



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL SUIT NO. 29 OF 2013**

*(Being an appeal arising from Kitale Chief Magistrate's court*

*in Civil Suit No. 239 of 2015 delivered by M.N. Gicheru*

*Chief Magistrate on 6/8/2013)*

**SAMSON WALIAULA.....APPELLANT**

**VERSUS**

**HEZEKIAH OMUCHILO KABALAR.....1ST RESPONDENT**

**JEREMIAH SHINYENZI INDULI .....2ND RESPONDENT**

**JUDGMENT**

1. The details of this appeal are clear and straight forward.

The Respondents purchased 10 acres out of land parcel No. **Trans Nzoia/Sinyerere/246** for a sum of Kshs 600,000/= which amount was paid to the appellant. The sale agreement dated 1/02/2003 stated as much.

2. The suit land apparently belonged to 2<sup>nd</sup> defendant known as Dr. Moses Otsyula. The Appellant had a power of attorney. From the record it appears that the transaction was never completed. The Appellant testified that the power of attorney was cancelled by the donor before the conveyencing exercise was completed. By then however he had already transferred about Kshs 500,000/- to the 2<sup>nd</sup> Defendant account. The bank slips were produced to that effect.

3. The Respondents then initiated the suit claiming a refund of the purchase consideration together with costs and interest. The trial court found in their favour and ordered that they be refunded the same.

4. The Appellant's grounds of appeal as contained in the Memorandum of Appeal dated 27<sup>th</sup> August 2013 inter alia states that the trial court failed to take into consideration that the appellant had already passed the purchase consideration to the 2<sup>nd</sup> Defendant, the owner of the land; that the Power of Attorney had been terminated and thus the appellant discharged and that the trial court failed to appreciate the agency laws.

5. I have read the proceedings at the trial court as well as the submissions by the parties herein. What is evidently not disputed is that the Respondent entered into a sale agreement with the appellant and they paid the sum of Kshs 600,000/= as a purchase consideration.

6. As to whether the Appellant had a Power of Attorney or not in my view has not for the Respondent to inquire. The Appellant presented himself as one with authority to dispose off the land. The appellant believed him. He signed the contract and received the money or any form of agency agreement. He even went ahead and procured land control board consent in favour of the Respondent which apparently never crystallised.

7. He stated that the 2<sup>nd</sup> Defendant (donor, or principal) for that matter rescinded and revoked the Power of Attorney. How, one may ask, has that to do with the Respondents? Infact, by the time he was given the authority the Respondents were not aware nor were they consulted. At the time they entered into the agreement, they believed the Appellant.

8. Consequently and without wasting much judicial time, it is upon the Appellant to follow up his donor. If he transmitted the money to his

account, as he alleged, then it was not really the business of the Respondents as they were not a party to the power of attorney. The Respondents were not told to deposit the money in the donors account but the Appellant. From the evidence on record it appears that they had their own understanding.

9. The trial court findings cannot be faulted. Let the Appellant follow up his donor for a refund if indeed he paid him the amount given by the Respondents. Looking at the sale agreement Dr. Moses Otsyula apparently did not sign anywhere as he had given authority to the Appellant vide Power of Attorney No. 233/2001.

10. This appeal is dismissed with costs to the appellant.

**Delivered, signed and dated at Kitale this 22<sup>nd</sup> day of January, 2019.**

---

**H.K. CHEMITEI**

**JUDGE**

**22/1/19**

**In the presence of:**

**Bungei for Nyamu for Appellant**

**No appearance for Respondent**

**Court Assistant – Kirong**

**Judgment read in open court.**