



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 243 OF 2013

SIFUNA TANDA WAMUKOTA.....PLAINTIFF

VERSUS

PETER WALUCHO SIMIYU.....DEFENDANT

JUDGMENT

1. The plaintiff filed his suit against the defendant seeking for immediate transfer of 3½ acres out of land parcel no. Ndivisi/Ndivisi/761 and in default the Executive Officer of the court be authorized to sign all relevant papers to effect the transfer. He also prayed for costs of the suit. The defendant filed a statement of defence in which at paragraph 3 he pleaded that he inherited 3.5 acres in Ndivisi/Ndivisi/761 which initially belonged to his father and which 3.5 acres is now comprised in L.R. no. Ndivisi/Ndivisi/2086. When the pleadings closed, the suit was heard by adducing oral evidence on 5th May 2014 when both parties testified.

2. The plaintiff, **Sifuna Tanda Wamukota** in his evidence told court that he lives in Lugulu and he is a farmer. The defendant sold to him land measuring 3 ½ about 9 years back and he produced a sale agreement as pex. 1. He wanted the defendant ordered to transfer to him the sold portion as he had paid the whole purchase price. In cross-examination he said the plot sold was L.R no. 761 and it was developed. The witness said he paid for the development on the land and does not owe the defendant any money.

3. **Moses Nicholas Barasa** testified as **PW2**. He lives in Webuye and he is a retired teacher. He is a brother to the plaintiff and he also knew the defendant as the person who sold land to the plaintiff. On 30th August 2005 the plaintiff gave him the sum of Kenya shillings four hundred and ten thousand (Kshs. 410,000/=) only which he paid to the defendant before J.M. Wafula advocate. The agreed purchase price for the 3½ acres was Kenya shillings four hundred fifty five thousand (Kshs. 455,000/=) only. After he made the payment, a balance of Kenya shillings forty five thousand (Kshs 45,000/=) only remained. **PW2** stated further that Kenya shilling forty five thousand was agreed to be paid for the trees. Therefore balance on purchase price of the land plus the trees was outstanding at Kenya shillings ninety thousand only (Kshs 90000/=). He continued that the balance was paid by the plaintiff and later the defendant went underground. This forced the plaintiff to refer the matter to the Land Disputes Tribunal and later to this court. In cross examination he said when the land was bought, there was a house and trees on it and cost of the development was Kenya shillings forty five thousand (Kshs 45, 000/=) not Kenya shillings ninety thousand (Kshs 90,000/=). The plaintiff then closed his case.

4. The defendant then took the witness box. He said he lives at Sirende location in Maili Saba. He admitted they had an agreement with the plaintiff. According to him each acre was priced at Kenya shillings One hundred thirty thousand (Kshs 130000/=) only giving the total the agreed purchase price at Kenya shilling four hundred fifty five thousand only (Kshs. 455,000/=). He stated that the Plaintiff

requested him to pay Kshs. Four hundred and ten thousand only as he had a son at the university which request he agreed to. The balance was also agreed to be paid in two installments. According to him the developments on the land was sold at Kshs. 90,000/=. He later carried the transfer forms thinking the whole balance was ready only to be paid Kshs. 45,000/=. He said the Plaintiff refused to pay the balance claiming the land was “*thambalare*”. He reported to the chief from where he learnt the plaintiff's wife sued him before the tribunal although he was never served.

5. The defendant said the award of the tribunal was never adopted by Webuye court as he wrote a letter of complaint to that court. He urged this court to dismiss this suit as he has no intentions of evicting the plaintiff from the land. He wants the plaintiff to pay him his balance then he will transfer the land to him. He said the plaintiff lives on this land peacefully. He admitted receiving the sum of Kshs. 455,000/= less Kshs. 90,000/=. In cross examination he said the trees were cut by one of his brothers but denied discussing the issue of reducing the price of trees because they were cut. He closed his case.

6. From the evidence adduced by both parties, it is not disputed that a sale of land measuring 3½ acres was entered into between the plaintiff and the defendant. It is also not disputed that the agreed purchase price for the land was Kenya shillings four hundred fifty five thousand (Kshs. 455,000/=) which has already been paid in full. It is further not disputed that the 3 ½ acres was to be carved out of L.R. Ndivisi/Ndivisi/761. Finally it is not disputed that the plaintiff is in possession of this land. The defendant has admitted too that he has not executed the transfer documents to enable the plaintiff become the registered proprietor.

7. The issue in dispute which this court finds is for determination is whether besides the price of Kenya shillings four hundred fifty five thousand (Kshs. 455,000/=) only for the land, was there a sum agreed and payable as the cost of development. Secondly was that sum for development Kenya shillings ninety thousand (Kshs 90000/=) or Kenya shillings forty five thousand (Kshs 45000/=) only and paid in full. Should the defendant sign the papers without imposing any conditions? In the sale agreement signed between the parties (Pex. 1), at clause 4 of the special conditions thereof stated thus; **“Development has been agreed at Kshs. 45,000/=. The balance is Kshs.90,000/= including the developments.”** Under paragraph on purchase price, a sum of Kshs. 410,000/= is recorded as paid which both parties signed as the amount paid at the time of execution of the agreement. I find therefore that the balance of Ksh.90, 000/= was partly balance of purchase price and partly development cost It Is therefore not true for the defendant to say that development cost was agreed at Kshs. 90,000/=.

8. The defendant has admitted receiving Kshs. 455,000/=. It was thus incumbent upon the plaintiff to show by way of documentary evidence this court when he paid the outstanding balance of Kshs. 45,000/= for the developments as agreed. The only document I found in the record referring to other payments besides the sale agreement is what is referred to as “consent undertaking” in the plaintiff’s list of documents no 2 and 3 (as acknowledgement slip dated 5th September 2009 and 7th September 2009) respectively. In this document, the defendant acknowledged receipt of Kenya shillings fifteen thousand (Kshs. 15,000/=) on 5th September 2009 and Kenya shillings five thousand (Kshs 5000/=) on 7th Sept 2009. There is nothing else to show that the plaintiff paid Kenya shillings Ninety thousand that was the outstanding balance as at the date the agreement was executed. Further at paragraph 5 of the defence, the defendant pleaded thus, **“As soon as the plaintiff pays the same balance of Kshs. 45,000/= the defendant will effect the transfer.”**The plaintiff failed to rebut this averment in his evidence.

9. Consequently I agree with the defendant’s contention that there is a balance of Kenya shillings forty five thousand (Kshs 45,000/=) which has not been settled todate by the plaintiff. It is mandatory that both parties perform their obligations as set out in the agreement. I shall allow the plaintiff’s suit but on the following terms;

- i). He shall pay to the defendant the balance of Kenya shillings forty five thousand (Kshs. 45,000/=) within **45 days** from the date of this judgment.
- ii. The defendant is hereby directed to appear before the applicable Land Control Board and secure for the plaintiff the requisite consent to transfer in respect of L.R. Ndivisi/Ndivisi/2086 **within 45**

days of this judgment.

iii. On receipt of the consent, the defendant to immediately sign and surrender the letter of consent, transfer forms, copy of his ID, pin and passport size photographs, original title deed for L.R. Ndivisi/Ndivisi/2086 to the plaintiff to enable him secure registration of the suitland.

iv. The matter be mentioned on 30th September 2014 to confirm compliance with these orders so the court can close the file or make further/ other appropriate orders.

v. Since both parties were in default at the time of filing this suit, I order each of them to bear their costs.

DATED, SIGNED and delivered in Bungoma on 10th of July 2014

A. OMOLLO

JUDGE.