



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NUMBER 276 OF 2017**

**(Formerly Machakos ELC Case No. 145 of 2012)**

**JAMES OBARA KEYA.....1<sup>st</sup> PLAINTIFF**

**LAWRENCE OMAGA OTWERE.....2<sup>nd</sup> PLAINTIFF**

**CHARLES MOGAKA OTWERE (suing for and on behalf of the  
members of Mageche Progressive Society).....3<sup>rd</sup> PLAINTIFF**

**VERSUS**

**STEPHEN RAKITA KURENDE.....DEFENDANT**

**JUDGEMENT**

In the Plaint dated 4<sup>th</sup> May, 2012 and filed in Court on 7<sup>th</sup> May, 2012, the Plaintiffs' pray for judgment against the Defendant in the following terms:

- a)** An order directing the Defendant to sign and/or execute the transfer and surrender original title documents for land parcels Title Number KAJIADO/ONYORE/11557 and KAJIADO/ONYORE/11559 and other critical and relevant completion documents to the Plaintiffs.
- b)** An order compelling the Defendant to refund to the Plaintiffs an amount constituting the current market value of the 2.3 Acres.
- c)** In the alternative of prayers (a) and (b) above, an order directing the Kajiado District Lands Registrar to vest in the Plaintiffs' title documents to land parcels KAJIADO/ONYORE/11557 and KAJIADO/ONYORE/11559 if the court grants prayer.
- d)** In the alternative that the defendant be compelled to refund to the Plaintiff an amount, constituting the current market value of the 10 acres contractually agreed.
- e)** Costs.

The Plaintiffs obtained interlocutory judgement against the Defendant on 3<sup>rd</sup> July, 2012. The Defendant sought to set aside the said Judgment but his application was dismissed. The suit hence proceeded undefended.

**Evidence of the Plaintiffs**

The Plaintiffs are officials of Magenche Progressive Society that is duly registered under the Society rules 1968 (rule 4) with 21 members. The Plaintiffs aver that they entered into a Sale Agreement dated the 26<sup>th</sup> June, 2011, with the Defendant to purchase 10 acres to be excised from land parcel number Kajiado/ Olchoro Onyore/ 5946 at Kshs. 3,350,000/- . The Plaintiffs paid to the Defendant a total of Kshs. 3,200,000/= but he declined to transfer the land to them and informed them of the said position, on 19<sup>th</sup> November, 2011. The Defendant sought to transfer an alternative parcel of land to the Plaintiffs but they declined. The Plaintiffs have learnt that the Defendant subdivided the aforementioned land into three portions namely Kajiado/ Olchoro Onyore/ 11557; 11558; and 11559 respectively. Further, that he has since sold Kajiado/ Olchoro Onyore./ 11558 to a third party. The Plaintiffs contend that despite numerous requests, the Defendant has declined to execute transfer documents and or handover critical documents for the remaining two parcels of land. The Plaintiffs produced various

documents including the Sale Agreement, Proof of payment; Certificate of Official Search for Kajiado/ Olchoro Onyore/ 5946; Copy of Title Deed for Kajiado/ Olchoro Onyore/ 5946 and Letter to the Defendant dated the 29<sup>th</sup> January, 2012 as their exhibits.

### **Analysis and Determination**

Upon consideration of the pleadings filed herein, testimony of the witness, exhibits produced and submissions, the only issue for consideration is whether the Plaintiffs are entitled to the orders sought in the Plaintiff.

The Plaintiffs were seeking for orders of specific performance against the Defendant who sold them land vide an agreement dated 26<sup>th</sup> June, 2011 but failed to transfer the land despite receiving most of the purchase price. As per the terms of the agreement, the Plaintiffs were purchasing 10 acres to be excised from Kajiado/ Olchoro Onyore/ 5946 at a cost of Kshs. 335,000/= per acre. The purchasers were to pay kshs. 100, 000 per month until payment in full. Further, at the time of signing the agreement the vendor had already received Kshs. 2,700,000/= and he had agreed to immediately commence the necessary process to transfer the said 10 acres to the purchaser. It was PW1's testimony that they had paid a total of Kshs. 3, 200,000/= but the Defendant who was the vendor was yet to transfer the land to them. A cursory look at the payment details, which were produced as an exhibit, I note that most of the purchase price were paid directly into the Defendant's account in Equity and Kenya Commercial Banks, with some monies being sent to him through his Mpesa account. Since the Defendant never controverted the Plaintiffs' averment, I hold that he indeed received Kshs. 3,200,000/= as purchase price. This now brings me to the issue at hand as to whether the Plaintiffs' are entitled to the orders of specific performance sought in the Plaintiff.

It was the Plaintiffs' evidence that in 2011, the Defendant had subdivided Kajiado/ Olchoro Onyore/ 5946 into Kajiado/ Olchoro Onyore/ 11557; 11558 and 11559 respectively. Further, that he had already disposed of Kajiado/ Olchoro Onyore/ 11558. I note on 2<sup>nd</sup> July, 2012, the Court granted orders restraining the Defendant from alienating, leasing, selling, transferring, dealing, or subdividing land parcel number KAJIADO/OLCHORO-ONYORE/11557 and KAJIADO/OLCHORO-ONYORE/11559 respectively. PW1 confirmed in court that the Defendant had sold one of the resultant subdivisions KAJIADO/OLCHORO-ONYORE /11558 to a third party and the remaining two portions of KAJIADO/OLCHORO-ONYORE /11557 including KAJIADO/OLCHORO-ONYORE/ 11559, which all measure 7.74 acres is less than the 10 acres they had purchased.

The Plaintiffs submitted that they were entitled to parcels numbers KAJIADO/OLCHORO-ONYORE/11557 and KAJIADO/OLCHORO-ONYORE/11559 comprising 7.74 acres and 1.98 acres respectively and the same should be transferred to them. In addition, they prayed for a refund of the sums of money comprising the 2.3. acres out of the 10 acres. They contended that the court had powers by virtue of the sections 13 (2) (d) of provisions of the Environment and Land Court Act 2011, and section 150 of the Land Act 2012 to hear this dispute and to grant relevant orders of specific performance as empowered under section 13 (7) (g). Consequently, they prayed for orders in the plaint or in the alternative for an order of the transfer of 10 acres in KAJIADO/OLCHORO-ONYORE/5946 which had been cautioned in December 2011 and should still be intact.

In the case of **William Kazungu Karisa –vs- Cosmas Angore Chanzera [2006] e KLR** the Court held that, *“The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them”*

**I note the Defendant signed the Sale Agreement and received most of the purchase price but declined to handle his obligation to the said contract. In associating myself with the above cited decision, I find that the Defendant owes an obligation to the Plaintiffs to transfer the portion of land he sold to them. On the question whether as to whether the Defendant should transfer to the Plaintiffs' the remaining portion of the land. I note the Defendant already subdivided the land and the remaining portion is smaller than the portion the Plaintiffs' had purchased. Halsbury's Law of England Volume 42 paragraph 57 provides that; “The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it. ”**

**Further, in the case of Shah -vs- Guilders International Bank Ltd [2003] KLR** the Court in considering the terms of the parties in a contract held that: - *“The parties executed the same willingly and they are therefore bound by it.”*

**In the current scenario, I find that the Defendant was bound by the terms of the Sale Agreement, which he signed with the Plaintiffs. Further, I find that it is the Defendant as a vendor who is bound to deliver to the Plaintiffs on the extend and quality of the property the Plaintiffs' purchased from him. It emerged in evidence that the Defendant had sought to give the Plaintiffs alternative parcels of land, which they declined. To my mind, I find that the Defendant was being dishonest when he decided to subdivide the land and failed to transfer to the Plaintiffs” the portion they had purchased. The Plaintiffs' seek for transfer of the 10 acres of land they purchased but I note they were yet to pay the remaining balance of Kshs. 150,000/= . Since I have already held that the Plaintiffs are entitled to the land they had purchased, I opine that they should receive less the Kshs. 150,000/= that they were yet to pay.**

**It is against the foregoing that I find the Plaintiffs' have proved their case on a balance of probability and will proceed to enter judgment in their favour in the following terms:**

**I.** The Defendant be and is hereby directed to execute the transfer and surrender of original title documents for land parcels Title Number KAJIADO/ONYORE/11557 and KAJIADO/ONYORE/11559 respectively and other critical and relevant completion documents to the Plaintiffs.

**II.** The Defendant be and is hereby directed to refund to the Plaintiffs an amount constituting the value of the 2.3 Acres less the Kshs. 150,000/= which was not paid to him with interest at court rates from 26<sup>th</sup> June, 2011 until payment in full.

**III.** In default of (1) and (11) above, the Deputy Registrar, Environment and Land Court Kajiado do execute transfer forms for KAJIADO/ONYORE/11557 and KAJIADO/ONYORE/11559 respectively in favour of the Plaintiffs.

**IV.** The costs of the suit is awarded to the Plaintiffs

**Dated signed and delivered in open court at Ngong this 24<sup>th</sup> day of September, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**