



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO 278 OF 2014**

**THE REGISTERED TRUSTEES**

**AFRICAN INLAND CHURCH.....PLAINTIFF**

**VERSUS**

**ZACHARIA RAWAGO JALANGO.....DEFENDANT**

**JUDGEMENT**

1. What is before me for determination is a matter wherein Judgment was entered against the defendant on the 16<sup>th</sup> December 2014. It is on record that the defendant was served with the Notice of Motion, summons to enter appearance together with a copy of the plaint, on the 24<sup>th</sup> September 2014 as per the affidavit of service sworn by one Paul Ado on the 3<sup>rd</sup> October 2014 and filed in court on the 6<sup>th</sup> October 2014. The defendant having failed to either enter appearance or file a defence despite being duly served, the matter was set down for formal proof on the 16<sup>th</sup> December 2014.

2. By a plaint dated the 17<sup>th</sup> September 2014 the plaintiff herein instituted this suit against the defendant seeking the following orders;

a) A Declaration that the Plaintiff is entitled to specific performance, over and in respect of the portion of land measuring 0.5 acres out of LR No. South Nyakach/Dianga East/2189 which was sold to/and or if favor of the plaintiff ad which portion is currently under the occupation of and possession of the Plaintiff.

b) An order of permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the Defendant from entering upon, re-entering trespassing onto, laying a claim to, building on, chasing away the plaintiff's workers, interfering with and/or in any other manner dealing with the portion of the suit property measuring 0.5 Acres (1/2 acre) that is, LR No. South Nyakach/Dianga East/ 2189

c) Costs of this suit be borne by the Defendant.

d) Such further and/or other relief as the Honorable court may deem fit and expedient so to grant.

3. The plaintiff's case is that it is the Registered Trustee of the African Inland Church(AIC) which a duly registered Organization pursuant to and in accordance with the provisions of the Society's Act.

4. That on the 12<sup>th</sup> march 2001 the Plaintiff and the Defendant who was the registered owner of land parcel No. LR No. South Nyakach/Dianga East/182 entered into a sale agreement whereby the defendant agreed to sell to the plaintiff a portion of his land measuring ½ (0.5) acres at an agreed consideration of Ksh. 600,000/= The parties agreed that the payment would be made in installments as agreed in their agreement.

5. That pursuant to this agreement and the terms met by the plaintiff, the defendant herein proceeded to cause the original parcel of the land to be sub-divided thereby generating the creation of LR No. South Nyakach/Dianga East/ 2189 the suit property herein.

6. That this subdivision of the original parcel of land by the Defendant which had been sold to the Plaintiff was calculated to defeat and/or defraud the Plaintiff of its rightful and legitimate interest over the sold parcel of land which now formed part of LR No. South Nyakach/Dianga East/ 2189. The Defendant has since refused to transfer and/or cause to be transferred the portion sold to the Plaintiff.

7. At the hearing of the suit which was prosecuted by M/s Asunah counsel for the Plaintiff, a total of 2 witnesses were called to prove their case. Thereafter submissions were filed.

8. The plaintiff's case was through its witnesses, who on oath and while relying on their witness statements testified that they had the authority as the pastor and deacon (who was party to the transaction) of the church respectively, to testify on its behalf.

9. That when the church wanted to purchase land, the officials had sat down together and had deliberated on the issue wherein on the 25<sup>th</sup> February 2009 they had conducted a search on the land wherein they had confirmed that indeed the Defendant was the registered owner of No. LR No. South Nyakach/Dianga East/182. A certificate of search was produced as exhibit 2.

10. That thereafter the church had entered a sale agreement on behalf of the church with the Defendant on the 12<sup>th</sup> March 2009 for the purchase of 0.5 acres of land at a price of Ksh 600,000/=. That a sale agreement, was signed on the 24<sup>th</sup> April 2013 after full payment of the suit land. The same was drawn by Mr. Owuor Advocate, now deceased, and produced as his exhibit 1.

11. The witness testified that prior to the signing of the agreement, the church had paid the defendant Ksh. 20,000/= and after the signing of the agreement parties agreed that the purchase price would be paid in instalments and paid Ksh 55,000/= to the defendant on that day.

12. Thereafter the church continued paying the defendant as agreed until the whole sum was paid. The plaintiff then produced a bundle of receipts which were marked as exhibit 3(a-n) showing the payments made in the following manner;

a) 3<sup>rd</sup> December 2009 -Ksh. 100,000/=

b) 10<sup>th</sup> June 2010 - Kshs. 100,000/=

c) 3<sup>rd</sup> August 2010- Kshs 4,000/=

d) 21<sup>st</sup> December 2010- Kshs 11,000/=

e) 19<sup>th</sup> April 2011- Kshs 60,000/=

f) 21<sup>st</sup> December 2011- Kshs 35,000/=

g) 12<sup>th</sup> January 2012- Kshs 10,000/=

h) 5<sup>th</sup> March 2012- Kshs 20,000/=

i) 18<sup>th</sup> May 2012- Kshs 50,000/=

j) 22<sup>nd</sup> August 2012- Kshs 52,000/=

k) 2<sup>nd</sup> November 2012- Kshs 30,000/=

l) 20<sup>th</sup> December 2012- Kshs 6,000/=

m) 1<sup>st</sup> April 2013- Kshs 10,000/=

n) 23<sup>rd</sup> April 2013- Kshs 35,000/= totaling to Ksh 600,000/=

13. It was the plaintiff's case that every time they made a payment the Defendant acknowledged receipt and surrendered claim of the land to the church.

14. The church then took possession of the land, and built a church and latrine thereon and fenced its compound upon completion of the payment. However the defendant had refused to release the title to the land.

15. The plaintiff testified through its representative that previously the defendant's land comprised of LR No. South Nyakach/Dianga East/182 wherein he had subdivide the same into three(3) creating three titles after obtaining consent from Upper Nyakach land Control Board. The said application and consent from the board dated 16<sup>th</sup> September 2013 was produced as exhibit 4a –b.

16. That the land the Church lay claim to was within parcel No. 2189 which was still in the name of the defendant. A copy of the map showing this land was produced as exhibit 8 showing the suit land as entry No.29.

17. On the 16<sup>th</sup> November 2016, the Defendant wrote to the District Officer upper Nyakach Division confirming that the land had been allocated to the Church. This letter was produced as exhibit 5.

18. The plaintiff testified that despite a demand letter (Exh 7) having been made, the defendant has refused to sign the transfer documents so that the church can procure a title to the suit land. The plaintiff also testified that the Defendant had never come to court despite notices

having been issued to him.

19. The plaintiff concluded by submitting that they were entitled to reliefs sought in the plaint because they had established their case.

20. Counsel's written submissions supporting the evidence adduced in court was to the effect that indeed the Defendant had breached the agreement entered between him and the Plaintiff by receiving the purchase money from the Plaintiff, causing her to move onto the suit land, causing to put up a construction thereon the subsequently subdividing the land and refusing to transfer ownership to the plaintiff.

21. The land having been situated within Sondu town was not an agricultural land and therefore there was no need to seek for consent from the Land Control Board, therefore nothing would have stopped the Defendant from transferring the land to the Plaintiff.

22. I have reviewed and considered the uncontroverted evidence of the plaintiff in support of his claim and the issue for determination is whether the plaintiff is entitled to be declared as entitled to be registered as the owner of the suit property.

23. The evidence on record is that on the 12<sup>th</sup> March 2001 the Plaintiff and the Defendant, who was the registered owner of land parcel No. LR No. South Nyakach/Dianga East/182, entered into a sale agreement whereby the defendant agreed to sell to the plaintiff a portion of his land measuring ½ (0.5) acres at an agreed consideration of Ksh. 600,000/= The parties agreed that the payment would be made in installments as agreed in their agreement.

24. That pursuant to this agreement and the terms met by the plaintiff, the defendant herein proceeded to give the Plaintiff vacant possession of the suit land and has been on the same since the year 2013.

25. Documentary evidence was produced to prove that indeed there was a sale transaction between the Defendant and the plaintiff and that payment was fully made by the Plaintiff. There is also no doubt that before the Plaintiff bought the land, the Defendant, was the registered owner of the suit property as on 25<sup>th</sup> February 2009 as per the abstract of the search certificate which was produced as Exhibit 2.

26. The plaintiff has been using the land ever since he purchased the same and he and his children have built their homes on the suit land. There is no evidence that the defendant has at any time sought to recover the land from the plaintiff by way of eviction or otherwise.

27. The Plaintiff has sought orders of specific performance. Extracts from Halsbury laws of England 3<sup>rd</sup> edition Vol36 paragraph 444 have the following observation;

*“A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract...”*

28. The case of **Nabro Properties Ltd vs Sky Structures Ltd & 2 Others (2002) KLR 299** wherein issues of validity of the contract entitling one to an order for specific performance was under interrogation. The court of appeal held inter alia that:-

*“A party seeking specific performance must show and satisfy the court that it can comply and be ready and able. A mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast on the appellant”*

29. From the finding above, it is clear that in order for the relief of specific performance to be availed to the claimant, the following guiding principles or parameters should be met or demonstrated to exist:-

(a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs.

(b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can withhold it and award damage instead.

(c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.

(d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to cause hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.

(e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.

30. The defendant herein did not tender evidence to show that they complied with their part of the bargain by showing proof that they tendered the completion documents to the plaintiff being the Title document which would have enabled the plaintiff's advocate to prepare the

transfer instrument in readiness for registration upon being signed by the defendant.

31. I therefore hold that since the plaintiff complied fully with the agreement between parties, all that remained was for the defendant to transfer the land to the plaintiff. After the defendant was paid the full purchase price, the defendant in my view continued to hold title to the parcel of land in trust for the plaintiff.

32. Under sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya, the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties.

33. Section 3 (1) of the **Environment and Land Court Act** states the overriding objective thus:-

***The principal objective of this Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.***

34. Having carefully considered and evaluated the evidence in this matter, I am satisfied that the plaintiff indeed purchased the suit property and that he occupies and uses the suit property as the owner thereof.

35. I hold the view as Mutungi J in **Ndiege Oach Atieno v Ndire Nyasore [2016] eKLR** that the defendant after having been duly paid the purchase price and having parted with vacant possession of the suit property, he now continues to hold the portion of his land measuring  $\frac{1}{2}$  (0.5) of the suit property as trustee for the plaintiff. The plaintiff is entitled to have that trust discharged by the defendant being ordered to transfer the suit property to the plaintiff even though the plaintiff had not pleaded trust.

36. The net result is that I find and hold the plaintiff's suit against the defendant proved on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff as against the defendant on the following terms:

1. A declaration be and is hereby made that the defendant holds portion of his land measuring  $\frac{1}{2}$  (0.5) out of title number LR No. South Nyakach/Dianga East/ 2189 in trust for the plaintiff.
2. The defendant be and is hereby directed to transfer portion of his land measuring  $\frac{1}{2}$  (0.5) out of title number LR No. South Nyakach/Dianga East/ 2189 to the plaintiff herein forthwith.
3. A permanent injunction order is herein issued restraining the defendant either by himself, agents, servants and/or anyone claiming under the Defendant from entering upon, re-entering trespassing onto, laying a claim to, building on, chasing away the plaintiff's workers, interfering with and/or in any other manner dealing with the portion of the suit property measuring 0.5 Acres (1/2 acre) that is, LR No. South Nyakach/Dianga East/ 2189
4. Costs to the Plaintiff at the lower scale since the suit was undefended.

**Dated and delivered at Kisumu this 24<sup>th</sup> day of October 2017.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**