



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.258 OF 2015**

**MICHAEL ODHIAMBO OUKO.....PLAINTIFF**

**VERSUS**

**GEORGE OCHIENG OMODHO.....1<sup>ST</sup> DEFENDANT**

**MARY OMODHO.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1 By the plaint dated 2<sup>nd</sup> October 2015, Michael Odhiambo Ouko, the Plaintiff sued George Ochieng Omodho and Mary Omodho, the Defendants, seeking for an order reverting land parcel **Kisumu/Dago/386** to him, damages for contract, and costs. The Plaintiff avers that he entered into a sale agreement with the 1<sup>st</sup> Defendant over land parcel **Kisumu/Dago/386**, on the 30<sup>th</sup> May 2014. That he executed all the necessary documents and gave them to the 1<sup>st</sup> Defendant who registered the land to his name and that of the 1<sup>st</sup> Defendant on the 6<sup>th</sup> June 2014. That the 1<sup>st</sup> Defendant has not paid the balance of the purchase price and hence this suit.

2. The Plaintiff's claim is denied by the Defendants through the statement of defence dated 12<sup>th</sup> November 2015. The Defendants among others avers that the Plaintiff knew that they were looking for land to buy with a view of Kisumu town. That the Plaintiff passed off his neighbour's land as his parcel when they agreed at the purchase price of Ksh.4,500,000/= and out of which they paid the Plaintiff Ksh.2,065,000/=, leaving a balance of Ksh.2,435,000/=. That after the sale agreement the Defendants engaged a surveyor who found out that the land the Plaintiff had sold to the Defendants had only a partial view of the town. That the Defendants are ready to retransfer the land back to the Plaintiff upon refund of the deposit of the purchase price paid.

3. That during the hearing the Plaintiff testified as PW1, while the 1<sup>st</sup> Defendant testified as DW1. That Mr. Amondi and M/S Bagwasi Advocates appeared for the Plaintiff and Defendants respectively.

4. The following are the issues for the court's determination;

- a) Who between the Plaintiff and the 1<sup>ST</sup> Defendant is in breach of their sale agreement obligations.
- b) Whether the Plaintiff is entitled to the orders sought.
- c) Who pays the costs.

5. That at the close of the oral evidence the parties counsel agreed on the timelines of filing and exchanging written submissions. The counsel for the Plaintiff filed theirs dated 21<sup>st</sup> June 2017 but none has been filed for the Defendants.

6. The court has carefully considered the pleadings, the oral evidence of both parties, the Plaintiff's written submissions and come to the following conclusions;

- a) That both the Plaintiff and the 1<sup>st</sup> Defendant are in agreement that they entered into a land sale agreement dated 30<sup>th</sup> May 2014 in which the Plaintiff sold to the 1<sup>st</sup> Defendant land parcel **Kisumu/Dago/386** at Ksh.4,500,000/=. That though the 1<sup>st</sup> Defendant claim that the land he was shown is different from the land that was transferred to him, as that other land had a view of Kisumu town, the sale agreement does not contain any clause to that effect. That in any case the 1<sup>st</sup> Defendant was expected to have done due diligence before appending his signature to the sale agreement, including to confirm that the parcel of land he was shown on the ground was the one described in the agreement and the documents of title as **Kisumu/Dago/386** that was eventually transferred to him.

b) That though the sale agreement required of the 1<sup>st</sup> Defendant at clause 3 that he “*shall pay to the Vendor [Plaintiff] the balance of Kenya Shillings Four million [Ksh.4 million] only upon successful transfer of the title into the purchaser’s [Defendant’s] name*”, the evidence adduced shows clearly that he is yet to pay Ksh.2,455,000/= though the transfer was effected on the 6<sup>th</sup> June 2014. The 1<sup>st</sup> Defendant is therefore clearly in breach of his obligation to the Plaintiff under the sale agreement.

c) That the Plaintiff availed a colour photograph reportedly taken on the suit land with a view of the lake in an effort to confirm that it is the same land that the 1<sup>st</sup> Defendant had inspected before entering into the sale agreement. That the 1<sup>st</sup> Defendant did not in his pleadings and oral testimony in court dispute the contents of the colour photograph and the court finds that it is a reflection of the view from the land.

d) That while this suit was pending in court, the 1<sup>st</sup> Defendant made a further payment to the Plaintiff of Ksh.700,000/= bringing the outstanding indebtedness to Ksh.1,735,000/=. That though the 1<sup>st</sup> Defendant claim that the purchase price has been revised to Ksh.3,800,000/ from Ksh.4,500,000/=: there is no documentary evidence availed to confirm it. That the court takes the purchase price to be Kshs.4,500,000/= as shown in the sale agreement dated 30<sup>th</sup> May 2014.

e) That in view of the above the court finds that the Plaintiff has proved his case against the Defendants on a balance of probabilities.

7. That the court enters judgment against the Defendants in the following terms;

a) That the 1<sup>st</sup> Defendant is in breach of clause 3 of the sale agreement dated 30<sup>th</sup> May 2014 by failing to pay the balance of the purchase price amounting to Ksh.1,735,000/= upon the Plaintiff effecting transfer of the land to his name on the 6<sup>th</sup> June 2014.

b) That the Defendants are ordered to pay the Plaintiff Ksh,1,735,000/= (one million seven thirty five thousands) being the balance of the purchase price with interest at courts rate.

c) That the 1<sup>st</sup> Defendant do pay the Plaintiff damages for breach of contract of Ksh.450,000/= [four hundred fifty thousand] which is equal to 10% of the purchase price, with interest from 6<sup>th</sup> June 2014, which is the date the suit land was transferred to his name, till payment in full.

d) The Defendants do pay the Plaintiffs costs of this suit.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED TH 31<sup>ST</sup>.DAY OF JANUARY 2018

IN PRESENCE OF;

PLAINTIFF Present

DEFENDANTS Absent

COUNSEL Mr. Achira for the Plaintiff

Mr. Nyangga for Olel for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/1/2018**