



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 90 OF 2017

MUSEMBI PHILIP KALLOKI ----- PLAINTIFF

VERSUS

PRISCILA KILONZO MUTISO -----DEFENDANT

JUDGMENT

1) By his amended plaint dated 15th September, 2017 and deemed as duly filed and served on 3rd November, 2017 pursuant to the application dated 15th September, 2017 and filed in court on 18th September, 2017, the Plaintiff prays for judgement against the Defendant for :-

a) **Specific performance of the agreement dated 25/7/2011 or in the alternative the Defendant be ordered to pay general damages for breach of the contract dated 25/7/2011 calculated at the prevailing market for land situate within the local area.**

b) **That the costs of this suit be awarded to the Plaintiff.**

c) **Any other relief that the court deems fit and just grant.**

2) The matter proceeded as undefended suit after the Defendant failed to enter appearance and to file her defence despite being served with summons.

3) During the hearing, the Plaintiff adopted his undated statement filed in court on the 23rd November, 2017 as his evidence. He also produced his four(4) documents in his two lists of documents dated 31st August, 2016 and 13th November, 2017 and filed in court on the 1st September, 2016 and 23rd November, 2017 as PEX Nos. 1 to 4 respectively.

4) The Plaintiff's evidence in brief was that on the 25th July, 2011 he and the Defendant entered into a sale agreement for plot number 1212 – 3022 Mang'etele Settlement Scheme at a purchase price of Kshs. 780,000/=. He said that he paid the Defendant the full purchase price. According to him the sale agreement was for sale and transfer of 13 acres but in breach of it, the Defendant excised and transferred to him 10.47 acres leaving 2.53 acres untransferred. He said that this was confirmed by Mr. Urbanus Mutuku Munyao who is a surveyor vide his survey report dated 22nd August, 2017 (PEX NO. 4). He said that he prays for an order that in the event that the Defendant does not transfer to him the said 2.53 acres of land, she should compensate him at the current market value of the land together with interest. He said that the current market value per acre is Kshs. 200,000 per acre. He also sought an award of damages.

5) The Plaintiff's counsel in his submissions referred to the ***Blacks Law Dictionary Eighth Edition by Bran Garner at page 1435*** which defines what specific performance entails. He also cited the case of ***Aziz Vs Bhatia Brothers Ltd(2001) 1EA7*** ...which held that:-

“A party who has performed his part of the bargain may be assisted by the court to enforce the contract against the defaulting party...”

6) It should be noted that the counsel never provided copies of these authorities. Be that as it may, he proposed that the Plaintiff be awarded Kshs, 300,000 x 2.53 acres which will add up to Kshs. 759,000 plus Kshs. 1,000,000 being general damages for breach of contract.

7) Having read the evidence on record as well as the submissions that were filed, it seems to me that the Defendant partially complied with the terms of the sale agreement. This is why the Plaintiff prays for the balance of 2.53 acres or its equivalent. This would therefore be Kshs. 200,000 x 2.53 acres = 506,000/= and not Kshs. 759,000 which the counsel has proposed that the Plaintiff be awarded. As for general damages of Kshs. 1,000,000 proposed by his counsel, no basis was put forth for the sum in question. In my view, the sum of Kshs. 100,000 would suffice under the circumstances given the fact of partial compliance by the Defendant. I hereby proceed to enter judgement

for the Plaintiff and against the defendant as hereunder:-

a) Specific performance of the agreement dated 25th July, 2011 or in the alternative the Defendant do pay general damages for breach of contract amounting to Kshs. 100,000 plus the correct market value of 2.53 acres amounting to Kshs. 506,000.

b) Costs of the suit.

SIGNED, DATED and DELIVERED at MAKUENI this 13TH day of DECEMBER, 2018

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Nagwere holding brief for

Mr. Mwangela for the Plaintiff

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

13/12/2018