



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 93 OF 2013.

SAMSON F. NYONGESA.....1ST PLAINTIFF

GEOFFREY S.S. ETYANG.....2ND PLAINTIFF

LAZARUS N. MARUTI.....3RD PLAINTIFF

VERSUS

BARNABAS EMOIT PAPA.....DEFENDANT.

J U D G M E N T.

SAMSON F. NYONGESA, GEOFFREY S.S. ETYANG and LAZARUS M. MARUTI, hereinafter referred to as 1st, 2nd, and 3rd Plaintiffs respectively, filed this suit against **BARNABAS EMOIT PAPA**, hereinafter referred to as Defendant, for specific performance in respect of their respective land sale agreement for portions of $\frac{3}{4}$ acre, 1 acre and $\frac{1}{2}$ acre of North Teso/Kocholia/696. In the alternative the Plaintiffs prays for refund of Kshs.282,000/= and interest at 23% per annum from 5th December, 2010 till payment in full. They also pray for costs.

The Defendant was served but did not enter appearance or file defence. The Plaintiffs applied for judgment vide their counsel's letter dated 20th February, 2014. The matter then proceeded to formal proof. The three Plaintiffs testified as PW1, PW 2 and PW 3 respectively.

PLAINTIFFS' CASE.

1. That the Defendant and the 1st Plaintiff entered into a land sale agreement in which Defendant was to sell to the 1st Plaintiff $\frac{3}{4}$ acre from North Teso/Kocholia/696 at Kshs.75,000/= on 21/2/2010. That the 1st Plaintiff finished paying the purchase price on 5th December, 2010 and was given possession of the land. The 1st Plaintiff said the Defendant was to include his names in the list of beneficiaries in the Succession Cause of his father namely, Philip Papa, who was the registered proprietor of the land but failed to do so.
2. That the 2nd Plaintiff told of the sale agreement that he entered into with Defendant over one acre of land from North Teso/Kocholia/696 at Kshs.137,000/= on 13/10/2012. He said Defendant gave him possession of the portion but has not transferred it to him even after getting the grant confirmed.
3. The 3rd Plaintiff said that on 10th May, 2011, the Defendant agreed to sell to him $\frac{1}{2}$ acre of land North Teso/Kocholia/696 for Kshs.70,000/=. The Defendant placed the 3rd Plaintiff into possession but declined to transfer it to him and hence this case.
4. The Plaintiffs prays for either specific performance or the refund of the monies paid plus costs.

ANALYSIS OF THE EVIDENCE.

5. That though the Plaintiffs case is that the Defendant was selling to each one of them, the specified portion from North Teso/Kocholia/696, the copy of the land's register which was certified as a true copy on 16th August, 2013 shows that the land was registered in the names of Philip Papa and not the Defendant.
6. That the said Philip Papa is reported to have been the father of the Defendant and is deceased. The Plaintiffs did not disclose the date of death of the said Philip Papa but from the copy of the certificate of confirmation of grant in Busia Succession Cause number 66 of 2009, which they availed to the court, the said Philip Papa had died before they entered into the sale agreement with Defendant. It would therefore have been impossible for the Defendant to include the Plaintiffs in the list of beneficiaries as the certificate of confirmation of grant which carries the schedule of beneficiaries. and their entitlement had been issued on 3rd November, 2010. It is noted that the 1st Plaintiff only finished paying the purchase price on 5th December, 2010 while the agreements in respect of 2nd and 3rd Plaintiff were of 26th May, 2012 and 10th May, 2011 respectively.
7. That the Defendant was not the registered owner of North Teso/Kocholia/696 at the time the land sale agreements with the Plaintiffs were made and in law he had no capacity to sell what he did not own. What the Defendant owned was a beneficial interest over the suit land. That after the grant was confirmed under the certificate dated 3rd November, 2010 in Busia succession cause No. 66 of 2009, his interest was settled as nine (9) acres. It is however not clear why the Defendant, as the administrator of his father's estate has not taken steps to register the said certificate with the Lands Office awaiting partitioning among the beneficiaries.
8. That the Plaintiffs sale agreement with the Defendant do not seem to have received the requisite consent from the Land Control Board as required under section 6 (1) and 8 (1) of the Land Control Board Act, Chapter 302 of the Laws of Kenya. It follows that the sale agreements became void after six months of their making and under section 7 of the said Act, the Plaintiffs can only recover the monies paid to the Defendant under the agreements. The Defendant did not file any papers in this case. The court find that there is proof that the Defendant received a total of Kshs.282,000/= from the Plaintiffs. The Plaintiffs are entitled to the refund as the suit was filed before the six years period from the date of the agreements.
9. That the demand notice dated 19th August, 2013 addressed to the Defendant by M/S. Gabriel Fwaya advocates for the Plaintiffs had taken the erroneous position that Defendant was yet to file Succession Cause in respect of his father's estate. The truth of the matter is that the Succession Cause had been filed in the year 2009, which is long before any of the sale agreements was made. The court is unable to know who then, between the Plaintiffs and Defendant, was to blame for the failure to complete the performance of the agreements. It was the duty of the Plaintiffs to show the court that the blame did not lie on them, but the Defendant, so as to be entitled to costs of the suit but they failed to do so.
10. That for reasons set out above, the court enters judgment for the Plaintiffs against Defendant for refund of Kshs.282,000/= (Two Hundred and eighty two thousands shillings) being monies received under the three sale agreements. Each party to bear their own costs.

It is so ordered.

S.M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON 19th DAY OF MARCH, 2015.

**IN THE PRESENCE OF PRESENT IN PERSON1ST
PLAINTIFF**

PRESENT IN PERSON.....2ND PLAINTIFF

PRESENT IN PERSON3RD PLAINTIFF

ABSENTDEFENDANT.

M/S. Maloba for Fwaya for plaintiffsCOUNSEL.

JUDGE.