



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 400 OF 2017 (OS)**

**IN THE MATTER OF ORDER 37 (5) OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 73 OF THE LAND REGISTRARION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF LAND REFERENCE NUMBER 36/III/163 AND LAND REFERENCE NUMBER 36/III/163**

**BETWEEN**

**MWATHA COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**WAKINA MAMA WA EASTLEIGH WAENDELEE MBELE**

**COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**SAMONA LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. This is an Originating Summons dated 29<sup>th</sup> May 2018 brought under Section 73 of the Land Registration Act, No 3 of 2012 Order 37 rule 3 and 5 of the Civil Procedure Rules, 2010.

2. Let WAKINA MAMA WA EASTLEIGH WAENDELEE MBELE COMPANY LIMITED of P. O Box 16014, Nairobi in the Republic of Kenya, SAMONA LIMITED of P. O. Box 21325 Nairobi in the Republic of Kenya and REGISTRAR OF TITLES Nairobi in the said Republic within 15 days after service of this summons on them to enter an appearance to this summons which is issued on the application of MWATHA COMPANY LIMITED who claims a purchaser's interest in LR No. 36/III/1163 and LR No 36/III/1164 for the determination of the following questions.

*(1) Whether the 1<sup>st</sup> defendant should execute transfer instruments and all other documents necessary for the transfer of the parcel of land known as LR No 36/III/1163 and LR NO. 36/III/1164 (hereinafter referred to us the "the suit property") in favour*

*of the plaintiff pursuant to the sale agreement dated 15<sup>th</sup> November 1996 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 the said transfer and such other necessary documents and or instruments herewith.*

*(2) Whether the plaintiff has established sufficient grounds which the Honourable Court can exercise its jurisdiction as provided under Section 73 (1) of the Land Registration Act by directing the 3<sup>rd</sup> defendant to remove the caveats placed in the registrar of the titles in respect of LR No. 36/III/1163 and LR No 36/III/1164.*

*(3) Such other orders and/or direction as this court may deem just and fit including but not limited to the costs of this application.*

3. The grounds are on the face of the originating summons and are:-

*(1) The plaintiff and 1<sup>st</sup> defendant entered into an agreement of sale on 15<sup>th</sup> November 1996, over the purchase of two parcels of land being LR No. 36/III/1163 and LR No. 36/III/1164.*

*(2) That plaintiff paid Kshs. 3,420,000 being the entire purchase price agreed between the parties on the completion dates agreed by the parties.*

*(3) That the plaintiff has been in possession of the suit property since 1<sup>st</sup> February 1997.*

*(4) That despite this being the case the 1<sup>st</sup> defendant has completely refused to sign the transfer forms and to handover all the completion documents with the exception of the original title to the plaintiff to enable them process the title in their name.*

4. The application is supported by the affidavit of Philip K Ndehi, a director of the plaintiff's company, sworn on the 29<sup>th</sup> May 2017.

5. Through an ex parte Notice of Motion dated 24<sup>th</sup> August 2017, the plaintiff sought and was granted leave to serve the 1<sup>st</sup> defendant by way of substituted service through an advertisement in the newspaper either in the Daily Nation or Standard Newspaper. The same was done through the Daily Newspaper on 18<sup>th</sup> October 2017.

6. On the 9<sup>th</sup> July 2018 the court directed that the originating summons be canvassed by way of written submissions.

7. It is the plaintiff's submissions that this summons is unopposed. The plaintiff is entitled to the order of specific performance having proved its case in a balance of probabilities. The plaintiff has relied in the case of **Stephen Kibet Malakwen v Benson Gateca Mbugua [2014] eKLR; Dinara Properties Limited v Malcedian Properties Limited & Another [2018] eKLR and Maria Nganga Gwako vs Charles Mwenzi Nganga, Civil Appeal No. 287 of 2012 [2014] eKLR.**

8. I am satisfied that the defendants were duly served but they neglected to file any responses. The prayers sought in the originating summons are therefore not opposed.

9. Order 37 rule 3 of the Civil Procedure Rules provides:

*“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”*

I find that this originating summons is proper before court.

10. In the case of **Stephen Kibet Malakwen vs Benson Gateca Mbugua [2014] eKLR** it was held:-

*“The defendant in his defence testimony stated that he is not opposed to the plaintiff's claim. His defence as filed is a sham.*

*There is nothing in this case which will disentitle the plaintiff from an order of specific performance. I find that the plaintiff has proved his case on a balance of probabilities. An order of specific performance of the agreement for sale dated 3/2/2009 is hereby issued. If the defendant will not willingly comply, the Deputy Registrar is hereby empowered to sign all documents necessary to give effect to the agreement of 3/2/2009. The plaintiff shall have costs of this suit.”*

I have gone through the sale agreement dated 15<sup>th</sup> November 1996 and the correspondences between the advocates for the vendor and the purchaser and I find that the plaintiff has proved its case on a balance of probabilities as against the defendants.

11. The 3<sup>rd</sup> defendant ought to remove the caveat lodged by the 2<sup>nd</sup> defendant in respect of the suit property. The plaintiff is entitled to an order of specific performance. I rely on the case of **Dinara Properties Limited vs Malcedian Properties Limited & Another [2018] eKLR.**

12. In conclusion, I find that the plaintiff has made out a good case as against the defendant and grant the orders sought namely:-

*(a) That the 1<sup>st</sup> defendant is hereby ordered to supply the plaintiff with completion documents for LR No. 36/III/1163 and LR No. 36/III/1164 within sixty (60) days, in default, an order be and is hereby issued authorizing the Deputy Registrar to execute the said documents.*

*(b) The 3<sup>rd</sup> defendant is hereby ordered to lift/remove the caveat lodged by the 2<sup>nd</sup> defendant against LR No 36/III/1164 and LR No. 36/III/1164.*

*(c) The 1<sup>st</sup> defendant be and is hereby ordered to pay the stamp duty payable at the current market value for the suit properties being LR No. 36/III/1163 and 36/III/1164. I make no orders as to costs.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 24<sup>TH</sup> day of JANUARY 2019.

L. KOMINGOI


JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant

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