



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 349 OF 2010(O.S.)
NANCY WANJIRU GITHUA NJAAGA.....PLAINTIFF
VERSUS
MARGARET NJERI MUKIRAI.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed the Originating Summons on 20/7/2010 seeking to have the court declare that the Defendant sold Plot number 5691 (“the Suit Property”) being a portion created from the subdivision of Dagoretti/Riruta/1591 to the Plaintiff through the sale agreement dated 25/11/2008; and that the Plaintiff has discharged her obligations under the sale agreement and duly paid part of the purchase price as it was agreed between the parties.
2. The Plaintiff entered into an agreement with the Defendant on 25/11/2008 for the purchase of $\frac{1}{4}$ of an acre of L.R. Number Dagoretti/Riruta/1591 for the agreed consideration of Kshs. 1,250,000/=. The Plaintiff was to make a down payment of Kshs. 300,000/= and the balance of Kshs. 950,000/= was to be paid upon the transfer and charge of the plot. It was agreed that the Plaintiff would take possession of the plot upon execution of the sale agreement.
3. The Plaintiff paid the deposit of Kshs. 300,000/=. She followed up on the transaction up to the point where mutation forms for the subdivision were prepared and registered against the main title. The Defendant obtained the Land Control Board consent to transfer L.R. Number Dagoretti/Riruta/5691 being the Suit Property to the Plaintiff on 11/06/08.
4. The letter from Musyimi & Company Advocates dated 12/01/2009 confirms that the Plaintiff had approached the Cooperative Bank to finance the balance of the purchase price. The letter is addressed to the Defendant. In the letter, the Bank’s Advocates sought copies of title, Land Control Board consent and the rates clearance certificate while undertaking to give the Defendant a professional undertaking for the payment of the purchase price on registration of the charge.
5. The Defendant frustrated all efforts to conclude the sale. The Plaintiff referred the matter to the Chief who summoned the Defendant to discuss the land dispute but the Defendant failed to honour the summons. The Plaintiff’s advocates issued a demand letter urging the Defendant to deliver up vacant possession by 10/5/2009 but this too went unheeded.
6. The Plaintiff obtained an interim injunction restraining the Defendant from transferring or dealing with the Suit Property on 20/7/2010. The orders were extended on 4/10/2010 until the suit is heard and determined.
7. The suit papers were served on the Defendant. From the court record it appears as if the court file went missing and the Plaintiff filed an application for reconstruction on 11/11/2013. It is not clear when the

Defendant appointed the firm of Mbugua Mureithi & Company Advocates to act for her in the suit.

8. The Plaintiff gave evidence at the trial. She produced the documents in support of her claim. The Defendant's advocates attended the hearing and cross examined the Plaintiff. During cross examination the Defendant's advocate raised the issue of the Defendant holding the Suit Property in trust for her 10 adult children and that she is elderly and does not understand English yet the sale agreement she executed was not translated to Kikuyu. These issues were also taken up in the Defendant's written submissions.

9. The court agrees with the Plaintiff that the facts as pleaded by the Plaintiff are not controverted by the Defendant who did not file a Replying Affidavit in the matter. Under Order 2 Rule 11 of the Civil Procedure Rules, any allegation of fact made by a party is deemed to be admitted by the opposing party unless it is traversed by that party in its pleadings.

10. A party who seeks specific performance is required to demonstrate that she has performed or is ready to perform the terms of the agreement (see the case of **Gurdev Singh & Narinder Singh Ghorta as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhubuti** [1997] eKLR).

11. The Plaintiff paid the deposit of Kshs. 300,000/= and approached the Co-operative Bank to finance the balance of the purchase price through a charge that was to be secured over the Suit Property. The Defendant failed to supply the documents sought by the Bank's advocates to enable the Bank advance the Plaintiff the funds to pay the balance of the purchase price.

12. The court finds that the Plaintiff has proved her case on a balance of probabilities and that she deserves the order for specific performance of the sale agreement dated 25/11/2008 having discharged her obligations under the sale agreement. The Plaintiff will have the costs of this suit.

Dated and delivered at Nairobi this 18th day of September 2017.

K. BOR

JUDGE

In the presence of: -

No appearance for the Plaintiff and for the Defendants

Mr. V. Owuor- Court Assistant