



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 745 OF 2017

(FORMERLY KISII ELC CASE NO. 82 OF 2014)

DR. MARY OWENGA GWAYI CHORE.....PLAINTIFF

-VERSUS-

TOM ODERO1ST DEFENDANT

JOYCE MWIKALI.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. Dr. Mary Owenga Gwayi Chore (**“The Plaintiff”**) commenced this suit vide a Plaint dated 26.02.2014; seeking the following Orders: -

i. Specific Performance of the agreement dated 28th June, 1990 and the Defendants be ordered to transfer land parcel KAMAGAMBO/KABUORO/873 to the Plaintiff and in default this Honourable Court do order its Executive Officer to sign transfer forms effecting transfer to the Plaintiff herein.

ii. Costs of this suit together with interest.

2. It is the Plaintiff’s contention that pursuant to a sale agreement dated 28.06.1990, made between the plaintiff as the purchaser on one part and the defendants as the vendors on the other hand, the Defendants agreed to sell the suit property KAMAGAMBO/KABUORO/ 873 measuring approx. 5acres to the Plaintiff for a consideration of Kshs. 50,000/=.

3. Further, the Plaintiff claims that in full compliance with the terms and conditions of the said agreement; she paid various amounts on diverse dates totalling to the agreed purchase price of Kshs. 50,000/= as follows;

- 28.06.1990 – Kshs. 19,000/=
- 9.11.1990 – Kshs. 6,000/=
- 5.02.1991 – Kshs. 5,000/=
- 10.08.1992 – Kshs. 7,000/=

- 7.09.1993 – Kshs. 13,000/=

4. The Plaintiff avers that despite fulfilling her obligation in the contract and paying the consideration price in full, the Defendants have failed and refused to transfer the title of the suit property to her or furnish her with the requisite transfer and completion documents thereby frustrating the completion process to her detriment. As a result of the said failure on the Defendants part, the plaintiff has filed the suit seeking specific performance of the agreement.

5. The Defendants acting in person, jointly entered Appearance by filing their Memorandum of Appearance dated 21.03.2014. on 26.03.2014; a Notice of Appointment of Advocates was filed appointing the firm of S.M. Sagwe & Co. Advocates to act for the Defendants jointly. Further, on 03.05.2016 the Defendants filed a Notice of Intention to Act in Person.

6. The Defendants filed their joint Statement of Defence dated 24.05.2016 wherein they denied all the allegations made by the plaintiff against them. They denied having entered into any sale of land agreement with the Plaintiff but rather the 2nd Defendant only leased a portion of the suit property to the Plaintiff for purposes of growing sugarcane at an agreed lease price of Kshs. 50,000/= which amount was paid in instalments.

7. It is their contention that the Plaintiff had an ulterior and ill motive over the suit property and is taking advantage of the 2nd Defendant's illiteracy by insisting that the suit land was sold to her when in fact the same was only leased.

8. The 1st Defendant also maintained that there was never a sale of land agreement between the Plaintiff and the 2nd Defendant and further stated that his signature was forged as appears on the plaintiff's list of documents was forged.

9. They also stated that since the plaintiff had used the suit land for the agreed period/duration as per the lease agreement, there was no breach of contract on their part and thus urged the court to dismiss the plaintiff's suit with costs.

B. TRIAL

10. On 22.06.2017, the matter did proceed for the Plaintiff's case. She testified as PW1 and called one witness. It was her testimony that she was introduced to the 2nd Defendant by one Nicholas Owino Moy, who is since deceased and was a neighbor to the defendants. The 2nd Defendant confirmed that she wanted to sell a portion of land measuring approx. 5acres. At an agreed consideration was Kshs. 10,000/= per acre and hence making the total price Kshs. 50,000/=.

11. They then went to the area Chief, Josiah Alende, whereupon the 2nd Defendant notified the chief of her intention to sell to her a portion of her land measuring 5acres. The chief then verified from the 2nd defendant's children including the 1st defendant, if they were aware of the intention to sell the 5acres portion of land and the all confirmed that they were aware. The chief then prepared the agreement; which was signed by the 2nd defendant as the vendor and the 1st defendant as a witness plus n elder as the 2nd witness and herself.

12. She further outlined the payments she made to the 2nd defendant as the purchase price as agreed on diverse dates, all totalling to Kshs. 50,000/=. That despite performing her obligation as per the contract, the defendants refused to transfer the said land to her and went further to deny her use, possession and occupation thus urged the court to grant an order for specific performance.

14. On cross-examination, she maintained that the 1st defendant together with another brother confirmed that the suit land belonged to 2nd defendant and that they agreed for their mother to sell the parcel of land and further signed the said agreement as a witness. She also maintained that the land was being sold and not leased for 10 years as alleged.

14. Retired Chief Josiah Arende testified as PW2. It was his testimony that at the time of the transaction he was the area chief and he witnessed the sale agreement for land No. 873; which was done at their office. He stated that the 2nd defendant told him that she was selling 5acres to the plaintiff for Kshs. 10,000/= per acre hence the total selling price was Kshs. 50,000/= and thereafter the sale agreement form was completed.

15. He also outlined the various payments made by the plaintiff as agreed on diverse dates all totalling to kshs. 50,000/=. The 2nd

defendant's 2 sons; the 1st defendant and one Lucas brother signed the sale agreement together with an Elder called Mathews who is since deceased and a church elder called Phares, all signed the agreement.

16. He also clarified that a lease agreement form was a separate form from a land purchase form, which had been used in the present case; stating that there was no objection to the sale. Further, the 1st defendant signed the form as a witness in his presence and confirmed that the sale actually occurred; parties were not leasing but selling. The plaintiff thereafter closed their case.

17. That upon the close of the plaintiff's case on 12.07.2017 Mutungi J. ordered that the file be transferred to Migori ELC court for further hearing given that the matter was arising in Migori County and the same be mentioned before the Judge on 17.07.2017.

18. The matter was then mentioned in Migori before the Deputy Registrar on 18.07.2017 whereupon a date for further hearing was fixed on 05.10.2017 but the same did not proceed due to non-attendance by the parties. The inaction necessitated the court to issue Notice to Show Cause upon the parties and a subsequent dismissal for want of prosecution on 17.12.2018. The Plaintiff vide an Application dated 13.03.2019 and filed under Certificate of Urgency, sought to have the suit which had been dismissed for want of prosecution reinstated.

19. The said Application was heard and allowed vide a Ruling issued on 14.03.2019 thus reinstating the suit for further hearing of the Defence case.

20. However, despite numerous Mention and Hearing Notices by the Deputy Registrar to the parties herein for the further hearing; there have been no attendance by the Defendants to defend the case against them. This as a result necessitated the close of the Defence case without their attendance, since they were fully aware of the date of the hearing but chose not to attend court, they had an opportunity to present their claim but did not take advantage of the same.

C. ANALYSIS AND DETERMINATION

21. I have carefully considered the Complaint and the joint Statement of Defence filed by the Defendants, the testimonies in court and the respective exhibits. On that account, it is this court's considered view that the main issue arising for determination is as follows:

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a. Whether the Plaintiff has proved her case to the required threshold to warrant an Order for Specific Performance as sought.

A. Whether the Plaintiff has proved her case to the required threshold to warrant an Order for Specific Performance sought.

22. From the onset, it is imperative to note that both parties have confirmed that there was an agreement between them for a consideration price of Kshs. 50,000/=, it is also common ground that the said amount was fully paid to the 2nd Defendant by the plaintiff in full compliance of her obligation as agreed. What appears to be in dispute is whether the agreement was a sale agreement or a lease agreement. While the Plaintiff maintains that the agreement was for the sale of the suit property, the Defendants contend that the agreement was for lease of the suit property for a period of 10 years for purposes of growing sugarcane and maize.

23. The Plaintiff produced a Purchase Form dated 28.06.1990 in support of her claim against the defendants. The said form contained the terms of sale of the suit property as agreed. From the same the plaintiff who was the purchase had an obligation to pay the agreed purchase price while the 2nd Defendant who was the vendor had an obligation to transfer the title to the said property measuring 5 acres in favour of the plaintiff within a reasonable time upon completion of payment of the purchase price.

24. The Defendants on the other hand did not produce any Lease Agreement (or any agreement to the contrary), containing the terms and obligation of the lease. Be that as it may, it is their contention that the agreed sum of the lease was Kshs. 50,000/= payable in instalments and the duration of the lease was a period of 10 years.

25. In the case of **Reliable Electrical Engineers Ltd -vs- Mantrac Kenya Limited (2006) eKLR** the court held that: -

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.

Even when damages are inadequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

26. In determining whether the Plaintiff is entitled to an Order of Specific Performance this court must satisfy itself as to the enforceability of the sale agreement contract between the parties herein and whether undue hardship will be caused to the defendants if the order sought is granted.

27. The agreement for sale of the suit property as validly contained in the Purchase Form dated 28.06.1990 between the parties herein and which was heavily relied on by the Plaintiff in support of her claim for specific performance was duly executed before the area chief, one Josiah Arende, who also testified as PW2. The same was executed upon confirmation by the 2nd Defendant and her 2 sons that the land belonged to the 2nd defendant and they were fully aware of her intention to sell a portion thereof measuring 5 acres to the plaintiff. This fact was explained by the Plaintiff in her pleadings and testimony and further reiterated by PW2 in whose presence the agreement was made. Further, upon explanation in both Kiswahili and dholuo, of the terms of the contract and their intention all the parties present together with their witnesses signed the documents before the area chief thus making it binding upon them.

28. The Defendants on the other hand denied the existence of the sale of land agreement as alleged by the plaintiff. They maintained that the agreement between them and the plaintiff was a lease agreement for a period of 10 years and for a consideration of Kshs. 50,000/=. The 1st Defendant further denied signing any agreement and stated that the signature contained in the annexed agreement was a forgery.

29. I have carefully examined the agreement between the parties herein as contained in the Purchase Agreement dated 28.06.1990 and I have noted that the same meets the condition of an enforceable contract. The intention of the parties in respect of the sale and consideration price was reduced in writing, there were witnesses who duly executed the agreement by signing and/or endorsing their thumbprint and the same was done in the presence of the area chief. The defendants have not denied receiving the full payment of the purchase price of Kshs. 50,000/= as agreed in the agreement.

30. Further, the allegations made by the 1st Defendant of forgery and fraud do not hold water or that the agreement between the parties was a lease agreement. I am satisfied by the testimony and evidence tendered by PW2 who was the area chief and custodian of the Purchase Forms and in whose presence the agreement was written/filled and duly executed by all the parties. He clearly distinguished that Purchase Form was different and separate from a Lease Form and categorically stated that the agreement between the parties was a sale agreement contained in a Purchase Form. The defendants did not produce any evidence to the contrary; no Lease Agreement Form between the parties was produced nor a different agreement containing the terms of lease as alleged, what criteria was used to arrive at the 10 years as being the period of lease. If the intention of the parties was to lease, then the said intention would have been aptly captured in the Lease Agreement Form as clarified by the area chief and not the Purchase Form. I therefore find the allegations on lease agreement made by the defendants are unsubstantiated claims and the same should be treated as mere allegations and the same was made in a bid to defeat the plaintiff's claim and to mislead the court.

31. In addition, the 1st Defendant has not provided any evidence in support of the serious allegations of fraud and forgery as alleged. There is no evidence of undue influence on the part of the 2nd defendant as claimed either. The defendants as a matter of fact are estopped from running away from their contractual obligations by claiming fraud and forgery. PW2 testified under oath that he was present and saw the 1st Defendant personally append his signature. He cannot therefore claim that he was not aware of the existence of the sale agreement and deny ever signing such a document or that the said signature is a forgery. I equally find that the said allegations of fraud are mere unsubstantiated claims and do not meet the evidentiary burden.

32. Having found that the agreement for sale contained in the Purchase Agreement Form dated 28.06.1990 was valid and enforceable; as a consequence, I find that the 2nd defendant having failed to fulfil her obligation under the contract as reasonably expected by transferring the suit property and/or providing the requisite completion documents there is need to compel her by an order of specific performance.

33. In view of the foregoing and the totality of the evidence adduced, I accordingly find that the Plaintiff has proved her case against the defendants on a balance of probabilities and consequently find that she is entitled to an order of specific performance as sought.

COSTS

34. Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced, I find that she is entitled to costs of the suit.

CONCLUSION

35. The upshot of the above is that the Plaintiff has proved her case to the required threshold and I thus enter judgement for the Plaintiff against the Defendants in the following terms: -

a. An Order of Specific Performance of the agreement dated 28.06.1990 be and is hereby issued in favor of the Plaintiff. The Defendants are hereby directed to duly execute the Transfer Forms and provide the Plaintiff with the requisite completions documents for purposes of transferring the suit property KAMAGAMBO / KABUORO/873 to the Plaintiff within 45 days from the date of this Judgment;

b. That in default of (a) above, the Deputy Registrar is hereby directed to duly execute the Transfer Forms in favor of the Plaintiff for purposes of Transfer of the suit property L.R. No. KAMAGAMBO / KABUORO/873;

c. Costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON THIS 22ND DAY OF FEBRUARY, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of: -

Mr. Agure Holding brief for Sam Onyango for Plaintiff

Nonappearance for Defendants

Tom Maurice – Court Assistant



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