



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL SUIT NO. 218 OF 2013

AISHA MBARAK ABDULRIZEG.....PLAINTIFF

VERSUS

KAHINDI NGOMA MZUKA.....1ST DEFENDANT

KAZUNGU NGOMA MZUKA.....2ND DEFENDANT

JUDGMENT

1. On 2nd December 2013, the Plaintiff Aisha Mbarak Abudulrizeg filed the suit herein seeking the following:-

(a) Specific performance of the Sale Agreement dated 20th June 2009.

(b) A declaration that 3 acres of land on Plot No. Kilifi/Mtwapa/486 and now 782 situated at Mtwapa Settlement Scheme belongs to the Plaintiff upon the Plaintiff paying the balance of the purchase price.

(c) In the alienative the Plaintiff to be refunded the Market value of the said piece of land as at now upon the same having been valued by a Land Valuer.

2. In support of the prayers, the Plaintiff states that on or about 20th June 2009, the two defendants Kahindi Ngoma Mzuka and Kazungu Ngoma Mzuka approached her and asked her to purchase from them 3 acres of land from their parcel of land known as Kilifi/Mtwapa/486 and now new number Kilifi/Mtwapa/782 at an agreed price of Kshs 800,000/=. Subsequently the Plaintiff proceeded to pay a sum of Kshs 340,000/= to the Defendants on various instalments between 20/6/2009 and 16/12/2009. It was an expressed part of the agreement that the Defendants were to survey the land, obtain title and then transfer the land to the Plaintiff upon which she would pay the balance of the purchase price.

3. It is her case that the Defendants proceeded to obtain title but did not disclose this to her thereby dispossessing her of her entitlements and necessitating the prayers aforelisted.

4. In a Statement of Defence filed on 3rd June 2014, the Defendants contend that it is the Plaintiff who did not bother to inquire if the title had been issued. They further deny that they breached the Sale Agreement as alleged by the Plaintiff or at all and aver instead that it was the Plaintiff who breached the Agreement by failing to pay the agreed amount in time.

The Plaintiff's Case

5. On 6th March 2017 when the matter came up for hearing neither the Defendants nor their counsel attended court. Being satisfied that there was due service upon the Defendants as per the Affidavit of Service filed herein on 6th March 2012 and sworn by one Michael Muthee Williams, the court ordered that the hearing proceeds as scheduled.

6. The Plaintiff Aisha Mbarak Abdulrizeg then took the witness stand and stated how she met the defendants through an agent who sells land. She narrated how they entered into the Sale Agreement dated 20/6/2009 which entitled her to 3 acres of land from a parcel of land measuring 12 acres which the plaintiffs were in the process of selling. She paid an initial deposit of Kshs 200,000/= and it was agreed that she would pay the balance once the Defendants had processed title to the land which was to be completed within 6 months. The land was originally in the name of the Defendants' father and the Defendants had agreed how to sub-divide the land among themselves.

7. She subsequently paid a further sum of Kshs 50,000/= on 21/10/2009 and another sum of Kshs 50,000/= on 29/10/2009. On 16/12/2009, she paid the defendants another deposit of Kshs 40,000/= through the Agent as the Defendants continued demanding more money from her. Thereafter they sought the Land Control Board consent and the Application for the consent clearly showed the consideration to the land was Kshs 800,000/=. The Board gave its consent on 10/12/2009 (Pex 5).

8. Earlier after discharging a charge that was on the land on 9/9/2010, (see Pex 7), the parties obtained consent to sub-divide the land on 3/9/2009. To-date however, she has never been given the land which she had been shown previously. When she confronted the Defendants, she learnt that they had sold the land to another person. The Plaintiff then demanded a refund of her money but to-date the Defendants have refused to pay.

Analysis of evidence

9. I have looked at the pleadings and considered the Plaintiff's uncontroverted testimony in court. It is not disputed that there was a Sale Agreement for purchase of 3 acres of land executed between the Defendants and the Plaintiff. It is also not disputed that the Plaintiff paid a sum of Kshs 340,000/= to the Defendants for purchase of the land identified in the Sale Agreement as Plot Number Kilifi/Mtwapa/486 now No. 782.

10. I note that the Plaintiff is seeking Specific performance of the Sale Agreement dated 20/6/2009. I note however that a great deal of time has passed since the Agreement was entered into and the Plaintiff herself admits that she learnt thereafter that the land was re-sold to a third party. The present owner may not be aware of the dispute herein as he/she was not made a party in this suit.

11. I have carefully looked at the Sale Agreement. I think it was extremely unfair for the Defendants to use the Plaintiff's money to process title for the land and thereafter deny her possession of her portion after she had done everything including the processing of the Land Control Board consent.

12. Accordingly, I hereby Order that the Plaintiff be refunded the current Market Value of LR No. Kilifi/Mtwapa/486 new No. 782 (minus any development thereon) Less the balance of the unpaid purchase price of Kshs 460,000/=

13. The Land Registrar Kilifi is hereby ordered to undertake a valuation of the said L.R. No. Kilifi/Mtwapa/486 new No. 782(minus any developments and/or improvements thereon) to establish its current Market Value and to file a Report thereon in court within 60 days of the date hereof.

14. The costs of the said Valuation and the cost of this suit to be borne by the Defendants.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J. O. OLOLA

JUDGE