



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 844 OF 2014**

**PERPETUA WANGUI IRIMU.....PLAINTIFF**

**VERSUS**

**BERNADETTA WAMBUI WANYOIKE.....1<sup>ST</sup> DEFENDANT**

**PAUL KINUTHIA WANYOIKE.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed suit on 26 June, 2014 seeking a declaration that she is the beneficial owner of one acre that was to be excised from L.R. No. 7497/66 (“the Suit Property”). She also seeks a permanent injunction to restrain the Defendant from taking possession of the Suit Property and specific performance of the agreements dated 15<sup>th</sup> June, 2012 and 29<sup>th</sup> October, 2012.

2. The Plaintiff entered into an agreement with both Defendants on 15<sup>th</sup> June, 2012 vide which the Defendants sold 1 acre from their land L.R. No. 74797/66 for the agreed consideration of Kshs 4,500,000/=. The firm of Njeri Mburu & Company Advocates represented both parties in the sale transaction. The Plaintiff paid a deposit of Kshs. 1 million and was to take possession of the land pending the subdivision and transfer of 1 acre to her name under the agreement. The balance of Kshs. 3,500,000/= was to be paid on or before 30<sup>th</sup> August, 2012. There was an error in this agreement where the land was described as L.R. No. 74797/60 instead of L.R. No. 74797/66. This necessitated a new agreement to correct this error.

3. A further agreement for sale dated 29<sup>th</sup> October, 2012 was entered into between the parties. In the further agreement, the balance of Kshs. 3.5 million was to be paid to the firm of Njeri Mburu & Co. Advocates either on signing the agreement or not later than 21 days from the date of the further agreement.

4. The original title was to be held by the advocates while a copy was to be released to the Defendants to undertake the survey work. The parties were to share the surveyor’s fees of 75,000/= and the Plaintiff was to deduct the seller’s portion of the survey fees from the balance of the purchase price.

5. The Defendant did not enter appearance on time despite being served prompting the Plaintiff to request for judgment on 3<sup>rd</sup> September, 2014. The court did not enter judgment. The Defendant filed two memoranda of appearance. The firm of Mulandi Kisabit & Associates entered appearance for both Defendants on 3<sup>rd</sup> October, 2014. Muiruri Kamande & Associates also entered appearance for Defendants on 7<sup>th</sup> October, 2014.

6. In the defence filed on 17<sup>th</sup> October, 2014 the Defendants admitted entering into the sale agreement for the sale of one acre to the Plaintiff. The Defendant denied all the other averment in the plaint and urged the court to dismiss the suit with costs.

7. A second defence was filed in court on 22<sup>nd</sup> October, 2014 by the firm of Muiruri Kamande and Associates. In this defence, the Defendants aver that the sale agreement could not be completed due to the breach by the Plaintiff of fundamental terms of agreement. The Defendant contended that the Plaintiff made payment of the balance of the purchase price after the stipulated period yet the agreement stated that time was of essence. The Defendant also denied being served with a completion notice. They also challenged the subdivision undertaken by the Plaintiff as being irregular and voidable for want of instructions from the Defendants who are the registered owners of the property.

8. The Defendant did not attend the hearing of the case. The 1<sup>st</sup> Defendant filed a witness statement in court on 2<sup>nd</sup> November, 2015 in which she stated that she had the authority of her son who is sued as the 2<sup>nd</sup> Defendant to make the statement. She states that she is the administrator of the Estate of the late Simon Wanyoike Kiarie whose wish was to have the land divided into 17 portions.

9. She further states that after the completion of the subdivisions, the family realised that the surveyor had made an error in the subdivided portions to be given to each of her children thereby creating a problem among her children. She admitted entering into a sale agreement with the Plaintiff and indicated that the process of surveying the land to correct the errors was on-going. She explained that the failure to release the title to the Plaintiff was not deliberate but that she needed to sort out the anomaly in the survey.

10. The witness statement of Mary Njeri Mburu filed in court 22<sup>nd</sup> October, 2015 confirms that this advocate is currently holding the sum of Kshs. 3,400,000 being the balance of the purchase price as a stakeholder awaiting completion of the sale transaction.

11. Jacqueline Njeri Irimu who holds a power of Attorney from the Plaintiff attended court and testified on behalf of the Plaintiff. She stated that as holder of power of Attorney which was duly registered she had authority and power to act on behalf of the Plaintiff. She produced the agreements for sale dated 15<sup>th</sup> June, 2012 and 29<sup>th</sup> October, 2012. She also produced a copy of the electronic transfer form dated 20<sup>th</sup> June, 2012 for payment of Kshs 1 million to Njeri Mburu & Company Advocates; a copy of the Plaintiff's bank statement confirming payment of Kshs. 3 million on 20/11/2012 to the firm of Njeri Mburu & Co Advocates and a copy of the remittance of Kshs. 518,750/= on 30<sup>th</sup> November, 2012 to Njeri Mburu & Company Advocates.

12. The witness also stated that the firm of Geocom Africa was appointed to undertake the survey work and they completed the subdivision and obtained deed plans on 3<sup>rd</sup> July, 2013 which showed that the Plaintiff was getting L.R. No. 7497/82. The witness produced the deed plan in respect of the Plaintiff's portion. She further stated that the Plaintiff paid the surveyors fees of 75,000/= out of which the Defendant share of 37,500 was to be deducted from the purchase price. The Plaintiff also paid the advocates legal fees of Kshs. 56,256/=.

13. Upon completion of survey work and establishment of the beacons and boundaries on the land, the Plaintiff requested the 1<sup>st</sup> Defendant to sign the transfer and hand over the original title to facilitate the registration of the transfer of the land to the Plaintiff but the 1<sup>st</sup> Defendant failed to sign the transfer citing the reason that she first needed to authenticate the beacons placed by the surveyor.

14. The parties held several meetings with the view to resolving the issue but the Defendant still refused to execute the transfer and hand over the original title and other completion documents to the advocate. The witness produced the completion notice dated 13<sup>th</sup> January, 2014 which gave the Defendant 21 days to submit the completion documents.

15. The issue for determination is whether the Plaintiff fulfilled her obligations under the sale agreement

and whether the orders she seeks ought to be granted. The Defendants do not deny entering into the sale agreement. The Plaintiff has demonstrated that she paid the deposit of Kshs. 1 million to the Defendant and the balance of Kshs. 3.5 million to the firm of Njeri Mburu & Co Advocates who acted for both parties in the sale transaction.

16. In the case of **Gurdev Singh Birdi and Marinder Singh Ghatora (as Trustees of Ramgharia Institute of Mombasa) V. Abubakar Madhbuti** (1997) eKLR the court stated that a party seeking specific performance must be prepared to demonstrate that they had performed or were willing to perform all the terms of the agreement which ought to have been performed by them and that they had not acted in contravention of the essential terms of the agreement.

17. The court is satisfied that the Plaintiff performed all the terms of agreement dated 15<sup>th</sup> June, 2012 and 29<sup>th</sup> October, 2012. The balance of the purchase price of Kshs. 3.5 million is held by Njeri Mburu & Co. Advocates as stakeholders pending completion of the sale transaction. If indeed the 1<sup>st</sup> Defendant was keen to complete the transaction, she should have sorted out the issues of the errors on the survey as it is now over 5 years since the survey work was done. The 1<sup>st</sup> Defendant indicated in her witness statement dated 15<sup>th</sup> October, 2015 that she would resolve the issue and undertake a new survey to subdivide the land which to date has not happened.

18. The court grants prayers (b), (c), (e) and (g) of the plaint dated 23<sup>rd</sup> June, 2014. The Plaintiff failed to prove the damages for the loss of earnings. The Plaintiff will have the costs of this suit.

Dated and delivered at Nairobi this 19<sup>th</sup> day of September 2017.

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff and Defendant

Mr. V. Owuor- Court Assistant