



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 260 OF 2017

JACOB OWALO ARIARO.....1ST PLAINTIFF

CYNTHIA ACHIENG ABIERO.....2ND PLAINTIFF

VERSUS

PHILIP ONYANGO OWICH.....DEFENDANT

JUDGMENT

1. The property in dispute in this matter is land parcel number Kamagambo/Kabuoro/1995 (the suit land) situated in Migori County within the Republic of Kenya. It is approximately 0.08 hectares in area and registered in the name of the defendant, Philip Onyango Owich.
2. The plaintiffs are represented by learned counsel, Mr. Odondi Awino of M/S Odondi Awino and Co. Advocates, Migori. The defendant is represented by learned counsel, Mr Omonde Kiseru of Omonde Kiseru and Company Advocates, Migori.
3. By a plaint dated 28th February 2017 and filed in court on 6th March, 2017, the plaintiffs have sued the defendant for the following orders;
 - a) *The sum of Kshs 245,000/= together with interest thereon at 24% per annum from 8th October 2012 until payment in full.*
 - b) *General damages for breach of contract or alternatively specific performance.*
 - c) *Costs of suit together with interest thereon at court rates.*
 - d) *Any other or further relief that this Honourable Court may deem fit to grant.*
4. Briefly the plaintiffs' claim is that by a land sale agreement dated 8th October 2012, the defendant sold the suit land to the plaintiffs at the purchase price of Ksh 385,000/= . Immediately the plaintiffs paid Ksh 215,000/= being part payment of the purchase price of the suit land and the balance of Ksh 170,000/= was to be paid on completion of transfer documents thereof. Further to the said agreement, the plaintiffs paid Ksh 30,000/= to one Damaris Kawaona for the removal of a restriction she had hitherto lodged in the land register. Consequently, the defendant wrongfully and in breach of the terms of the said agreement, refused to execute transfer documents in favour of the plaintiffs thus provoking the present suit.
5. In his statement of defence dated 8th June 2017 and filed in court on 9th June 2017, the defendant denied the plaintiffs' claim and sought its dismissal with costs. The defendant stated that whereas a third party, Damaris Kawaona had lodged a restriction against title of the suit land and that the plaintiff was aware of it, the alleged payment of Ksh 30,000/= purposefully to remove the said restriction, was strange to him. That the suit contract is voidable by either party due to frustration by the third party who had parallel involvement with the plaintiff even with no notice to the defendant.
6. The 1st plaintiff (PW1) testified in support of their claim and called a witness namely Richard Ochieng Odongo (PW2). He relied on the agreement dated 8th October 2012 (PEXh1), a certificate of official search dated 24th December 2015 (PEXh2) and a copy of title deed of the suit land issued on 4th June 2007 (PEXh3).
7. On 26th September 2018, last adjournment was granted to the defendant and hearing of the defendant's case was fixed for 24th January 2019. In the spirit of Article 159 (2) (b) of the Constitution of Kenya 2010 and as the defendant and his counsel were absent without reason at the said hearing, the defendant's case was deemed closed.
8. Learned counsel for the plaintiffs filed submissions dated 12th February 2019 on 13th February 2019. He submitted, inter alia, that the

defendant was evasive and did not defend his statement of defence. He urged the court to find in favour of the plaintiffs and assess general damages as per the valuation report dated 11th February 2019 and filed in court on 13th February 2019 for loss of opportunity at Ksh 2.2 million with interest and costs of the suit.

9. On the other hand, in his submissions dated 10/4/019, learned counsel for the defendant made reference to the pleadings and that the plaintiffs relied on a valuation report which was not one of the plaintiffs' exhibits herein. He identified and analysed three (3) issues for determination namely whether the defendant is in breach of the contract (PEXh1), whether the plaintiffs are entitled to Ksh 2 million stated in the plaintiffs' submissions and whether the plaintiffs are entitled to the prayers sought in the plaint. That the plaintiffs have not proved their case on a balance of probability and that the same should be dismissed with costs.

10. I have duly considered the entire pleadings, the evidence of PW1 and the submissions of the respective parties in this suit. I am guided by the decision of the Court of Appeal in the case of **Great Lakes Transport Company (V) Ltd vs Kenya Revenue Authority (2009) KLR 720** regarding issues for determination in a suit. I am of the considered view that the issues that fall for determination in the instant suit are the ones framed by the defendant's counsel in submissions and are condensed as follows:-

a) Whether PEXh1 is valid and enforceable ?

b) Did the defendant breach Pexhibit 1?

c) Are the plaintiffs entitled to the reliefs sought in their plaint?

11. On the issue of PEXh1, I note paragraphs 4,5,6 and 7 of the plaint. PW1 testified in examination in chief that the defendant agreed to sell the suit land to him as per PEXh1. That he has not paid the purchase price balance of Ksh 170,000/= to the defendant as the latter refused to honour clause 3 of PEXh1.

12. PW1 also testified that he has been pursuing the defendant to honour PEXh1 to no avail. That the defendant has proved to be uncooperative in the matter.

13. During cross-examination, PW1 stated, inter alia;

“The completion date is not indicated on PEXh1. It is drawn by counsel I was not present when PEXh1 was signed. I did not sign it before the counsel. I was not present when the defendant signed it”

14. On further cross examination, PW1 stated that the defendant was neither a party to the payment of Ksh 30,000/= to the third party, who is now deceased nor gave a consent to the payment of the said amount. That he did not pay the amount to the defendant and that it is not shown on PEXh1.

15. It was the testimony of PW2 that he signed PEXh1 for and on behalf of PW1 who did not honour its terms. That the defendant has refused to refund Ksh 215,000/= paid to him by PW1 through counsel Ojala's account.

16. On cross examination, PW2 stated that he signed PEXh1 for PW1 and that his name does not appear therein. That he organized PW1 and the defendant to meet to prepare PEXh1 which has neither completion date nor signed by the third party, a daughter of the original owner of the suit land who lodged a caution over it.

17. In the circumstances is PEXh1 valid and enforceable? The evidence of PW1 was pretty clear that PEXh1 has no completion date and he was not present when it was signed by the parties to the same. He admitted that he did not pay Ksh 30,000/= to the defendant hence exonerated the defendant from the present claim.

18. Moreover, PW2 who purportedly signed PEXh1 for PW2 confirmed that PEXh1 does not bear his (PW2) name and it's completion date. His testimony further exonerates the defendant from liability herein.

19. I am aware of **section 3(3) of the Law of Contract Act (Cap 23)** regarding contracts in respect of interests in land. Under **section 97(1) of the Evidence Act (Cap 80)** no evidence to prove or in proof of terms of contract in a document except the document itself or secondary evidence of its contents in cases where secondary evidence is admissible.

20. It has emerged from the available evidence that the plaintiffs alleged breach of an agreement in writing between the defendant and themselves as shown in PEXh1; see **Sumaria and another v Allied Industries Ltd (2007) 2KLR1**.

21. Be that as it may, PW1 and PW2 clearly stated that PEXh1 has no completion date. Furthermore, PW1 was not present when PEXh1 was signed by the defendant. PW1 admitted that whereas he signed PEXh1, his name does not appear therein.

22. At paragraphs 5, 6 and 7 of the plaint and the plaintiffs' evidence, part performance of PEXh 1 is alleged. However, the plaintiffs cannot be allowed to rely on the doctrine of part performance as it is not pleaded as recognized in **Sumaria case(Ibid)**.

23. I take into account PEXh2 which shows that on 9th October 2007, a caution was lodged in respect of PEXh3 in favour of a third party, Damaris Kawaona (Deceased) claiming purchaser's interest. However, PW1 did not involve the defendant in the alleged payment of Ksh 30,000/= to the said deceased for the removal of the caution.

24. I consider the entire statement of defence herein. The available evidence and submissions persuade me to agree with the same. The plaintiffs' counsel introduced a report and valuation dated 11th February 2019 in his submissions. The said document did not feature in the plaintiffs' pleadings and evidence thus it cannot aid their claim.

25. It is quite clear that PEXh1 does not satisfy the requirements of contract regarding interest in land at law as it was even frustrated by the third party. In sum, whereas equity shall suffer no wrong without a remedy as held in the case of **Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) eKLR** and as recognized in **Article 10 (2) (B) of the Constitution of Kenya, 2010**, the plaintiffs have failed to prove their claim against the defendant on a balance of probabilities.

26. Consequently and for the foregoing reasons, I dismiss the plaintiffs' claim commenced by way of a plaint dated 28th February, 2017.

27. Costs of this suit shall be borne by the plaintiffs jointly and severally.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 17TH DAY OF SEPTEMBER 2019.

G.M.A ONGONDO

JUDGE

In the presence of :-

Mr. Odondi Awino learned counsel for the plaintiff

Mr. Oywer learned counsel for the defendant

Tom Maurice – Court Assistant