



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. NO. 249 OF 2013

PETER OUMA ANG'ASA.....PLAINTIFF

VERSUS

CHARLES JABERO OCHIENG'.....DEFENDANT

JUDGEMENT

1. Peter Ouma Ang'asa, the Plaintiff, sued Charles Jabero Ochieng', the Defendant, through the plaint dated 10th April 2012 seeking for;

- **Refund of Kshs. 160,000/= being the amount paid to the Defendant under the sale agreement.**
- **Payment of 30% of Kshs. 200,000/= as damages for breach of the terms of the agreement.**
- **In the alternative, the Defendant be ordered to perform his duty under the agreement.**
- **Costs and interests.**

The Plaintiff avers that he entered into an agreement with the Defendant for sale of Kisumu/Kapuonja/300 at Kshs. 200,000/=. That he was to pay Kshs. 140,000/= and the balance upon successful transfer to his name. That he has so far paid the Defendant Kshs. 160,000/= but the Defendant has refused, ignored and failed to transfer the land to him or to take possession or occupy the land.

2. The Plaintiff's claim is opposed by the Defendant through the statement of defence dated 21st May 2012. The Defendant averred that the verifying affidavit is defective. That the sale agreement was for a portion and not the whole parcel and the transfer was after final payment. That his signature on the agreement was obtained through misrepresentation as the agreement which is in English language was not read to him before signing.

3. The hearing took place on the 7th February 2018 when the Plaintiff testified as PW1. It was his testimony during cross-examination by the court that he entered into an oral agreement on the 30th November 2010 to buy the suit land from the Defendant. That he took possession of the land but on the 10th July 2011, the Defendant asked him to stop using the land. That on the same date they made the written sale agreement. That they have not obtained a Land Control Board Consent. That though he had obtained a certificate of official search on the land confirming that it was in the name of the Defendant, the certificate has not been availed to the court.

4. The counsel for the Plaintiff then filed the written submissions dated 27th March 2018.

5. The issues for determination are as follows;

- a) **Whether the sale agreement between the parties was on the 30th November 2010 or 19th July 2011.**
- b) **Whether the sale agreement was for the whole suit land or a portion thereof.**
- c) **Whether the sale agreement had a default clause.**
- d) **Who pays the costs.**

6. The court has carefully considered the pleadings by both parties, oral and documentary evidence tendered by PW1, the submissions by counsel for the Plaintiff and come to the following conclusions;

a) That from the plaint and defence filed in this suit, the parties had entered into a sale agreement relating to Land Parcel Kisumu/Kapuonja/300 allegedly belonging to the Defendant. That though the Plaintiff's pleadings and evidence in chief was that the sale agreement was made on the 19th July 2011, that changed during cross examination with the Plaintiff confirming that the sale agreement was initially oral and made on the 30th November 2010. That the Defendant has disputed the Plaintiff's averments that the sale was for the whole parcel claiming that it was for a portion. He has also alleged that his signature on the written sale agreement was obtained through misrepresentation as the agreement was in English and was not read over to him before signing. That the Defendant did not attend court to testify and his averments are therefore without support of evidence.

b) That the parties reduced their oral sale agreement of 30th November 2010 to the written sale agreement of the 19th July 2011. That on the same date the Plaintiff paid the Defendant Kshs. 20,000/= bringing the total payment to 160,000/=. That however the parties did not apply for or obtain the consent of the Land Control Board within six months of the date of the agreement and in accordance with **Sections 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya** their agreement became void. That under **Section 7 of the said Act**, the Plaintiff is only entitled to a refund of the monies paid.

c) That though the Defendant did not testify in the proceedings, the court has taken note of the two annexures marked **CJO"1"** and **CJO"III"** to his affidavit sworn on the 18th March 2014 which confirms that the Defendant had deposited a total of Kshs 160,000/= to the Chief's Office by 17th March 2014 being refund to the Plaintiff. That deposition by the Defendant do not appear to have been rebutted, controverted or challenged by the Plaintiff. That the deposit of Kshs 160,000/= with the Chief by the 17th March 2014 made any further proceedings in this case unnecessary.

d) That the verifying affidavit filed with the plaint dated 10th April 2012 do not carry any signature and or stamp of the Commissioning Officer. That though dated 22nd, the month is unclear but it appears to read "May". That though the Defendant did not testify in this case, he raised the issue of the affidavit in his defence and that being a legal issue, the court is obligated to make its finding. That the failure to have the verifying affidavit commissioned makes the document fail to be an affidavit. That the plaint is therefore without a valid verifying affidavit and therefore defective.

7. That for reasons in (d) above, the Plaintiff's suit against the Defendant is struck out with no order as to costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2018

In the presence of:

Plaintiff Present

Defendant Absent

Counsel Mr. Osodo for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE