance and fraud. The Plaintiff further urged the Court to enforce the contractual relationship between the parties as agreed in the sale agreement dated **27<sup>th</sup> July 2014**. The Court was also urged to allow the remedy of **specific performance** given that there is a valid and enforceable contract devoid of such defects as informality, mistake or illegality. The Plaintiff further relied on the case of **Wambugu...Vs...Njuguna (1983) KLR 172**, where the Court held that:-

***“For a party to enjoy the remedy of specific performance, that party ought to have fully complied with the terms of the agreement”.***

It was also submitted that though the Defendant pleaded fraud in the transaction, he did not render any evidence to that effect either factual or documentary. For this, she relied on the case of **Koinange & 13 Others...Vs...Koinange (1986) KLR 23**, where the Court held that:-

***“The standard of proof of such an allegation of fraud ought to be higher than that of a balance of probabilities”.***

Further on the issue of inadequate consideration, the Plaintiff submitted that the Defendant has not demonstrated to this Court the value of the two plots so as to authoritatively conclude that there was misrepresentation on the true value of the land. It was further submitted that inadequacy or otherwise of the consideration does not render a contract null and void. She relied on the case of **Chappell & Co. Ltd...Vs...Nestle Co. Ltd (1960) A.O 87**, where the Court held that:-

***“An inadequate consideration amounted to real consideration and therefore the contract was enforceable”.***

The Court has now carefully considered the pleadings, the annexures thereto and the available evidence. The Court has also considered the written submissions and the cited authorities and the relevant provisions of law and the Court makes the following findings:-

There is no doubt that the Defendant herein was the allottee of the two **unsurveyed Plots No.A & B** being **No.183889/44 & 45**, which were allotted to him on **9<sup>th</sup> November 2007**. The two letters of Allotment were issued to the Defendant by the Commissioner of Lands and there were various charges to be paid by the said allottee. It is also evident that on **10<sup>th</sup> August 2010**, the Commissioner of Lands confirmed to **Metro Cosmos Ltd**, a Company appointed to act for the Plaintiff in the transaction in issue that the said letters of Allotment to the Defendant (**Joseph Mwangi Mwai**) were authentic.

There is also no doubt that the said **Joseph Mwangi Mwai**, entered into a sale agreement with the Plaintiff for the sale and purchase of the stated two unsurveyed plots for a consideration of **Kshs.500,000/=** which amount was payable in instalments. It is also evident that on the date of execution of the sale agreement, a sum of **Kshs.100,000/=** was paid to the Defendant herein and he acknowledged receipt of the same vide an **acknowledgement note** dated **30<sup>th</sup> July 2010**. There is also no doubt that the **balance** of **Kshs.400,000/=** was paid in **two instalments of Kshs.200,000/=** to the Defendant as is also evident from the **acknowledgement notes** dated **6<sup>th</sup> August 2010** and **19<sup>th</sup> August 2010**. The Defendant also admitted in his defence to having entered into the said sale agreement, though he alleged that the said suit properties had been **undervalued** and the sale agreement was therefore entered **fraudulently**. Further, it is evident that vide a letter dated **18<sup>th</sup> August 2010**, the Defendant made an **irrevocable undertaking** to avail himself and sign all the necessary transfer documents when required to do so to facilitate the transfer to the new owner.

It has been alleged that even with the signing of the sale agreement, receipt of the full purchase price and the irrevocable undertaking, the Defendant still refused and or neglected to sign the transfer documents. The Defendant did not deny refusing to sign the transfer documents but only alleged that the sale agreement was **null and void** as the suit properties had been **undervalued**. However, the Defendant did not appear in court to expound on how the suit properties were undervalued and avail evidence of **fraud** and **misrepresentation**. It is evident that allegations of fraud are serious and must be strictly proved. See the case of **Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76**, the Court held that:-

**“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”**

The issue now for determination is whether the Plaintiff is deserving of the orders sought.

As the Court had earlier observed, the Plaintiff and the Defendant entered into a sale agreement dated **27<sup>th</sup> July 2010**, for the sale and purchase of two **unsurveyed plots No.A & B**, within **Thika Municipality**. The sale agreement is in writing and it was signed by both the Plaintiff and the Defendant. The plots to be sold were identified and the purchase price was given. The sale agreement in issue has therefore met the ingredient of a contract for sale and purchase of land. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi High Court Civil Case No.956 of 1991 (LLR 7670 (HCK))**, 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”.**

It is therefore evident that the Plaintiff and the Defendant entered into a **valid contract which is enforceable**. There was indeed an **offer, acceptance** and **consideration** and the contract entered by the parties herein is binding. See the case of **JK Patel...Vs...Spear Motors Ltd. Supreme Court of Uganda, Civil Appeal No.4 of 1991(1993) 1 KALR 40**, where the Court held that:-

**“Under the rules of the Law of Contract, particularly relating to offer and acceptance, if there has been an offer to enter into legal relations or definite terms and that offer is accepted, the law considers that a contract has been made, whether there has been an acceptance of an offer or documents that have been passed between the parties or from their conduct”.**

It is evident that the Plaintiff and the Defendant entered into a sale agreement on **27<sup>th</sup> July 2010** which is a **valid contract** and which contract is **enforceable**. The Defendant had alleged fraud on the part of the Plaintiff and **Metro Cosmos Ltd**, the Company that represented her in the transaction. However, as the Court had observed earlier, fraud is a serious allegation which must be strictly proved on a standard higher than balance of probabilities. The Defendant did not give any evidence and therefore that onus was not discharged.

Further the Defendant alleged that the purchase price was understated and therefore the Defendant was paid less the supposedly market value of the Plaintiff. However, the Defendant did not call any evidence to prove what the actual market price was at the time of drawing the sale agreement on **27<sup>th</sup> July 2010**. What is evident is that the Plaintiff and Defendant entered into a sale agreement which had set the purchase price and the Defendant was paid the full purchase price and he acknowledged receipt of the same. The Court will therefore not inquire whether the said purchase price was adequate or not. See the case of **Namusisi & Others...Vs...Ntabaazi (2006) 1EA 247**, where the Supreme Court of Uganda held that:-

**“The courts will not inquire into the sufficiency or adequacy of the consideration as long as there is some consideration”.**

The Defendant has also pleaded misrepresentation and he needed to specifically plead the same. See also a Ugandan case of **Bank of Uganda...Vs...Masaba & Others (1999) 1EA 2 (SCU)**, where the Court held that:-

**“It is trite law that where a party relied on misrepresentation in support of his claim in Civil suit, the Party must plead it”.**

The Defendant herein needed to plead the issue of **fraud** and **misrepresentation** as alleged by him.

It is therefore evident that the Plaintiff has met her part of the bargain and the Court should assist her in enforcement of the said contract. See the case of Aziz...Vs...Bhatia Brothers Ltd (2001) 1EA 7 (CAT), where the Court held that:-

***“A party who has performed his part of the bargain may be assisted by the court to enforce the contract against the defaulting party unless it is shown that the consent of the Commissioner of Lands was sought and refused”.***

The Plaintiff herein has performed her part of the contract and she should be assisted by the court to enforce the contract in issue.

The Plaintiff has sought for an **Order of Specific Performance**. It is trite that specific performance is a discretionary remedy which compels a party in breach to perform its contractual obligations. However it is also trite law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he/she has either **performed** or is **ready and willing** to perform all the terms which ought to have been performed by him/her. See the case of Masha...Vs...Tol Ltd (2003) 2 EA 593 (SCU);

***“It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to have been performed by him...”***

From the available evidence herein, the Plaintiff did perform her part of the bargain by paying the full purchase price and even the Stand Premium. It is evident that the Plaintiff was and is still ready and willing to perform all the terms of the sale agreement herein. However the Defendant is in breach. The Defendant made an undertaking that he would be available to sign all the transfer documents and he should therefore honour the said undertaking. See the case of Peter Nganga Muiruri...Vs...Credit Bank & Others, Civil Appeal No.263 of 1998, where the Court held that:-

***“An undertaking is a solemn thing. In enforcing the undertaking, the court is not guided by consideration of the contract, but the court aims at securing the honesty of its officers in such matters as they undertake to perform.....”***

The Defendant herein made an *irrevocable undertaking* and he should remain true to the said undertaking and thus securing his honesty. The **undertaking herein is to sign all the relevant transfer documents**.

The Plaintiff having been the party who has honoured her part of the bargain and who is the party who should also be assisted by the Court to enforce the sale agreement in issue, then the Court finds that the same can only be achieved by an order of specific performance. See the case of Kisumuwllah Oil Industries Ltd...Vs...Panasiatic Commodities PTA Ltd & Another, Civil Appeal No.100 of 1995, where the Court held that:-

***“And in a contract relating to the sale and purchase of land, the law takes the view that the purchaser of a particular piece of land or particular house (however ordinary) cannot on the vendor’s breach obtain a satisfactory substitute, so that specific performance is available to him”.***

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein is entitled to the prayers sought herein. Consequently, the Court finds that the **Plaintiff has proved her case** against the Defendant on the balance of probabilities. For the above reasons, the **Court enters Judgement for the Plaintiff against the Defendant** in terms of **prayers No.(a), (b) (c) and (d)**. The Plaintiff is also entitled to **costs of the suit as prayed in prayer No.(f) and interest** at court’s rate.

It is so ordered.

**Dated, Signed and Delivered at Thika this 9<sup>th</sup> day of April 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

M/S Cheserek holding brief for Mr. Nduhiu for Plaintiff

No appearance for Defendant

Esther - Court clerk.

**Court** – Judgement read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**9/4/2018**