



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 190 OF 2017

ISABELLA AUMA KUBENDE.....PLAINTIFF

VERSUS

MICHAEL OWINO WAFULA.....DEFENDANT

J U D G E M E N T

1. By a Plaint dated 6th December 2017, the Plaintiff, **ISABELLA AUMA KUBENDE**, instituted this suit against the Defendant, **MICHAEL OWINO WAFULA**. The Plaintiff seeks a refund of the purchase price regarding the property known as **BUKHAYO/MATAYOS/4207** which she was buying from the Defendant who later on breached the contract of sale by reneging on the sale agreement.

2. The Defendant did not enter appearance and file Defence. Interlocutory judgment was therefore entered against the Defendant and the matter proceeded for formal proof. The Plaintiff stated that on 11th September 2013, she entered into an agreement with the Defendant for the purchase of the aforementioned suit property at a consideration of Kshs.370,000. She paid Kshs.305,000 up front which payment was acknowledged by the Defendant. She then paid Kshs.10,000 pursuant to a second agreement dated 11th November 2013. There was a caution placed on the suit property and the clearance of the balance of the purchase price was not to be paid until its removal.

3. The Plaintiff and Defendant applied for Land Control Board consent which was granted. She averred that she observed due diligence by conducting a search before buying the property. The search revealed that the Defendant was indeed its registered proprietor. The Defendant then signed a Transfer form in favour of the Plaintiff and promised to facilitate the processing of her Title Deed. Later, she discovered that there was a caution on the property placed by one SYLVANO. On inquiry, the Defendant assured her that he had not sold the land to any other party. She however learned that the land had been sold which fact she confirmed at the Lands Office. She was also evicted from the property. She then sent a demand letter to the Defendant for the purchase price and as nothing came of it, she filed this suit.

4. The Plaintiff produced the following exhibits in support of her case:

P. Exh 1 – Copy of Plaintiff’s National Identification Card.

P. Exh 2 – Copy of Land Sale Agreement dated 11th September 2013.

P. Exh 3 – Copy of Land Sale Agreement dated 11th November 2013.

P. Exh 4 – Copy of Land Control Board Consent to Transfer dated 5th September 2013.

P. Exh 5 – Copy of Mutation Form for BUKHAYO/MATAYOS/4098.

P. Exh 6 (a) – Copy of Certificate of Official Search for

BUKHAYO/MATAYOS/4207 dated 10th September 2013.

P. Exh 6 (b) – Copy of Certificate of Official Search for

BUKHAYO/MATAYOS/4207 dated 6th November 2017.

P. Exh 7 – Transfer of Land Form dated 19th September 2013.

P. Exh 8 – Demand Letter to Defendant dated 15th November 2017.

5. The Plaintiff filed her written submissions on 25th February 2019. Counsel for the Plaintiff simply recounted the Plaintiff's case as presented in her pleadings and testimony. I have considered the same as well as the applicable law. In as much as the Plaintiff's case is uncontroverted she must still prove her case to warrant the orders sought. From the testimony as well as the Evidence adduced, without a doubt, the Plaintiff has proved her case on a balance of probabilities. There was an initial sale agreement dated 11th September 2013 confirmed by the follow up Agreement of 11th November 2013 that stipulates that the Plaintiff had advanced Kshs.315,000 for the purchase of the suit property, thus remaining with a balance of Kshs.55,000. The final search dated 6th November 2017 indicates that the property was indeed sold to one SILVANUS DAVID WABWIRE who was registered as its proprietor on 29th August 2017 notwithstanding the fact that the transaction between the Plaintiff and Defendant had reached an advanced stage.

6. The Defendant is clearly in breach of contract. In making its final orders the Court shall also be guided by clause 8 of the Sale Agreement (P.Exh 2) which envisaged the situation presently before Court. It states as follows:

‘Should there be a third party claim over the land so sold, the seller shall indemnify the buyer accordingly’

7. Without further ado judgment is hereby entered in favour of the Plaintiff for a refund of Kshs.315,000 with interest thereon from the date of filing suit as well as costs of the suit.

Dated, signed and delivered at Busia this 16th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: N/A

Court Assistant: Nelson Odame