



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LANDCOURT AT MAKUENI**

**ELC NO.162 OF 2017**

**BERNARD NYAMAI.....PLAINTIFF**

**VERSUS**

**STEPHEN NDUVA KIOKO.....DEFENDANT**

**JUDGMENT**

1. By his plaint dated 8<sup>th</sup> August, 2016 and filed in court on 21<sup>st</sup> September, 2016 the plaintiff prays for judgement against the defendant for orders that:-

- a) That the defendant puts beacons and transfers a piece of land to the plaintiff.**
- b) General damages.**
- c) Costs of the suit**
- d) Any other order and/or any other relief that this court may deem fit and just to grant.**

2. The claim is premised on the land sale agreement that the plaintiff and the defendant entered into on the 2<sup>nd</sup> December, 2003 whereby the defendant agreed to sell a portion of land from parcel number 355 Kyemundu Location, Yumbani Sub-location in Makueni County to the plaintiff for the consideration of Kshs. 27,000.

3. The claim is denied by the defendant vide his statement of defence dated 20<sup>th</sup> November, 2017 and filed in court on the 23<sup>rd</sup> November, 2017. The defendant accuses the plaintiff for breach of the sale agreement, an issue the latter denies in his reply to defence dated 6<sup>th</sup> December, 2017.

4. At the hearing, the plaintiff adopted his statement that he recorded on the 8<sup>th</sup> June, 2016 as his evidence. He also produced the sale agreement dated 2<sup>nd</sup> December, 2003 between himself and the defendant as well as a demand letter that he wrote to the defendant as PEX Nos. 1 and 2 respectively.

5. His evidence was that on the 2<sup>nd</sup> December, 2003 he and the defendant entered into a sale agreement (PEX No. 1) whereby the latter agreed to sell a portion of his land at Yumbani Sub-location, Kyemundu Location to him. The purchase price was agreed at Kshs. 27,000 whereupon the plaintiff paid Kshs. 26,000 leaving a balance of Kshs. 1,000 which he was to pay to the defendant upon the latter erecting beacons after the subdivision of his family land. The plaintiff went on to say that he immediately took possession of the portion of land that the defendant sold to him. He added that he planted trees and other plants on the said portion of land.

6. The plaintiff further told the court that in breach of the agreement, the defendant alleged that he could refund the purchase price that the plaintiff had paid to him. He added that the defendant demanded that the trees that the plaintiff had planted on the land be uprooted. According to the plaintiff, the defendant made the demand in the presence of the chairman of Ambua Clan, one Peter Mwau Maweu (PW1). The plaintiff pointed out that it was then that he decided to serve the defendant with a demand letter (PEX No. 2).

7. The plaintiff's evidence in cross-examination by the defendant was that out of the purchase price of Kshs. 27,000, there remained a balance of Kshs. 1,000. The plaintiff reiterated that he is in occupation of the portion of land that the defendant showed to him. He added that although the portion that the defendant sold to him is planted with sisal plants, they (sisal plants) do not mark the boundary of his land. He said that it was the defendant who asked him to wait until the defendant and his family members had subdivided their family land so that the defendant could transfer the land to him. The plaintiff went on to say that the sale agreement (PEX No. 1) was prepared by Peter (PW1). He added that the defendant has never stopped him from working on the portion of land that he bought. He revealed that he is yet to pay the balance of Kshs. 1,000 since the defendant has not put beacons on the land and also due to the fact that the defendant has not transferred the land to him. It was also the plaintiff's evidence that the land in question is number 355 and that it belongs to the defendant's grandfather,

one Ndivo Kilukya.

8. Upon the close of cross-examination by the defendant, the court asked the plaintiff to clarify if the land in question is titled and also whether he had carried out a search at the land's office to ascertain its owner to which the plaintiff replied in the negative.

9. The plaintiff called Peter Mwau Maweu (PW1) as his sole witness. Like the plaintiff, Peter (PW1) adopted his statement that he recorded on the 8<sup>th</sup> August, 2016 as his evidence.

10. His evidence was that he knows both the plaintiff and the defendant and pointed out that the latter is from his Ambua Clan. He said that on 2<sup>nd</sup> December, 2003 he witnessed the sale of a portion of the defendant's land to the plaintiff. He revealed that he did so as the chairman of the clan while the plaintiff and the defendant had their spouses as their witnesses. He said that the purchase price was Kshs. 27,000 of whereupon the plaintiff paid Kshs. 26,000 leaving a balance of Kshs. 1000 which was to be cleared once the beacons were erected. He went on to say that the defendant later breached the agreement when he indicated that he would refund the purchase price to the plaintiff.

11. Peter's (PW1) evidence in cross-examination was that the plaintiff is in occupation of the portion of the land that he bought from the defendant. He also said that the plaintiff has planted trees on it and that the defendant has never barred the plaintiff from working on his portion of the land. He said that the defendant barred him and others when they went to plant beacons on the land on 25<sup>th</sup> August, 2015. The witness was not re-examined by the plaintiff.

12. On the other hand, the defendant adopted his statement that he recorded on 20<sup>th</sup> November, 2017 as his evidence. He also produced two agreements as DEX No.1 and 2 respectively.

13. His evidence was that in the year 2003, he sold an acre of land to the plaintiff at a price of Kshs. 27,000. He said that the plaintiff paid him Kshs. 26,000 leaving a balance of Kshs. 1,000 which he seeks to be paid with interest and cost from the year 2003.

14. The Defendant was not cross-examined by the plaintiff.

15. Jackson Muthoka Muteti (DW1) in his evidence in chief told the court that the plaintiff is his brother in law while the defendant is his cousin. The witness proceeded to adopt his statement dated 20<sup>th</sup> November, 2017 as his evidence. His evidence was that on the 17<sup>th</sup> February, 2007 the defendant sent him to collect Kshs. 1,000 from the plaintiff which the defendant said was the balance of the purchase price of the land that the plaintiff had bought from him. He went on to say that the plaintiff refused to pay the balance of the purchase price claiming that he would make sure that he gets a bigger portion land from the defendant.

16. His evidence in cross-examination was that the plaintiff confirmed to him that he owed the defendant Kshs. 1,000. He was not re-examined by the defendant.

17. The plaintiff chose not to file any submissions. The defendant in his written submissions urged the court to find that the plaintiff has failed to prove his case on a balance of probabilities and hence it should dismiss the same with costs to the defendant. He also urged the court to order the plaintiff to pay him the balance of the purchase price plus interest starting from the year 2003.

18. Having read the evidence on record and the submissions that were filed by the defendant, I am of the view that the issues for determination are:-

**1) Whether or not the defendant should be ordered to transfer the portion of land that he sold to the plaintiff.**

**2) Whether or not the plaintiff is entitled to damages.**

19. On the first issue, the evidence from both the plaintiff and the defendant was that there was indeed a written sale agreement between the two. The defendant agreed to sell a portion of his family land to the plaintiff. The purchase price was Kshs. 27,000. The plaintiff paid 26,000 leaving a balance of Kshs. 1,000 which remains unpaid to date. The defendant in his evidence stated that the land that was the subject of the sale was one acre. It also came out clearly that the one acre was to be excised from land parcel number 355. There is also evidence to show that the plaintiff took possession of the portion of land that he bought and proceeded to plant trees and other plants. Even though the plaintiff is yet to clear the balance of the purchase price, there is no reason why the defendant should not take steps to transfer the one acre to the plaintiff who in turn should clear the balance of the purchase price. I wish to point out that parties are bound by their pleadings and as such, there is no pleading in the defence that the plaintiff should be condemned to pay interest on the balance of the purchase price backdated to the year 2003. As such, I will not condemn the plaintiff to pay the same.

20. As for the second issue, the evidence on record is that the plaintiff has been in occupation of the portion of land that he bought from the defendant since the year 2003. He has carried out economic activity on the portion of land without any hindrance from the defendant. Even though the portion is yet to be transferred to him by the defendant, the plaintiff has failed to adduce evidence to demonstrate that he is entitled to damages. In my judgment, I hold that the plaintiff is not entitled to any damages.

21. The upshot of the above is that the plaintiff has on balance of probabilities satisfied this court that he has a cause of action against the defendant. In the circumstances, I hereby proceed to enter judgement for the plaintiff and against the defendant in terms of prayers (a) and (c) of the plaint. It is so ordered.

**Signed, dated and delivered at Makueni this 9<sup>th</sup> day of October, 2018.**

**MBOGO C.G,**

**JUDGE**

**In the presence of:**

The plaintiff

Defendant

Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**9/10/2018**