



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 74 OF 2015

CHRISTOPHER ODHIAMBO OPONDO.....PLAINTIFF

= VERSUS =

ODUKU MUGANDA ODUKU.....DEFENDANT

J U D G E M E N T

1 The plaintiff – **CHRISTOPHER ODHIAMBO OPONDO** – filed this suit against the defendant – **ODUKU MUGANDA ODUKU** – on 21/7/2015 vide a plaint of even date. His complaint is that the purchased three (3) acres of land to be excised from the defendant’s land parcel No. LR. MARACHI/ELUKONGO/1609 (“suit land” hereafter) at an agreed total purchase price of 111,000/=. But the Defendant reneged on the agreement and refused to transfer the land to him. The Plaintiff therefore asks for an order of specific performance directing the Defendant to appear before Butula Land Control Board and cause the transfer of a three (3) acre portion from land parcel No. LR. MARACHI/ELUKONGO/1609 to the Plaintiff and in default, the Deputy Registrar of this court be authorized to sign all the necessary transfer forms and papers on behalf of the Defendant, so as to effect the said transfer of three (3) acre portion of land from parcel LR. MARACHI/ELUKONGO/1609. (This is prayer (a)). The Plaintiff also asks for costs (prayer (b)).

2. The Defendant responded by filing a defence and a counter-claim. To him, there was an agreed sale of land. But the agreement was not written; it was oral. And while the Plaintiff claims the price per acre was 37,000/=, with 111,000/= therefore being the total purchase price, that was not the position. The price, the Defendant pleaded, was 75,000/= per acre thus requiring the payment of 225,000/= as the total price. Of this amount, Defendant continued, the Plaintiff paid 111,000/= leaving a balance of 114,000/= which remains unpaid to date. The defendant pleaded, *inter alia*, that he could not go to the relevant Control Board to facilitate transfer while the balance remained unpaid.

3. According to the Defendants defence, the Plaintiff entered the suit land in the year 2007. He has only paid 111,000/= and the balance owing remains unpaid. By not paying the balance, the Plaintiff is said to have rescinded the sale contract. And since he has stayed on the suit land for 8 years without paying the balance, he is said to have forfeited the 111,000/= already paid. The Defendant therefore wants the Plaintiff evicted from the land (prayer (a)), costs of the defence and counter-claim (prayer (b)) and/or any other just relief (prayer (c)).

4. There was reply to defence and defence to counter-claim filed on 21/9/2015. The Defendant reiterated that the total purchase price was KShs.111,000 and that the agreement between the parties was written, not oral. It was averred that the Defendant is not entitled to orders of eviction.

5. The court started hearing the matter on 8/3/2016. The Plaintiff called three witnesses, with himself being the first (PW1), while Edward Ongalo Ouma (PW2) and Brian Opondo Otieno (PW3) were the second and third respectively.

6. While giving his testimony, the Plaintiff said he was introduced to the Defendant by his brother, who called him from Nairobi with information that the Defendant had land to sell. That happened on 20/8/2005 and the Plaintiff travelled home on 23/8/2005. There were discussions on that very day with the Defendant and the Plaintiff was shown the land. It was agreed that the Plaintiff would buy the land and the Defendant promised to call the surveyor the following day to demarcate the portion to be sold. The surveyor came the following day – 24/8/2005 to be specific – and demarcated the land.

7. According to the Plaintiff, the price per acre was agreed at 37,000/=. He would buy three (3) acres and the total price would be 111,000/=. The Plaintiffs evidence is that he paid the total purchase price as follows:

- 24/8/2005 - 30,000/=

- 14/10/2005 - 40,000/=

- 3/6/2006 - 15,000/=
- 13/3/2007 - 6,000/=
- 13/3/2007 - 20,000/=

The Plaintiff further said that after paying all the money, he occupied the land, put up some structures, and started cultivating. But the Defendant became crafty at some point and stopped the already started process of vesting ownership of the purchased portion in him.

8. In the course of hearing, the Plaintiff availed the alleged written agreement (PEX No.1), consent obtained by Defendant from Land Control Board to sub-divide the land (PEX No.2), mutation forms (PEX No.3), and receipt for the money paid to the surveyor to demarcate the land (PEX No.4).

9. The Defendant cross-examined the Plaintiff but the questioning done centred on alleged violence and insults traded against each other.

10. PW2 chose to adopt his written statement as his evidence. That statement is dated 21/7/2015. It vouches for the Plaintiff's purchase of land from the Defendant, with the witness saying he saw 30,000/= being paid on 24/8/2005. This witness also said that he was aware the Plaintiff paid the full purchase price and was allowed to move into the land. He also saw the surveyor come to demarcate the land. The Plaintiff and his family have been occupying the land since 2005, according to PW2. During cross-examination by the defendant, this witness said his name does not appear in the agreement. He said he left the venue where the agreement was being made and went to another place.

11. The final witness was PW3. Like PW2, he asked the court to rely on his written statement. He also said he was the one who introduced PW1, who is his brother, to the Defendant. According to the witness, the total purchase price was 111,000/= which the Plaintiff fully paid. And a written agreement showing payments was entered into between the parties.

12. The Plaintiff's case was closed on 22/6/2016 and the defence evidence came much later. The Defendant testified as DW1 on 9/5/2017. He said he was selling land to the Plaintiff but not at 37,000/= per acre as alleged but at 75,000/= per acre. He was selling three (3) acres and was supposed to get 225,000/= but only 111,000/= has been paid. And the 111,000/= paid came in tranches of 30,000/=, 25,000/=, 40,000/=, 15,000/= and finally 1,000/=. He is, he said, still owed 114,000/=. The agreement was oral, not written, and the understanding was that a written agreement would be made after the Plaintiff had made all the payments.

13. The rest of the defendant's evidence relates to attempts at solving the problem locally. It is clear that the matter went to area local administration and elders even sat at one time but were unable to resolve it. The elders proceeding were availed here (DEX No. 1). There was also a letter from the area elders (DEX N0.2).

14. During cross-examination by Mr. Elungata for Plaintiff, the Plaintiff reiterated that there was no written agreement entered into. He also said that his family members used to witness when payments were made. The rest of the Defendants witnesses – DW2 and DW3 – were wife and daughter respectively. Both were clear that payments made started with 30,000/=, then 25,000/=, followed by 40,000/=, after which 15,000/= was paid. The final payment was 1,000/= only and no other payment was made. All the defence witnesses were clear that the Plaintiff asked to be allowed to occupy and use the land upon representing to the Defendant that he would be assisted to pay the remaining balance by his own sister if allowed to settle.

15. Hearing over, written submissions were filed. The Plaintiff's submissions were filed on 19/9/2017. According to the Plaintiff, there was written sale agreement and it was the one availed to court. According to the Plaintiff too, the defence witnesses did not deny that the written agreement had the names and identity card numbers of those who witnessed. It was alleged too that the Defendant never raised the issue of having not been paid the full purchase price at the local levels where the matter was taken for arbitration before it was brought to court. The issue of incomplete payment was said to be an afterthought and the court was told to disregard it.

16. The Plaintiff submitted that the case is proved and the Defendant is merely refusing for his own reasons to transfer the land to the Plaintiff.

17. The Defendant filed his submissions on 10/7/2017. He was very focused on the contents of the alleged written agreement. According to him, the agreement shows that 30,000/= was paid on 24/8/2005 but no witness is shown to have been present and no signing was done. Then the Defendant pointed out the contents of page 1 of the agreement showing that 40,000/= was paid on 14/10/2005. He pointed out that various witnesses are shown to have been present but none of them was called to testify in this case. The Defendant pointed out on the same page another payment said to have been made on 13/3/2007 with two witnesses shown as present yet none of them was called to testify.

18. In the agreement also, the defendant pointed out that he is shown to have signed in two different places but the signatures, though said to be his, were markedly different. The Defendant submitted that no witness was shown well to have been really present when the purchase price was agreed on and no witness therefore could authoritatively assert that the purchase price was Kshs.111,000/= stated by the Plaintiff and not the 225,000/= stated by the Defendants.

19. Issue was also taken with an asserted fact that the alleged sale took place in the year 2005 but no consent of Land Control Board was obtained. It was posited that this suit was filed in the year 2015 and no application for extension of time to obtain consent of Land Control Board had been made. That being the case, and there being no extension of time, the Plaintiff cannot be entertained to urge for specific performance.

20. The court was ultimately asked to dismiss the Plaintiffs claim and allow the Defendants counter-claim.

21. I have considered the pleadings, evidence, and rival submissions. A lot in this case depends on the nature of agreement – whether oral or written; the purchase price – whether 111,000/= or 225,000/=; and payment made – whether full or partial. To the Defendant the written agreement was a fabrication and was, as presented, replete with shortcomings. To the Defendant too, crucial witnesses who should have shed light on the matter were not called.

22. But the Plaintiff disputes the Defendants position. The agreement is real, he said, and the purchase price was 111,000/=, which he paid in full. The Defendant however raised serious concerns about the agreement. I have already pointed out the issues. True, the witnesses called seem to me to be peripheral witnesses. When the case was filed, it came with a list of witnesses and their various statements. During the hearing however, some of these witnesses were left out and their statements never became evidence. A look at the statements filed show that these would have been crucial or very central witnesses to the case. The omission to call them remains unexplained.

23. But that is not all. As pointed out by the Defendant various witnesses are shown in the agreement. The most crucial factor in this case is the authenticity of the agreement availed. And this is so because the defence has disputed the agreement. The Plaintiff again omitted to call at least some of the witnesses to vouch for the truthfulness of the contents of the agreement. As things stand, the Defendant for instance pointed out that the payment of 40,000/= allegedly made on 14/10/2005 is reflected twice in the agreement. It is shown first on the first page where it appears as an insertion by a different pen (the writing showing it is much bolder than the rest of the writing in the page) and is repeated on the second page where it is reflected in Kiswahili language, with six witnesses shown to have been present.

24. And again as pointed out by the Defendant, the signature of the Defendant shown on the first page and his other signature on the second page are obviously different. Without doubt, crucial witnesses were required to give some explanation. But the Plaintiff was content with calling PW2, who was clear that he did not witness the writing or making of the agreement because he left the venue to go to some place. The only other witness left was PW3, the Plaintiffs own brother, who, like the Plaintiff himself, never explained the shortcomings pointed by the Defendant.

25. I have myself tried to scrutinize the agreement in light of the oral and written statement availed by the Plaintiff. I see the first page of the agreement showing that the first payment of 30,000/= was made on 24/8/2005. This was repeated by the Plaintiff in his oral evidence in court.

26. But the dates appearing in the oral evidence and those appearing in the written statement differ. In the Plaintiffs oral evidence, the Plaintiff was called from Nairobi by his brother on 20/8/20105. He travelled on 23/8/2005 – and managed to meet the Defendant. He paid 30,000/= on 24/8/2005 and on the same date the surveyor came to the land. It is necessary to look now at the Plaintiffs written evidence. In one crucial paragraph the Plaintiff wrote as follows:

“I thereafter made a down payment of 30,000/= and the Defendant and I agreed to seek the consent of Butula Land Control Board which was to sit on 10/8/2005, so as to allow the Defendant to curve out the three acres”.

27. A Plain reading of the above piece of written statement shows that after payment of 30,000/= the Plaintiff and the Defendant agreed that the consent of Land Control Board could be obtained. The Board was to sit on 10/8/2005. From a purely commonsensical standpoint, the 30,000/= appears to have been paid on or before 10/8/2005 if the written version of evidence is anything to go by. It may also be necessary to note that the application for consent to Land Control Board and the subsequent consent obtained both bear the date of 10/8/2005. The written agreement itself is shown to have been written first on 24/8/2005 and subsequently on various other dates as other instalments were paid. Looking at all this, one readily realizes that the agreement started as oral for there was nothing written between the parties when Land Control Board was brought on board.

28. The point here is simple: The Plaintiff was duty-bound to explain his written agreement well and dispel doubts as to the anomalies apparent in it. Neither the Plaintiff’s evidence nor the evidence of his witnesses explained it. And the crucial evidence of the witnesses who would possibly have shed light on the anomalies was left out. It is important to appreciate that the Defendant had no duty to prove any case. On the contrary, it was the Plaintiff’s sole duty to prove his case well.

29. In the Plaintiff’s submissions, he tried to say that the Defendant’s own members of the family were present during the making of the agreement and even appended their signatures and gave their identity card numbers. According to the Plaintiff, the Defendant and his witnesses did not deny that the written sale agreement produced in court by the Plaintiff bore their names and identify card numbers. But I find this bit of submission mischievous and/or lacking in foundation. When the Defendant’s witnesses were giving evidence, they were not asked about their names or identity card numbers appearing in the written agreement. Had they been asked, then foundation would have been laid for submitting that they did not deny their identity. And since they were not asked, how could they be said not to have denied something that was never brought to their attention? In fact in all the defence evidence, only the defendant was asked to for his identity card. He availed it to the Plaintiff counsel and it was returned to him quickly. Curiously, the contents of what the counsel saw on the identity card were not made a basis of his submissions.

30. Overall, then, I get the impression that the Plaintiff approached the prosecution of his case in a rather casual manner. That contrasts sharply with the evidence of the Defendant who, though unrepresented, availed evidence of remarkable cogency and consistency and subsequently followed that up with well-reasoned submissions.

31. I am also constrained to observe that the Plaintiff failed to address the law relating to specific performance, yet that is precisely the order he is seeking. Specific performance is an equitable remedy. And being such remedy, it is discretionary. Usually, it is granted where common law remedies are inadequate. While considering whether or not to grant it, the court usually considers the principle that equity will not act in vain. The court additionally requires that facts in support of it be well demonstrated.

32. I expected the Plaintiff to expound on the law applicable and demonstrate how it applies to the case at hand. This was not done.

33. I also see a shortcoming in the pleadings as brought by the Plaintiff. Only two prayers were made, that of specific performance and that of costs. It is usual in these kind of pleadings to ask for any other just relief that the court may deem fit. The Defendant was careful enough to ask for such relief; the plaintiff did not. What this in effect means is that should the court be minded to grant the Plaintiff some relief, it can only do so under Section 3A of Civil Procedure Act (cap 21) which relates to the court's inherent power to administer justice.

34. There is lack of clarity as to when the Plaintiff occupied the land. From the Plaintiff's oral evidence, he occupied the land after paying all the money. The Plaintiff finished paying the money, he owed in the year 2007. Going by his oral evidence then, it would appear that he occupied the land in the year 2007 or sometime after that. But from PW2's written statement, it appears clear that the Plaintiff occupied the land in the year 2005. From the Defendant's oral evidence, the Plaintiff entered the land in the year 2013. This same position appear from the oral evidence of the Defendant's wife – DW2. In the Defendant's written statement however, the position is that the Plaintiff occupied the land in the year 2007. Faced with all these discrepancies, I think I would take year 2007 as the period the Plaintiff occupied the land. This is implied in his oral evidence and it is also the period stated by the Defendant before he changed his position in his oral evidence.

35. I think it is clear now from all the foregoing, that the Plaintiff set out to make a case of breach of contract by the Defendant regarding purchase of land. The Defendant filed a defence and a counter-claim making the sale agreement the central pillar of his contest. And knowing that the Defendant had approached the matter that way, the Plaintiff went about his case in a manner that reflected lack of seriousness. The end result is that the defendant cast serious doubts as to the contents of the written agreement availed and he also managed to point out serious shortcomings in the stratagem adopted by the Plaintiff to prosecute the entire case.

36. The end result is that vital areas of the Plaintiff's case were successfully attacked and the Plaintiff's case therefore remained unproved.

37. The court's findings is that the Plaintiff's case is not proved to the requisite standard. It is hereby dismissed. I will come to the issue of costs shortly.

38. The Defendant filed a claim and the main order he wanted is that that of eviction. Given that the Plaintiff was unable to prove his case, this order must be granted. The order of eviction is hereby granted but with conditions. And the conditions are imposed because the Plaintiff well demonstrated that he had paid 111,000/=. This money is admitted by the defence. The Defendant would wish to have the money treated as forfeited. He desires this because the Defendant has been using the land. I will invoke Section 3A of Civil Procedure Act (cap 21) in order to do justice.

39. The court disagrees with the Defendant on this issue. It is clear the Plaintiff was allowed into the land. And the understanding was that he would ultimately own it. In his evidence in court, the Defendant talked of having offered to refund the Plaintiff's money at one time. I fail to understand why he is changing position this time round. That money must be refunded.

40. The condition therefore is that the order of eviction is granted but the eviction will only take place if the Defendant has refunded all the money paid (Kshs.111,000). That money will have to be paid with interests at court rates starting from the year 2007 running up to the time the money will be paid. In addition, the development undertaken by the Plaintiff on the land has to be evaluated and the Plaintiff has to be fully paid for that too. The development include the structures put up by the Plaintiff on the land. No interests will be charged on the value of development.

41. After the Plaintiff has been fully paid all his dues, he has to be given 3 months within which to prepare and vacate the land of his own volition. If the Plaintiff fails to vacate within three months the Defendant will be at liberty for forcefully evict him.

42. I now come to the issue of costs. Both sides have cases against each other, the Plaintiff by way of plaint and the Defendant by way of counter-claim. Both filed defence against each other. Both appeared to the court to be simple country folk of humble circumstances. The court orders that each side bear its own costs.

Dated, signed and delivered at Busia this 25th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: