



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 44 OF 2016**

**ALBERT MWANGA KILINGA.....PLAINTIFF**

**VERSUS**

**JUDITH MARTHA ONYANGO.....1<sup>ST</sup>DEFENDANT**

**CALVIN MOSES ODHIAMBO.....2<sup>ND</sup>DEFENDANT**

**CLEMENT OMONDI ONYANGO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit by way of a plaint dated 29/2/2016 which was filed on 2/3/2016. In that plaint he sought the following orders as against the defendants:-

**(a) An order for specific performance against the defendants to effect transfer of two (2) acres of their entitlement in Bungoma/Naitiri/122 to the plaintiff.**

**(b) In the alternative, an order that Deputy Registrar of High Court to be empowered to execute all the documents and papers necessary for the effectual transfer of two (2) acres of the suit property to the plaintiff.**

**(c) In the alternative orders for refund of the current value of the 2 acres parcel.**

**(d) A permanent injunction against the defendants, their agents, legal representatives, workers or in any other person from interfering with the plaintiff's right of possession, use and occupation of the suit property.**

**(e) Costs of the suit and interest at court rates.**

**(f) Any other relief this Honourable Court may be pleased to grant in the circumstances.**

2. The 3<sup>rd</sup> defendant filed a memorandum of appearance on 31/3/2016. He also filed a defence on 12/5/2016.

3. The plaintiff sought judgement on 16/5/2016 against the 1<sup>st</sup> and the 2<sup>nd</sup> defendants for failure to enter appearance or file defence within the time stipulated in the Rules.

4. However, all the defendants never attended the hearing which took place on 26/9/2017. Only the plaintiff testified at the hearing.

5. The plaintiff's case is that the defendants are the administrators of the Estate of one **Shadrack Onyango**; the plaintiff entered into a sale agreement with the 1<sup>st</sup> and the 2<sup>nd</sup> defendants in their capacity as administrators of the Estate of the late Shadrack Onyango; by that agreement the 1<sup>st</sup> and 2<sup>nd</sup> defendants agreed to sell two (2) acres to be hived off their entitlement in the deceased **Shadrack Onyango**'s Estate comprised in a parcel of land known as **Bungoma/Naitiri/122** situated in Bungoma County.

6. When the parcel known as **Bungoma/Naitiri/122** was subdivided, the defendants were registered as proprietors of Title No. **Bungoma/Naitiri/2405**. The defendant had paid the entire purchase price for the two (2) acres which was **Kshs.480,000/=**.

7. According to the plaintiff he was to be put into actual physical possession of the two (2) acres of the suit property after payment of the purchase price. The plaintiff pleads that despite fulfilling all his obligations under the sale agreement the defendants have refused or ignored to put the plaintiff into possession of the land or complete the sale transaction.

8. When the defendants failed to give him the physical possession of the land, a demand letter was issued from his advocate's office. However when the plaintiff went to the defendants, the 1<sup>st</sup> defendant allowed him to cultivate the land but when he went there with a tractor ready to plough, the 2<sup>nd</sup> defendant chased him away.

9. A letter was written thereafter by the plaintiff's advocate demanding a refund of the purchase price but up to the time of the hearing, the plaintiff had not received either physical possession of the land or the money. The plaintiff said that he had sold some other land in order to purchase the land the 1<sup>st</sup> and 2<sup>nd</sup> defendants were selling and now he does not have a place to stay in.

10. The plaintiff prays for an order of specific performance against the defendant to effect the transfer of the two acres of land to him. In the alternative the plaintiff prays that the Deputy Registrar of the Court be empowered to execute the documents necessary for the effectual transfer of the two (2) acres to him. An alternative prayer for refund is included.

11. As stated earlier the suit is not defended by the 1<sup>st</sup> and 2<sup>nd</sup> defendants who sold the land to the plaintiff. Only the 3<sup>rd</sup> defendant filed his defence. The 3<sup>rd</sup> defendant denied being a party to the agreement. This was contained in his defence.

12. The plaintiff never outlined any role that the 3<sup>rd</sup> defendant may have played in the whole transaction. I find that he was not a party to the agreement. He never received the purchase price and he is not alleged to have refused the plaintiff entry into the premises as the 2<sup>nd</sup> defendant did.

13. I therefore find that the plaintiff's claim can only be maintained against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who never defended the suit. Indeed the sale agreement dated 7/5/2007 does not bear the 3<sup>rd</sup> defendant's name.

14. The plaintiff has established his case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on a balance of probabilities. However the plaintiff has failed to establish any case against the 3<sup>rd</sup> defendant.

15. Considerable caution must be applied while dealing with a prayer for a remedy of specific performance which can be granted only in certain cases. In the case of **Mukika Chai Dzombo vs Coast Development Authority (2014) e KLR**, this court observed as follows:

**“Instead, the Defendant is asking for specific performance of the contract. It is trite law that an order of specific performance can only succeed where a party shows that he has complied with all the terms of the contract, which the Defendant has not done. Specific performance is an equitable remedy that compels a party to complete a contract according to the precise terms agreed upon so that under the circumstances, justice will be done between the parties.”**

16. There are certain conditions that were to be fulfilled by the parties. It is not clear whether they were fulfilled. The obtainance of the Land Control Board Consent was among these. Both parties have a role in ensuring the consent is obtained.

17. Without clear pleading on the part of the plaintiff and the 3<sup>rd</sup> defendant and in the light of the silence of the other defendants it is impossible to determine the status of such part of the transaction at the moment.

18. In the light of the foregoing I find that the most appropriate remedy in the circumstances would be a refund of the entire purchase price to the plaintiff.

19. I therefore enter judgement for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I dismiss the case against the 3<sup>rd</sup> defendant with no orders as to costs.

20. Consequently I issue the following orders:-

**(a) The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall jointly and severally pay the plaintiff the sum of Kshs.480,000/= being the refund of the purchase price paid in respect of the agreement for the sale of two (2) acres out of Bungoma/Naitiri/2405 to the plaintiff.**

**(b) The 1<sup>st</sup> and 2<sup>nd</sup> defendant shall bear the costs of this suit.**

**(c) The plaintiff's suit against the 3<sup>rd</sup> defendant is hereby dismissed with no orders as to costs.**

**(d) The plaintiff is hereby awarded interest on the sums in paragraphs (a) and (b) hereinabove at court rates from the date of judgment till payment in full.**

It is so ordered.

Dated, signed and delivered at Kitale on this 9<sup>th</sup> day of **October, 2017.**

**MWANGI NJOROGE**

**JUDGE**

**9/10/2017**

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah

Mr. Waweru for the plaintiff

N/A for the defendant

**COURT**

Judgment read in open court in the presence of counsel for the plaintiff.

**MWANGI NJOROGE**

**JUDGE**

**9/10/2017**