



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.239 OF 2015

ST. TERESA ACK NANGA CHURCHPLAINTIFF

VERSUS

SIMON OWINO ODINGA1ST DEFENDANT

STEPHEN ODHIAMBO ODINGA.....2ND DEFNDANT

JOSEPH ODHOCH ODINGA.....3RD DEFENDANT

MARTIN OGONYO ODINGA4TH DEFENDANT

JUDGMENT

1. **St. Teresa Ack Nanga Church**, the plaintiff commenced this suit against **Simon Owino Odinga, Stephen Odhiambo Odinga, Joseph Odhoch Odinga and Martin Ogonyo Odinga**, the 1st to 4th Defendants respectively, through the plaint dated 17th September 2015 seeking for the following prayers;

- a) Subdivision and transfer to the Plaintiff of a quarter acre from **Kisumu/Nyalenda ‘B’/2394**.
- b) That the Deputy Registrar be authorized to execute all conveyance documents to give effect to the judgment in the event of the Defendants failing to do so.
- c) Costs.

The Plaintiff avers that the purchase price for the quarter acre was Ksh.1,300,000/= and Ksh.1,100,000/= has already been given. That the Plaintiff is ready and willing to pay the defendants the balance of Kshs.200,000/= but the Defendants have declined to do the subdivision insisting on additional payment of Kshs.500,000/=. That the Defendants have since subdivided a portion and transferred it to a third party.

2. The Defendants did not enter appearance or file defence. The Plaintiff applied for interlocutory judgment vide their letter dated 18th December 2015. The interlocutory judgment was entered on the 21st January 2016 with directions that hearing do proceed to formal proof.

3. The hearing commenced on the 10th May 2016 with Mr. Omayo advocate representing the Plaintiff. The Plaintiff called John Ogalo Agutu who testified as PW1. He told the court how the Defendants were introduced to the Plaintiff as the owners of land parcel **Kisumu/Nyalenda ‘B’/2264** from which the Plaintiff wanted to buy quarter of an acre portion. The purchase price was agreed at Kshs.1,300,000/= though no formal sale agreement was made as the portion had not been subdivided. PW1 produced an

acknowledgement document under which the Plaintiff paid the Defendants Ksh.100,000/ as deposit on the 11th April 2012. He also produced payment vouchers dated 16th July 2012, 16th October 2013, 10th December 2012 of Kshs.200,000/=, 305,000, 300,000/= and 160,000/= respectively bringing the total payment to Ksh.1,065,000/=. The witness talked of another payment Ksh.40,000/= but no documentary evidence was availed. PW1 told the court that when they asked the Defendants to sign the application for land control board and transfer documents, they declined. That the Plaintiff visited the land Registrar's office to file a caution but found land parcel **Kisumu/Nyalenda 'B'/2264** had been subdivided into two and one portion transferred to one Ben Ouma Otieno. That they therefore filed a caution on the remaining portion **Kisumu/Nyalenda 'B'/2394**, the suit land and prays for the orders.

4. The counsel for the Plaintiff then filed written submission dated 26th May 2016. The learned counsel summarized the pleadings and the evidence adduced by PW1. He submitted that the acknowledgment documents on the five payments were signed by the parties and hence constitutes the sale agreement.

5. The following are the issues for the courts determination;

- a) Whether there exists a valid sale agreement for land between the Plaintiff and the Defendants.
- b) What the terms of the sale agreements are.
- c) Whether there has been breach of the sale agreement, and if so, by which party.
- d) Whether an order of specific performance should issue in favour of the Plaintiff.
- e) Who pays the costs.

6. The court has carefully considered the pleadings filed by the Plaintiff, the oral and documentary evidence tendered, the submissions by counsel and come to the following finding.

a) That though the Plaintiff evidence is that the Defendants were the registered owners of land parcel **Kisumu/Nyalenda 'B'/2264** by the time they made the first installment of Ksh.100,000/= on 11th April 2012, no documentary evidence in form of a copy of the title, register or certificate of official search was availed to the court for confirmation.

b) That the copy of official search issued on 2nd March 2015 that was annexed in the Plaintiff's list of documents show that land parcel **Kisumu/Nyalenda 'B'/2394**, measures 0.264 hectares and is registered in the names of Simon Owino Odinga, Joseph Odhoch Odinga, Martin Ogonyo Odinga and Stephen Odhiambo Odinga, who are the Defendants herein.

c) That the Plaintiffs case is that land parcel **Kisumu/Nyalenda 'B'/2394** is a subdivision from **Kisumu/Nyalenda 'B'/2264** from which they were buying a quarter of an acre portion. That without relevant documents being availed to the court like the register for parcels **Kisumu/Nyalenda 'B'/2264 and 2394**, the court is not in a position to confirm with certainty whether parcel **Kisumu/Nyalenda 'B'/2394** is a subdivision from **Kisumu/Nyalenda 'B'/2264**.

d) That though there was no formal written land sale agreement done between the plaintiff and the Defendants, the court agrees with the submissions of the learned counsel for the Plaintiff that the contents of the five documents under which payments of Ksh,1,065,000/= was acknowledged by the Defendants sufficiently sets out the terms of the parties agreement. That four of the five acknowledgement documents refers to the land parcel **Kisumu/Nyalenda 'B'/2264** from which the Plaintiff was buying a portion. That the fifth document dated 10th December 2012 captured the land as **KSM/Nyalenda "B"/** leaving out the last digits. That the acknowledgment documents dated 16th April 2013 and 16th December 2013 indicates the balances after the payment made. That the last payment is evidenced by the document dated 16th October 2013 and indicates the balance outstanding as Ksh. 235,000/=. The total paid under the five acknowledgement documents

plus the balance outstanding brings the total to Ksh.1,300,000/= which is the stated purchase price.

e) That the prayers sought by the Plaintiff against the Defendants are in the nature of specific performance. That such a prayer is available where a party has performed all its obligations under the agreement, has taken possession and the other party has unreasonably declined to transfer the land. That in this case there is no evidence to show that the Plaintiff ever took possession of the portion of land parcel **Kisumu/Nyalenda ‘B’/2264** that they were buying from the Defendants by the time of their agreement or when they made any of the installment payments. The court is therefore not in a position to confirm whether the portion the plaintiff was buying has been identified on the ground and the person in occupation or possession thereof. That it follows that specific performance orders are not available for the Plaintiff.

f) That the evidence adduced by the Plaintiff confirms that the Defendants declined to sign the land control board application for consent. That the quarter acre that the Plaintiff was buying was never excised from the parent title and hence the reason no formal land sale agreement had been made. That the provision of **Section 6 and 8 (1) of the Land Control Act Chapter 302 of the Laws of Kenya** requires applications for consent of land control board, to be made within six months of the date of the sale agreement. That in the absence of a formal sale agreement, the court would take the date of the last acknowledgement document as the date from which the six months period started to run. That the document is dated 16th October 2013 and the consent of the land control board ought to have been obtained by the 16th April 2014, after which the agreement become void. The Plaintiff’s recourse is provided for under **Section 7 of the Land Control Act** that deals with the recovery of consideration paid in a void sale agreement.

g) That even though the Defendants did not defend this suit, and in view of the finding that specific performance order is not available to the Plaintiff, and that their sale agreement did not receive the consent of the land control board, the court is of the considered view that the Plaintiff is entitled to a refund of the purchase price paid notwithstanding the fact that it is not one of the prayers sought in the plaint.

7. That flowing from above the court finds that the Plaintiff has proved on a balance of probabilities that they paid the Defendants Ksh.1,065,000/= towards the purchase of a portion of land parcel

Kisumu/Nyalenda “B”/2264. That as their agreement has become void for reasons of lack of land control board consent, the court enters judgment for the Plaintiff against the Defendants for payments of Ksh. 1,065,000/= and costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 15TH DAY OF MARCH 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Omayo for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/3/2017

15/3/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Court: Judgment dated and delivered in open court in presence of

Mr. Omayya for the Plaintiff only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/3/2017