



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.23 OF 2017**

**BETWEEN**

**SHABAN OTIENO ABDI.....APPELLANT**

**VERSUS**

**KENNEDY OTIENO MBAI.....RESPONDENT**

*(An appeal from the Judgment and decree of the Chief Magistrate's Court, Homa Bay in CMCC No.11 of 2014 delivered on the 28/03/2017  
– Hon. L. Simiyu, SRM)*

**JUDGMENT**

1. This appeal, arises from the decision and judgment of the Senior Resident Magistrate in Homa Bay CMCC NO.11 of 2014, in which the appellant, **SHABAN OTIENO ABDI**, sued the respondent, **KENNEDY OTIENO MBAI**, for the sum of Kshs.200,000/= and general damages for breach of contract.

The suit was based on a sale agreement entered between the appellant and the respondent for the purchase of a portion of land described as **KANYADA/KOTIENO-KATUMA'A/1025**, measuring 0.35 hectares at a purchase price of Kshs.200, 000/=.

2. After a full hearing of the suit, the trial court dismissed the appellant's claim against the respondent on the basis that it was not proved on the applicable standard of proof.

Being aggrieved by that conclusion, the appellant preferred this appeal on the basis of the grounds in the memorandum of appeal dated 24<sup>th</sup> April 2017 filed herein on 25<sup>th</sup> April 2017.

3. The appeal was canvassed by way of written submissions and in that regard, the appellant filed his submissions through the firm of **OGUTTU MBOYA & CO. ADVOCATES**, while the respondent did likewise through the firm of **H. OBACH & PARTNERS ADVOCATES**.

The duty of this court was to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

4. In that regard, the evidence led by both parties and their respective witnesses was given due consideration by this court. It clearly showed that the issue which arose for determination was whether there was a valid agreement between the appellant and the respondent and whether a sum of Kshs.200, 000/= was paid to the respondent by the appellant in furtherance of the agreement.

5. In the pleadings, it was implied by the appellant that the respondent breached the sale agreement by selling the suit property to third parties. However, the respondent denied the existence of the alleged sale agreement and averred that the alleged third parties were strangers to him.

The burden to prove the existence of the alleged agreement and the payment of Kshs.200, 000/= by the appellant in furtherance of the agreement lay with the appellant on a balance of probabilities standard.

6. In his evidence, the appellant (**PW1**) indicated that the respondent (**DW1**) approached and offered to sell to him the suit land at a purchase price of Kshs.200, 000/=. This was on the 7<sup>th</sup> November 2011 and it would appear that the offer was accepted as the purchase price was allegedly paid and a visit to the land was carried out followed by a consent of the Land Control Board.

7. The appellant also indicated that the agreement was made on a friendly basis as the respondent and himself were friends.

The Land Surveyor, **TOM OWUOR AGUTU OSANDA** (also referred to in the record as PW1) indicated that he surveyed the land on 7<sup>th</sup> November 2012, as instructed by the appellant and respondent. He also indicated the purchase price was paid in instalment with the first instalment of Kshs.100, 000/= being paid in his presence. He said the next instalment of Kshs.80, 000/= and Kshs.20, 000/= were paid before the consent of the Land Control Board.

8. The exhibited application for consent of the Land Control Board is dated 7<sup>th</sup> November 2009 and the letter of consent indicates that the necessary approval was done by the board on the 1<sup>st</sup> December 2009. The effect of these two documents was to show that there was an intention on the part of the respondent to sell his land to the appellant in the year 2009 and not the year 2011 which the appellant referred to as the year in which the impugned agreement between himself and the respondent was entered or made.

9. The Land Registrar, **VIOLET LANN** (referred to as PW2) indicated that in the year 2011, the Land Control board approved a transfer of the suit land from the respondent to one **SIMON OTIENO BOLO** and **RAYMOND VICKY OJWANG**. This was two years after the approval of transfer of the land from the respondent to the appellant was given. It therefore followed that the initial intention of the respondent to sell the land to the appellant was never effected and this explained why the appellant could not secure a title deed for the land.

10. The contention by the respondent remained that there was no sale of land transaction conducted between him and the appellant in the year 2009 as alleged by the appellant. That, he never signed a transfer form to transfer his land to the appellant in December 2009 and could not do so as he was sick and in hospital. That, what he did was only to allow the appellant and the surveyor, **TOM OWUOR** (Actual, PW2) to till his land for a period of time after which he sold it to one **SIMON OTIENO BOLLO** in 2011.

11. The respondent also contended that the appellant used his land from January 2008 to January 2009 and vehemently denied having been paid the sum of Kshs.200, 000/= by the appellant as consideration for the purchase of the land by him (appellant).

12. From the evidence, it was apparent that the existence of a valid sale agreement between the appellant and the respondent was never proved to the required standard and so, was the payment of a sum of Kshs.200, 000/= to the respondent by the appellant.

The appellant failed to avail any written agreement as required under **Section 3 (3) of the Law of Contract Act (Cap 23 Laws of Kenya)** considering that if there was indeed any agreement then it related to an interest in land.

13. The attempt by the appellant and the land surveyor (PW2) to establish the existence of such agreement, hitherto oral, was futile and could not meet the required standard of proof.

The alleged purchase price was a sum of Kshs.200, 000/=. This was not a small amount by any ordinary standard, yet the appellant failed to produce any documentary evidence such as a payment receipt or any other credible document to establish payment of the sum to the respondent.

14. The respondent made suggestions to the effect that he was involved in some sought of arrangement or transaction with the appellant over usage of the suit land by the appellant for a period of time rather than the sale of the land to the appellant.

It was also suggested that if at one time there existed an intention to sell the land to the appellant, the intention aborted and could never be actualized.

15. For all the foregoing reasons, this court must agree with the conclusion reached by the trial court in dismissing the appellant's case.

This appeal is therefore without merit and is hereby dismissed with costs.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

[Delivered and signed this 19<sup>th</sup> day of **December, 2018**].