



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.824 OF 2017

(FORMERLY NAIROBI ELC.NO.380 OF 2010)

KASAMA KIMANI..... PLAINTIFF/APPLICANT

-VERSUS-

JANE WANGECHI KIMANI.....DEFENDANT/RESPONDENT

JUDGMENT

1. On **9th August 2010**, the Plaintiff namely **KASAMA KIMANI (PW1)** filed a **Plaint** dated **6th August 2010** suing the Defendant, **JANE WANGECHI KIMANI** for the following reliefs:-

a. An order of specific performance compelling the Defendant to transfer to the Plaintiff all that parcel of land known as SIGONA/932 failure to which the Land Registrar Limuru/Kiambu Districts do issue title to the Plaintiff and the Registrar of this Honourable Court do sign all documents on behalf of the Defendant, necessary to effect the transfer of the said land to the Plaintiff.

b. An order of permanent injunction restraining the Defendant, her agents, servants and/or employees from entering, possessing, transferring, alienating, wasting or in any other way dealing with all that parcel of land known as SIGONA/932.

c. Costs and interest of the suit.

2. The gist of the Plaintiff's claim is that in or about **April 2009**, the Defendant agreed to sell the suit land **LR.NO.SIGONA/932** registered in her name to PW1. The agreed purchase price was **Kshs.700,000/=** which was paid to the Defendant by PW1. That during the signing of the **Sale Agreement** dated **30th April 2009** (P.Exhibit A3), the suit land was misspelt as **SIGONA/934** in lieu of **SIGONA/932**. That the Defendant attempted to transfer to the Plaintiff **LR.NO.SIGONA/934** rather than the suit land and refused to transfer the latter to PW1 thus precipitating the instant suit.

3. Learned Counsel, Mr. Mwaniki Kariuki of Mwaniki Kariuki & Company Advocates represents PW1. Previously Kivuva Omuga Waweru & Company Advocate were on record for him.

4. The Defendant was duly served, inter alia, on **17th March 2015**, **14th January 2016**, **13th June 2018**, **22nd October 2018** through various **Affidavits of Service**. She never entered appearance or filed a Statement of Defence and or attended court for hearing or at all. As a result, Counsel for PW1 sought a request for Judgement dated **29th September 2010** against the Defendant.

5. Notably, the suit was dismissed under **Order 17 rule (1)** of the **Civil Procedure Rules 2010**, on **25th may 2015** further to a Notice to Show Cause issued on **6th May 2015**. However, by a **Notice of Motion** dated **30th November 2015**, the suit was reinstated on **9th March 2018**.

6. On **6th January 2017**, the suit was transferred from Nairobi Environment and Land Court to this station for hearing and determination.

7. On **6th November 2018**, PW1 testified in support of his claim for the suit land. He relied on his lists of documents dated **31st January 2013** (P.Exhibits A1 to 3), **25th June 2018** (P.Exhibits B1 to 11) and **1st November 2018** (P.Exhibits C1 to 4).

8. Learned Counsel for PW1 orally submitted on the orders sought in the **Plaint, P.Exhibits A1 to C4**, and sale of the suit land between PW1 and the Defendant. He asserted that the Defendant refused to transfer the suit land to PW1, who holds it's title (**P.Exhibit A2**) given to him by the Defendant. That the Plaintiff's claim is not opposed by the Defendant.

9. I have examined the Plaintiff, the evidence of PW1 and his Counsel's submissions in the matter. I bear in mind the decision in Galaxy Paints Ltd...Vs...Falcon Grounds Ltd (2000) 2EA 385, that:- **issues for determination in a suit generally flow either the pleadings or as framed by the parties for the court's determination.**

10. In this suit, the issues for determination were framed by PW1.

By his statement of issues dated **31st January 2013**, Learned Counsel for the Plaintiff framed the following two issues for the court's determination:-

a. Which parcel of land did the Defendant agree to sell to the Plaintiff?

b. Is the Plaintiff entitled to the reliefs sought?

11. PW1 stated that the suit land was erroneously misspelt as **SIGONA/934** in **P.Exhibit A3** which was signed by the Defendant and himself. **P.Exhibit 3** was witnessed by among others, **Jeremiah Kingata Wangondu**, who also signed **P.Exhibit B2**. PW1 was emphatic that he purchased the suit land and not any other property. That the Defendant attempted to transfer to PW1 two other parcels of land known as **SIGONA/934** and **SIGONA/946** as an alternative to the suit land. That PW1 resisted the sale of the other two parcels of land which are not owned by the Defendant.

12. PW1 further stated that the Defendant gave him **P.Exhibit A2** after the sale of the suit land. PW1 was to hold and is still holding **P.Exhibit A2** pending the transfer of the land. By **P.Exhibit B10**, PW1 claimed purchaser's interest on the suit land.

13. It was noted in **P.Exhibit C3** that PW1 was only claiming the suit land and not **SIGONA/934**. Indeed his evidence was that he was offered and bought the suit land from the defendant.

14. This Court is aware of the old maxim, '**caveat emptor**', which cautions buyers to be aware at all times. See **Margaret Wanjiku Kamau..vs...John Njoroge gachuru (2005) eKLR**.

15. In the present suit, it is evident that the Defendant sold the suit Land to PW1. However, the defendant purported to transfer LR **LR.NO.SIGONA/934** which she subdivided and titles issued thereby were meant for cancellation as shown on **P.Exhibits B4** and **6**. The Defendant is legally bound to specifically perform the transfer of the suit land in lieu of any other property in favour of PW1

16. In the circumstances, I find the Plaintiff's case sound and unchallenged. See also Linus **Ng'ang'a Kiongo & 3 Others ..vs...Town Council of Kikuyu (2012)eKLR**.

17. Clearly, this case was heard by way of Formal Proof. In **Kirugi & Another...vs...Kabiya & 3 Others (1987) KLR 347**, the Court of Appeal stated that;- **the burden was always on the Plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case is heard by way of formal proof.**

Considering the entire case, I find that the Plaintiff is entitled to the orders sought in his Plaintiff as he has proved his case against the Defendant on a balance of probability.

18. Accordingly, I enter Judgement for the Plaintiff against the Defendant in terms of **Orders (a)** and **(b)** sought in his **Plaint** dated **6th August 2010** and filed in court on **9th August 2010**.

19. The **Defendant shall bear the costs** of this suit.

Dated, signed and delivered at Thika this 7th day of November, 2018.

G. M. A. ONG'ONDO

JUDGE

In the presence of

Non appearance for Plaintiff

Non appearance for Defendant

Tom and Irene, Court clerk