



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 193 OF 2015

MILDRED SANDRA IGADI PLAINTIFF

VERSUS

ELIZABETH M. FEDHA DEFENDANT

JUDGEMENT

Vide an agreement made on 18th June, 2014 the plaintiff purchased from the defendant a portion of land measuring 0.15 Hectares from the defendant's land parcel No. TIRIKI/SHAMAKHOKHO/1268 at a consideration of Kenya Shillings Eight Hundred Thousand (Ksh. 800,000/=) only out of which the plaintiff paid to the defendant a sum of Ksh. 750,000/= leaving a balance of Ksh. 50,000/= which sum was to be paid subsequently. That pursuant to the aforesaid agreement the defendant applied for consent for sub-division of her land parcel No. TIRIKI/SHAMAKHOKHO/1268 to Tiriki East Land control Board which consent was granted and the said parcel of land was surveyed and sub-divided creating L.R. No. TIRIKI/SHAMAKHOKHO/1455 measuring 0.2 hectares retained by the defendant and L.R. No. TIRIKI/SHAMAKHOKHO/1456 measuring 0.15 hectares whose possession was handed to the plaintiff. The plaintiff avers that she has taken exclusive possession of land parcel No. TIRIKI/SHAMAKHOKHO/1456, constructed a home thereon and has developed the same peacefully, openly, continuously and exclusively from the time of purchase to-date but in breach of their agreement the defendant has refused to execute documents to facilitate the transfer of title No. TIRIKI/SHAMAKHOKHO/1456 into the plaintiff's name. The plaintiff avers that the defendant also refused to accept the balance of the consideration of Ksh. 50,000/= from the plaintiff. That when the plaintiff delivered a bankers cheque for the said amount to the defendant, the defendant returned it to the plaintiff unbanked which made the plaintiff to send the same amount to the defendant via M-Pesa on the defendant's Safaricom mobile number. The plaintiff prays for judgment to be entered against the defendant for:-

- (a) An order directing the defendant to execute all the documents necessary to facilitate the transfer of title No. TIRIKI/SHAMAKHOKHO/1456 into the plaintiff's name and in default of the defendant voluntarily executing the said documents the deputy registrar of this court be authorized to execute all such documents on behalf of the defendant.
- (b) The plaintiff's further prayer is for the honourable court to issue a permanent injunction restraining and or barring the defendant, her relatives or agents from in any manner alienating, claiming, selling or offering for sale, carrying out any works on, trespassing on or in any other manner interfering with the plaintiff's exclusive and peaceful occupation and use of land parcel No. TIRIKI/SHAMAKHOKHO/1456.
- (c) Costs of this suit and interest.
- (d) Any other or further relief deemed fit and expedient.

PW2 and PW3 who were witnesses to the sale agreement corroborated the plaintiff's evidence. PW4 the surveyor testified that he surveyed the land in 2014 after being directed by the plaintiff's son and the area was 0.15 hectares.

The defendant admits that indeed she entered into an agreement with the plaintiff on the 18th of June, 2014 for the sale of a portion of land parcel No. TIRIKI/SHAMAKHOKHO/1268 measuring about 0.128 Hectares and not 0.15 hectares for a consideration price of Ksh. 800,000/=, the plaintiff did pay Ksh. 750,000/= leaving a balance of Ksh. 50,000/= to be paid later on. The defendant states that she has never applied for consent of the land board and that to the best of her knowledge there have been no sub division on TIRIKI/SHAMAKHOKHO/1268. The defendant states that the plaintiff has taken possession of a portion of land parcel No. TIRIKI/SHAMAKHOKHO/1268 measuring 0.128 hectares developed the same, the breach of agreement was occasioned by the plaintiff's action of trying to acquire and register 0.16 ha of the agreed upon land instead of 0.128 ha as such it is the plaintiff who is in breach of the contract. The defendant indeed refused to accept the balance of the purchase price due to the actions of the plaintiff attempting to defraud her of her parcel of land, the defendant refunded the Ksh. 50,000/= send via M-Pesa. That the plaintiff is not entitled to the claim or prayers sought for, as the plaintiff not only breached their agreement but also attempted to defraud the defendant of her land, and for this reason the defendant counterclaims against the plaintiff. DW2 the defendants son testified that he was a witness in the said agreement but DW1 was selling only 0.128 HA and not 0.15 HA.

This court has carefully considered the evidence and the submissions herein. 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.”

It is not in dispute that by an agreement made on 18th June, 2014 the plaintiff purchased from the defendant a portion of land from the defendant's land parcel No.TIRIKI/SHAMAKHOKHO/1268 at a consideration of Kenya Shillings Eight Hundred Thousand (Ksh. 800,000/=) only out of which the plaintiff paid to the defendant a sum of Ksh. 750,000/= . It is not in dispute that the plaintiff did pay Ksh. 750,000/= leaving a balance of Ksh. 50,000/= to be paid later on. It is a finding of fact that, the plaintiff has taken exclusive possession of land parcel No. TIRIKI/SHAMAKHOKHO/1456, constructed a home thereon and has developed the same peacefully, openly, continuously and exclusively from the time of purchase to-date but the defendant has refused to execute documents to facilitate the transfer of title No. TIRIKI/SHAMAKHOKHO/1456 into the plaintiff's name. That the defendant also refused to accept the balance of the consideration of Ksh. 50,000/= from the plaintiff. The issue now for determination is whether the sale of a portion of land parcel No. TIRIKI/SHAMAKHOKHO/1268 was to measure about 0.128 Hectares or 0.15 Hectares. I have perused the sale agreement on record which is the primary document in this matter and I find that the acreage is 0.15 Hectares. The same has been signed by the plaintiff and her son PW2, they cannot now turn around and come to court and say it was meant to be 0.128 Hectares. I find that the contract is valid and the plaintiff has also called all her witnesses PW2 and PW4 who were present and signed the contract. The jurisdiction of specific performance is based on the existence of a valid enforceable contract like this one. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. The plaintiff is to pay the balance of the purchase price Kshs. 50/000/= thereafter the defendant to execute all the documents necessary to facilitate the transfer of title No. TIRIKI/SHAMAKHOKHO/1456 into the plaintiff's name and in default of the defendant voluntarily executing the said documents the deputy registrar of this court be authorized to execute all such documents on behalf of the defendant.
2. A permanent injunction restraining and or barring the defendant, her relatives or agents from in any manner alienating, claiming, selling or offering for sale, carrying out any works on, trespassing on or in any other manner interfering with the plaintiff's exclusive and peaceful occupation and use of land parcel No. TIRIKI/SHAMAKHOKHO/1456.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE