



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.702 OF 1994

MELCAZADEK ONGIROPLAINTIFF

VERSUS

GEORGE OWILI MEADEFENDANT

JUDGMENT:

The plaintiff has brought this suit on behalf of his son Orwa Ongiro (PW1) pursuant to a power of attorney registered at Land Registry as No.107 on 7.6.1995. The basis of the grant of the power of attorney is that the PW1 who entered into the transaction giving rise to this suit was at the material time working for the PTA in Zambia and was not thus able to effectively prosecute the case against the defendant from so far a place.

In my view the basic facts of this case are very clear and straight forward although a lot of other irrelevant material has been introduced into the matter in an attempt I suspect to confuse and to cover the truth. I will deal only with the relevant facts.

On 1.9.83 PW1 and the defendant entered into a sale agreement in writing under the terms of which the defendant agreed to sell to the PW1 that piece or parcel of land known as Suna West/Wasweta II/1077 at an agreed price of 7,605/=. Pursuant to the agreement PW1 paid a deposit of shs.2000/= to the defendant. The sale agreement (Exh.2) was signed by both parties and is witnessed by the District Officer Macalder where the land is situated. The parties then applied for the necessary land control board consent from the Macalder Land Control Board. The application Exh.1 is dated 1.9.93 and is signed by both PW1 and the defendant.

The application for land control board consent was listed for consideration on 29.9.1983 on which date both PW1 and the defendant again appeared before the board and the consent applied for was duly granted.

PW1 also paid the balance of the purchase price of shs.5,605/= before the same District Officer Macalder Division on the date consent was granted but before PW1 could complete the transaction, he got job with the PTA in Zambia which has kept him away from home. Fortunately for him he was on leave when this matter came up for hearing and, he was thus able to testify.

In his evidence PW1 stated that whenever he came home at Awendo he has always tried to trace the defendant in order to complete the transaction but the defendant has avoided him and has always

made false promises whenever the two meet by chance. As a result of the defendant's refusal to complete the transaction, PW1 has been forced to institute this suit, through his father as aforesaid. He seeks an order of specific performance of the contract and the eviction of the defendant from the suit land together with costs.

The surprising thing about this case is that the defendant does not deny the transaction between him and the defendant but he seeks to explain it away.

Regarding the sale agreement the defendant claimed that it was made for the purpose of misleading the Agricultural Finance Co-operation to advance a loan to PW1 (who was then an employee of the Co-operation). The defendant further claimed that PW1 intended to use the proceeds of the loan to purchase some pieces of land identified for him by the defendant.

And as to the payment of the deposit in the sum of shs.2000/= which the defendant acknowledges to have received from PW1, his explanation was that it was not, contrary to the express writings on the agreement, a deposit but a 'gift' to him by PW1 for assisting him. That explanation is clearly a lie and I do not for a moment believe it.

Also in respect of his appearance with PW1 before the Macalder Land Control Board on 29.9.83 the defendant shamelessly told this court a pack of lies. He stated:-

“Mr. Ongiro (PW1) told me he would pay me some money which I would (have) to refund afterwards. In other words, we were going to act as if Ongiro was buying the land when the truth was that there was no such transaction. What we really were after was the AFC loan.”

Apart from reflecting the defendant as a deceitful and thoroughly dishonest person the above evidence shows that he is not a reliable person. For that and other obvious reasons arising from his own evidence, I do not believe him. One of those reasons is that the defendant is telling an obvious lie. If all he wanted to achieve was to assist PW1 obtain a loan from the AFC then all he needed to do is to simply guarantee such a loan and offer his property as security therefor instead of actually appearing to be selling it and in the process deceiving and misleading, as he claims to have done, so many other innocent public officers. Consequently I do not as I have said above believe one iota of the defendant's evidence. I am convinced he is a fraudster and a swindler and that he has lied to this court in an attempt to wrangle out of the sale of the property to PW1. In my judgment what PW1 and the plaintiff told the court is the truth. I find that the defendant sold parcel No.SUNA WEST/WASWETA II/1077 to PW1 for shs.7,605/= and was paid the full purchase price on two different dates, namely on 1.9.1983 (shs.2000/=) and on 29.9.1983 (shs.5,605/=) as shown in the agreement.

I further find that the parties applied for and were granted the necessary land control board consent by the Macalder Divisional Land Control Board.

On the basis of the above evidence I further find that the plaintiff has proved his case against the defendant on the balance of probability and, accordingly, I enter judgment in favour of the plaintiff against the defendant as prayed in the plaint together with costs and interest.

DATED at KISII this 25th day of April 1996.

TOM MBALUTO

JUDGE