



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1764 of 2002**

**JORAM OTIENO SAMSON ..... PLAINTIFF**

**VERSUS**

**SAMSON CHARLES ODHIAMBO JUMA**

**& 2 OTHERS ..... DEFENDANTS**

**JUDGMENT**

The plaintiff in this suit seeks the following relief:

1. That the 1st and 2nd Defendants be compelled and /or ordered to transfer land parcel Number NAIROBI/BLOCK/11067 in the sole names of the Plaintiff, failing which this honorable court be pleased to authorize the District Land Registrar to execute the requisite documents to effect transfer.
2. That in the alternative to prayer (1) herein above, the 1st and 2nd defendants be ordered to refund the money obtained by them together with interest in pursuant of the sale agreement for purchase of land reference number NAIROBI BLOCK/11067 under the terms of their written sale agreement.
3. That it be ordered and /or found that the 3rd defendant has no right to the suit parcel of land and that her name must not appear on the sale documents and/ or arrangements.
4. The defendants are ordered to pay general damages to the Plaintiff for breach of the sale agreement.
5. Costs of this suit to the Plaintiff.

The plaintiff and the third defendant were married on the 27.12.2001 prior to that they had cohabited together and had a daughter born in the year 2000. The 2nd and 3rd defendants are husband and wife. The 1st defendant is an advocate and the 3rd defendant is related to the defendant.

On the 9.2.2001 the parties entered into an agreement for sale of the said premises (the property) which is situated in Garden Estate. The agreement provided for a sale price of Shs.1.3 million of which Shs.900,000/= was payable on execution thereof. Completion was to take place on the 1.10.2001.

The 2nd and 3rd defendants who were the sellers were to obtain the documents set out in the agreement. The balance of the purchase price was to be paid on or before the completion date. The 2nd defendant acted as advocate for the parties. Vacant possession was to be given on completion of payment of the full purchase price.

It was the plaintiff's evidence that the 3rd defendant's name was included in the sale agreement because the 1st defendant told him the transaction would go quicker if the agreement was in the name of the 3rd defendant, his wife to be.

He paid Kshs. 900,000/= on the 9.2.2001. Kshs. 300,000/= on the 20.11.2001 and Kshs. 100,000 on the 7.12.2001. He complained that the 2nd and 3rd defendants had not fulfilled condition 4 of the agreement.

On the 16.1.2002 the 1st defendant wrote saying that the rates payable had not been calculated. He first said it was for the buyer to pay stamp duty and registration fees and gave the amounts. He said he went to see the 2nd defendant and it was agreed he should not develop the property before completion. He did not have possession. Early in 2002 he saw the 1st defendant in his office and asked him to hasten the transaction. He was having problems with his wife and did not want the property registered in their joint names. He said the 3rd defendant did not contribute any money. He produced an undated letter from the 3rd defendant (ex 4) which stated she had not consented to her name being removed from the documents. This was copied to the 1st defendant's firm stating she had not given authority for her name to be removed from the documents as the plot was bought in their joint names with her husband.

On the 13.5.2002 a firm of advocates S.J Nyang & Co. wrote to the 1st defendants firm as follows:

***Our Ref 2002/SN/CIV/286***

***13.5.2002***

***Samson Juma & Co. Advocates***

***Jubilee Place 5th Floor***

***P.O. Box 79567***

***NAIROBI***

***Dear Sir,***

***RE: SALE OF PLOT NUMBER NAIROBI/BLOCK/110687 AT GARDEN ESTATE TO JORAM OTIENO SAMSON***

***Please be appraised that we act for our above named client who has instructed us to address you as hereunder.***

***That he intended to purchase the above referred parcel of land together with the structures on it, which payment has been fully paid as was agreed. You are yet to effect the transfer of the title to his names.***

***Now, by the conduct of the parties the agreement ought to have been amended if it has to proceed and void altogether.***

***The circumstances surrounding the marital status of our client and his wife is within your knowledge. Therefore it would be wrong to take advantage of the circumstances to impose an impossibility just because his wife is your niece.***

***We therefore humbly urge you to proceed and amend the contract and/or agreement as per our client's specifications since he was the one who paid the money.***

***By your letter dated 16.1.2002 to our client, you acknowledged that he was the owner of the plot and/or title and this was made with mutual understanding between you, our client and that his wife's name was put as a formality and therefore her insistence to remain attached to the said plot is of your own***

*making and/or advice.*

*We therefore, demand which we hereby do that you immediately and unconditionally effect the transfer as per our client's specifications or you make a refund of the money to the party which paid you together with the interests thereof. Please note that by advising your niece to claim our client's right is only a way of you avoiding your responsibility and as such, the law will not allow you.*

**TAKE NOTICE that failure to respond to us within the next fourteen working days from the date hereof, our mandatory and strict instructions are to proceed and institute appropriate legal proceedings against you for the recovery of the purchase price together with the interests thereon, costs and consequences notwithstanding.**

**Yours**  
S.J NYANG & CO. ADVOCATES

**faithfully,**

**MRS. SUSAN ODHIAMBO**

The 2nd defendant gave evidence of the transaction and said vacant possession was given to the plaintiff and 3rd defendant and that they had planted a Kai apple hedge. They came to his office with a plan and an architect. They employed a watchman who the 3rd defendant paid for.

Vacant possession was given before the full purchase price was paid. He denied that he had suggested the 3rd defendant's name should be included in the agreement. At all times the plaintiff and 3rd defendant came together. It was his evidence that as the outgoings had not been paid by the buyer he could not complete on the due date.

Early in the year 2002 he received a letter from the plaintiff asking that the property be in the plaintiff's name alone. He said he could not do as there was a contractual obligation to transfer the property to both.

The 2nd defendant stated it was not true she had advised the plaintiff not to develop the property until the title was in his (the plaintiff's) name. The 3rd defendant stated that she was married to the plaintiff and had a child by him and they were separated in February 2002. Although the sale was to be completed in October 2001 she and the plaintiff delayed in paying. She was the one who took the cheques to the 1st defendant.

She gave her husband Kshs.100, 000/= cash and he wrote the third cheque for this sum. She objected to the removal of her name from the title deed.

Having heard the evidence I preferred the evidence of the three defendants to that of the plaintiff and where there is a conflict I accept the defendants' stories. In particular I find as a fact that the 3rd defendant paid Kshs.100, 000/= to her husband as part of the purchase price.

In so far as the allegation contained in paragraph 10 of the plaint that the defendants after execution of the sale agreement and payment completed have since refused or failed and or neglected to transfer the property to the plaintiff is concerned, I reject this as it was the act of the buyers mutually in not paying the purchase price on the completion date which delayed the sale and subsequently the plaintiff's insistence in altering the agreement for sale to exclude the name of his wife which caused the sale not to be completed.

So far as the plaintiff's insistence on the removal of his wife's name is concerned this he could not demand unilaterally.

The agreement is between the 2nd defendant as vendors and the plaintiff and 3rd defendant as purchasers. Only in the event of a joint agreement to which all parties agree can the agreement for sale be altered to exclude the 3rd defendant. She has as much constitutional right to the premises as the plaintiff and he has no right whatsoever to demand that her name be excluded from the transfer.

The 3rd defendant has filed a defence and counterclaim. The counterclaim seeks a declaration that the 3rd defendant has a legitimate and rightful interest in the subject property.

As the plaintiff is the one who is in breach of the agreement for sale by demanding a condition which is impossible for the 2nd and 3rd defendants to comply with, I dismiss his suit against the 1st, 2nd and 3rd defendants with costs. The 3rd defendant has every right to be retained as a joint owner of the property and I have made the declaration asked with costs on the counterclaim.

**Dated and Delivered at Nairobi on 4th day of February 2005.**

**P.J RANSLEY**

**JUDGE**