



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KITALE

LAND CASE NO. 45 OF 2012

CHARLES OWITI MUDUNYI & 2 OTHERS.....PLAINTIFF

VERSUS

APPOLLOS KENNEDY MWANGI.....DEFENDANT

J U D G M E N T

INTRODUCTION

1. The defendant is the registered owner of LR. No. Kapkoi/Waitaluk Block 9/Gutongoria/4 (suit land). On diverse dates between the year 2007 and 2008, the defendant sold various portions of the suit land to the plaintiffs. The defendant has since neglected to complete the sale by transferring the respective portions bought by the plaintiffs prompting them to file this suit seeking specific performance.
2. The defendant who was duly served with summons to enter appearance neither entered appearance nor filed defence. The hearing therefore proceeded by way of formal proof.

PLAINTIFF'S CASE

3. The first plaintiff Charles Owiti Mudunyi testified that on 26/7/2007 he bought one acre from the defendant at Ksh. 275,000/=. Again on 10/12/2007, he bought another one acre at Ksh. 300,000/=. On 21/12/2008 he bought a third acre at Ksh. 300,000/=. He paid the entire purchase price for the three acres. On 13/1/2010 he visited his land and found that the defendant had caused a road to pass through his plot. This road is not in the map. He has since been asking the defendant to transfer the land to him but the defendant has been giving excuses that he will transfer the land.
4. The second plaintiff Ignatius Were Otsyengi testified that on 30/12/2008 he bought one acre from the defendant at Ksh. 220,000/= through the defendant's agent one Ben Simiyu. He paid the Ksh. 220,000/= through the defendant's bank account at Co-operative Bank. He testified that he was put in possession of the one acre and that he is still in possession. He testified that the defendant later caused a road to pass through his plot. This road was not initially there.
5. The third plaintiff Fredrick Ojuku Okora testified that he bought a total of one acre from the defendant. He is yet to clear a balance of Ksh. 45,000/=.

ANALYSIS OF EVIDENCE

6. The first plaintiff produced a sale agreement between him and the defendant dated 26/7/2007 [Exhibit

1]. In that agreement, the defendant acknowledged receipt of Ksh. 225,000/=. The first plaintiff also produced another agreement of 10/12/2007 in which he bought a second acre at Ksh. 300,000/=. The total amount of purchase price is acknowledged on the agreement produced as exhibit 2. The first plaintiff also produced a third agreement [Exhibit 3] in which he bought a third acre. The defendant has acknowledged the entire purchase price of Ksh. 300,000/=.

7. In the case of the second plaintiff, he testified that he bought one acre from the defendant through the defendant's agent one Ben Simiyu on 30/12/2008. In the agreement, it is stated that the entire purchase price was paid to the defendant's account at Co-operative bank. The branch of the bank is not indicated. Though the agreement states that a copy of the banking slip was annexed, there was no such banking slip annexed or produced. The second plaintiff testified in court that he had provided an acknowledgement of the payment of the purchase price. There was no such document in the list of documents on the part of the second plaintiff. The second plaintiff testified that there is a balance due to the defendant. He did not specify the actual balance. His evidence before court contradicts the agreement signed on behalf of the defendant by Ben Simiyu. This agreement states that the Ksh. 220,000/= was full and final settlement. It therefore defeats logic why again the second plaintiff claims that he paid the balance which was acknowledged and that there is yet another unspecified balance due to the defendant. There was no proof that Ksh. 220,000/= actually went into the account of the defendant and if Ben Simiyu was the defendant's agent.

I therefore find that the 2nd plaintiff has failed to prove his case against the defendant as required.

8. In the case of the third plaintiff he has produced documents to show that he at first bought ½ an acre. He later bought another ½ acre to make it one acre. In the agreement of 14/12/2010, the defendant acknowledges that the 3rd plaintiff has paid all the monies except for the balance of Ksh. 45,000/=.

The defendant in his testimony in court agreed that he is yet to clear a balance of Ksh. 45,000/=. He is however ready and willing to clear the same.

9. The first plaintiff has cleared paying for his three acres. The third plaintiff has made substantial payment of the purchase price. He is yet to pay the balance of Ksh. 45,000/= which he is willing to pay. The defendant has no reason of not meeting his part of the bargain. There is evidence that he has been promising to transfer the land to the plaintiffs. He is not doing so. The law is clear that where a party has met part payment and is willing to complete the deal, an order of specific performance can be given.

DETERMINATION

10. For the reasons given hereinabove I find that the first and third plaintiffs have proved their cases against the defendant on a balance of probabilities. An order of specific performance is hereby given ordering the defendant to transfer 3 acres to the first plaintiff and one acre to the third defendant. If the defendant declines to comply with the order of the court all documents necessary to effect transfer of the respective portions to the first and third plaintiffs shall be signed by the Deputy Registrar of this court.

11. As for the second plaintiff, I find that he has failed to prove his case to the required standard. The same is hereby dismissed with no order as to costs.

[Dated, signed and delivered at Kitale on this 29th day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of M/s. Munialo for Mr. Kiboi for plaintiff.

Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

29/1/2015.