

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 199 OF 2016

KENNEDY MUYEKHO TOVOKO.....PLAINTIFF

VERSUS

FRANCIS LUANGALE SIKWEKWE.....DEFENDANT

JUDGEMENT

This case is briefly that, sometime between 8th March 1998 and 9th April 2000, the Defendant agreed to sell to the Plaintiff a portion measuring 0.34 of an acre of land to be carved out of his land parcel L.R N. KABRAS/ LWANDETI/1940, at an agreed consideration of Ksh.12,200/=, which the Plaintiff paid in full and immediately took possession of the same and occupies and uses the same to date. It is the Plaintiff's case that, it was further mutually agreed by the parties herein that the Defendant would cause the smooth transfer of the said 0.34 acre portion of land to the Plaintiff, by taking the Plaintiff to the Lugari Land Control Board and cause the transfer of the same. It is the Plaintiff's case that despite numerous requests and pleading to the Defendant to accompany the Plaintiff to the Lugari Land Control Board and transfer the said 0.34 acre to the Plaintiff, the Defendant has refused and or neglected to do so hence this suit. It is the Plaintiff's case that thereafter the Defendant has backtracked on his promise and has failed and or refused to move the whole process to its logical conclusion and has become wild and unco-operative to the Plaintiff. That as a result of the Defendant's conduct and refusal to appear at the Lugari Land Control Board and officially transfer the 0.34 acres to the Plaintiff, to date the Plaintiff has not received a title deed to his 0.34 acre portion, though he has settled and uses the said portion. The Plaintiff's case against the Defendant is for an order of specific performance, compelling the Defendant to perform his part of the contract by appearing before the Lugari/Matete Land Control Board and transfer the said 0.34 acre portion to the Plaintiff, in default the Deputy Registrar of this Honorable Court be authorized to sign all the necessary transfer forms and papers on behalf of the Defendant, so as to effect the said transfer of 0.34 acre portion of land parcel L.R. N. KABRAS/LWANDETI/1940 to the Plaintiff. The plaintiff prays for judgment against the defendant for:-

i. An order for Specific Performance, Ordering the Defendant to appear before the Lugari/Matete Land Control Board and cause the transfer of 0.34 acre portion from land parcel L.R. N. KABRAS/LWANDETI/1940 to the Plaintiff, in default the Deputy Registrar of this Honorable Court be authorized to sign all the necessary transfer forms and papers on behalf of the Defendant, so as to effect the said transfer of 0.34 acre portion of land parcel L.R. N. KABRAS/LWANDETI/1940 to the Plaintiff

ii. Costs.

The plaintiff testified that, sometime in the year 1998 the Defendant herein offered to carve out a portion measuring 0.18 acres of his land parcel L.R. N. KABRAS/LWANDETI/1940 and sell the same to him at an agreed consideration price of Ksh. 5,000/=. He paid the said agreed consideration of Ksh. 5,000/= in full and in two installments of Ksh. 2,500/= each. On 8th March 1997 he paid the first installment of Ksh. 2,500/= and the second and last installment of Ksh. 2500/ was paid on 25th March 1998. One of his surviving witness to the said agreement of 8th March 1997 was Ainea Maruti who also appended his signature to the said agreement. Thereafter on 29th March 2000 the Defendant further offered more land or a second portion of land measuring 0.16 acres at a further consideration of Ksh. 7,200/=. He also paid for the second portion in three installments i.e. on 29th March 2000 he paid the Defendant herein Ksh. 2,000/-. On 6th April 2000 the Defendant received a further Ksh. 4,000/= and on 10th May 2000 he paid the last and final installment of Ksh. 1,200/=. His witnesses to the said second purchase of the second portion were the Defendant, his wife and children. The area Assistant Chief for Mabuye Sub Location also witnessed and attested to the said sale. In total he bought land measuring 0.34 acres which he paid in full. After paying the full consideration he took possession of the said land and he has been using the same to date. It was mutually agreed between them that the Defendant would as soon as practicable accompany him to the then Lugari Land Control Board and transfer the whole of that portion sold to him measuring 0.34 acres. Despite having on several occasions asked the Defendant to accompany him to the Land Control Board and transfer the said portion to him, the Defendant herein has become doggy and evasive. Of late he has become very wild and abusive to him, hence this suit. It is therefore his wish that the court compels the Defendant herein to perform his part of the contract and transfer the 0.34 acres to him.

The Defendant should be compelled to voluntarily appear at the Lugari/Matete Land Control Board and transfer the 0.34 acre portion to him. In default the Defendant voluntarily transferring the said 0.34 acre portion to him, the Deputy Registrar of this Honorable court be authorized to sign all documents on behalf of the Defendant herein in order to carve out and cause the transfer of 0.34 acres of the Defendant land parcel L. N. KABRAS/LWANDETI/1940 to him.

When it was time for defense hearing the Defendant herein gave oral evidence and accepted and acknowledged having sold the Plaintiff land and that indeed the Plaintiff was in occupation and use of the said portion of land he had sold him. The Defendant herein on his own admission gave in to surrender the said land to the Plaintiff.

This court has carefully considered both the plaintiff's and the defendant's case and the submissions therein. Judge Maraga as he then was in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“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. 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.”

At the hearing of this case, the Plaintiff did produce in court land sale agreements evidencing sale of the subject land. The Plaintiff proved that he paid the full and agreed consideration price. The Plaintiff also produce photographs showing and indicating that he is in occupation and use of the portion of the suit property he had purchased. When the Defendant was given a chance to defend himself he admitted having received the consideration price from the Plaintiff. The reason why the Plaintiff came to court is that for a period of over 20 years since purchasing the suit land from the Defendant and taking vacant possession of the same, the Defendant has failed and or refused to transfer the 0.34 of an acre to the Plaintiff. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order of Specific Performance, ordering the Defendant to appear before the Lugari/Matete Land Control Board and cause the transfer of 0.34 acre portion from land parcel L.R. N.KABRAS/LWANDETI/1940 to the Plaintiff, in default the Deputy Registrar of this Honorable Court be authorized to sign all the necessary transfer forms and papers on behalf of the Defendant, so as to effect the said transfer of 0.34 acre portion of land parcel L.R.N. KABRAS/LWANDETI/1940 to the Plaintiff

2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE