



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.80 OF 2013**

**JARED SAGINI KEENGWE.....PLAINTIFF**

**VERSUS**

**WATER ONCHWARI.....1<sup>ST</sup> DEFENDANT**

**EVELYN ONCHAWARI.....2<sup>ND</sup> DEFENDANT**

**NATIONAL SOCIAL SECURITY FUND.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a the plaint dated 14<sup>th</sup> January 2013. The Plaintiff prays for judgement against the Defendant for:-

*a) A declaration that the Suit Property in the Plaintiff's property.*

*b) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the legal ownership of the Suit Property in trust for the Plaintiff.*

*c) A declaration that the 3<sup>rd</sup> Defendant holds the title document of the Suit Property in trust for the Plaintiff.*

*d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the rent received and/or collected by the Defendants from the Suit Property with effect from 1<sup>st</sup> December, 2010 in trust for the Plaintiff.*

*e) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves or their servants or agents or otherwise whomever from disposing of the Suit Property by the way of sale, transfer, charge, mortgage, lease or dealing with the Suit Property in any manner inconsistent with the Plaintiff property rights and interests.*

*f) A permanent injunction restraining the 3<sup>rd</sup> Defendant whether by itself or its servants or agents or otherwise howsoever from releasing the title documents of the Suit Property to, transferring the Suit Property and/or disposing of the Suit Property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person, not affecting any other such dispositions prejudicial to the property rights and interests of the Plaintiff.*

*g) An order for specific performance that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transfer the Suit Property in compliance with the Agreement for sales dated 30<sup>th</sup> November, 2010.*

*h) An order that the 3<sup>rd</sup> Defendant effect and/or facilitates the transfer of the Suit Property and release of the title documents thereof to the Plaintiff.*

*i) An order for account of the rent received by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from the Suit Property with effect from 1<sup>st</sup> December 2010 and payment of the total amount of the rent to the Plaintiff.*

*j) In the alternative to Order (i) above, an order for payment of mesne profits to the Plaintiff since 1<sup>st</sup> December 2010 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

**k) Interest on amount due under either Order (i) or order (j) above at such rates and for such periods as this Honourable Court shall deem fit to grant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**l) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pay the cost of this suit.**

**m) Any such other or further relief as this Honorable Court may deem appropriate.**

#### **The Plaintiff's Case**

2. The Plaintiff contends that by a sale agreement dated 30<sup>th</sup> November 2010, he bought property **Land Reference Number 189/5** (herein referred to as the suit property) situated at Nyayo Estate, Embakasi in Nairobi for Kshs.4 Million from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are husband and wife and joint owners of the suit property by virtue of a tenant-purchase scheme managed and administered by the 3<sup>rd</sup> Defendant.

3. He further contends that while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to handover to him vacant possession of the suit property on 1<sup>st</sup> December 2010, they did not as there was a subsisting tenant which the Plaintiff was to take over thus the Plaintiff established a bank account into which the rental proceeds were to be remitted but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continued and still continue to receive rent from the suit property.

4. He avers that the Defendants have refused to transfer the suit property to him and also refused to remit the rent collected from the suit property by them in blatant and flagrant violation of his rights thus he has suffered loss and damage.

#### **The Defendants' Case**

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a statement of defence dated 30<sup>th</sup> January 2013 denying all the allegations contained in the plaint. They averred that during the year 2010, they agreed with the Plaintiff that the Plaintiff would extend to them by way of a friendly loan, a sum of Kshs.4 Million in order for them to improve a facility whose returns would be used to refund the said sum to the Plaintiff. They contended that the sale agreement referred to by the Plaintiff was procured from them under false misrepresentation and that the value of the suit property is by far in excess of Kshs.4 Million.

#### **Evidence of the Plaintiff**

6. The Plaintiff testified in court on 28<sup>th</sup> March 2017. He stated that he bought the house on **LR No.189 /5 Nyayo Embakasi** from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are his brother and sister in law respectively for kshs.4 Million and that he paid kshs.200,000/= in cash and Ksh. 3,800,000/= to their account through a bank transfer. He produced the said transfer and the sale agreement dated 30<sup>th</sup> November 2010 as exhibits in this case.

7. He stated that they agreed that he was to take over the house from 1<sup>st</sup> December 2010 but since there was a tenant staying in the house, they agreed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would remit rental proceeds to his Commercial Bank of Africa savings account which he opened for that purpose but the Defendants have never deposited anything neither did they transfer the property to him. He also stated that he went to United States of America for a year but when he returned, the Defendants had changed the agreement to state that the amount he paid them was for a loan. He urged with the court to compel the defendants to effect transfer of the suit property in his favour and for rent collected from 1<sup>st</sup> December 2010 to date plus interest.

8. When cross-examined, he stated that he took a loan from the United States of America to buy a property in Kenya and that the Defendants offered to sell the suit property which he bought without conducting due diligence but based on trust since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are his in laws. He stated further that he does not have any documentation to show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants own the suit property. He also stated that he did not involve any legal counsel in the sale as the 2<sup>nd</sup> Defendant who works at Oraro & Company Advocates drafted the sale agreement. He also stated that although the sale agreement is dated 30<sup>th</sup> November 2010, the consideration was transferred on 29<sup>th</sup> November 2010 to the 1<sup>st</sup> Defendant's bank account. He stated that he has no documentary evidence to show that he opened the savings account alluded to during examination in chief and that he had no evidence to show that he directed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to collect rent from the suit property for him. He also conceded that there is no mention of the tenant in the sale agreement. It was also his testimony that the agreement was not for comfort and that he has not received any refund from the 2<sup>nd</sup> Defendant.

#### **Evidence of the Defendant**

9. On 27<sup>th</sup> June 2018, the defence case was closed without calling evidence.

10. The 3<sup>rd</sup> Defendant did not enter appearance thus it did not participate in these proceedings

11. The parties did not tender any final submissions.

12. I have considered the pleadings and the evidence on record. The issues for determination are:-

**(i) Whether the sale agreement dated 30<sup>th</sup> November 2010 is valid.**

**(ii) Have the 1<sup>st</sup> and 2<sup>nd</sup> Defendants breached the said Agreement?**

**(iii) Is the Plaintiff entitled to the reliefs sought?**

**(iv) Who should bear costs of this suit?**

13. The dispute herein, involving brothers in law stems from the sale agreement dated 30<sup>th</sup> November 2010. While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants admit to receiving the sum of Kshs.4,000,000 from the Plaintiff, they contend that the said sum was advanced to them by the Plaintiff as a loan thus the sale agreement dated 30<sup>th</sup> November 2010 was procured from them through false misrepresentation. On the other hand, the Plaintiff maintains that the said sum was consideration for sale of the suit property. The sale agreement dated 30<sup>th</sup> November 2010 was produced in evidence. It was signed by the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and another witness.

14. The relevant law is **Section 3(3)** of the Law of Contract Act which provides:-

**“No suit shall be brought upon a contract for the disposition of an interest in land unless:-**

**(a) The contract upon which the suit is founded –**

**(i) Is in writing**

**(ii) Is signed by all the parties thereto: and**

**(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.**

15. The Plaintiff has tendered evidence to show that he fulfilled his obligations under the contract by paying Kshs.4 million to the 2<sup>nd</sup> Defendant. Indeed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do not dispute that they received the said sum. On their part however, they did not give the Plaintiff vacant possession of the suit property and neither did they transfer the property as the contract required them to do.

16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were obligated to transfer the suit property to the Plaintiff. The rent proceeds from the tenant who was occupying this house was to be deposited in the account of the Plaintiff. This was not done.

17. I find that the Plaintiff has proved that the sale agreement ought to be enforced. I find that he is entitled to an order of specific performance. In the case of **Andrew Karemi Kingori vs Joseph Waweru Njoroge [2018] eKLR**, it was held that:-

**“It should be noted that specific performance is an equitable remedy and as a rule of equitable remedies is available at the courts discretion. In this current case the plaintiff has established by his evidence that he performed his part of the bargain and therefore he is entitled to an order of specific performance”.**

18. As stated earlier the Plaintiff’s case has not been challenged. I find that he is entitled to the rent collected from 1<sup>st</sup> December 2010 to date.

19. All in all, I find that the Plaintiff has proved his case as against the Defendants on a balance of probabilities. I enter judgment in his favour as follows:-

**(a) That a declaration is hereby issued that the Suit Property in the Plaintiff’s property.**

**(b) That a declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the legal ownership of the Suit Property in trust for the Plaintiff.**

**(c) That a declaration is hereby issued that the 3<sup>rd</sup> Defendant holds the title document of the Suit Property in trust for the Plaintiff.**

**(d) That a declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the rent received and/or collected by the Defendants from the Suit Property with effect from 1st December, 2010 in trust for the Plaintiff.**

**(e) That an order of permanent injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves or their servants or agents or otherwise whomever from disposing of the Suit Property by the way of sale, transfer, charge, mortgage, lease or dealing with the Suit Property in any manner inconsistent with the Plaintiff property rights and interests.**

**(f) That an order of permanent injunction is hereby issued restraining the 3<sup>rd</sup> Defendant whether by itself or its servants or agents or otherwise howsoever from releasing the title documents of the Suit Property to, transferring the Suit Property and/or disposing of the Suit Property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person, not affecting any other such dispositions prejudicial to the property rights and interests of the Plaintiff.**

*(g) That an order for specific performance is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transfer the Suit Property in compliance with the Agreement for sales dated 30<sup>th</sup> November, 2010.*

*(h) That the 3<sup>rd</sup> Defendant is hereby directed to effect and/or facilitate the transfer of the Suit Property and release of the title documents thereof to the Plaintiff.*

*(i) That an order is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to give an account of the rent received from the Suit Property with effect from 1<sup>st</sup> December 2010 and the same be remitted to the Plaintiff within one twenty (120) days from the date of this Judgment.*

*(j) Interest on amount due under Order (i) above at court rates and against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

*(k) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pay the cost of this suit.*

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 28TH DAY OF OCTOBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

**MS FAITH FOR MR. NYAMWEYA FOR THE PLAINTIFF**

**NO APPEARANCE FOR THE DEFENDANTS**

**STEVE - COURT ASSISTANT**