



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI  
Civil Case 93 of 2003**

**SAMUEL GORDON OTIENO ORWA**

**GEORGE OWINO ORWA (Suing as the**

**Administrators of the estate of ZAKARIA ORWA.....PLAINTIFFS**

**VERSUS**

**PATRICIA MUTHONI WACHANIA.....1<sup>ST</sup> DEFENDANT**

**ANNE SALOME WACHANIA.....2<sup>ND</sup> DEFENDANT**

**BAPTISTA SIMON WACHANIA.....3<sup>RD</sup> DEFENDANT**

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

By an amended plaint filed on 25<sup>th</sup> February 2004. Samuel Gordon Otieno Orwa and George Owino Orwa who are the administrators of the estate of the Late Zakaria Orwa (*hereinafter referred to as the deceased*) sought judgment against Patricia Muthoni Wachania (1<sup>st</sup> Defendant) and Anne Salome Wachania (2<sup>nd</sup> Defendant) for an order of eviction in respect of property known as Nyeri Municipality/Block 1/353, (*hereinafter referred to as suit premises*) and an order for payment of mesne profits from the 30<sup>th</sup> day of October 1997 upto the date of vacating the suit premises.

The Plaintiffs' claim arose from an agreement entered into between the deceased and both Defendants on 30<sup>th</sup> January 1997 for sale of the suit premises as a result of which the Defendants paid Ksh.90,000/= and took possession of the suit premises. The Defendants however neglected or refused to pay the balance of the agreed price which was due on or before 30<sup>th</sup> day of January 1998 but continued to illegally occupy the suit premises thereby rendering this suit necessary.

The Defendants filed a joint defence and a counterclaim on the 2<sup>nd</sup> April 2004 in which they admitted the agreement of 30<sup>th</sup> January 1997, but contended that there was an earlier agreement between the deceased and Baptista Simon Wachania pursuant to which the Defendants and the interested party took possession of the suit premises in the year 1989 and not 1997 as alleged. The Defendants contended that the suit premises were derelict and they spent a sum of Kshs.241,000/= to make it habitable and have spent a further amount of Kshs.500,000/= in developing the premises. The Defendants denied failing to pay the balance of the purchase price but maintained that it was the Plaintiffs who refused to take the money. The Defendants therefore counterclaimed for specific performance of the transaction to facilitate the transfer of the suit premises to the Defendants.

On 27<sup>th</sup> October 2004 Baptista Simon Wachania successfully applied to be joined as a party to this suit

and became the 3<sup>rd</sup> Defendant. By his defence and counterclaim filed on 9<sup>th</sup> November 2004, the 3<sup>rd</sup> Defendant maintained that apart from the agreement allegedly entered into between himself and the deceased, He has been in continuous uninterrupted occupation of the suit premises for a period of more than 12 years before the institution of the Plaintiffs suit. The 3<sup>rd</sup> Defendant counter-claimed *inter alia* for orders that the ownership of the suit premises passed by sale to the Defendants before the death of the deceased and was therefore not part of the estate of the deceased, in the alternative that the ownership of the suit premises now vests on the 3<sup>rd</sup> Defendant by virtue of the fact that He has been in continuous uninterrupted occupation for a period of more than 12 years.

In proof of the Plaintiff's case George Owino Orwa (*hereinafter referred to as George*) testified. He produced a grant of Letters of Administration intestate (Exhibit I) issued to him and his brother Samwel Gordon Otieno Orwa in respect of the estate of the deceased. Although Samwel Gordon Otieno Orwa died during the pendency of the suit, George the remaining administrator opted to proceed with the suit.

In his evidence George produced a sale agreement dated 30<sup>th</sup> October 1997 (Exhibit 2) entered into between the deceased and the two Defendants for the sale of the suit premises to the Defendants at a consideration of Kshs.800,000/= a down payment of Kshs.90,000/= being acknowledged and the balance payable by 30<sup>th</sup> January 1998. He explained that there was an earlier agreement entered into in 1988 between the deceased and the 3<sup>rd</sup> Defendant who is the father of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for sale of the suit premises to the 3<sup>rd</sup> Defendant at a consideration of Kshs.300,000/=. Pursuant to this agreement the 3<sup>rd</sup> Defendant was given possession of the suit premises however the agreement fell through as the consideration was not paid by the agreed date of 18<sup>th</sup> February 1989. That is why the agreement of 30<sup>th</sup> October 1997 became necessary. George conceded that although clause 7 of the agreement of 1997 provided for possession to be given to the purchaser immediately after payment of the entire – purchase price, the Defendants were already in occupation of the suit premises and continued in occupation.

The Defendants did not pay the balance of the purchase price as agreed. By 26<sup>th</sup> April 2002, the balance not having been paid the administrators instructed their advocate who wrote to the Defendants demanding that they vacate the suit premises. Another Letter of demand was written to the Defendants on 29<sup>th</sup> July 2002, however the Defendants neither replied to the letters nor gave vacant possession of the suit premises. The Plaintiffs therefore filed this suit.

George denied that they had refused to accept the balance of the purchase price and explained that their advocate only rejected a sum of Kshs.310,000/= which was offered after the letter of 29<sup>th</sup> July 2002 demanding vacant possession.

Under cross-examination George conceded that the certificate of lease relating to the suit premises was given to the 3<sup>rd</sup> Defendant by their former advocate on the authority of the deceased, on the professional undertaking of A. J. Kariuki Advocate. He also conceded that there was a special condition to the agreement of 1997 that 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to get money for the purchase price from Housing Finance Company of Kenya

George also explained that following the death of the deceased's former advocate Gumba Onywera Advocate in 1993, the title to the suit premises could not be traced until 5<sup>th</sup> March 1999.

The 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant testified on behalf of the defence. The 3<sup>rd</sup> Defendant produced the agreement which He entered into with deceased in the year 1988. He testified that He paid a deposit of Kshs.60,000/= and that there was a balance of Kshs.240,000/= which He was to pay by February 1989. He was not however able to raise the required balance because his efforts to get a mortgage from Housing Finance Company of Kenya were frustrated as the suit premises were in a derelict state. The 3<sup>rd</sup> Defendant was advised to carry out repairs but by the time He finished the repairs, Housing Finance Company of Kenya had changed its policy and was only financing new buildings so they could not give him the loan.

The deceased extended the completion period to enable him get an alternative source of funding. The deceased even signed a blank transfer of the suit premises to assist the 3<sup>rd</sup> Defendant in his efforts to get funding. In the meantime the 3<sup>rd</sup> Defendant remained in occupation of the suit premises on the understanding that He would raise the balance of the money. His efforts did not however bear any fruit. In 1997 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants met the deceased and entered into the agreement of 1997 for the sale of the suit premises. The 3<sup>rd</sup> Defendant produced an authority from the deceased to his advocate for release of the title to the Defendants. The 1<sup>st</sup> Defendant explained that they were to get a mortgage from Housing Finance Company of Kenya for the purchase of the suit property and the deceased was to avail the title to the property to facilitate the mortgage. Housing Finance Company of Kenya gave the Defendants a letter of offer for the mortgage. The title to the suit property was however not availed.

Despite the offer being extended to October 1998, the title was not availed until March 1999 by which time the offer for the mortgage had expired. Thereafter the Defendants' attempts to pay Kshs.310,000/= being part of the purchase price was rejected by the purchaser's advocate. The Defendants explained that they have been paying Land Rent for the property in the name of the deceased. Receipts were produced. A receipt for Kshs.710,000/= being amount deposited in court on 8<sup>th</sup> July 2004 in respect of the balance of the purchase price was also produced.

The advocate for the Plaintiffs and the Defendants have each filed written submissions urging the court to find in favour of their clients. No statement of agreed issues was filed instead the advocates for the Plaintiffs and the Defendants each filed statement of issues wherein several issues were raised. It is apparent from the evidence that most of these issues listed are actually not in dispute.

For instance it is not disputed that the deceased entered into an agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the sale of the suit premises in 1997 and that prior to this agreement the deceased had entered into an agreement with the 3<sup>rd</sup> Defendant for the sale of the suit premises but that the suit premises was never transferred to the 3<sup>rd</sup> Defendant as He was unable to raise the balance of the agreed purchase price. It is also not disputed that although the agreement provided for possession to be given to the 3<sup>rd</sup> Defendant after payment of the purchase price the 3<sup>rd</sup> Defendant took possession of the suit land in 1989 and has remained in occupation of the suit premises together with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to date.

Further it is generally agreed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants paid an initial deposit of Kshs.90,000/= upon signing the agreement with the deceased and the balance of Kshs.710,000/= has not been paid but was subsequent to the filing of this suit paid into court.

The issues which remain in dispute are as follows: -

- ***Whether the possession of and continued occupation of the suit premises by the Defendants is illegal or unlawful.***
- ***Whether the agreement dated 30<sup>th</sup> October 1997 was breached by failure to complete it by 30<sup>th</sup> January 1998.***
- ***Whether the suit premises form part of the estate of the deceased or ownership had passed to the 3<sup>rd</sup> Defendant before the death of the deceased either through the agreement of sale of 1988 or by virtue of his continuous uninterrupted occupation for a period of more than 12 years.***
- ***Whether the Defendants are liable to pay mesne profits at the rate of Kshs.7,500/= per month.***
- ***Whether the Plaintiff's suit is incompetent or defective for want of particulars.***
- ***Whether the Defendants expended the sum of Kshs.241,000/= to make the suit premises habitable and a further sum of Kshs.500,000/= in developing the suit premises.***

· ***Whether the Plaintiffs rejected and or were entitled to reject further payment of the purchase price from the Defendants.***

· ***Whether the Defendants are entitled to the prayers sought in the counterclaim conversely whether Plaintiff is entitled to the prayers sought in the amended plaint.***

As concerns the 1<sup>st</sup> issue it is evident that the agreement of 1988 between the 3<sup>rd</sup> Defendant and the deceased collapsed because of failure of consideration on the part of the 3<sup>rd</sup> Defendant as He was unable to raise the balance of the purchase price. The 3<sup>rd</sup> Defendant explained that He was unable to secure mortgage finance from Housing Finance Company of Kenya because the suit property was derelict, but that cannot absolve him from his obligation to pay the agreed consideration, the 3<sup>rd</sup> Defendant no doubt had seen the suit premises before He entered into the agreement of sale He cannot therefore use the state of the premises as an excuse. The fact is that the 3<sup>rd</sup> Defendant was unable to perform his part of the agreement and the suit premises could not have passed to him by virtue of that agreement. The suit premises remained the property of the deceased. Ownership of the property never at any stage passed to the 3<sup>rd</sup> Defendant and remained vested in the estate of the deceased upon the deceased's death.

Although the 3<sup>rd</sup> Defendant took possession of the premises sometime in 1989, He remained in occupation with the knowledge and consent of the deceased on the understanding that He was making efforts to get the balance of the purchase price with a view to buying the suit property. A similar situation arose in the case of ***Wambugu v/s Njuguna [1983] KLR 172*** wherein the court of appeal held *inter alia*: -

***“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. The Respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the Respondent's possession was exclusive and continuous but was not adverse; it only became adverse after the licence was determined.”***

In this case it was not disputed that the 3<sup>rd</sup> Defendant took possession of the suit premises even though the agreement between him and the deceased did not specifically allow him to take possession. ***Clause 5(1)*** of the agreement signed between the Deceased and 3<sup>rd</sup> Defendant provided as follows.

***“Where the Purchaser takes possession of the property before completion other than under a lease or tenancy entered into before the contract the Purchaser occupies the property as licensee of the vendor and not as tenant and the taking of possession is not an acceptance of the vendors title nor a waiver of the Purchaser's right to make requisitions or objection to title.”***

It is evident therefore that the 3<sup>rd</sup> Defendant was in possession of the suit premises as a licensee. The issue of title passing to the 3<sup>rd</sup> Defendant by adverse possession before the deceased died cannot therefore arise as the license to remain in the property was not determined by the deceased. Instead the deceased's title to the property was reinforced through novation by the new agreement dated 30<sup>th</sup> October 1997 entered into between the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant with the knowledge and consent of the 3<sup>rd</sup> Defendant, wherein the title of the deceased was fully acknowledged. The counter claim of the 3<sup>rd</sup> Defendant therefore fails.

In the agreement of 30<sup>th</sup> October 1997, the completion date was provided as 30<sup>th</sup> January 1998. The special condition number one provided for the sale to be subject to the Purchaser obtaining a loan from the Housing Finance Company of Kenya by 30<sup>th</sup> January 1998 and the vendor was to provide the documents of title and all necessary documents to facilitate the transaction.

It was conceded by the Plaintiffs that the deceased was unable to avail the title to the suit property as the same could not be traced after Gumba Onywera the advocate who was acting for the deceased died

and it was not until March 1999 that the title was availed by which time the offer for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from Housing Finance Company of Kenya for mortgage finance had expired. It is obvious that the delay by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in failing to pay the balance of purchase price before the completion date was not of their making but was as a result of the delay in getting the title to the suit property from the deceased.

In accordance with the agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were entitled to rescind the agreement since it was subject to their getting a loan from Housing Finance Company of Kenya which they were not able to get. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants however opted to continue with the agreement and it is evident that the deceased was also still interested in the agreement and that is why He authorised his advocates to release the title deed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocates in March 1999 long after the extended completion date had expired.

The parties must therefore be taken to have waived the conditions regarding the completion date. As per letter dated 5<sup>th</sup> March 1999 the title document was released to the Defendants' advocates A. J. Kariuki & Company on his professional undertaking that the purchase price would be released to the Deceased 30 days from the date of registration of the transfer in the Defendants' favour and a charge in favour of Housing Finance Company of Kenya.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants however made no efforts to pay the balance of the purchase price after the title deed was released to them. It was only after the Plaintiffs' advocates wrote to the Defendants seeking vacant possession of the suit premises that the Defendants attempted to pay part of the purchase price through their advocates' letter dated 24<sup>th</sup> December 2003. Contrary to the Defence assertions, that the Plaintiff refused to accept the money, the cheque for Kshs.310,000/= was only returned by Aboge and Company Advocates because they no longer had instructions in the matter. This ought to have been obvious to the Defendants' advocate who forwarded the cheque as the letter of demand for vacant possession had come from Odhiambo M. T. Adala Advocate and not Aboge & Company Advocates.

There is no evidence of any efforts having been made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to secure mortgage finance or to have the transfer registered after the title documents were forwarded to their advocate. While the Defendants were very active in pursuing the documents of title, they appear to have gone to sleep after obtaining the same. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants as purchasers were under an obligation to complete the transaction as per the undertaking of their advocate or at the very least within a reasonable time from the time of receipt of the title documents. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants however failed to pay the balance of the purchase price for over three years by July 2002 when the demand for vacant possession was made, and only made attempts to pay part of the purchase price a year later.

The Law Society's conditions of sale and agreement for sale **clause 7** provides as follows: -

*7 (b) " If the sale shall not be completed on the completion date, either party (being himself ready able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete.*

*(i) If he could do so but for some default or omission of the other party;*

*(ii) .....*

*(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.*

*(d) If the purchaser does not comply with a completion notice:*

*(i) the purchaser shall forthwith return all documents delivered to him by the vendor and at his own*

*expense procure the cancellation of any entry relating to the contract in any register;*

*(ii) without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.*

*(e) If on any such re-sale contracted within six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date.*

The above being applicable to the agreement between the Deceased and 1<sup>st</sup> and 2<sup>nd</sup> Defendants it was necessary for the Plaintiffs to serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with a completion notice for time to be of the essence.

I have perused the list of documents which were filed by the Plaintiffs and the documents which were produced in evidence, but have found no notice served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the Plaintiffs or their advocate giving the 1<sup>st</sup> and 2<sup>nd</sup> Defendants notice that unless payment of the balance of the purchase price is made within 21 days the failure to pay will be taken as refusal to complete the transaction and **Clause 7 of the Law Society** conditions of sale will become applicable

The two letters of demand dated 26<sup>th</sup> June 2002 and 29<sup>th</sup> July 2003 from Odhiambo M. T. Adala proceeded on the assumption that the agreement between the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was no longer valid and the Defendants were therefore illegally in the suit premises. There was no evidence of any of the parties having specifically rescinded the agreement of sale.

Nevertheless the period of more than 3 years taken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before making any effort to pay the balance of the purchase price was an unreasonably long time such that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant must be taken to have refused to complete the transaction and therefore in breach of the agreement of sale.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are therefore not entitled to the equitable remedy of specific performance as they are coming to this court with unclean hands since they failed to discharge their obligation under the contract of sale. The Defendants having taken possession of the suit premises as a licensee of the deceased and that license for them to be in the suit premises having been withdrawn through the request for the Defendants to give up vacant possession and the Defendants having refused to complete the sale transaction they have no right to be in the suit premises. It was maintained that the Defendants had spent Kshs.241,000/= to put the suit premises into a habitable state and a further sum of Kshs.500,000/= in developing the premises. No evidence was however adduced to show how these amounts were expended and if actually spent whether the same was done with the consent of the deceased. It is true that the Defendants may have operated on the premises that they were in the process of buying the suit premises, nevertheless it is the Defendants who are in breach and they therefore have only themselves to blame. The doctrine of equitable estoppel cannot arise to bar to the Plaintiff from obtaining vacant possession of the suit premises.

As regards the claim for mesne profits the deceased apparently gave possession of the premises to the Defendants. There was no agreement for any payment of rent. Indeed as observed **clause 5 (1)** of the agreement signed in 1988 clearly indicated that possession granted to the Purchaser before completion date only conferred upon the Purchaser the position of a licensee and not a Tenant. Moreover, although the Defendants have been in occupation for a long time even after being asked to vacate, it would be difficult to assess the mesne profits as no tangible evidence was adduced to confirm how much the premises are worth. I would disallow the claim for mesne profits.

The upshot of the above is that I find that the Defendants have failed to prove their counterclaim and both

the counterclaims are dismissed.

I give judgment in favour of the Plaintiff as against the Defendants jointly and severally and do order that the Defendants their servants or agents shall vacate the suit premises, and that the Defendants shall give vacant possession of the suit premises to the Plaintiffs within 60 days from the date hereof failing which an eviction order shall issue against the Defendants, their servants and agents.

I further award costs of the main suit to the Plaintiff. Those shall be the orders of this court.

***Dated, signed and delivered this 22<sup>nd</sup> day of November 2006.***

**H. M. OKWENGU**

**JUDGE**