



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 379 OF 2014

MOSES LUKHANDO MBASU.....PLAINTIFF

VERSUS

NOAH OSUNA OBUSHURU.....DEFENDANT

JUDGEMENT

The Plaintiff's case is that, by a written and signed agreement made on or about 19th day of October 2010, the defendant agreed to sell the plaintiff a portion of land comprised in the defendant's parcel of land better known as LR NO.BUTSOTSO/SHIKOTI/14270 at a consideration of Kshs.660,000/= on which material day the defendant acknowledged a sum of kshs.60,000/= upon signing the agreement. That on or about the 21st day of October 2010, the defendant acknowledged further payment of kshs.600,000/= towards the purchase of the aforementioned portion of land, full particulars are well within the defendant's knowledge. The plaintiff's claim against the defendant is specific performance of contract and/or in the alternative the full refund of Kshs.660,000/= being the purchase price duly paid together with interest at bank rates. The plaintiff avers that there is no other suit pending and that there have been on previous proceedings in any court between the plaintiff and the defendant over the same subject matter. Despite demand and notice of intention to sue having been given, the defendant has failed, refused and/or neglected to comply. The plaintiff prays for judgment as follows:

- a) Specific performance of contract and/or in the alternative the full refund of kshs.660,000/= being the purchase price duly paid together with interest at bank rates.
- b) Costs of this suit.
- c) Interest on (a) and (b) herein above at court rates.

It's the plaintiff's case that on the 19th day of October 2010, the Plaintiff got into a land sale agreement with the defendant for a portion of land measuring half (1/2) an acre comprised in LR No. BUTSOTSO/SHIKOTI/14270 at a consideration of Kshs.660,000/=. The plaintiff paid Kshs.660,000/= on the date of agreement i.e. on 19.10.2010 and the balance of Kshs.600,000/= was paid on 21.10.2010. kshs.570,000/= vide bankers cheque Number 870499 drawn in favour of the defendant and kshs.30,000/= handed to the Plaintiff in person which monies he Defendant acknowledged receipt.

In his evidence, the plaintiff produced an agreement dated 19.10.2010, he further produced an acknowledgment note dated 21.10.2010, whereby the defendant acknowledged receipt of full purchase price. From the agreement, it was an express term that the vendor/defendant executes all relevant transfer documents and attend all relevant Land Control Board meetings and obtain consent to transfer the purchased land to the plaintiff.

It was the Plaintiff's evidence that upon receipt of the purchase price, the defendant attended the land Control Board meeting and obtained relevant consent for transfer. That the defendant however refused to sign the transfer documents thus negating on the contract and making it impossible for the plaintiff to obtain registration over his purchased portion.

The defendant upon being served with pleadings and summons, he entered appearance and filed a defence which defence does not raise and or disclose any cause of action against the plaintiffs' claim. The defendant further opted not to attend court despite having been served severally. This leaves the Plaintiff's claim and evidence unchallenged.

The plaintiff raised the following issues for determination;

1. Whether there existed a valid land sale agreement between the Plaintiff and the defendant.

2. Where the plaintiff fully performed his part of the contract.
3. Whether the defendant is in breach of the contract.
4. Whether the plaintiff is entitled to an order for specific performance.
5. Whether the plaintiff is entitled to full refund of purchase price with interest at banking rates from date of agreement.

a) Whether there existed a valid land Sale agreement between the Plaintiff and the defendant

In his evidence the plaintiff produced a sale agreement dated 19.10.2010 between himself and the defendant (PEx1). The agreement is signed by both parties. In his defence, the defendant does not raise any issue as to the contents of the agreement. There is sufficient evidence to show that indeed the defendant had every intention to get into a legal relation with the plaintiff regarding the subject land and he did get into the relationship without being forced. The contract between the plaintiff and defendant pertaining this matter was valid and binding.

The plaintiff adduced evidence to show that he paid the full purchase price within the agreed period. He produced the agreement dated 19.10.2010 and an acknowledgment note dated 21.10.2010 whereby the defendant acknowledged receipt of full purchase price. The plaintiff further produced a copy of the bankers cheque that was issued to the defendant PEx2 and 3).

It was clear term of the contract that upon receipt of complete purchase price, the Defendant would obtain all the relevant transfer documents execute the same and have the title of the subject land transferred to the plaintiff. It's the plaintiff's evidence that the defendant obtained all the documents but refused to sign the transfer form that would then enable the plaintiff to obtain registrable title for the subject property (PEx3 to 7).

In this evidence, the plaintiff is not interested in the refund of the purchase price and particularly seeks for specific performance. The defendant has further not adduced any evidence to show that in order for specific performance cannot be complied with.

Never the less, they submit that incase the court is inclined to find that an order of specific performance cannot be granted then the defendant be ordered to refund the purchase price with interest at banking rates as from the date of the agreement.

The plaintiff submitted that, he claims for an order for specific performance of a land sale agreement contract against the Defendant. In the alternative, the Plaintiff prays for refund of the purchase price with interest from date of agreement at bank rates.

The defendant was served but failed to attend court or file any papers in defence. It is a finding of fact that, on the 19th day of October 2010, the Plaintiff got into a land sale agreement with the defendant for a portion of land measuring half (1/2) an acre comprised in LR No. BUTSOTSO/SHIKOTI/14270 at a consideration of Kshs.660,000/= (PEx 1). The plaintiff paid Kshs.660,000/= on the date of agreement i.e. on 19.10.2010 (PEx2) and the balance of Kshs.600,000/= was paid on 21.10.2010. kshs.570,000/= vide bankers cheque Number 870499 drawn in favour of the defendant and kshs.30,000/= handed to the Plaintiff in person which monies he Defendant acknowledged receipt (PEx3).

The jurisdiction to order for specific performance is based on the existence if a valid and enforceable contract. The plaintiff has clearly demonstrated to this Honourable court that indeed, the contract between him and the defendant is valid and capable of being enforced. He further demonstrated that he did perform what was required of him by the contract within the specified timelines. He even prepared the transfer document and presented the same to the defendant for signature but the defendant refused to sign. The plaintiff has met all the requirements meted out for specific

Performance and its only proper that an order for specific performance do issue. Be that as it may the search certificate produced in court to prove ownership is dated 2010 (PEx8). The court cannot ascertain ownership of the land today. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. Specific performance of contract and/or in the alternative the full refund of kshs.660000/= being the purchase price duly paid together with interest.
2. Costs of this suit.
3. Interest on (a) and (b) herein above at court rates.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE