



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 150 OF 2017

(Formerly Kisii Elc case No. 173 of 2016)

THOMAS NYANGARA BASWETI.....PLAINTIFF

VERSUS

MICHAEL ONYANGO ODERO.....DEFENDANT

JUDGMENT

1. By a plaint dated 22nd June 2016, (Fast track) and filed on 23rd June 2016, the plaintiff through S.M. Sagwe and Company Advocates has sued the defendants for the following reliefs:-

- i. Refund the plaintiff purchase price Ksh. 85,000/=**
- ii. Interest an (i) above at court rates.**
- iii. Any other relief this Honourable court may deem fit and just be granted.**

2. The gist of the plaintiff's case is that on 7th March 2011 the defendant sold a portion of land measuring 120 feet by 50 feet to be curved out of LR NO. Kamagambo /Kameji/12 at a consideration of kshs. 85,000/= which the plaintiff paid in full to the defendant by way of installments of Kshs. 30,000/= and kshs. 55,000/= on 7th March 2011 and 23rd May 2011 respectively. That on the same day the defendant demarcated the land and fix the boundary of the portion of the suit land which the plaintiff started to use.

3. The plaintiff further stated that the suit land LR NO. Kamagambo/Kameji/12 was sub divided and gave rise to LR NO. Kamagambo/Kameji/ 617 registered in the name of Odero Onyango on 13th February 1990. The said subdivision LR No. Kamagambo/Kameji/617 was further subdivided into LR NO. Kamagambo/Kameji/1020 registered in the name of Dickson Ongera Obondo. Hower, the defendant failed to surrender the portion of the suit land to the plaintiff hence provoking the instant suit.

4. The defendant was duly served on various dates including 4th December 2017 and 28th November 2018 as revealed in affidavits of service sworn on 5th December 2017 and 20th December 2018 respectively. He never entered appearance or filed statement of defence or appeared in court for hearing of this suit. Thus, hearing of the suit proceeded on 7th December 2017.

5. The plaintiff (PW1) testified and relied on the following documents:-

- a) Sale agreement dated 7th March 2011 (PExhibit 1)**
- b) Sale agreement dated 23rd May 2011 (PExhibit 2)**
- c) A certificate of official search dated 14th June 2011 (PExhibit 3).**
- d) A certificates of official search dated 16th June 2016 (PExhibits 4 and 5).**
- e) Copy of the plaintiff's identity card (PExhibit 6).**

6. Learned counsel for the plaintiff filed submissions dated 5th April 2018 in favour of the present claim. He submitted that the plaintiff's claim is not opposed and it be allowed accordingly.

7. I have duly examined the entire plaintiff's claim, the evidence of PW1 and the plaintiff's submissions. It is trite law that the issues for determination in a suit generally flow either the pleadings or as framed by the parties; see the Court of Appeal decision in **Galaxy Paints Company Ltd –v- Falcon Grounds Limited (2000) 2EA 385.**

8. In that regard, I embrace the plaintiff's agreed issues dated 6th August 2017 and filed on 24th July, 2017. The said issues are compressed thus:-

a) Whether the plaintiff and the defendant entered into a sale of land agreement in respect of the portion of the suit land.

b) Whether the defendant breached the agreement in (a) hereinabove

c) Is the plaintiff entitled to the orders sought in his plaint?

9. By PExhibit 1, the defendant sold the portion of land to the plaintiff who paid full purchase price to him. Quite clearly, the plaintiff's claim is based on an agreement in writing; see **Sumaria and another –v- Allied Industries Ltd (2007) 2 KLR 1.**

10. The contract was for the sale of land. It was not illegal in the circumstances; see **Scott –v- Brown Doering McNab and Company (1892) 2 QB 724 at 728.**

11. As revealed at paragraphs 7 and 8 of the plaint and PExhibits 3,4 and 5, the suit land was subdivided and further subdivided and registered in the name of other people. Therefore the defendant breached their written contract in this matter.

12. As a result of the breach of contract, PW1 craves for orders sought in the plaint. His claim is not challenged or at all by the defendant.

13. In the case of **Kirugi and another-v- Kabiya and 3 others (1987) KLR 347,** the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof.

14. In the premises, I find that, the plaintiff has discharged the burden of proof against the defendant on a balance of probabilities.

15. Wherefore, I enter judgment for the plaintiff against the defendant according to orders (a) and (b) sought in his plaint dated 22nd June 2016. Interest at court rates to run from the date of filing this suit.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of JUNE 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. G. Nyambati hold brief for S.M. Sagwe learned counsel for the plaintiff.

Tom Maurice – Court Assistant.