



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 175 OF 2014**

**EUNICE A. NDEGWA.....PLAINTIFF**

**VERSUS**

**PAUL OCHIENG ACHAYO.....DEFENDANT**

**JUDGEMENT**

Eunice A. Ndegwa, (**hereinafter referred to as the Plaintiff**) comes to this court by way of plaint against Paul Ochieng Achayo (**hereinafter referred to as the defendant**) claiming that he is the bonafide owner and proprietor of all that property known as Land Reference Plot number 35-SG, Mamboleo, Kisumu County. She laments that on or about the 23<sup>rd</sup> July, 2011, the Defendant did offer to sell to the Plaintiff the said Suit Property Land Reference Plot Number 35-SG, Mamboleo, Kisumu County for Kshs. 800,000/= (Kenya Shillings Eight Hundred Thousand) and the Plaintiff did accept the offer and the parties executed an Agreement for sale of the subject property.

The Plaintiff did pay the Defendant in full the Purchase Price for the said suit property and further paid all the Levies, Rates and Transfer Fees for the same. The Defendant did promise to have the Suit Property Title documents to the Plaintiff in her name and further undertook to put the Plaintiff into possession of the said Suit Property.

Upon payment by the Plaintiff of all the monies demanded by the Defendant, the Defendant has failed neglected and or refused to give the Plaintiff vacant possession of the Suit Property prompting the Plaintiff to physically proceed to the said Property to find out its status.

The Plaintiff has now discovered that the Defendant indeed never owned the subject plot and did in fact sell to her (the Plaintiff) a plot belonging to someone else. The plot has in fact been fenced off by the true owner, Mr. Peter who has in fact leased the same to a road construction Company. The Plaintiff's claims against the Defendant is for the refund of the Plaintiff's monies paid to the Defendant and damages for breach of contract.

Despite demand and notice of intention to sue, the Defendant has ignored neglected and/or refused to refund the Plaintiff her monies and compensate her for her damages. The Plaintiff prays for a refund of Kshs. 950,000 being the purchasing price and interest of 20% per annum from the date of payment till payment in fully.

In the statement of defence, defendant denies the Plaintiff's claim and states that the Plaintiff took possession of the land after being given the same by the defendant. The Defendant states that the suit plot belongs to defendant and that the Plaintiff should sue a third party.

When the matter came for hearing, PW1 the Plaintiff himself stated that she bought the suit land from the defendant who showed her the allotment letter. She paid Kshs. 800,000 by Bankers Cheque. She produced the Bank Requisition form and the Bankers Cheque. She further paid Kshs 3,500/= and later Kshs 5,600 for rates. On cross examination by Mr. Rodi she states she was shown the piece of land which was not developed and that there were no buildings. She paid a total of Kshs. 950,000. She bought the land in 2011 and were to develop it in 2012 but found someone else in the land.

The Defendant on the other hand testified as DW1 and stated that they had a land transaction with the Plaintiff in 2011. He showed the plaintiff the parcel of land. They did an agreement and the land was transferred to the Plaintiff by the defendant Municipal Council. He was paid Kshs. 950,000/=. The Plaintiff paid rates. She took possession and fenced the parcel of land. He has not given the land to someone else. He has transferred the land to Eunice Ndegwa.

I have considered the evidence on record and the rival submissions and do find that it is not a disputed fact that the plaintiff and defendant entered into agreement for the purchase of the suit land. The plaintiff paid the full purchase price of Kshs. 950,000, the plaintiff was to take possession but when he went to take possession, he found one Peter had fenced the land and therefore he could not take possession. The land was not transferred to the plaintiff as was agreed. The defendant states that he gave the plaintiff vacant possession but this is not true as someone called Peter stays on the land. The defendant in his defence paragraph 7 appears to admit that there is a third party in the parcel of land.

I do find that the plaintiff was in breach of clause 5 of the agreement of sale of land produced as PEX2 which states that the vendor shall give vacant possession of the said parcel of land to the purchaser on payment by the purchaser of the entire purchase consideration.

Clause 4 of the agreement provided that in default by either party in fulfilling its part of the agreement in full within the prescribed period, the party in breach shall be held liable and the aggrieved party shall be entitled to 10% of the purchase consideration as damages for breach in liquidated damages in addition but without prejudice to any other or further relief. In view of these clauses, I do find that the defendant failed to give the plaintiff vacant possession as agreed and therefore breached the terms of agreement.

I do find that the plaintiff has proved his case on a balance of probabilities and do grant Judgment to the plaintiff thus the defendant to refund the plaintiff a sum of Kshs. 950,000 being the purchase price and interest of 12% per annum from the date of filing the suit till payment in full. Costs of the suit to the Plaintiff.

**DATED AT KISUMU THIS 5<sup>th</sup>. DAY OF MAY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**