

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 930 of 1985

BONIFACE KAMAU.....PLAINTIFF

VERSUS

JUSTUS MATHENGE.....DEFENDANT

JUDGMENT

By a Sale Agreement entered into between the plaintiff and one James Kiruki Mucheru on 12th June 1984, the said James Kiruki Mucheru offered and the plaintiff agreed to purchase a portion of LR NO. 5881/3 measuring approximately 0.0223 of an hectare.

The agreed purchase price was Shs.250,000/=. The sale was subject to the Law Society conditions of Sale. All the necessary consents were granted and he is now the registered owner. The plaintiff in his evidence told the court that after completion of the purchase he could not take possession because the defendant was already in occupation. When he asked the defendant to vacate, he declined. He filed this suit against the defendant seeking an order for eviction of the defendant from the suit premises as well as mesne profits from September 1984 until determination of the suit.

The defendant on being served with summons filed a defence in which he states that he had entered the premises as a purchaser pursuant to an agreement with James Kiruki Mucheru dated 26th November 1976 and claims specific performance of the agreement dated 26th November 1976 as well as general damages for breach of contract.

The plaintiff in his evidence told the court that he bought the suit premises from James Kiruki Mucheru on 12th June 1984. He was financed by his employer M/S Standard Bank. He produced assignment, lease and discharge of charge to prove his contention.

Indeed the defendant agrees that the plaintiff is the registered owner of the suit premises but states that the plaintiff title was obtained fraudulently but fraud was not proved. The defendant claims to have entered into a Sale Agreement with James Kiruki Mucheru on 26th November 1976. But the plaintiff is said to have purchased the suit premises on 12th June 1984.

This is about 10 years later. There was no Sale Agreement between the defendant and the plaintiff so that the defendant cannot claims specific performance from the plaintiff nor can the claim for breach of contract as against the plaintiff be sustainable.

The defendant ought to have filed a suit against the said James Kiruki Mucheru for breach of contract but not the plaintiff as there was no agreement between him and the plaintiff. The plaintiff was not a party to the agreement dated 26th November 1976 between the defendant and James Kiruki Mucheru.

On the issue of mense profits the plaintiff told the court that defendants had been paying a monthly rent of Sh.1000/=. This was admitted by the defendant. After evaluating the evidence by both parties and considering the submissions by both counsels, I am satisfied that the plaintiff has proved his claim against the defendant. I therefore enter judgment for the plaintiff and against the defendant as prayed in paragraph (a) and (b) of the plaint.

The plaintiff is also entitled to the costs of this suit and it is so ordered.

Delivered and dated at Nairobi this 24th day of October 2005.

J.L.A. OSIEMO

JUDGE