



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 11 OF 2017**

**FRANCIS ODHIAMBO ODANGA.....PLAINTIFF**

**VERSUS**

**ISABELLA MAKOKHA AKWANALO.....DEFENDANT**

**JUDGEMENT**

Briefly, the plaintiff's case is that at all material times on 22<sup>nd</sup> November, 2012 the plaintiff who was a friend to the defendant entered into a land buying agreement with one Hamisi Shikuku Muchelule wherein the latter was to sale to the plaintiff a plot measuring 50ft x 100 ft currently earmarked for registration as South Wanga/Ekero/5231 which was covered out of South Wanga/Ekero/4256 currently registered in the names of Hamisi Shikuku Muchelule. The defendant has without any colour of right entered upon, trespassed upon the plaintiff's proposed LR. SOUTHWANGA/EKERO/5231 and went on to place a caution and a restriction on the parent SOUTH WANGA/EKERO/4256 on 1/12/2016 claiming purchaser's interest. The plaintiffs claim against the defendant is for an order of permanent injunction restraining the defendant, his agents, servants or assignees from entering upon, constructing, residing, putting up structures or in any manner dealing or interfering with the plaintiffs' proposed LR. NO. SOUTH WANGA/EKERO/5231 currently forming part of LR. NO. SOUTH WANGA/EKERO/4256 and also for an order of eviction. The plaintiff prays for judgment against the defendant for:-

- a. An order of permanent injunction restraining the defendant either by herself, her agents, servants or assignees from entering upon, trespassing, working on, constructing structures or in any manner dealing or interfering with the plaintiff's LR. NO. SOUTH WANGA/EKERO/5231 currently forming part of SOUTH WANGA/EKERO/4256.
- b. An order of eviction of the defendant therefrom.
- c. An order for removal of the caution and restriction dated 1/12/2016 from LR. SOUTH WANGA/EKERO/4256.
- d. Any other relief this honourable court deems just and expedient.
- e. Costs of this suit plus interest.

PW2 the seller, corroborated the plaintiff's evidence. He signed the agreement with the defendant because the plaintiff did not have his ID. PW3 also witnessed the sale agreement. They later entered into the second agreement where the balance of the purchase price was paid.

The defendant testified that, the averment that the defendant was the plaintiff's friend is denied and she avers that she was his wife and they lived together as a couple for 4 years. That the plaintiff and the defendant agreed to purchase the subject property and after transfer the title was to bear the defendant's name, thus explaining why in the agreement dated 22<sup>nd</sup> November, 2012, the defendant was named as the purchaser and the plaintiff signed the sale agreement as a witness, and whereas the defendant paid the sum of two hundred and sixty thousand (Ksh. 260,000/-) being part of the purchase price and a remaining balance of Kenya Shillings Seventy Thousand only (Ksh. 70,000/=) which was to be paid later. (DEX1 is a copy of the sale agreement dated 22<sup>nd</sup> November, 2012. That the plaintiff cleared the balance of seventy thousand (Ksh. 70,000/=) thus the acknowledgement of dated 14/5/2013. That the plaintiff later persuaded and convinced the defendant to enter into another sale agreement where they would be joint proprietors of the property thus the agreement dated 6<sup>th</sup> May, 2015, which clearly states out the same (DEX2). That by now, the plaintiff and the defendant had constructed a semi-permanent house which they considered their matrimonial property where they resided. That the defendant later discovered that the plaintiff was trying to obtain the title in his name without her knowledge and denied the same vehemently thus the defendant lodged the caution DEX 3 a & b). That the plaintiff went ahead and entered into another sale agreement dated 29<sup>th</sup> December, 2016 excluding the defendant without her knowledge. The defendant avers the grant of the orders sought in the plaint would greatly prejudice the defendant as she will be rendered homeless and the total amount of Kenya Shillings Two Hundred and Sixty thousand that she has contributed will be lost. She holds a purchaser's interest in the property and have every right to be in possession of the property and enjoy quiet possession of the property.

This court has carefully considered the evidence and submissions in this case. It is not in dispute that, the defendant entered into a land buying agreement with one Hamisi Shikuku Muchelule wherein the latter was to sale to the plaintiff a plot measuring 50ft x 100 ft which was sub divided from South Wanga/Ekero/4256 currently registered in the names of Hamisi Shikuku Muchelule. The plaintiff states that the defendant was a business partner and she stood in as the buyer as he did not have his ID on the material day. The defendant never contributed to the purchase and development of that land. From the demeanor of the plaintiff I find that he is not being truthful about his relationship with the defendant. DEX5 a letter from the chief confirms that the plaintiff and the defendant were husband and wife. The letter dated 24<sup>th</sup> January 2017 confirms that the defendant stays in a semi permanent house constructed on the suit land. I believe the chief. Why did the plaintiff allow the defendant to occupy the suit land if they were just business partners? I find that the litigants were a couple and the defendant has beneficial interest on the suit land. From the foregoing, I find that the plaintiff is not entitled to the equitable remedies sort since he has approached this court with unclean hands and is guilty of material non-disclosure and deceit. The plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**