



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 66 OF 2018

WILLIAM RICHARD QUENTIN LUKE.....1ST PLAINTIFF

PATRICIA ANNE LUKE.....2ND PLAINTIFF

VERSUS

PAUL OLE KAIKA.....DEFENDANT

JUDGEMENT

By a Plaint dated the 10th May, 2018, the Plaintiff prays for judgment against the Defendant for:

- a. A refund of all the monies paid to the Defendant herein all totalling to Kshs. 28,569,912/=.
- b. General and aggravated damages.
- c. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

The Defendant though duly served on 16th May, 2018 as evidenced by the affidavit of service filed on 8th June, 2018 failed to enter appearance and file a Defence. Interlocutory Judgement was entered against the Defendant on 14th June, 2018 and the matter proceeded for formal proof on 14th May, 2019.

Evidence of the Plaintiffs

The Plaintiffs entered into a Sale Agreement dated the 30th March, 2012 with the Defendant for the Sale of land parcel number Kajiado/ Mailua/ 177 (BLOCK 3) at Kshs. 3, 955, 000/= . The Defendant further conjured that he was representing owners of six (6) other plots who were desirous of selling land to the Plaintiffs. Further, as a sign of their intention to sell, the Defendant handed to the Plaintiffs, six (6) Beacon Certificates of the said parcels of land. The Defendant caused six (6) Sale Agreements to be prepared and executed by the Plaintiffs. The said agreements were made as follows: Sale Agreement dated 28th April, 2012 between Amboko Ole Laimeru and the Plaintiffs for Kshs. 4,897,900/= in respect to land parcel number Kajiado/ Mailua/ 172; Sale Agreement dated 28th April, 2012 between Teretui Lesirr and the Plaintiffs for Kshs. 3,707,760/= in respect to land parcel number Kajiado/ Mailua/ 173; Sale Agreement dated 28th April, 2012 between Meeli Ole Koisikirr and the Plaintiffs for Kshs. 3,969,000/= in respect to Kajiado/ Mailua/ 175; Sale Agreement dated 28th April, 2012 between Leken Ole Simindei Paingoni for Kshs. 3, 969,000/= in respect to Kajiado/ Mailua/ 176; and Sale Agreement dated the 28th April, 2012 between Maaiyo Masenke and the Plaintiffs for Kshs. 3, 969, 000/= in respect to Kajiado/ Mailua/ 178.

Upon the Plaintiffs executing the said Sale Agreements, the Defendant purported to take the same to the six (6) vendors to sign and brought them back thumbprinted. The Plaintiffs' confirm paying the Defendant a total of Kshs. 28, 596, 912/= as purchase price. Further, they paid the Defendant Kshs. 1,973,600/ being stamp duty registration and lawyers' fees for the six plots and a further Kshs. 1, 376,301/= for costs Defendant had incurred on their behalf. PW1 explained that the Defendant later brought them a title for Kajiado/ Mailua/ 172 but upon undertaking a Search, they were informed by the District Land Registrar that the said title deed was fake. The Plaintiffs reported the matter to the Kajiado County Commissioner who summoned the Defendant and directed him to avail the six (6) vendors to confirm the purported Sales. The Defendant failed to avail himself nor the six (6) vendors culminating in the matter being reported to the Police and he has since been charged with a criminal offence. The Plaintiffs produced the Bundle of the Sale Agreements; Statement of monies paid; Bundle of Beacon Certificates for the aforementioned parcels of land; Consent to subdivide the parcels of land; Letter to the County Commissioner; Letter from the ODPP and Letter under reply from the ODPP as their exhibits.

The Plaintiffs filed their submissions which I have considered.

Analysis and Determination

Upon consideration of the Plaintiff, PW1's testimony, Plaintiffs' exhibits and submissions, the following are the issues for determination:

Whether the Plaintiffs' are entitled to a refund of Kshs. 28, 596, 912/= with interest.

Whether the Plaintiffs are entitled to General and aggravated damages.

Who should bear the costs of this suit.

As to whether the Plaintiffs are entitled to a refund of Kshs. 28, 596, 912/= with interest as well as General and Aggravated Damages. The Plaintiffs' claim to have entered into a Sale Agreement dated the 30th March, 2012 with the Defendant for the Sale of land parcel number Kajiado/ Mailua/ 177 (BLOCK 3) for Kshs. 3, 955, 000/=. The Defendant further misled the Plaintiffs that he was representing six other people who intended to sell their parcels of land and handed to them six (6) Beacon Certificates as a sign of commitment. The Defendant then caused six Sale Agreements to be prepared and executed by the Plaintiffs as follows: Sale Agreement dated 28th April, 2012 between Amboko Ole Laimeru and the Plaintiffs for Kshs. 4,897,900/= in respect to land parcel number Kajiado/ Mailua/ 172; Sale Agreement dated 28th April, 2012 between Teretui Lesirr and the Plaintiffs for Kshs. 3,707,760/= in respect to land parcel number Kajiado/ Mailua/ 173; Sale Agreement dated 28th April, 2012 between Meeli Ole Koisikirr and the Plaintiffs for Kshs. 3,969,000/= in respect to Kajiado/ Mailua/ 175; Sale Agreement dated 28th April, 2012 between Leken Ole Simindei Paingoni for Kshs. 3, 969,000/= in respect to Kajiado/ Mailua/ 176; and Sale Agreement dated the 28th April, 2012 between Maaiyo Masenke and the Plaintiffs for Kshs. 3, 969, 000/= in respect to Kajiado/ Mailua/ 178. It emerged in court that the Defendant never had an intention of completing the transactions as he also failed to avail the six vendors who had purportedly thumbprinted Sale Agreements after being directed to do so by the County Commissioner producing and produced a fake Certificate of Title for Kajiado/ Mailua/ 172. I note the Defendant has since been charged with a criminal offence in respect to the transactions herein.

Sections 107 and 109 of the *Evidence Act*, provides that

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

In the case of **MILLICENT PERPETUA ATIENO WANDIGA & another v JOHN CHEGE [2013] eKLR**, Lady Justice Pauline Nyamweya observed that: 'The main issue before the court is the type and measure of damages recoverable by the Plaintiffs. The principles governing the loss that is recoverable and the measure of damages upon breach by a seller of land are stated in Halsbury's Laws of England, Volume 12, 4th Edition at paragraph 1183 as follows:

"...Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...."

In the current scenario, the Defendant never controverted the averments of the Plaintiffs and interlocutory judgment had already been entered against him. In associating myself with the decision cited above, based on the evidence before me as well as the exhibits presented, I find that since the Defendant failed to complete the transactions herein, the Plaintiffs are indeed entitled to a refund of Kshs. 28, 596, 912/= which they paid to him including interest from the date of payment. The Plaintiffs further sought for General and Aggravated damages as against the Defendant. In line with these legal provisions and based on the evidence before me, I find that the Plaintiffs are entitled to a refund of the following payments that they paid to the Defendant: Kshs. 1,973,600/ being stamp duty registration and lawyers' fees for the six plots and a further Kshs. 1, 376,301/= for costs the Defendant claimed he had incurred on their behalf.

Who should bear the costs of this suit. Since the Plaintiffs were inconvenienced by the Defendant's action, I direct that he bears the costs of the suit.

It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and will proceed to enter judgment for them against the Defendant in the following terms:

- i. The Defendant be and is hereby directed to refund to the Plaintiffs all the monies paid to him herein all totalling to Kshs. 28, 569, 912/= within 90 days from the date hereof.
- ii. The Plaintiffs are hereby awarded Kshs. 3,349, 901 as being General Damages which should be paid by the Defendant within 90 days from the date hereof.
- iii. Interest is awarded on (i) and (ii) above at Court Rates, to be paid from 28th April, 2012 until payment in full.

iv. The costs of the suit are awarded to the Plaintiffs.

Dated signed and delivered via email this 11th day of May, 2020.

CHRISTINE OCHIENG

JUDGE