



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 196 OF 2012**

JAMES MOENGA NYAKWEBA.....1<sup>ST</sup> PLAINTIFF

ROBERT KIPROTICH BETT.....2<sup>ND</sup> PLAINTIFF

STELLA KWAMBOKA NYAKWEBA.....3<sup>RD</sup> PLAINTIFF

- V E R S U S -

JAIRO ATENYA ASITIBA.....DEFENDANT

**JUDGEMENT**

1) The plaintiffs filed an action by way of the plaint dated 26.4.2012 against defendant in which they sought for judgment in the following terms:

*a. The sum of kshs.1,400,000 paid to the defendant.*

*b. The sum of ksh.1,000,000 being the agreed penalty under the agreement dated 13<sup>th</sup> November, 2008*

*c. Interest on (a) and (b) above at the prevailing commercial rates.*

*d. Cost of this suit.*

*e. Any other relief that the court may deem fit.*

2) The defendant filed a defence denying the plaintiffs' claim. When the suit came up for hearing, the plaintiffs presented the evidence of four witnesses in support of their case but the defendant closed his case without testifying nor summoning any witness to buttress his defence.

3) The brief background of this dispute is that the defendant is alleged to have represented himself as the proprietor and or beneficial owner of plot nos. 57A, 58A, 52A, 50B, 48B, 49B at Imara Daima Self Help Group and plot no. (ii) in Imara Daima phase IV and that he was willing and able to transfer the same to the plaintiffs. The plaintiffs aver that they were purchasers for value without notice of defect in title. The plaintiffs aver that they later discovered that the defendant was a fraudster with no property registered in his name and hence he is and was incapable of transferring the same. The plaintiffs sought for a refund of their money from the defendant in vain thus necessitating the filing of this suit.

4) The plaintiffs' case is supported by the evidence of four (4) witnesses namely James Moenga Nyakweba (PW1), Robert Kiprotich Bett (PW2) Philip K. Sambu (PW3) and Stella Kwamboka (PW 4). I

have considered the evidence of these witnesses and I do not need to regurgitate here. At the close of evidence, learned counsels appearing in this matter were permitted to file written submissions. I have further considered the rival submissions. After considering the evidence and the submissions, I think the following issues arose for the determination of this court.

- i. Whether the plaintiffs and the defendant entered into a sale agreement over land.**
- ii. Whether the defendant received any payments from the plaintiffs in furtherance of the sale transaction.**
- iii. Depending on the answers to (i) and (ii) above whether the defendant performed his part of the bargain.**
- iv. Whether the conduct of the defendant in the transaction was fraudulent**
- v. Whether the sale agreement entered if any is enforceable?**
- vi. Whether the plaintiffs are entitled to the remedies sought.**

5) On the first issue as to whether the parties to this dispute entered into a sale transaction over land, the answer can be derived from the evidence tendered in support of the plaintiffs' case. It came out clearly from the evidence of PW1, PW2, PW3 and PW4 plus the documents produced in evidence as exhibits, that Jairo Atenya Asitiba, the defendant herein had agreed to sell to the plaintiffs plot nos. 48B, 49B, 50B, 52B, 57A and 58A at Imara Daima Self Help Group and plot no. II in Imara Daima Phase IV. The agreement between the defendant and James Moenga and Grace Kwamboka indicates that the selling price for each of the five plots was ksh.150,000/=. PW1 also produced in evidence as an exhibit the agreement he executed with the defendant dated 13.11.2008 whereby the defendant indicates that he was selling a plot (ii) at Imara Daima Phase IV for ksh.500,000/=.

6) Robert Kiprotich Bett (PW2) produced a sale agreement he executed with the defendant over plot no. 52B at kshs.150,000/=. I am satisfied from the evidence tendered both oral and documentary that there existed sale agreements between the plaintiffs and the defendant.

7) On the second question as to whether the defendant received payments from the plaintiffs in furtherance of the sale agreement, the answer too can easily be discerned from the evidence. A critical examination of the agreements executed and produced before this court indicates that there are acknowledgement of receipt of payment clauses (specifically clause 2)

8) According to James Moenga, the 1<sup>st</sup> plaintiff, (PW1) he paid ksh.600,000/= to the defendant at the time of executing the agreement in respect of plots no. 48B, 49B, 50B, 52B, 57A and 58A. The evidence of PW1 were never controverted. It is also clear from the sale agreement over plot no. (ii) Imara Daima Phase IV that the defendant received ksh.500,000/= upon signing the agreement.

9) The evidence of the plaintiffs (PW1, PW2 and PW4) were corroborated by the evidence of Philip Sambu (PW3) over the execution of the agreement and receipt of payments.

10) In short, I am convinced that the defendant was paid the amount stated in the sale agreements upon signing the same.

11) The third and most pertinent question to be determined in this suit is whether the defendant's conduct was fraudulent. This question can be answered by the evidence of James Moenga (PW1). It is apparent from the evidence of PW1 that the defendant presented himself to the plaintiffs that he was in a position to sell, transfer and deliver vacant possession of the plots in question. It is now clear to all and sundry that the plots the defendant offered for sale are non existent. They only existed on paper but not in real sense. The defendant was very swift in receiving the consideration and in executing the sale agreements. The evidence presented shows that the defendant made and gave out to the plaintiffs fake certificates of Imara

Daima Development project in the names of the plaintiffs purporting to be genuine certificates in respect of the certificates in respect of the suit premises.

12) It is this court's conclusion that the defendant's conduct was fraudulent. The answer to this issue also determines the question as to whether or not the defendant performed his part of the bargain. The defendant was required to transfer and to deliver vacant possession of the plots in question to the plaintiffs. There is clear evidence that the plaintiffs discharged their end of the bargain as per the contract. This court is convinced that there was offer, acceptance, consideration and the intention to create a legal relationship through the sale agreements executed. This court has already stated that the certificates given by the defendant are illusory, fake and therefore the defendant had no title to convey or pass over to the plaintiffs. The defendant did not simply perform his part of the bargain.

13) Having come to the conclusion that the parties to the sale agreement intended to create a legal relationship, the next question is whether the same is enforceable. According to the submissions filed by the defendant, since the sale agreement was void ab initio, the same is unenforceable. The plaintiffs are of the contrary view that the defendant cannot be allowed to benefit from an illegality he perpetuated on them. I have carefully considered the rival arguments. What is clear to me is that the agreements executed by the parties to this dispute appear to have been done voluntarily. There was no misrepresentation and therefore the agreement remained enforceable as against the defaulting party.

14) The agreement had a defaulting clause which clearly stated as follows:

**“The defaulting party shall pay the innocent party a sum of 200% as liquidated damages notwithstanding any other remedy in the court of law or equity.”**

15) With respect, I agree with the plaintiffs that the agreement having been signed willingly, the same, is binding among the parties to the contract. The defendant has consistently contended that since the sale agreements are void, the same cannot be enforced by a court of law. It is not in dispute that the disposition on land must be in writing. The plaintiffs have already shown that the agreements they executed were in writing. I have also perused the same and it is evident that the agreements specify the property in question, the consideration and the completion date. In my view the sale agreement meets the requirements of Section 3(3) of the law of Contract Act (Cap 23 laws of Kenya). The plaintiffs are therefore entitled to their claim since the sale agreements are specific. On the issue of liquidated damages in the range of 200%, this court finds that the defendant is liable to refund the 1<sup>st</sup> plaintiff the agreed liquidated sum i.e 200% of 500,000=1000,000/= as per the sale agreement which has not been challenged by the defendant. In the absence of evidence in rebuttal from the defendant, this court is convinced that the plaintiffs proved their case on a balance of probabilities. There is no doubt that the defendant failed to tender evidence to controvert the plaintiffs' assertions. Therefore the plaintiffs' case remains uncontroverted and unchallenged.

16) In the end, I am convinced that the plaintiffs have proved their claim to the required standards on a balance of probabilities. Consequently judgement is entered in favour of the plaintiffs and against the defendant as follows:

**i. Payment as a result of Ksh.900,000/=**

**Being the purchase price paid for plots**

**no. 57A, 58B, 52B, 50B, 48B and 49B at**

**Imara Self Help Group at ksh.150,000/=**

**each (i.e.6x150,000)**

**= ksh.900,000/=**

**ii. Payment of ksh.500,000/= being a**

**Refund of the purchase price of**

**Plot no. (ii) of Imara Daima Phase IV**

**at ksh.500,000/=**

**=ksh.500,000/=**

**iii. Payment of ksh.1000,000/= being**

**Liquidated damages of 200%**

**for (ii) above.**

**=ksh.1000,000/=**

**iv. Damages of breach of contract assessed**

**At Ksh.200,000/=**

**=ksh.200,000/=**

**Total**

**=ksh.2,600,000/=**

**v. Costs of the suit.**

Dated, Signed and Delivered in open court this 24<sup>th</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant