

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE 62 OF 2006

DAVID JOMO NJAGI.....PLAINTIFF

VERSUS

ABSOLOM NJAGI RUNDIA.....1ST DEFENDANT

JOHN NJEGA NYAGA.....2ND DEFENDANT

ERASTUS NYAGA ABSOLOM.....3RD DEFENDANT

RULING

The plaintiff filed this suit on 12th July 2006 against the 3 defendants seeking orders that they be compelled to perform their part of the agreement and/or transfer Plot No.3 Mufu market and or refund the money paid.

The defendants in their separate statements of defence admitted having received the money and stated that they have not refused to transfer the plot in question to the plaintiff.

Following this admission, the plaintiff through Momanyi Gichuki & Co. Advocates filed the notice of motion dated 2/3/2009 asking for summary Judgment against 3 defendant/Respondents. The Respondents again in their replying affidavits admitted having received the money in question. Indeed they annexed documents to show that immediately after entering into the agreement, they proceeded to the Runyenjes Municipal Council and signed the forms to transfer the plot. The hitch is that the plot was co-owned with them and one Eustace Daudi who is said to be deceased. Unfortunately, the said Eustace did not feature anywhere in their sale agreement. So although they say that his widow is waiting to get the letters of administration to her husband's estate so that she can sign the transfer, she cannot be compelled to do so as her husband was not privy to the agreement of sale. From the information contained in the said affidavit and the annexures thereto, there are clearly no triable issues here.

I cannot grant the order for specific performance because the Respondents have already signed their part. In my view however they are still responsible for the frustration of the sale agreement because they failed to bring the Eustace's wife into the picture for her to have signed the agreement. Without her or her husband being a party to the agreement, an order for specific performance cannot lie against her. The only recourse therefore is for the 3 defendants to refund the purchase price they received from the plaintiff applicant.

I therefore allow the application for summary Judgment and enter Judgment for the plaintiff against the 3 defendants as prayed in the plaint dated 12/7/2006. This means that the 250,000/= will attract interest at court rates (not commercial rates) from the date of filing the claim until payment in full. The defendants will also pay the costs of the suit to the plaintiff with interest thereon at court rates.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 7th day of Oct 2009

In presence of:- Mr. Ogoti for Momanyi for plaintiff and 2nd and 3rd defendants.

W. KARANJA

JUDGE

7/10/2009