



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 268 OF 2015

ROSELINE NDUGU LIVU.....PLAINTIFF

VERSUS

JOSEPH KALAMA MWATSUMA.....DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit by way of a plaint dated 6th October, 2015 and filed on 21st October 2015. She contended that on or about 13th May, 2011, the Plaintiff and the Defendant entered into a contract of sale whereby the Defendant agreed to sell and the Plaintiff agreed to buy plot No.2119 Shanzu Squatter Settlement Scheme at an agreed price of Kshs.450,000/=. That pursuant to the sale agreement the Plaintiff paid to the Defendant the full purchase price. The Plaintiff averred that in breach of the agreement for sale, the Defendant has refused, failed and/or neglected to complete the sale and/or transfer the property sold to the Plaintiff and is in the process of selling and/or transferring it to a third party.

2. The Plaintiff claims that the Defendant's actions are unlawful and/or illegal and/or irregular and/or unprocedural. The Plaintiff therefore prays for judgment against the Defendant for: -

a) An order of permanent injunction restraining the Defendant either by himself, his agents or servants from selling alienating, parting with possession, transferring, subdividing, charging and/or any other manner whatsoever interfering with the Land known as Plot No.2119 Shanzu Squatter Settlement Scheme and/or committing a breach of contract for the sale of land known as Plot No.2119 Shanzu Squatter Settlement Scheme entered into on 13th May, 2011 between the Plaintiff and the Defendant.

b) An order of the prohibition prohibiting the Land Registrar, Mombasa District, from registering any transaction or transfer in respect of land known as Plot No.2119 Shanzu Squatter Settlement Scheme in favour of any person other than the Plaintiff herein.

c) An order of specific performance of the contract of sale of land known as Plot No. 2119 Shanzu Squatter Settlement Scheme executed on 13th May, 2011 by the Plaintiff and the Defendant herein or in the alternative, an order directing the Defendant and/or Deputy Registrar of the court to execute documents of transfer in respect of the land known as Plot No. 2119 Shanzu Squatter Settlement Scheme in favour of the Plaintiff.

d) Costs of the suit and interest.

3. The Defendant filed his statement of defence on 24th February, 2017 wherein he stated that he had two plots and the plot mentioned by the Plaintiff did not go for Kshs.450,000/= as alleged but was for a portion of it that did not have a title deed. The Defendant further averred that the plot sold to the Plaintiff is available and the Plaintiff is at liberty to take possession of it at any time she wants to. The Defendant denied that he was in breach of the agreement.

4. When the matter came up for hearing, on 18th September, 2018, only the Plaintiff and her Advocate attended court. The Defendant and his Advocate did not attend court despite having been duly served.

5. In her evidence, the Plaintiff reiterated the contents of the Plaintiff and adopted her witness statement filed in court on 21st October, 2015. She produced the agreement for sale dated 13th May, 2011 and the payment voucher of the same date which shows payment of the sum of Kshs.400,000 as down payment for **Plot No. 2119 Shanzu Squatter Settlement Scheme**. The Plaintiff also produced as an exhibit a payment voucher dated 15th September 2011 for the sum of Kshs.50,000/= being the balance of the purchase price for the said plot.

6. The Plaintiff stated that before they signed the agreement for sale, they went to the land office on 10th May 2011 where they made

payment for outright purchase for the said plot and produced the receipt for that payment. The Plaintiff further stated that survey fees was paid and produced the receipt dated 29th September 2011 for Kshs.300/=

7. It was the Plaintiff's testimony that a transfer form in his favour was signed by both parties but the same was not registered as the Defendant did not avail the original title deed. The documents referred to hereinabove were produced as P.exhibits 1 to 6. The Plaintiff therefore urged the court to grant the orders sought in the Plaintiff.

8. Having read and considered the parties pleadings and the evidence on record, this court has narrowed the issues for determination as follows:

i. **Whether the Plaintiff is entitled to the remedies sought in the plaintiff.**

ii. **Who bears the costs of this suit?**

9. It is not in dispute that there was a sale agreement dated 13th May, 2011 between the Plaintiff and the Defendant whereby the Plaintiff was the purchaser and the Defendant the vendor. The property sold was a portion of that piece of land known as **Plot No. 2119 Shanzu Squatter Settlement Scheme measuring approximately 50 x 70 square feet**. It is also not in dispute that the Plaintiff paid the sum of Kshs.450,00 being the agreed purchase price.

10. It is the Plaintiff's contention that the Defendant is in breach of the said agreement by failing to transfer the land known as **Plot No. 2119 Shanzu Squatter Settlement Scheme** and that the Defendant is in the process of selling and transferring the subject plot to third parties, hence the filing of this suit.

11. While making a determination of the issues herein this Court is guided by the decision the Court of Appeal in **National Bank of Kenya Limited v Pipeplastic Samsolit (K) 2 EA 503** where the court held that a Court of law cannot re-write a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract. I also must remind the parties that they are bound by their pleadings as filed.

12. The Plaintiff has *inter alia* sought an order of specific performance against the Defendant. Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well settled principles. 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 formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable, specific performance will, however, not be ordered where there is an adequate alternative remedy.

13. The Plaintiff has sought to have specific performance and she has shown that she was ready, able and willing to complete the transaction by paying the purchase price in full on 15th September, 2011.

14. In this case, the Defendant has indicated that he was ready and willing to complete the transaction but for the portion bought by the Plaintiff out of **Plot No. 2119 Shanzu Squatter Settlement Scheme**. The agreement for sale indicates that the portion sold measures approximately **50 x 70 feet**. What is not clear is whether the land known as **Plot No. 2119 Shanzu Squatter Settlement Scheme is measuring 50 x 70 feet** or is more.

15. Having found that the Defendant has shown that he is ready and willing to complete the transaction and let the Plaintiff take possession of what was sold, I find that the Defendant is not in breach of agreement. The court notes that the Plaintiff is seeking specific performance for **Plot No. 2119 Shanzu Squatter Settlement Scheme** and not a portion **measuring 50 x 70 feet** or thereabouts as set out in the agreement for sale.

16. Since both parties are desirous to have the sale agreement completed, it is my finding that the order for specific performance is justified.

17. The Court finds that the Plaintiff has proved her case on a balance of probabilities and grants the following prayers: -

a) **An order of permanent injunction restraining the Defendant either by himself, his agents or servants from selling, alienating, parting with possession, transferring, subdividing and/or any other manner whatsoever interfering with the land known Plot No. 2119 Shanzu Squatter Settlement Scheme measuring approximately 50 x 70 feet or thereabouts and/or committing a breach of contract for sale of the said land entered into on 13th May, 2011 between the Plaintiff and the Defendant.**

b) **An order of specific performance of the contract of sale of land known was Plot No. 2119 Shanzu Squatter Settlement Scheme measuring 50 x 70 feet executed on 13th May, 2011 by the Plaintiff and the Defendant herein or in the alternative, an order directing the Defendant and/or Deputy Registrar of the court to execute documents of transfer in respect of the land known as Plot No. 2119 Shanzu Squatter Settlement Scheme measuring 50 x 70 feet in favour of the Plaintiff.**

c) **The Plaintiff will have costs of this suit.**

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. K. YANO

JUDGE