



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 309 OF 2011**

**BENARD KIPKEMOI SOY.....PLAINTIFF**

**VERUS**

**LABAN CHERONGONY.....DEFENDANT**

**JUDGMENT**

1. By a Sale Agreement dated the 23<sup>rd</sup> December 2008 the defendant offered to sale and the plaintiff accepted to purchase a parcel of land Known as **LR. No. PIONEER/NGERIA BLOCK 1 (EATEC)/185** from the defendant.

Pursuant to the sale agreement, the plaintiff paid the agreed purchase price of Kshs.3.8.Million with a balance of Kshs.200,000/= on various dates that was acknowledged by the defendant. The defendant however failed to hand over the Title Deed in respect thereof despite application for the requisite Land Control Board consent and executing the transfer form in favour of the plaintiff, and handing to the plaintiff copies of his identity Card and Personal Identification Notification (PIN) certificate and giving him vacant possession of the land parcel.

2. The above prompted the plaintiff to file this suit against the defendant seeking orders for specific performance or refund of the purchase price of Kshs.3,800,000/= received by the defendant. In his plaint dated The 11<sup>th</sup> July 2011, the plaintiff alleged breach of contract and fraudulent obtaining of Kshs.3.8 million by:

***a) offering for sale to the plaintiff the subject land parcel when he knew that he had already sold and transferred the same to a third party by name Vijay Morjaria.***

***b) Failure to disclose material facts at the commencement of the sale transaction that he did not have the Title Deed to the land parcel and that he had already sold the same to a third party.***

3. The plaintiff further states that upon discovery of the fraud he caused the defendant to be arrested and charged with the offence of obtaining money by false pretenses from the plaintiff. The case is yet to be determined.

4. In his statement of defence filed on the 18<sup>th</sup> November 2011, the defendant denied the claim and the particulars of fraud and shifted the blame to the 3<sup>rd</sup> party, Vijay Morjaria for transferring the land parcel to himself without his knowledge and consent.

He however did not enjoin this 3<sup>rd</sup> party as a necessary party to the suit.

5. have considered the straightforward evidence tendered by the plaintiff and his witnesses as well as the defendants evidence.

PW1 testified that he executed the sale agreement between himself and the defendant before an advocate.

The sale agreement was duly produced as PExt. 1 and paid Kshs.3.8 Million by Bankers cheques and deposits in the defendants bank account as advised. Copies of the bankers cheques and deposit slips were produced as PExh.2 Also produced were the transfer forms (PExh 4).

6. That upon conducting an official search of the land parcel, the plaintiff found that the said land was registered in favour of one Vijay Morjaria on the 4<sup>th</sup> January 2006 before the land was offered to him for purchase.

These documents were produced as **PExh No. 7 (b) and PExh 5**.

He testified that upon the above revelations, and upon getting no satisfactory explanation and refund of his money, he filed this suit.

7. The defendant testified as DWI. His testimony was that at the date of sale of the property to the plaintiff, he was not aware that the said Vijay Morjaria had transferred the same to himself. He acknowledged having entered into the sale agreement and received Kshs.3.8M from the plaintiff. He however testified that he should not refund the purchase price because he was not aware of the transfer to Vijay Morjaria and further that the plaintiff entered into an agreement that resulted into Vijay Morjaria transferring the land to the plaintiff, that he offered to refund the money in place of the transfer to him by the said Vijay Morjaria which he rejected.

He therefore states that the purchase price ought not be refunded.

8. The plaintiff's submissions are that the plaintiff's further purchase of the same suit property from the 3<sup>rd</sup> party Vijay Morjaria was a separate and different contract as the defendant was not a party. He urged the court to find in favour of the plaintiff. The defendant's submission was that the completion of the sale transaction was frustrated by the 3<sup>rd</sup> party and had the plaintiff waited, the contract would have been fulfilled. It was his submission that the remedies available to the plaintiff is to bring him back to the position he was in before the frustration of the contract, and that if additional costs were incurred it was not for the defendant to pay.

9. I have considered the rival submissions. In his own evidence the defendant admits that he received the money Kshs.3.8 Million from the plaintiff but completion of the sale was frustrated by the 3<sup>rd</sup> party, Vijay Morjaria.

This party is not a party to the suit. The defendant did not find it fit to enjoin him to the suit.

The defendant having not ultimately transferred the suit property to the plaintiff despite the purchase price having been paid and acknowledged, the only remedy is refund of the purchase price with attendant interest.

10. After the aborted sale and transfer, the plaintiff thereafter purchased the suit property from the 3<sup>rd</sup> party, Vijay Morjaria. This was a separate and independent sale contract in which the defendant was not a party as title of the property had passed over to the said Vijay Morjaria.

The defendant's defence in its totality is but a sham. Had the defendant expressly admitted the claim when served with summons, costs and accrued interest since November 2011 would not have been necessary or occasioned.

He chose to defend a suit that he knew, or ought to have known had no merits evidenced by the material

facts stated in his own defence. I have considered the plaintiffs' claim for Kshs.384,000/= being travel costs incurred by the plaintiff. This being a liquidated claim ought to have not only been pleaded but also proved. No evidence at all was led to prove the travel costs. It is without merit, and is dismissed.

11. For those reasons, I am and persuaded that the plaintiff has proved his case against the defendant on a balance of probability and therefore entitled to the prayers sought in the plaint.

Consequently, Judgment is entered for the plaintiff against the defendant as follows:

- 1. Refund of Kshs.3.8 Million with interest at court rates from the 23<sup>rd</sup> December 2008 until payment in full.***
- 2. Claim for Kshs.348,000/= being traveling expenses is disallowed having not been proved.***
- 3. Costs of the suit shall be borne by the defendant.***

**Dated, Signed and Delivered this 9<sup>th</sup> Day of February 2017.**

**J.N. MULWA**

**JUDGE**