



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**LAND CASE NO.9 OF 2012**

**JACKTONE OKONG'O OTIENDE.....PLAINTIFF**

**VERSUS**

**EDCOMM SYSTEM LIMITED.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff – **JACKTONE OKON'GO OTIENDE** – was the registered owner of land parcels **KISUMU/OJOLA/1502** and **KISUMU/OJOLA/1503** (Suit parcels hereafter). On 3/3/2011 he entered into sale agreements with the defendant – **EDCOMM SYSTEM LIMITED** - and agreed to sell the suit parcels for 310,000/= (for 1502) and 430,000/= (for 1503). At the time, 10% of the purchase price for each parcel was paid to the plaintiff, meaning that he got 31,000/= and 43,000/= respectively for each parcel.
2. The suit parcels were later transferred to the defendant but the balance of the purchase price, all amounting to 666,500/=, was never paid. And despite demand and notice of intention to sue, the balance remains unpaid to date.
3. This state of affairs impelled the plaintiff to file this suit. He seeks an order of specific performance, general damages for breach of contract, costs of the suit, and interests.
4. It seems clear that the defendant was served. An affidavit of service dated 20/7/2012 and filed on the same date shows that personal service was attempted first but the defendant couldn't be traced. Service was then effected via registered post.
5. In spite of service however, the defendant didn't enter appearance and/or file defence. There was then a written request for entry of judgment. Subsequently, judgment was entered on 23/7/2012 and the matter had to go for formal proof.
6. The court entertained the matter by way of formal proof on 1/4/2014. The plaintiff's evidence more or less captured what the plaint contains. In addition, the court was shown the sale agreements (plf Ex Nos.1 & 2) and copies of green cards showing transfer of the suit parcels to the defendant (plf Ex No.3 & 4).
7. It emerged also that the plaintiff was selling the suit parcels in order to raise money for treatment. He has a hearing problem and he intended to seek treatment. Indeed, at the time of testifying, the plaintiff looked sickly and couldn't hear well.
8. The plaintiff wants to be paid damages for breach of contract. He said that before selling the land, he had thought of leasing it to a road construction company to extract murram and stones for road construction. The defendant did precisely that after the suit parcels were sold to it. According to the

plaintiff, 10 tonnes are extracted per day. The defendant gets about 200,000/= per day. The submissions by plaintiff's counsel suggest that the plaintiff should get 1,000,000/= as general damages.

9. This is an uncontroverted matter. The plaintiff demonstrated well that he sold the suit parcels to the defendant. He even facilitated transfer of ownership. It seems clear that the defendant didn't honour its side of the bargain. That is why the plaintiff came to Court.

10. It was shown that for parcel No.1502, a balance of 387,500/= remained. For parcel No.1503, the balance was 279,000/=. That makes a total of 666,500/=. The court has no problem granting an order of specific performance so that this balance can be paid.

11. The next consideration is damages. I am constrained to observe that the information availed on this is not a useful guide. It was first suggested that the defendant gets about 200,000/= from sale of materials extracted from the suit parcels. Question is: where is evidence to support this? Plaintiff's counsel then proceeded to ask for general damages amounting to 1,000,000/=. That amount would be five days worth of the materials extracted from the suit parcels. Question is: why five days? Is that the period the materials have been extracted?

12. Simply put, there are imponderables standing in the way of trying to assess general damages. The plaintiff's counsel didn't do a good job of trying to make it easier. And I feel reluctant to pluck a figure from the air and award it as general damages to the plaintiff. I would have been inclined to grant the plaintiff compensation for any loss or damage shown to have arisen from breach of contract but this has not been adequately demonstrated. I therefore decline to grant damages.

13. The plaintiff also wants costs and interest. He is granted the same.

14. In short, the plaintiff gets prayers (a) (c) and (d) as asked for in the plaint.

**A.K. KANIARU – JUDGE**

**19/3/2015**

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a – C/C

No party present

No counsel present

**Interpretation:** English/Kiswahili

**Court:** There is a Notice dated 10/3/2015 for delivery of the ruling herein.

Accordingly, ruling on Notice of Motion dated 21/2/2013 and filed on 26/2/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**19/3/2015**

