



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C NO. 73 OF 2017

ROSEBELLA IRANMWENYA MIRIEH.....PLAINTIFF

VS

MWANGI NGUGI.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 2nd February 2017 against the Defendant seeking the following orders;-
 - a. An order of specific performance compelling the defendant to subdivide Dagoretti/Waithaka/1207 and furnish the Plaintiff with completion documents to wit duly executed transfer form, land control board consent, clearance certificates, P.I.N Certificate, Copy of Identify Card and 3 Passport photos.
 - b. An order extending time within which to obtain consent from the Land Control Board.
 - c. In the alternative to prayer (a) above a refund of the sum already paid to the respondent together with costs paid to the surveyor plus interest.
 - d. Costs of this suit.
2. The Plaintiff's claim is that on the 3rd February 2011 she entered into an agreement for sale for a portion of land measuring $\frac{1}{4}$ acre of land known as Dagoreti Waithaka/1207 with the Defendant who is the registered owner. The purchase price was Kshs. 2.0 Million out of which a sum of Kshs 1,550, 000/- has been paid leaving a balance of Kshs. 450,000/=.
3. The Plaintiff's case is that she entered into an agreement for sale, paid the substantial amount of the purchase price and was given possession of the suit property on signing the agreement of sale. The Plaintiff avers that the Defendant has willfully breached the agreement of sale and stalled the completion of the transaction by his failure to obtain consent from the Land Control Board; failure to provide the required clearances and certifications from the relevant authorities; failure to engage a surveyor to subdivide the land. She avers that these are the particulars of breach on the part of the Defendant.
4. The Plaintiff avers that she has tried to resolve the matter amicably by involving the local chief but the Defendant has been adamant in completing the sale. That he never heeded to the demand sent by her lawyers on 19.8.2016. In her evidence she referred the Court to the agreement for sale dated 3rd February 2017 which provided *inter alia*: that the balance of Ksh 450,000/= would be paid to the Defendant by the

Plaintiff's upon successful transfer of the property to the purchaser name; that the vendor would obtain the Land Control Board consents to subdivide and transfer the subject portion to the Defendant; that the cost of subdivision would be paid by the vendor; that the Defendant undertook to hand over possession of the suit property on completion of the survey work by 15th February, 2011.

5. It is on record that the Defendant was served with the Plaint and Summons to enter appearance in this case on 25th April 2017, 17th May 2017 and 23rd May 2017. The Defendant did not enter appearance nor file any defence in the case within the time stipulated by law and accordingly the plaintiff set the matter for hearing. The claim of the plaintiff therefore is undefended by the defendant.

6. Issues, analysis and determination.

Whether the Plaintiff is entitled to an order for specific performance.

Whether the plaintiff is entitled to an order to extend time for application of the Land Control Board.

Whether the plaintiff is entitled to an order for refund?

7. In her submissions the Plaintiff's learned counsel has urged the Court to hold that the Plaintiff is entitled to the order of specific performance. She has relied on the cases of **Rose Wambui Wahito Vs John Ian Maingey (2013) Eklr** and **Geoffrey Kinuthia Njoroge vs Macro Ventures Developers Ltd (2013) eKLR** urged the Court pronounced itself as follows;

“The remedy of Specific performance involves the Court in issuing an order directing one of the parties to a contract to carry out his or her obligations. The sanction for failure to comply is that the person concerned will be in contempt of Court and liable to fines and imprisonment as a consequence. Since the remedy is an equitable one, it is discretionary, unlike damages which are available as of right. This means that a claimant is not entitled to the order simply as a result of proving that the other party is in breach of its obligations. Once this has been established, the Court will then decide whether it is appropriate in this particular case that the order should be made”.

8. This Court was pointed to the fact that the transaction sought to be protected and enforced by the plaintiff is a controlled one since the suit property is subject to the Land Control Act which stipulates that where consent of the Land Control Board for a controlled area is not given for a controlled transaction such transaction is void for all purposes. That consent must be obtained within 6 months of signing of the agreement. The plaintiff admits that though the consent was not obtained, the Court has discretionary powers to so extend the period within which to obtain the consent to steer back the contract to validity.

9. Relying on the case of **David Kinisu Vs Marriane Eyaase Kisanji & 2 others (2015) Eklr** the plaintiff opined that the defendant is using the failure to obtain the Land control board consent as a ground to deny the plaintiff her entitlement to the suit property and the more reason that the Court should extend the time for application of the Land Control Board consent.

10. It is not in dispute that the suit land is agricultural land and as such is subject to the Land Control Board Act. The purpose of the Land Control Act is to control transactions in respect of agricultural land. Section 6 of the Land Control Act therefore provides that;

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of

less than twenty acres into plots in an area to which the Development and Use of Land (Planning)

Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(8) (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto provided that the High Court may, notwithstanding the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it may deem fit.”

11. It is on record that the instant transaction was bereft of consent and applying the meaning of section 6(1) this transaction is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. Consent was and has not been obtained.

12. In respect to the issue of 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. Any litigant seeking the remedy must meet the requirements to qualify for specific performance; existence of a valid contract, conduct of the parties must commend itself to equity – come to equity with clean hands, remedy should not cause hardship and damages must be insufficient or cannot be established.

13.. Specific performance will not be ordered if the contract suffers from some defect, such as failure to comply with the 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. **Chitty on Contract, 30th edition, volume one at paragraph 27-003** observed that:

“The jurisdiction to order 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.”

14. Failure to obtain the necessary Land Control Board consent automatically vitiates a sale of land which is subject a controlled transaction like this one. I find that the transaction in this case is void, invalid and therefore the remedy of specific performance is not available to the plaintiff.

15. Regarding the prayer for extension of time for application of the land control board, I find this prayer moot in this way; given my finding that the transaction is void and invalid on account of lack of consent which is a statutory requirement. The reasons for extension have not been adduced to enable the Court to apply its mind on whether or not to extend the time. In any event the Court in **Joseph Boro Ngera v Wanjiru Kamau Kaime & Another CA No. 32 of 2005 (Nakuru)** held that “the real issue was whether the High Court had properly exercised its jurisdiction under Section 8 of the Land Control Act when it declined to extend time for applying for consent of the Land Control Board. This Court held that the appellant, who had taken possession of agricultural land under a transaction, which he knew to be void for lack of consent of the Land Control Board, was not entitled to extension of time because such possession constituted a criminal offence under section 22 of the Land Control Act”.

16. In **Black’s Law Dictionary Eighth Edition by Bran A. Garner page 1435**, it is stated “specific performance is an equitable remedy that was within the courts discretion to award whenever the common law remedy is in sufficient either because damages would be in adequate or because the damages could not possibly be established. The plaintiff has prayed for an alternative in the suit which is the refund of

the sum already paid to the defendant”. Section 8 of the Land Control Act states that;

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

I hold and find that in the circumstances this is the only remedy available to the plaintiff and I so grant.

17. Having considered the pleadings, the submissions and the evidence in this case, I hereby make the final orders as follows;

- a) The order for specific performance is declined
- b) The order extending time within which to obtain consent from the Land Control Board is declined
- c) The defendant is ordered to refund to the plaintiff the sum of Kshs 1, 550,000/- together with Kshs 30,000/- being the costs of subdivision forthwith with interest at court rates from the time of filing suit till payment in full.
- d) Costs of this suit shall be met by Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND SEPTEMBER 2017

J.G. KEMEI

JUDGE