



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 1577 OF 2014

AKASH HIMATLAL DODHIA.....PLAINTIFF

VERSUS

DOROTHY MARGARET WANJIKU KUNG'U.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 22/12/2014 seeking a declaration that there exists a valid sale agreement between him and the 1st Defendant. He seeks a permanent injunction to restrain the 1st Defendant or her beneficiaries from selling, transferring, alienating, developing or otherwise dealing with the property known as L.R. No. 7741/422 Nairobi being a division of L.R. No. 7741/163 Nairobi ("the Suit Property").

2. The Plaintiff further seeks an order of specific performance to compel the 1st Defendant to transfer the Suit Property to him and an order requiring the Deputy Registrar of the High Court to execute any documents necessary for the transfer of the Suit Property to him. He also seeks an order to compel the 2nd Defendant to issue a certificate of title in respect of the Suit Property.

3. By the sale agreement dated 26/5/2011, the 1st Defendant agreed to sell to the Plaintiff the property known as L.R. NO.7741/422 Nairobi being a subdivision of L. R. No. 7741/163 Nairobi ("the Suit Property") for the agreed consideration of Kshs. 20 million. The Plaintiff was required to pay a deposit of Kshs. 2 million on or before the date of the agreement. The balance of Kshs. 18 million was to be paid into the 1st Defendant's account within 7 days of the registration of the transfer and issuance of a certificate of a title in the Plaintiff's name.

4. The Plaintiff paid the deposit of Kshs. 2 million. The 1st Defendant did not complete the sale on time and on 17/8/2011 the Plaintiff registered a caveat against the Suit Property claiming a purchaser's interest.

5. The 1st Defendant demanded an additional sum Kshs. 7 million claiming that it was intended for payment of outstanding rates in respect of the Suit Property. The Plaintiff issued a completion notice on 4/6/2012. The 1st Defendant informed the Plaintiff on 29/11/2012 that she was not able to complete the sale.

6. The Plaintiff claims that the 1st Defendant is in breach of the sale agreement while he has at all times been ready, able and willing to complete the sale. He avers that the Suit Property is of a unique character and of high sentimental value to him since it is situated within Kitisuru, Nairobi and he may not get a similar property in the same area at the price the parties agreed upon when they entered into the agreement. The Suit Property is located about 2 to 3 plots away from his parents' home. He had intended to build his home on the Suit Property so that he could be close to his aging parents and take care of them.

7. The 2nd Defendant was joined in the suit for purposes of ensuring that it issues the certificate of title over the Suit Property, which is one of the completion documents under the agreement.

8. The 1st Defendant filed her Defence and Counterclaim on 19/1/2015. The 1st Defendant is the executrix of the will of the late Ndung'u Samuel Kung'u whose estate comprises various properties including the Suit Property situated in Kitisuru. The 1st Defendant was appointed the executrix of the said estate vide the Will dated 15/12/1979 which was probated on 2/10/2006 in **Nairobi High Court Succession Cause No. 493 of 2003**.

The 1st Defendant avers that the sale agreement she entered into with the Plaintiff cannot be enforced and is void on account of the agreement referring to a non-existent property since no certificate of title had been issued for the Suit Property.

10. Her other contention is that at the time of entering into the agreement with the Plaintiff, her share of the residue could not be ascertained

since the assets of the estate of her late husband had not been distributed to the respective beneficiaries. The 1st Defendant claimed that the beneficiaries of the estate of the late Samuel Kung'u who have an interest in the Suit Property objected to its sale asserting that the 1st Defendant lacked capacity to alienate it.

11. The 1st Defendant counterclaims for the removal of the caveat which the Plaintiff registered against L.R. No. 7741/163 and a declaration that the sale agreement she entered into with the Plaintiff is null and void. She also seeks general damages against the Plaintiff for loss suffered on account of the caveat the Plaintiff placed against L.R. No. 7741/163.

The 2nd Defendant avers in its defence that since the Plaintiff makes no claim of wrong doing on its part, the suit should be dismissed.

13. The Plaintiff testified at the hearing of this case. He adopted his witness statement. He sought to have the sale transaction completed and the Suit Property transferred to him. He testified that he entered into the sale agreement with the 1st Defendant and duly paid the deposit. When the 1st Defendant delayed in completing the sale, he registered a caveat against the Suit Property claiming a purchaser's interest.

14. He also stated that the 1st Defendant demanded to be advanced a further sum of Kshs. 7 million vide her letter dated 22/5/2012 alleging that the money was required to pay the outstanding rates in respect of the Suit Property. The 1st Defendant demanded a further sum Kshs. 500,000 for an unspecified urgent matter while stating that if the money was not paid within one month, the 1st Defendant would sell the land to someone else.

15. The Plaintiff's advocate issued a completion notice on 4/6/2012 requiring the 1st Defendant to complete the sale while confirming to the 1st Defendant that he was able and willing to complete the sale.

16. Under the agreement of sale, the 1st Defendant was required to procure the provisional certificate of title and pay the City Council rates and conclude the sale within 21 days, time being of essence. The Plaintiff's advocates wrote to 1st Defendant on 4/6/2012 giving notice that the Plaintiff would claim interest on the deposit of Kshs. 2 million at the agreed contract rate of 12% per annum within 4 days of the date of the notice until payment in full. The amount was computed and the 1st Defendant was informed by the letter dated 7/9/2012 that the sum due was Kshs. 2,060,000.

17. The 1st Defendant's advocate's letter of 29/11/2012 informed the Plaintiff that she was willing to refund the deposit and further stated that she was not able to complete the sale due to challenges she faced in subdividing the property and obtaining provisional certificates of titles over the subdivided portions.

18. The 1st Defendant's letter of 21/3/2013 informed the Plaintiff that the 1st Defendant was ready to refund the deposit plus the accrued interest. It also claimed that the Plaintiff had reached a position that the agreement for sale could no longer hold. The Plaintiff denies that he had reached such a position and claims that he only sought the accrued interest on the deposit following the delay by the 1st Defendant in concluding the sale and not a refund of the deposit.

19. The Plaintiff was also apprehensive that the 1st Defendant who had started soliciting offers from third parties for the sale of the Suit Property would sell it to the detriment of the Plaintiff. The Suit Property is of high sentimental value to the Plaintiff and is of a unique character. It measures both half an acre (1/2). Being prime property within Kitisuru in Nairobi, the Plaintiff may not easily get a similar property in the same area at the same price. The Plaintiff argues that no amount of damages would compensate him since he wanted to be in close proximity to his parents' home which is two plots away from the Suit Property.

20. The Plaintiff avers that he has always been ready, able and willing to complete the sale and his advocate's letter of 13/12/2012 asked the 1st Defendant's advocate to provide the bank account details for the deposit of the balance of the purchase price.

21. The Plaintiff urged the court to issue the orders sought in the plaint. In the alternative, he sought a refund sum of Kshs. 2 million that he paid as a deposit to the 1st Defendant together with interest at 12% per annum from 26/5/2011 until payment in full. In the event that the court does not order specific performance, the Plaintiff claims damages for loss of bargain.

22. On cross examination, the Plaintiff admitted that he never saw the certificate of title for the Suit Property and that he did not do a search based on the assurance the seller had given him. He also stated that he had not seen the Will of Ndung'u Samuel Kung'u. He entered into the sale agreement with the Plaintiff as the executrix of the Estate of Ndung'u Samuel Kung'u. He stated that when he entered into the contract with the 1st Defendant he did not know whether or not the deceased's property had been distributed according to the will.

23. He stated that he knew Caroline Kung'u, the 1st Defendant's daughter, who approached him and that he entered into the deal based on her friendship after the said Caroline Kung'u told him that her mother wished to sell the land in question. The Plaintiff went to see the land and liked it. The Plaintiff stated that at no time did the 1st Defendant inform him that she did not have the legal capacity to sell the Suit Property.

24. Brian Ndung'u gave evidence on behalf of the 1st Defendant. He relied on his father's will and stated that his mother was the executrix of the will. He stated that his father's entire estate had not been distributed. He admitted that his mother was paid a deposit of Kshs. 2 million for the Suit Property and that the agreement had not been completed. He stated that they objected to the sale of the Suit Property to the Plaintiff since they felt that their father's property had not been distributed according to his Will. He maintained that it was a mistake for the Plaintiff to place a caveat on L.R. No. 7741/163.

25. He was of the view that the Plaintiff entered into the agreement with his mother over a different parcel of land that is not L. R. No. 7741/163. On cross examination, he agreed that by signing the agreement his mother confirmed that there were no third party claims over the Suit Property and that she had full capacity and authority to enter into the agreement.

26. He conceded that clause 3 of the Will gave his mother as the trustee power to sell the assets of his late father's estate. Clause 4 of the will states how the net profit will be distributed while clause 5 provides for the distribution of the residue.

27. He confirmed that deed plan No. 311319 issued by the Director of Surveys on 9/8/2010 was in respect of the Suit Property which his mother was selling to the Plaintiff. He denied that his mother was not completing the agreement because she thought she could get a better price for the land. He stated that it was unfortunate the Plaintiff did not do due diligence that is why he found himself in the unfortunate situation he was in.

28. The witness held the view that the sale was entered into under a mutual mistake. The other issue stressed was that the 1st Defendant has never been registered as the proprietor of the Suit Property.

29. The court has considered the pleadings, the evidence and the submissions of counsels. The issues to be determined can be summed up as follows:

- i. Is the agreement for the sale of the Suit Property between the Plaintiff and the 1st Defendant valid?
- ii. Is the 1st Defendant in breach of the Sale Agreement?
- iii. Is the Suit Property unique and of high sentimental value to the Plaintiff?
- iv. Was the registration of a caveat against L.R. No. 7741/163 valid?
- v. Is the Plaintiff entitled in the alternative to a refund of Kshs. 2 million being the deposit he paid with interest at 12% per annum from 26/5/2011?
- vi. Is the Plaintiff entitled to the prayers he seeks in the plaint?
- vii. Are the Defendants entitled to the prayers they seek in their defences and the 1st Defendants counterclaim?

30. The sale agreement dated 26/5//2011 states on the cover page that it is in respect of L.R. NO.7741/422 Nairobi being a subdivision of L.R. No. 7741/163 Nairobi. It is between Dorothy Margaret Wanjiku Ngung'u, as the executrix of the estate of Samuel Ndungu Kung'u and Akash Himatlal Dodhia. This is repeated on the first page of the agreement.

31. The agreement states that whereas the vendor is registered as a proprietor of all that piece of land known as land reference 7741/163 situated in Nairobi and has caused it to be subdivided into several pieces thereof and that the vendor has agreed to sell and the purchaser has agreed to buy one of the subdivisions thereof known as L.R. No. 7741/422 measuring 0.180 of an acre or thereabouts at the price agreed. A copy of the plan is attached to the sale agreement.

32. Clause 2 states that the vendor is selling her right, title and interest subject to the conditions contained in the title but otherwise with a clear title free from encumbrances and in vacant possession. The purchase price was stated to be Kshs. 20 million, 10% of which was to be paid into the 1st Defendant's account whose details are given in the agreement. The purchaser granted permission for the vendor to utilise the deposit to pay rates and surveyor's fees. The parties agreed that the purchaser would be granted access to the property to erect a fence pending registration of the transfer. The balance of Kshs. 18 million was to be paid within 7 days of the registration of the transfer and the issuance of certificate of title for the property to the purchaser.

33. The completion date is stated to be 30 days from the date of issuance of the provisional certificate of title to the vendor. The completion documents are listed at clause 5 of the agreement. They include a copy of grant of probate and certificate of confirmation of grant duly registered against the title to the land; original provisional certificate for the land and subdivision certificate issued by the City Council of Nairobi. These and other documents were to be handed over to the purchaser's advocate on the completion date once the vendor had received an undertaking from the purchaser or his advocates to pay the balance of the purchase price within 7 days of the date of the registration of the transfer.

34. Under Clause 7, the vendor warrants that she holds an unencumbered title to the property which is sold free from any third party claim, dispute, hindrance or inhibition and that she has full capacity and authority to enter into the agreement. She confirms that the execution of the agreement and her performance of the obligations under the agreement constitute legal, valid and binding obligations enforceable in accordance with the terms of the agreement.

35. From these clauses in the agreement it is clear that what was being sold was a subdivision of L.R. No. 7741/163 which had already been subdivided and allocated plot number L.R. No. 7741/422. The 1st Defendant is described as the executrix of the estate of Ndung'u Samuel Kung'u. The 1st Defendant knew very well that she was entering into the agreement as the executrix of the estate of Ndung'u Samuel Kung'u. This is further confirmed by the inclusion of the copy of grant of probate and certificate of confirmation of grant duly registered against the title to the land among the completion documents.

36. The 1st Defendant alleges that there was a mutual mistake when she entered into the agreement and that the agreement is invalid because the land had not been subdivided. It is clear from the foregoing paragraph that the land had already been subdivided and was awaiting completion of the process of registration of the new portions and issuance of titles. The parcel of land being sold already had a number.

37. A mutual mistake is a mistake in which each party misunderstands the others intent. The 1st Defendant did not lead any evidence to show that there was a mistake in entering into the sale agreement. In **Nebart Njeru Munyi v Nicholas Murithii Zakaria** [2015] eKLR the court stated that mistake is termed as mutual where parties misunderstand one another and are at cross purposes. Purported acceptance of something different from what was actually offered is ineffectual and does not bind the parties in contract. The court finds that Plaintiff and 1st Defendant were clear on the agreement they were entering into and the Suit Property could be ascertained. There was no mistake.

38. The three ingredients for a valid contract of offer, acceptance and consideration were met in this transaction. The 1st Defendant as the executrix of the estate of the late Samuel Ndung'u Kung'u warranted that she had capacity to enter into the sale agreement with the Plaintiff.

39. The 1st Defendant in her written submissions confirms that the will dated 15/12/1979 left by Samuel Ndung'u Kung'u appointing her executrix of his estate was probated on 2/10/2006 in **Nairobi High Court Succession Cause No. 493 of 2003**. That was eight years before the 1st Defendant entered into the sale agreement.

40. The court finds that the agreement for the sale of the Suit Property between the Plaintiff and the 1st Defendant is valid.

41. The Plaintiff duly paid the deposit which is not denied by the 1st Defendant. The court finds that the 1st Defendant was in breach of the sale agreement by failing to supply the completion documents within the time stipulated in the agreement.

42. The Plaintiff testified that the reason the Suit Property interested him and he entered into the sale agreement with the 1st Defendant was because it is close to his parents' home and he wished to be close to his aging parents so that he can take care of them. He also testified that he will not get similar property in the same neighbourhood for the cost he had agreed with the 1st Defendant when he entered into the agreement. The court finds that the Suit Property is unique and of high sentimental value to the Plaintiff due to its proximity to his aging parents' home.

43. When the 1st Defendant failed to complete the agreement, the Plaintiff registered a caveat against L.R.NO. 7741/163 to protect his interest as a purchaser. It was not possible for him to register a caution against the portion he was buying which is L.R. No. 7741/422 since the latter had not been registered at the lands office.

44. In addition, there was the threat by the 1st Defendant to sell the Suit Property to other 3rd parties. This is confirmed by the 1st Defendant's advocate email of 22/5/2012 in which it is stated that the 1st Defendant will sell to the Plaintiff or any other person on condition that the buyer advances her Kshs. 7 million to pay the outstanding rates. The 1st Defendant sought a further deposit of 500,000/= for other urgent needs. That email is copied to Carol, the 1st Defendant's daughter who introduced the Plaintiff to her mother.

45. The letter ends with a threat that if the Plaintiff or his lawyers do not respond to that letter by close of business on Thursday, 31/5/2012 then the Plaintiff was to rest assured that the 1st Defendant would proceed to sign an agreement with another buyer who is willing to comply with her conditions. The court finds that the Plaintiff was justified in registering the caveat against L.R. No 7741/163.

46. The Plaintiff has claimed in the alternative for a refund of the deposit of Kshs. 2 million which she paid together with interest at 12% per annum from 26/5/2011 which is the date of the agreement. Clause 9 of the sale agreement provided that interest meant 12% per annum. This is what the Plaintiff will be entitled to if the court does not find that he deserves an order for specific performance of the contract.

47. The 1st Defendant contends that the sale agreement was invalid because her entitlement to the estate of her deceased husband had not been determined. She entered into the agreement as the executrix of the estate of the deceased and warranted that she had full capacity to enter into the sale agreement and perform her obligations and that the agreement was valid and binding upon her.

48. Clause 2 of the will appointed her as the executrix and trustee of her deceased husband's will. Clause 3 of the will bequeathed the deceased's property to the 1st Defendant upon trust to sell, call in, invest and to convert into money as the 1st Defendant deems fit. The 1st Defendant was to hold the net proceeds of the sale or investments upon trust and deal with it in the manner set out in clause 4 including paying debts, funeral expenses and payment for the education and marriages of the deceased's children. The 1st Defendant also threatened to sell the property to third parties who were willing to advance her the sum of Kshs. 7 Million to enable her pay the outstanding rates. The unpaid rates would constitute a debt envisaged by clause 4 of the will.

49. The 1st Defendant's son testified on her behalf and stated that there was a family dispute which is why the 1st Defendant could not complete the sale transaction. Clause 5 of the 1st Defendant's will on the residue of the estate of the deceased provides that one fourth (¼) of the residue of the deceased estate will vest in the 1st Defendant. It is clear that the beneficiaries would only be entitled to the residue of the deceased's estate once payments under clause 4 had been made. If there was any dispute as to the distribution of the deposit paid by the Plaintiff, then that was the matter to be dealt with by the 1st Defendant with her children. No evidence was adduced to show that the 1st Defendant used the deposit by the Plaintiff in a manner inconsistent with the will. She was also prepared to sell the Suit Property to third parties who would abide by her conditions.

50. In Re Estate of Thiong'o Nginyayu Muthiora – (Deceased) 2013 eKLR. The court stated that the executor who has been granted probate represents the deceased so far as the affairs of the deceased concerning the estate property are concerned and that he holds the legal

title to the assets which make the estate and can deal with the assets as if he were the owner albeit in a representative capacity. The court further pointed out that beneficiaries who are not personal representatives have no role in the administration of the estate and should let the personal administrator run the estate. If the administrators do not do the right thing, then the available remedy is to ask the administrator to render an account of their management of the estate.

51. In **Thrift Homes Ltd V. Kenya Investment Ltd 2015** eKLR, the court stated that specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.

52. Having found in this case that the sale agreement was valid and that there was no mistake when parties entered into the sale agreement, the court is of the view that an order for specific performance ought to issue. It has not been shown that there is an adequate alternative remedy for the Plaintiff who avers that the Suit Property is unique and of high sentimental value to him.

53. The Plaintiff has also shown that he is ready, able and willing to complete the sale agreement dated 26/5/2011. It is the duty of the 1st Defendant to procure the completion documents listed in the agreement and complete the registration of the subdivided portions from the parent title.

54. The 1st Defendant argued that the court should never award specific performance when it is incapable of enforcing the order or where it entertains any serious doubt that the contract is capable of performance (See **Gitanga Mwaniki V. Annuncita Waithira Kibue** [2013] eKLR). The court has no doubt that the contract is capable of performance the grant of probate having been made to the 1st Defendant way back in 2006.

55. The 1st Defendant argues that the Plaintiff's suit for the registration of L.R. No. 7741/422 Kituru is barred by the Limitation of Actions Act the request having been made more than 12 months from the date when the deed plan was issued. The 1st Defendant also argues that the proceedings against the Government ought to have commenced within one year of the date of the cause of action.

56. The Plaintiff seeks an order to compel the 2nd Defendant to issue a certificate of a title and or a provisional certificate of title in respect of the Suit Property. The Limitation of Actions Act does not apply. The Director of Surveys may cancel a deed plan before an instrument is registered under Section 33 of the Survey Act where it is found to be inaccurate by reason of any error or omission in the survey. The deed plan prepared for the Suit Property has not been cancelled by the Director of Surveys. It is still valid.

57. The 1st Defendant claims damages and alleges that she has suffered loss owing to the Plaintiff's registration of the caveat against L.R. No. 7741/163. She alleges that she could not proceed to distribute the estate of her late husband as the executrix of the will.

58. Having found that the Plaintiff was justified in registering the caveat against this parcel of land the court finds that the 1st Defendant was the author of her own misfortune and dismisses her claim for damages for mental anguish from the Plaintiff. The 1st Defendant's counterclaim is dismissed with costs to the Plaintiff.

59. The court finds that the Plaintiff has proved his case on a balance of probabilities and grants prayers a, b, c, d and e of the plaint.

60. The Plaintiff will have the costs of this suit to be borne by the 1st Defendant.

61. The Plaintiff will cooperate with the 1st Defendant and withdraw the caveat at the time of registration of the transfer of the Suit Property in his favour.

Dated and delivered at Nairobi this 12th day of October 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Ochieng for the Plaintiff

Ms. Apolot for the 1st Defendant

Mr. Terrell for the 2nd Defendant

Mr. V. Owuor- Court Assistant