



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC . CASE NO. 100 OF 2015
BALCON HOUSING COMPANY LTD.....PLAINTIFF
VERSUS
ANN KARIRI KIARIE.....DEFENDANT
(AS ADMINISTRATOR OF THE ESTATE OF THE LATE JACINTA NJERI KIARIE)

JUDGMENT

This suit was commenced by way of an Originating Summons dated 9th February 2015 in which the Applicant sought for the determination of the following questions:

1. Whether the Defendant should execute transfer instruments and all other documents necessary for the transfer of 22 acres from the parcel of land known as L. R. No. 10823/21 (hereinafter referred to as the “suit property”) in favour of the Plaintiff pursuant to the Sale Agreement dated 21st May 2009 within 14 days or such other period as this court may deem just and appropriate and in default the Deputy Registrar be directed to execute said transfer and such other necessary documents and/or instruments herewith,
2. Such other orders and/or directions as this court may deem just and fit including but not limited to the costs of this Application.

The Originating Summons was premised on the Supporting Affidavit of John Maina Munge, sworn on 9th February 2015, in which he averred that he is a Director of the Plaintiff and duly authorized to swear this Affidavit on its behalf. He averred that the Plaintiff through its advocates Messrs Ngugi Muhindi & Co. Advocates made an offer vide an offer letter dated 26th March 2009 to the late Jacinta Njeri Kiarie (herein the “Deceased”) through her advocates Messrs J. M. Waiganjo Advocates for purchase of 22 acres to be excised from L.R. No. 10823/21 for Kshs. 250,000/- per acre. He further averred that the Deceased through her advocates unreservedly accepted the stated offer vide letter dated 3rd April 2009. He further averred that the Plaintiff and the Deceased proceeded to enter into a Sale Agreement dated 21st May 2009 for the sale of the suit property for the said consideration. He added that the purchase price of the suit property totaled up to Kshs. 5,500,000/- out of which the Plaintiff has paid Kshs. 3,800,000/-. He averred further that the Plaintiff was consequently given vacant possession of the suit property by the Deceased pending completion of the sale which unfortunately did not materialize owing to the death of the Deceased on 19th April 2010. He confirmed that the Plaintiff and its advocates made all the necessary

follow up with the Deceased's advocates with a view to completing the transaction to no avail. He stated further that the Defendant has obtained grant of letters of administration intestate of the estate of the Deceased but despite follow up with her and payment of further amounts to her, the Defendant has not availed the completion documents. He averred that the Plaintiff is ready, able and willing to complete the Sale Agreement and it is only fair that the court do issue an order of specific performance of the Sale Agreement.

Despite being duly served with the Originating Summons and the Hearing date of 5th March 2015, the Defendant failed to turn up in court or file any response. In the circumstances, the court directed the Applicant to file its written submissions which was done and a judgment date given.

The issue arising for determination is whether to grant the Plaintiff the order of specific performance of the Sale Agreement dated 21st May 2009 entered into between the Plaintiff and the Deceased.

The Plaintiff filed its written submissions in court on 12th March 2015 and submitted that the Sale Agreement bound the personal representatives and successors in title as stated in Clause 12. It relied on the case of ***Sammy Some Kosgei vs Grace Jejel Boit (2013) eKLR*** where the court held that an administratrix steps into the shoes of the vendor therefore the Defendant as Administratrix of the Estate of the Deceased has the same obligations as the Deceased in respect of the sale agreement and can be compelled to specifically perform the contract in the same manner as the Deceased would and as sought in the Originating summons. The Plaintiff further submitted that it is in occupation of the suit property having been given possession prior to completion pursuant to clause 6 of the Sale Agreement and that they are ready and willing to complete the transaction and have issued the Defendant with a completion noticed. It relied on the case of ***Stephen Kibet Malakwen vs. Benson Gateca Mbugua [2014] eKLR*** where the court held that where there is a valid agreement and the plaintiff has met his obligation and the defendant has failed to perform its part of the obligation the court will not hesitate to grant the orders of specific performance.

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. In this particular case, the Applicant seeks for this court to order the specific performance of the Sale Agreement dated 21st May 2009 in which the Deceased agreed to sell to the Applicant a portion of land comprising of 22 acres to be excised out of a larger parcel of land registered as Land Reference Number 10823/21. This is to say that the Deceased agreed to sell to the Applicant a portion of her land. This presents a challenge when it comes to seeking an order for specific performance because it is not clear which particular portion of the larger parcel was agreed to be sold. This appears to have been the reasoning behind **section 42** of the **Land Registration Act, Act No. 3 of 2012** which provides as follows:

“No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision.”

No evidence has been produced by the Applicant to demonstrate that the Deceased had subdivided and registered the portion of land she was to sell to the Applicant. In that case, an order of specific performance cannot issue. In light of this and in line with the Applicant's prayer that this court may issue any order as this court deems just, I direct that the Respondent do refund to the Applicant the sum of Kshs. 3,800,000/- paid to the Deceased for the suit property. The costs of this suit are awarded to the Applicant.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE