



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1026 OF 2013

JOHNSON NJOROGE MWANGI..... PLAINTIFF

VERSUS

FREDRICK KUBAI KINYANJUI. DEFENDANT

JUDGMENT

This suit was filed by the Plaintiff by way of a Plaint dated 21st August 2013 and filed on 26th August 2013 in which the Plaintiff sought for the following orders:-

- a. A permanent injunction restraining the Defendant by himself, his agents, servants or anybody with his authority from selling, disposing of, excising, subdividing, entering or in any way interfering with the sold 2 acres in Nachu/Ndacha/453;
- b. A mandatory injunction compelling the Defendant to subdivide and transfer the sold portion of 2 acres out of Nachu/Ndacha/453 to the Plaintiff and /or in the alternative the Registrar of the High Court do sign and execute all the relevant forms, applications, transfer on behalf of the Defendant in favour of the Plaintiff to complete the transaction.
- c. An order that the time for issuance of the Land Control Board consent to subdivide and transfer the sold portion of 2 acres out of Nachu/Ndacha/453 be extended.

Despite being served with the court papers in this suit, the Defendant neither entered appearance nor filed a statement of defence and interlocutory judgment was entered against him on 12th February 2014. The matter proceeded for formal proof on 30th July 2015 with the Plaintiff being the only witness.

In his testimony, the Plaintiff stated that he entered into a Sale Agreement with the Defendant dated 22nd September 2007 for the sale to him of a portion of 2 acres out of a larger parcel of land identified as Nachu/Ndacha/453 for the purchase price of Kshs. 247,500/-. He stated that he paid a total of Kshs. 242,000/- as follows:

1. Bankers cheque for Kshs. 105,000/-;
2. Bankers cheque for Kshs. 120,000/-; and,

3. Kshs. 17,000/- in cash.

He conceded that he was yet to pay the Defendant the remaining balance of Kshs. 5,500/- which they agreed was to be paid upon transfer of the sold portion to the Plaintiff. He stated that he is ready and willing to pay this balance.

He further testified that prior to the purchase, he had carried out a search on the property and had confirmed that it is indeed owned by the Defendant. He produced copies of the title deed and search certificate.

It was his testimony that he has been in possession of the 2 acre portion since 2007 to date yet the Defendant has never transferred the parcel to him as agreed. He added that the Defendant has also never tried to evict him out of that parcel. He confirmed that he cultivates maize and potatoes on the parcel of land.

He further testified that prior to filing this suit, he had made an attempt to resolve this issue out of court, specifically by approaching the District Officer, Kikuyu where the Defendant was summoned. The Plaintiff stated that the Defendant presented himself before the District Officer, Kikuyu and undertook to transfer the parcel to the Plaintiff within 2 months but failed to do so. He added that with the Defendant failing to comply with his undertaking, he was left with no option but to file this suit so that the court could order the Defendant to transfer the parcel to him failing which the court do authorize for the relevant papers to be signed by someone else.

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 Plaintiff seeks for this court to order the specific performance of the Sale Agreement dated 22nd September 2007 in which the Defendant agreed to sell to the Plaintiff a 2 acre portion of land to be excised out of a larger parcel of land registered as Nachu/Ndacha/453. This is to say that the Defendant agreed to sell to the Plaintiff a portion of his 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 Plaintiff to demonstrate that the Defendant had subdivided and registered the portion of land he was to sell to the Plaintiff. In that case, an order of specific performance cannot issue. In light of this, this court arrives at the conclusion that it cannot order for the transfer of a portion of land which is not duly subdivided and registered. This suit is hereby dismissed with no order as to costs.

DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF MAY 2016.

MARY M. GITUMBI

JUDGE