

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 200 OF 2016

JOHN NYONGESA WAFULA.....PLAINTIFF

VERSUS

FRANCIS LWANGALE SIKWEKWE.....DEFENDANT

JUDGEMENT

It is the plaintiff's case that, on 30th May 2006, the defendant herein agreed to sell to the plaintiff a portion of land measuring 0.2 of an acre to be curved out of his land parcel L.R. N. KABRAS/LWANDETI/207, at an agreed consideration of Ksh. 24,000/=, 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 0.2 acre portion of land to the plaintiff, by taking the plaintiff to the Lugari Land Control Board and cause the transfer of the same. Sometime in the year 2007 or thereabout the defendant herein subdivided the said original land parcel L.R. N. KABRAS/LWANDETI/207 to create two land parcels L.R. N. KABRAS/LWANDETI/1940 and 1941. The defendant herein retained L.R. N. KABRAS/LWANDETI/1940, which land comprises part of the plaintiff's 0.2 acre portion. 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 0.2 acres 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 uncooperative to the plaintiff. It is the plaintiff's further case that as a result of the defendant's conduct and refusal to appear at the Lugari Land Control Board and officially transfer the 0.2 acres to the plaintiff, to date the plaintiff has not received a title deed to his 0.2 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 0.2 acre portion to the plaintiff. In default, the Deputy Registrar of this 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 0.2 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 Matete Land Control Board and cause the transfer of 0.2 acre portion from land parcel L.R. N. KABRAS/LWANDETI/1940 to the plaintiff, in default the deputy registrar of this honourable 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 0.2 acre portion of land parcel L.R. N. KABRAS/LWANDETI/1940 to the plaintiff.

(ii) Costs.

PW1 the plaintiff testified that, on 30th May 2006 the defendant herein offered to curve out a portion measuring 0.2 acres of his land parcel L.R. N. KABRAS/LWANDETI/207 and sell the same to him at an agreed consideration price of Ksh. 24,000/=. He paid the said agreed consideration of Ksh. 24,000/= in full and in three instalments. On 30th May 2006 he paid the 1st instalment of Ksh. 6,000/= and the second on 6th June 2006 of Ksh. 16,000/= and the 3rd and last instalment of Ksh. 2,000/= was paid on 16th August 2006. One of his surviving witnesses to the said agreement of 30th May 2006 was Ainea Maruti who also appended his signature to the said agreement. The area assistant chief for Mabuye sub location also witnessed and attested to the said sale. 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 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 0.2 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 0.2 acres to him. The defendant should be compelled to voluntarily appear at the Matete Land Control Board and transfer the 0.2 acre portion to him. In default of the defendant voluntarily transferring the said 0.2 acre portion to him the Deputy Registrar of this honourable court be authorized to sign all documents on behalf of the defendant herein in order to curve out and cause the transfer of 0.2 acres of the defendant land parcel L.N. KABRAS/LWANDETI/1940 to him.

The defendant testified that, he did receiving the consideration price from the plaintiff. His complaint was that the plaintiff had promised to give him a further Ksh. 2,000/= which the plaintiff had failed to pay. Otherwise the defendant admitted that the plaintiff was currently in occupation of the suit land and that he had no problem giving him the land.

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 unenforceable. 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 purchase of part of the subject land from the

defendant. The plaintiff did prove that he paid the full and agreed consideration price and did also produce photographs showing and indicating that he is in occupation and use of part of the suit property he had purchased from the defendant herein. I find that the plaintiff has proved his case to the required standards the defendant on his own admission admitted having sold and received the consideration price from the plaintiff. The defendant is a man who cannot be trusted as he kept changing his testimony in court. I reject his defence and find that he has been paid the full purchase price. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order for specific performance, ordering the defendant to appear before the Matete land Control Board and cause the transfer of 0.2 acre portion from land parcel L.R. N. KABRAS/LWANDETI/1940 to the plaintiff, in default the deputy registrar of this honourable 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 0.2 acre portion of land parcel L.R. N. KABRAS/LWANDETI/1940 to the plaintiff.

2. Costs 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