



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ENVIRONMENT AND LAND CASE NO. 157 OF 2016

SHIVJI NARAN VIRJI.....PLAINTIFF

VERSUS

OGLA JEMELI BARNГ'ETUNY.....DEFENDANT

J U D G M E N T

Shivji Naran Virji (*herein referred to as the plaintiff*) comes to this court by way of Plaintiff against Oгла Jemeli Barnг'etuny (*herein after referred to as the defendant*) claiming that by a land sale agreement dated 28th May 2011 between the plaintiff and the defendant, the plaintiff purchased one half (1/2) of an acre of land from the defendant out of all that parcel of land then described as **ELDORET MUNICIPALITY BLOCK 13/ 530**. The parties duly executed the agreement. The plaintiff claims to have paid the defendant the entire purchase price of Kshs. 3,500,000/=. Pursuant to the agreement, the defendant proceeded to subdivide **ELDORET MUNICIPALITY BLOCK 13/530** into two parcels, that is to say **ELDORET MUNICIPALITY BLOCK 13/885 AND ELDORET MUNICIPALITY BLOCK 13/886**.

It was a term of the land sale agreement that the defendant would, upon the aforesaid subdivision, transfer one of the two resultant subdivisions namely **ELDORET MUNICIPALITY BLOCK 13/886** into the plaintiff's names. In breach of the sale contract. The defendant effected the subdivision but has refused and or failed to convey title to **ELDORET MUNICIPALITY BLOCK 13/886** unto the plaintiff.

The *particulars of breach of contract are* receiving the purchase price in full but failing to complete the sale through executing a valid transfer of the land or at all. The defendant denying that she sold the suit land to the plaintiff. The plaintiff has issued a demand that the defendant transfers the land to him but the defendant has declined and hence this suit.

The plaintiff's claim against the defendant is for an order that the defendant conveys unto the plaintiff title over **ELDORET MUNICIPALITY BLOCK 13/886** and that the defendant be restrained by an order of injunction from interfering with the plaintiff's title thereto in any manner howsoever.

The defendant filed defence and Counter Claim stating that there was never any sale agreement between the plaintiff and the defendant. Moreover, that the defendant did not sign the sale agreement and did not receive the sum of kshs. 3,500,000/.

In essence, the defendant claims that the sale agreement was a forgery. In the Counter claim the defendant claim to be the registered owner of the suit property and that the plaintiff claims the property through a forgery and a scheme to acquire the property fraudulently. The defendant prays that the plaintiff suit in the original action against her be dismissed with costs.

Moreover, a declaration that all the suit property Eldoret Municipality Block 13/530 and its subdivisions Eldoret Municipality Block 13/885 and Eldoret Municipality Block 13/886 belongs to the plaintiff in the counterclaim and she was the absolute and indefeasible owner thereof.

She further prays for a declaration that the purported alienation of whole or part of the suit property herein or its sub division and the claim by the 1st defendant in the counterclaim over the whole and or portion of suit property described as L.R. No. Eldoret Municipality Block 13/886 was invalid, null and void initio and in law amounts to nothing.

Lastly, she prays for a permanent injunction restraining the defendant in the counterclaim by himself, his servants, his agents, his employees and or any other person however from trespassing, from encroaching onto, from remaining on, from selling disposing, from charging from mortgaging, from constructing and or in any other way whatsoever interfering with all the suit property particularly a portion thereof described as L.R. No. Eldoret/Municipality Block 13/886 or any part thereof. Plus, the costs of the counterclaim and interest thereof.

When the matter came for hearing, *Shivji Naran Virji* testified that he bought the suit land from the defendant at Kshs. 3,500,000/= which was paid in instalments. The agreement of sale made on 28.5.2011 was signed by both parties and their witnesses thus Erick Barngetuny and Stephen Kiplating Miso both signed the agreement. The agreement was signed before an Advocate and the defendant was to subdivide the land and transfer L.R. No. Eldoret Municipality Block 13/886 to the plaintiff but she refused to transfer. He produced the original agreement of sale.

On cross Examination by Mr. Arusei, learned counsel for the defendant he states that he gave Magdeline the money and Magdeline gave the defendant but Magdeline gave him a cheque. He does not have evidence that Magdeline gave Oglu the money. On re-examination by Mr. Manani, he states that the money was to be paid as per the agreement and that the agreement was signed by the defendant. On cross Examination by court, he states that he paid Magdaline the money because of trust.

PW2 Madgaline Jepkemboi Kibor a farmer who lives in Tinderet is the sister in-law of the defendant. A wife to the defendant's brother. He states that the plaintiff bought the plot from her sister in-law but she refused to transfer. The parcel of land was Eldoret Municipality Block 13/350. She was involved in the transaction. She would go to the plaintiff's office with the sister in-law and the plaintiff would pay. She would give the money to the defendant and issue a clearance to the plaintiff. On cross examination by Mr. Omboto she stated that it was a family arrangement.

PW3, Isaack Kipkoach Terer and Advocate of the High court of Kenya states that the parties were his clients. He prepared the agreement in his office in respect of the half share of L.R. No. Eldoret Municipality Block 13/530 measuring 0.4015 Ha. The parties were present and their witnesses. They signed the agreement in his presence. There was Erick Bargetuny and Stephen Kiplating Miso the spouse of the defendant. On Execution Kshs. 140,104 was paid. The other amount was to be paid as per the agreement. The defendant signed the agreement in his presence, the spouse signed the agreement in his presence.

On Cross Examination by Mr. Arusei he stated that only Kshs. 140,104 was paid in his office, the rest was not paid in his office. He could not confirm whether it was paid or not.

PW4, is Jane Choge, A secretary of Kiplelei Limited. She states that the defendant is a sister to Erick Barngetuny and that she was called to prepare petty cash voucher as the plaintiff was buying land from the defendant. She prepared petty cash voucher for the defendant to sign. The plaintiff paid the defendant through the petty cash voucher. The defendant acknowledged payments in the presence of PW4. She acknowledged having received all the money.

On cross examination by Mr. Arusei, she states that she prepared the vouchers according to information she received. She did not witness the agreement. The deal was personal between the plaintiff and the defendant. She states that the defendant wrote that the balance of 1,100,000 was cleared. She wrote what the plaintiff and defendant asked her to write but they did not sign.

PW5 was Erick Kipkemboi Barngetuny a director of Kiplelei that a brother to the defendant. He states that his sister sold half of the land in issue to the plaintiff due to the advice made by PW5's wife that the plaintiff could pay without a title. They went to a lawyer and signed and confirmed. She was paid ksh. 140,104 as per the agreement. They were to follow the agreement but his sister (Plaintiff) wanted the money urgently. The plaintiff put 1,000,000/= in her account.

On cross Examination by Arusei he states that the property in issue is Eldoret L.R. No. Eldoret Municipality Block 13/530. His sister requested the cash to be paid to her directly as opposed to the mode in the agreement.

After the close of the plaintiff's case the Defendant, Ogla Jemeli Barngetuny took oath and stated that she works with Agricultural Finance Corporation as a teller in Narok Branch. She states that she never sold land to the plaintiff. The signature on sale agreement dated 28.5.2011 was not hers. She never appeared before Terer Advocate. She is the registered owner of L.R. No. Eldoret Municipality Block 13/350. She has subdivided the land into the two parts thus L.R. No. Eldoret Municipality Block 13/885 and L.R. No. Eldoret Municipality Block 13/886. She is not aware of voucher and cheque. The signatures on the documents are not hers. She states on cross examination that PExhibit.3 to PExhibit.13 were made without her participation.

When shown PEX.9 – 12 she states that the money was made to her account thus 1,000,000/= and kshs. 569,000/=. The payments were made after the agreement. She states that she borrowed the money from her father.

DW2, Emmanuel Karisa Kenga a retired Commissioner of Police a Document Examiner of more than 27 years in the field, states that he received a request from the firm of Arusei & Co. Advocates. He was given the signatures. He was paid kshs.60,000/= for the job. The gist of his report is that the signatures in the agreement were written by a different person and not the defendant. On cross examination by Mr. Manani, he states that when he collected the specimen signatures they had already been taken by another person. He did not take the specimen signatures. He did not get certificates of the persons who took specimen signatures. They did not sign before him. He was given photocopies and not originals. He admitted that anything can be done with the photocopies and that they are of lesser quality.

DW3 Stephen Kipleting Misoi States that he was not a witness in the sale agreement. That the signature in the agreement is not his. He states that he never visited the office of the lawyer who did the transaction.

DW4, Shaleen Jerotich Misoi is a daughter to the defendant. She states that the mother did not sign the agreement. On cross examination, she states that she was not present when the agreement was made.

DW5 is Macleeverly Kiproop Misoi a student at Midlah University at Ongata Rongai. He is a son to the defendant. He states that the sale agreement is a forgery and is false. On cross examination, he states that he was not present when the agreement was made.

The court called an independent witness John Masinde a Senior Superintendent of Police based at the Directorate of Criminal I. Forensic Scenes department in the national police Service. He appeared in court to testify due to a request by the Deputy Registrar. He states that he was availed the original agreement which had the known signature of Ogla Jemeli Barngetuny and known signature of Stephen Misoi. He examined the documents and found that the signatures were made by one person. On cross examination by the defendant, he states that he examined the original agreement but did not receive the identity cards of the persons whose signatures were to be examined. That was the close of the hearing of the case.

The gravamen of the submissions of Mr. Manani, learned counsel for the plaintiff is that there is a valid sale agreement between the plaintiff and the defendant. Moreover, that consideration was paid by the plaintiff and that there was breach of agreement by the defendant. The plaintiff is therefore entitled to an order specific performance.

The defendant on her part submits through Mr. Arusei, learned counsel that the plaintiff has no legal or equitable claim and his redress will not be to land. There is no agreement as to the sale of land as required by section 3/3 of the Law of Contract Act cap 23 Laws of Kenya. According to counsel for the defendant the plaintiff's case has not reached the threshold to a balance of probability as he did not prove that he purchased the land in dispute. I have considered the pleadings, evidence on record, submissions and do find that following issues ripe for determination.

1. Whether there was a valid contract.
2. Whether it was breached.
3. Whether the plaintiff is entitled to specific performance.

The starting point is the sale agreement dated 28.5.2011. There is no doubt that the same was drawn by Terer & Co. Advocates witnessed by Isaac K. Terer an advocate of the above said firm who states that parties and the witnesses named in the agreement appeared before him and signed the agreement. Mr Terer appeared before court as PW2 and confirmed that all the parties and the witnesses appeared before him. His evidence remained steadfast on cross Examination and re-examination.

This court requested for a document examiner to consider the agreement of sale and examine the same to ascertain whether it was signed by the defendant together with Mr. Stephen Kipleting Misoi. Mr. John Masinde Senior Superintendent of Police did the examination and prepared a report that found the document to have been signed by the defendant and Stephen Misoi. The report is of less probative value to assist this court to determine the issue as whether the defendant and Mr Stephen Misoi signed the agreement as Mr. John Masinde did not consider the National Identity Card of the said defendant and Stephen Misoi. Moreover, the Examiner did not consider specimen signature and known signatures.

The second report was prepared by Mr. Kenga who considered photocopies of the documents as opposed to the original documents. Moreover, the specimen signatures were taken in his absence and therefore the authenticity of the same is questionable. He should have taken the specimen signatures personally. I do find both reports without credibility.

However, I do believe Mr. Terer Advocate that the parties and their witnesses appeared before him and executed the agreement.

Section 3(3) of the Law of construct Act cap 23 Law of Kenya provides:

No suit shall be brought upon a contract for the disposition of an interest in land unless—

3(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

The agreement satisfies section 3 (3) of the Laws of Contract Act as it is in writing, signed by both parties and their witnesses before an advocate. Moreover, I do find that consideration was made by the plaintiff in the terms that Kshs. 140,000/= on the signing of the agreement.

I do find that the evidence of **Magdeline Jepkemboi Kibor**, the wife to Erick Barngetuny, credible that she received payments on behalf of the defendant and would give her the money. She received the money from the plaintiff so that she would be responsible in case the defendant refused to transfer the land to the plaintiff. She testified that the money was received in the presence of the defendant. She issued cheque to the plaintiff in respect of the monies received that totaled to kshs. 642,000/=.

PW 4, Jane Choge confirmed that she used to write invoices for Ogla (defendant) to sign and that she signed documents showing that she had received the balance of payment. PW1 bought the land for kshs. 3,500,000. The same had not been subdivided. I do find that PW 1 paid Kshs. 1,000,000/= on 4.6.2011 per P.Ex.2.

I have looked at P.Ex.1 where both Jane and the defendant wrote that the balance of kshs.1.100,000/= had been cleared. The defendant wrote that, that was the full payment but they were to discuss Kshs. 25,000/= only.

This was an admission by the defendant that the plaintiff had made full payment. I do find that consideration was fully paid.

In conclusion, I do find that there was an agreement and consideration was fully paid by the plaintiff and therefore the plaintiff is entitled to an order of specific performance. I do give Judgment in the following terms.

a. An order of specific performance by the defendant of the land sale contract dated 28th May 2011 by compelling the defendant to convey unto the plaintiff ELDORET MUNICIPALITY BLOCK 13/886.

b. An Order of permanent injunction forbidding the defendant from interfering with the plaintiff's title over ELDORET MUNICIPALITY BLOCK 13/886 in any manner howsoever.

Costs to the plaintiff. Orders accordingly.

Dated and delivered this 29th day of August, 2019.

A. OMBWAYO

JUDGE



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