



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 541 OF 2017

FORMERLY KISII ELC CAUSE NO. 25 OF 2017

DAVID LEKUTA RUDISHA.....PLAINTIFF

-VERSUS-

NASHURU KANYUKIYA MURIANKO.....DEFENDANT

JUDGEMENT

By a Complaint dated 21st January, 2017 and filed in court on 1st February, 2017 the Plaintiff herein seeks the following- an order of specific performance of the Sale Agreement dated 23rd September, 2015 in respect of a portion of land known as Trans- Mara/Oloiborsoito/302 entered into between the Plaintiff and the Defendant, a permanent injunction restraining the Defendant from re-entering, trespassing into, laying claim, building or interfering whatsoever with that portion of land measuring 5.3 acres of land Parcel No. Trans-Mara/Oloiborsoito/302, an order directing the Land Registrar, Trans-Mara East/West sub-counties to remove, vacate and/or discharge the caution endorsed on 28th September, 2015 on the register and to facilitate the transfer and registration of the portion sold in favour of the plaintiff and costs of the suit.

It is the Plaintiff's case that on or about 21st September, 2015 the plaintiff approached his brother so that he could purchase a portion of land measuring 5.3 acres which was part of **LR NO. TRANS- MARA/OLOIBORSOITO/302** and hence he entered into negotiations with the Defendant with a view to purchase the suit land and on 23rd September, 2015 the plaintiff and the Defendant entered into a sale agreement for a consideration of kshs. 1,350,000/- and the Plaintiff deposited the sum of kshs. 1,300,000/- in account No. [Particulars Withheld] Co-operative Bank of Kenya Kilgoris Branch and despite the Sale Agreement and part payment of the consideration, the Defendant has failed/neglected and refused to sub-divide the suit land and deliver the portion the plaintiff bought and also signed all transfer documents in respect of the land.

The Plaintiff avers that the Defendant is in breach and has violated the terms of the sale agreement by entering into an agreement. She knew she would conclude, failed to execute and transfer mutation forms and transfers, attempting to defraud the purchase price and/or withholding on the purchase price.

The Plaintiff called 4 witnesses. PW2 Benson Mpaiyani Matasi testified that he coordinated the transaction and confirmed that the plaintiff bought the suit land and he was present when the Defendant signed the sale agreement by thumb printing at the offices of Jumba advocate in Kilgoris before Benjamin Ndeto an employee of the said Law firm.

PW2 further attested that the sale agreement was executed after the Defendant had confirmed that the purchase price was transferred into and in the account of Sylvia Natumoi who was taking care of the Defendant.

PW3 Sylvia Natumoi testified that she was taking care of the Defendant who is her daughter in law and she requested that the purchase price be deposited in her account and various amounts were withdrawn from the said account on the instructions of the Defendant. She further stated that she was present when the Defendant executed the sale agreement at the offices of the aforementioned advocate.

The Plaintiff also called John Sankale who also testified that he was in the company of PW2 and PW3 when the Defendant signed the sale agreement.

The Defendant in her evidence in chief told the court she never sold her land to the plaintiff or any other party and that she never met the plaintiff. She further informed the court that even though her grandson indicated to sell the land she refused and objected.

The Defendant in her evidence also stated that even though she signed by way of thumb print to her mind she was signing to lease the land but not to sale and it was after she was informed that the plaintiff had fenced the land that she told her children that she did not sale the land and that her title to the land was with her daughter.

DW2 Rosemary Shetishoi the daughter of the Defendant informed the court that the Defendant was given the parcel of land by her deceased father. She told the court that she was approached by her nephew one Frankline Naiguran who wanted to sale the land but she declined. She stated that the entire transactions was a fraud and the Defendant was not consulted with regard to the sale of the land.

When both the Plaintiff and Defendant closed their case the court sou moto called one Benjamin Ndeto who works at the offices of Jumba Advocate and who was alleged to have prepared the agreement for signature by the parties before the advocate. In his evidence he stated that he is an employee of Mr. Jumba Advocate and one of his duty is to prepare conveyancing documents for clients before the Advocate signed them. He told the court he remembers PW2, PW3 and the Defendant arriving at their offices and requested for a sale agreement. He prepared the same and he witnessed PW2 and the Defendant sign and apprehend their signatures and thumb print respectively.

At the close of hearing the case counsel for both parties filed their respective written submissions and having heard the parties and read the submissions the issues for determination before me are:-

- (i) Whether the sale agreement dated 23/9/15 is valid and enforceable
- (ii) Whether the plaintiff has established a prima facie case for grant of orders of injunction
- (iii) Who shall bear the costs of the suit.

The law in respect of the sale of land is set out under section 3 (3) of the law of contract which provides that:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) The contract upon which the suit is founded:-

- (i) In writing
- (ii) Is signed by all the parties thereto; and
- (iii) The signature for each party signing has been attested by a witness who is present when the contract was signed by such party.

PW 1 in his evidence had testified that he was in Eldoret when PW2 who is his brother called him and informed him about the suit land and that it was him who gave authority to PW2 to sign the sale agreement on his behalf. I find that PW2 had the express authority of the plaintiff to negotiate for purchase of the land and the subsequent negotiations culminating in the sale agreement. As for the Defendant it is her testimony she did not dispute the fact that she went to the law firm of Jumba Advocate to sign a document but she states that she thought she was leasing the suit land and not for sale. Am not convinced that she did not know she was signing a sale agreement and from the above I find that there was a binding sale agreement between the plaintiff and the Defendant for the purchase of 5 acres of land being part of LR NO. Trans- Mara/Oloiborsoito/302.

On whether the plaintiff had satisfied the conditions of grant of injunction having found that there was a binding sale agreement between the plaintiff and the Defendant, the plaintiff has established that he has a prima facie case for the grant of orders of injunction and that damages may not be an adequate remedy on the instant case.

The upshot of my finding is that the plaintiff has proved his case on a balance of probability and I therefore enter judgement for the plaintiff against the defendant in the following terms:-

1. An order of specific performance do issue against the defendant over and in respect of portion of land LR. Trans-Mara/Oloiborsoito/302.
2. A permanent injunction do issue restraining the Defendant by herself or any other person from entering, trespassing, laying claim whatsoever with that portion measuring 5.3 acres of land being part of that parcel of land known as Trans- Mara/Oloiborsoito/302.
3. An order do issue against the Registrar Trans-Mara/East/West sub-counties to vacate and discharge the caution endorsed on the title dated 28/9/15.
4. An order do issue against the Defendant to facilitate the execution of transfer of portion measuring 5.3 acres in favour of the plaintiff within the next 30 days and in default the deputy Registrar of the court to sign all such transfer forms in favour of the plaintiff.
5. Costs to the plaintiff.

DATED, SIGNED and DELIVERED in open court at NAROK on this 12th day of October, 2018

Mohammed Noor Kullow

Judge

12/10/18

In the presence of:-

Mr Ogutu for the plaintiff

Mr Anganda for the Respondent

CA:Chuma