



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 469 OF 2011**

**MARY WAIRIMU MUTURI.....PLAINTIFF**

**VERSUS**

**JOHN WAKIBI MURUA.....DEFENDANT**

**JUDGMENT**

The Plaintiff and the Defendant entered into a written agreement for sale dated 18<sup>th</sup> December, 2006 in respect of a portion of all that parcel of land known as L.R No. 10874/51 (hereinafter referred to as “the suit property”) measuring one (1) acre. The purchase price was agreed at Kshs.650,000/= of which Kshs.400,000/= was paid upon the execution of the agreement of sale and the balance thereof in the sum of Kshs.250,000/= was to be paid “on or before 30-4- 2007 and or upon sub-division and acquiring a Title Deed in respect of the purchaser.” It was a term of the agreement for sale that:

- i. The vendor was to co-operate with the purchaser in the sub-division of the suit property and obtaining of the title to the portion of land which was sold to the purchaser.
- ii. The vendor was to bear the costs of the sub-division of the suit property.
- iii. Each party was to bear its own costs of the titles after the subdivision.

The Plaintiff brought this suit against the Defendant seeking a declaration that the Plaintiff is the legal owner of one (1) acre to be excised from the suit property, and an order for specific performance of the agreement for sale dated 18<sup>th</sup> December, 2006. In her plaint, the Plaintiff averred that the Defendant had ignored, refused and/or neglected to effect the transfer of the portion of the suit property which he had sold to him after receiving a sum of Kshs.500,000/= on account of the purchase price. The Plaintiff averred that the Defendant intended to fraudulently and maliciously sell the said portion of land to other buyers.

In his defence filed on 29<sup>th</sup> June, 2010, the Defendant admitted that he entered into an agreement for sale with the Plaintiff on 18<sup>th</sup> December 2006 in respect of a portion of the suit property measuring one (1) acre. The Defendant admitted further that he received a sum of Kshs.450,000/= from the Plaintiff on account of the purchase price. The Defendant denied that the Plaintiff had paid to him a total sum of Kshs.500,000/= as claimed in the plaint. The Defendant averred that the balance of the purchase price was payable on or before 30<sup>th</sup> April, 2007 and that it was the duty of the Plaintiff to pursue the title in respect of the portion of the suit property which was sold to him after the subdivision. The Defendant averred that he had fulfilled his part of the agreement by subdividing the suit property and lodging the Deed Plans with the Director of Surveys. The Defendant averred that the suit property had been subdivided into L.R No. 10874/1180 and LR No. 10874/1181 with the latter parcel being the one which was

sold to the Plaintiff. The Defendant averred that in breach the terms of the agreement aforesaid, the Plaintiff failed and/or neglected to pursue her title for LR No. 10874/1181 and also to pay the balance of the purchase price. The Defendant averred that in the circumstances, the Plaintiff was not entitled to the reliefs sought. There is no evidence on record that the Plaintiff filed a reply to defence.

The suit was fixed for hearing on 11<sup>th</sup> April, 2016 by the Plaintiff's advocates. When the matter came up for hearing, only the Plaintiff and her advocate appeared. After satisfying myself that the Defendant's advocates were served with a hearing notice, I allowed the hearing to proceed the absence of the Defendant notwithstanding. The Plaintiff gave evidence and did not call any witness. In her evidence, the Plaintiff reiterated the contents of her plaint which I have highlighted at the beginning of this judgment. The Plaintiff stated that she had paid to the Defendant a total of Kshs.450,000/= leaving a balance of Kshs.200,000/= which she was ready and willing to pay to the Defendant upon transfer of the portion of the suit property which he sold to her to her name.

I have considered the pleadings and the evidence on record. There is no dispute that the Defendant agreed to sell to the Plaintiff a portion of the suit property measuring one (1) acre at a consideration of Kshs.650,000/=. It is not in dispute that the Plaintiff paid to the Defendant a sum of Kshs.450,000/= on account of the purchase price leaving a balance of Kshs.200,000/=. The only disagreement between the parties concerns the time within which the balance of the purchase price was to be paid and the role of each party in the processing of the title for the portion of the suit property which was sold by the Defendant to the Plaintiff. The Plaintiff pleaded and led evidence that the balance of the purchase price was payable upon the Defendant obtaining a title for the portion of the suit property which he had sold to her ("hereafter referred to as "the disputed property"). The Defendant on the other hand contended that the balance of the purchase price was payable on or before 30<sup>th</sup> April, 2007. The agreement for sale dated 18<sup>th</sup> December 2006 is very clear on when the balance of the purchase for the disputed property became payable. I have re-produced the relevant part of the agreement earlier in this judgment. The balance of the purchase price was payable according to paragraph 1 (b) of the agreement aforesaid on or before 30<sup>th</sup> April, 2007 and/or upon the subdivision and issuance of the title infavour of the purchaser (Plaintiff). My understanding of this clause of the agreement which was not well drafted is that, the Plaintiff could either pay the balance of the purchase price on or before 30<sup>th</sup> April, 2007 or upon the subdivision of the suit property and the issuance of a title in her favour in respect of the disputed property. The choice was the Plaintiff's and the Plaintiff seems to have chosen the later. It is not correct therefore to say as contended by the Defendant that the balance of the purchase price was payable strictly on or before 30<sup>th</sup> April 2007. With regard to the role the parties were to play in the processing the title for the disputed property, clause 5 of the agreement provided that the vendor was to bear the expenses for subdividing the suit property while each party was to take care of its own costs for processing the individual titles after the subdivision. My understanding of this clause from the evidence on record is that the Defendant had the responsibility of sub-dividing the suit property so that the Plaintiff may have a separate title for the disputed property. Once the suit property was sub-divided, separate titles issued and the Defendant had executed the transfer of the disputed property infavour of the Plaintiff, the Plaintiff was to pay the stamp duty and registration fees for the title in her favour to be issued. The Plaintiff has contended that the Defendant has failed to execute the transfer in her favour in respect of the disputed property. The Defendant had contended in his defence that he had sub-divided the suit property and submitted the Deed Plans to the Director of Surveys. I am of the view that this was not enough as far as the responsibilities of the Defendant in the sale transaction were concerned. The Deed Plans had to be authenticated by the Director of Surveys after which new certificates of titles had to be issued in respect of the subdivisions. It is after this that the Plaintiff would have been expected to take over the process. There is no evidence on record that the Deed Plans for the subdivisions of the suit property were authenticated by the Director of Surveys and that new certificates of title were issued and instrument of transfer executed by the Defendant in favour of the Plaintiff in respect of the disputed property.

On the evidence before me, I am satisfied that the defendant breached the agreement dated 18<sup>th</sup> December 2006 between him and the Plaintiff. The plaintiff has sought specific performance of the said agreement. An order for specific performance is a discretionary remedy. As was held in the case of Gruder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, Court of Appeal Civil Appeal No. 165 of 1996

which was cited by the Plaintiff, for the Court to order specific performance, the party seeking the same “*must demonstrate that he has performed or willing to perform all the terms of the agreement and that he had not acted in contravention of the essential terms of the said agreement.*” I would add that there should also be no circumstance which militates against the grant of the remedy. The Plaintiff told the court that she is ready and willing to pay the balance of the purchase price and to fulfill all other terms of the agreement between the parties. The Defendant did not give evidence. There is no evidence before the court that there exists any circumstances that would militate against the granting of the order of specific performance.

In conclusion, I am satisfied that the Plaintiff has proved her case against the Defendant to the required standard. I therefore enter judgment for the Plaintiff against the Defendant as prayed in paragraphs (i),(ii) and (iii) of the plaint dated 20<sup>th</sup> May, 2010. The Plaintiff shall pay to the Defendant a sum of Kshs.200,000/= being the balance of the purchase price upon the execution of the instrument of transfer of the disputed property in her favour.

**Delivered and Signed at Nairobi this 28<sup>th</sup> day of April, 2017**

**S. OKONG’O**

**JUDGE**

**In the presence of**

Mr. Nyangau                      for the Plaintiff

N/A                                      for the Defendant

Kajuju                                  Court Assistant