



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.197 OF 2016

1. CHRISTOPHER MBOGO MUGANGA.....1ST PLAINTIFF

2. THEODORA MKABILI MAGHANGA.....2ND PLAINTIFF

VERSUS

1. MICHAEL MBURA BALO.....DEFENDANT

JUDGMENT

1. Christopher Mbogo Muganga and Theodora Mkabili Maghanga, hereafter referred to as the plaintiffs, are husband and wife and have sued Michael Mbura Balo, hereinafter referred to as the defendant, vide a plaint dated 20th July 2016 and filed on even date. The plaintiffs claim that vide an agreement for sale dated 30th April 2016, the defendant sold to the plaintiffs an undemarcated plot measuring 38 feet by 35 feet at Majengo Mapya at an agreed consideration of Kshs.100,000.00. The plaintiffs state that prior to the execution of the said agreement, they were shown the specific portion which was being sold to them. The plaintiff's further state that pursuant to the said agreement, they took immediate possession of the purchased plot and constructed a temporary wooden structure of a three bedroomed residential house and were about to lay iron sheets on it when on 6th May 2016, the defendant demolished it. The plaintiffs state that when they sought an explanation from the defendant, he told them that a third party had developed an interest in the same plot and suggested that he gives the plaintiffs an alternative plot. The plaintiffs did not buy the defendant's idea and began to reconstruct another structure but which was also pulled down by the defendant. The plaintiffs further state that for the third time, they reconstructed another structure which is still standing on the said plot. According to the plaintiffs, the defendant, in an effort to frustrate their possession, fenced off the plot to deny the plaintiffs access.

2. The plaintiffs claim for an order for vacant possession of the plot they purchased, and alternatively refund of the purchase price of Kshs.100,000.00. The plaintiffs are claiming the sum of Kshs.80,380.00 being the cost for constructing the structures that were demolished by the defendant as well as the one that is still standing on the plot. They also claim for costs and interest.

3. Service of summons was effected upon the defendant. No appearance was made by the defendant and therefore the case was not defended.

4. The 1st plaintiff testified that on 30th April 2016, they entered into a written agreement for sale with the defendant who agreed to sell them a plot measuring 38 feet x 35 feet at Majengo Mapya in Majengo-Kanamai. He stated that the agreed purchase price was Kshs.100,000.00 which they paid in full. The 1st plaintiff stated that they took immediate possession of the suit plot and developed it by constructing a

three-roomed mud house thereon. According to the 1st plaintiff, the defendant, in breach of the agreement demolished their structure on two occasions and wanted to allocate them a plot different from the one they had purchased. The plaintiffs resisted the defendant's move and went ahead to construct their house for the third time. The 1st plaintiff told the court that they later learnt that the plot they had purchased from the defendant had been sold to a third party without their knowledge and their attempt to have quiet possession have been frustrated by the defendant. They were constrained to seek legal redress in which they seek reliefs in terms set out in the plaint and as outlined hereinabove.

5. The 2nd plaintiff also testified and in her evidence, she reiterated what the 1st plaintiff gave in his testimony.

6. The court has considered the pleadings and the evidence on record. The issues arising for determination are: -

i. Whether there was a valid agreement for sale between the plaintiffs and the defendant and whether the consideration of Kshs.100,000.00 was paid.

ii. Whether the plaintiffs are entitled to the prayers sought.

7. It is not in dispute that the plaintiffs and defendant entered into an agreement dated 30th April 2016 in which the defendant sold and the plaintiffs purchased plot measuring 38ft x 35ft. The agreement, which was produced by the plaintiffs as an exhibit shows the purchase price as Kshs.100,000.00. The plaintiffs testified that they paid the said sum of Kshs.100,000.00 to the defendant. The plaintiffs' evidence is not controverted. I hold that on a balance of probabilities, the sum of Kshs.100,000.00 was paid by the plaintiffs to the defendant.

8. The plaintiffs stated that they took possession of the plot they purchased from the defendant and constructed some structure which the defendant demolished on two occasions. They further stated that their attempts to have quiet possession have been frustrated by the defendant who has fenced off the suit plot. In their testimony, the plaintiffs told the court that they spent Kshs.80,380.00 in putting up the structure that was demolished by the defendant. They produced photographs and receipts to support their claim. There was no evidence availed to contradict the plaintiffs' averments. I therefore hold that on a balance of probabilities, the plaintiffs incurred a cost of Kshs.80,380.00 to construct the structure on the suit plot.

9. The plaintiffs are seeking for an order to compel the defendant to give them vacant possession. In their evidence, the plaintiffs told the court that the defendant had sold the same plot to a third party. In the circumstances, an order for specific performance as claimed by the plaintiffs in this matter may very well be an order in vain if the plot is now in the hands of a third party who may be an innocent purchaser for value. The order for specific performance in the matter sought cannot therefore issue.

10. The plaintiffs made an alternative prayer for refund. I am satisfied that an order for refund can be made.

11. With respect to the claim for Kshs.80,380.00 I have already made a finding that the plaintiffs have, on a balance of probabilities, proved this claim. This claim was more of a special damage which the law requires that it must not only be specifically pleaded but must also be strictly proved. The plaintiffs not only specifically pleaded for it, but they went ahead to prove their claim by availing to the court receipts and photographs to support their case. I have seen the receipts and the photographs produced. I see no reason why I should not believe the plaintiffs. In the end, I find that the plaintiffs are entitled to the sum of Kshs.80,380.00 being the cost of the structures that were demolished by the defendant.

12. In view of the foregoing, I am satisfied that the plaintiffs have proved their case on a balance of probabilities and hereby enter judgment for the plaintiffs against the defendant in the following terms:

- 1. Kshs.100,000.00 being refund of the purchase price.**
- 2. Kshs.80,380.00 being costs for the demolished structures.**
- 3. Costs of the suit to the plaintiffs.**
- 4. Interest at court rates on (1), (2) and (3) above.**

13. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST MAY 2017.

C. YANO

JUDGE