



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 7 OF 2014.

JOSEPH ATSIAYA OMUTAMBA.....PLAINTIFF

=VERSUS=

MOLI WAFULA MARERE.....DEFENDANT

J U D G M E N T.

1.INTRODUCTION.

- a. **JOSEPH ATSIAYA OMUTAMBA** filed this case against **MOLI WAFULA MARERE**, through the plaint dated 28th January, 2014. He claims to have bought a portion of land measuring 50 feet by 200 feet out of South Teso/Angoromo/7728 from the Defendant for Kshs.20,000/= which has since been subdivided into parcels South Teso/Angoromo/8167 and 8168. The Plaintiff prays for the two new titles to be cancelled to enable the Defendant transfer the portion he bought to him. He also prays for costs.
- b. The Defendant Moli Wafula Marere filed his statement of defence which is undated on the 22nd May, 2014 denying the Plaintiff's claim. He further averred that the Plaintiff's claim was time barred, res judicata and an abuse of the courts process.

2. ISSUES FOR DETERMINATION.

0. Whether the Plaintiff and Defendant had a valid land sale agreement.
0. Whether the Plaintiff has complied with the terms of the sale agreement.
0. Whether the Defendant had placed the Plaintiff in possession of the land subject matter of this suit.
0. Whether the Plaintiff is entitled to orders of specific performance,
0. Who pays costs.

3. ANALYSIS OF EVIDENCE PRESENTED.

- a. The Plaintiff testified as PW 1 and called Saferio Osigwar and Jacob Efusi, who testified as PW 2 and PW 3 respectively. The Defendant testified as DW1. The testimonies of both parties clearly show that on or about 1994, they entered into an agreement under which Defendant agreed to sell to the Plaintiff a plot of 100 feet by 50 feet, out of Defendant's land parcel. The Plaintiff had annexed to the plaint his list of documents, dated 28th January, 2014 which included what he described as a agreements dated 5th December, 1994, 7th June, 1995, 10th July, 1996, 2nd November, 1995, 14th August, 1998, 2nd October, 1996 and 2nd January, 2009. The Defendant did not dispute the existence of the sale agreement or contents of the said documents but said he sold the land to another person after the Plaintiff took too long to clear the balance of the purchase

- price. The parties evidence therefore shows there was a valid sale agreement between the Plaintiff and Defendant consisting partly of the various written acknowledgements of payments.
- b. The court has carefully perused the documents described as agreements and even though they do not specify the land parcel from which Defendant was to sell to the Plaintiff a plot measuring 50 feet by 100 feet, it is clear they contain acknowledgement of the monies paid by the Plaintiff to the Defendant pursuant to their agreement for sale of land. The totality of the said documents is that they contain the terms of the agreement. The land from which the Plaintiff was to get his portion as described by the Plaintiff has not been disputed by the Defendant and the court will take it to be parcel Sought Teso/Angoromo/7728 which was registered in the names of the Defendant until 5th May, 2011 when the title was closed on subdivision to parcels 8167 and 8168. This information is available on the copies of certificates of official searches for parcels South Teso/Angoromo/7728, 8167 and 8168 in the Plaintiffs list of documents. That the certificate of official search for parcel South Teso/Angoromo/8167 shows it is still registered in the Defendants names while that of parcel South Teso/Angoromo/8168 shows it was registered in the names of Jane Obali on 26th June, 2012 and title deed issued on 27th June, 2013.
 - c. The available evidence also shows that the Plaintiff had taken possession of the plot he had bought from the Defendant with the permission of the Defendant as he continued making the payments in instalments. However when Plaintiff went to pay the last payment in 2013, the Defendant declined to accept and ordered Plaintiff to vacate from the portion he had taken in possession. The Defendant has offered to refund the money he had received.
 - d. This suit was filed in 2014 which is about one year after Defendant asked Plaintiff to vacate from the land. It is also about five years from 22nd January, 2009 when the Defendant received the payment of Kshs.2,100/= and an acknowledgement of the same date made. This suit is therefore not time barred as the six years had not passed from the date of the last portion of the agreement dated 22nd January, 2009 to 16th April, 2014 when this suit was filed (**Refer to section 4 (1) (a) of the Limitation of Actions Act**)
 - e. Though the Defendant had in his statement of defence averred that the suit was res judicata and an abuse of the court's process, no evidence was adduced to prove those allegations.
 - f. The evidence availed shows that the Defendant and Plaintiff had agreed that the purchase price was to be paid in instalments. The Plaintiff has shown that he had been ready and willing to pay the last instalment in the year 2013 but the Defendant declined to accept it. The efforts of the Plaintiff to seek an out of court settlement also failed. The Defendant has indicated that he is not ready to accept the balance of the purchase. The Defendant offers to make a refund of the monies paid. The court notes that the Defendant never took steps to obtain the Land Control Board consents to facilitate the completion of his agreement with Plaintiff whom he had placed in possession of the land.

4. FINDING.

- a. The court has taken note that the sale agreement was made in 1994 which is about ten (10) years before this suit was filed. The agreed purchase price was Kshs.20,000/= and if the court was to allow Defendant's request to refund the purchase price, the Plaintiff would stand prejudiced as prices of land have changed upwards. Such an order would instead benefit the Defendant who must have received much more for the portion he subdivided from South Teso/Angoromo/7728 and sold to Jane Obali.
- b. This being a court of equity, the court is of the considered view that the Plaintiff has established his case against the Defendant to entitle him to a plot measuring 50 feet and 100 feet out of the parcel South Teso/Angoromo/8167, still remaining in the Defendant's names. The following orders are therefore issued;
 0. That the Defendant do transfer to the Plaintiff a plot measuring 50 feet by 100 feet out of Land parcel South Teso/Angoromo/8167, upon the Plaintiff paying the outstanding balance of Kshs.4,100/= within the next 30 days.
 0. That should the Defendant decline to receive the said balance, the same be deposited with the court for transmission to the Defendant.
 0. That should the Defendant decline to sign the documents necessary to give effect to (i) above,

the Deputy Registrar to sign all such documents.
0. The Defendant to meet the Plaintiff's costs of this suit.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 13TH DAY OF MAY, 2015.

IN THE PRESENCE OF ;

PLAINTIFFPRESENT.

DEFENDANT.....PRESENT.

JUDGE.