



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 19 OF 2017**

**BEATRICE OKOTH.....PLAINTIFF**

**VERSUS**

**FRANCIS PIUS OMWERI NYABERI.....1<sup>ST</sup> DEFENDANT**

**REBECCA NYABOKE OMWERI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In the Complaint dated 9<sup>th</sup> October, 2013, the Plaintiff averred that on 30<sup>th</sup> July, 2012, he entered into an agreement with the Defendants to purchase parcel of land known as L.R. No. 27770 for Kshs. 4,000,000; that he paid to the Defendants a total of Kshs. 3,000,000 in installments and that it was a term of the Agreement that the Defendants were to deposit with their advocates all the completion documents.

2. The Plaintiff has averred that the Defendants did not hand to their advocates the completion documents and that they are in breach of the agreement of 30<sup>th</sup> July, 2012.

3. The Plaintiff is praying for an order of specific performance compelling the Defendants to hand over to him the completion documents and for general damages for breach of the Agreement.

4. In their Defence, the 1<sup>st</sup> Defendant stated that the 2<sup>nd</sup> Defendant was not present when the agreement of 30<sup>th</sup> July, 2012 was drawn and signed; that the Kshs. 2,000,000 was not paid as agreed and that the payment of Kshs. 1,700,000 to Omariba & Co. advocates was in contravention of the Sale Agreement.

5. The Defendants finally averred that the payment of Kshs. 3,000,000 having not been paid, they could not avail the completion documents.

**The Plaintiff's case:**

6. The Plaintiff, PW1, informed the court that through her advocate, she entered into an agreement dated 30<sup>th</sup> July, 2012 with the Defendants to purchase the suit land for Kshs. 4,000,000.

7. According to PW1, she paid a deposit of Kshs. 1,000,000 to the Defendants' advocates and deposited Kshs. 300,000 in the 1<sup>st</sup> Defendant's account on 9<sup>th</sup> August, 2012.

8. It was the evidence of PW1 that on 14<sup>th</sup> September, 2012, her advocate paid to the Defendants' advocate a further sum of Kshs. 1,700,000 and that the balance of the purchase price being Kshs. 1,000,000 was to be paid after the Defendants hand in completion documents.

9. PW1 further stated that it was a condition of the agreement that the Defendants were to deposit all the transfer documents with their advocate; that this has never been done; that it was erroneous for the Defendants to demand from her Kshs. 1,200,000 and that she has always been ready and willing to pay the balance of Kshs. 1,000,000.
10. In cross-examination, PW1 stated that although the suit land was registered in favour of the two Defendants, the 2<sup>nd</sup> Defendant was not in attendance when the Agreement was agreed upon; that the Agreement never provided for the paying of the purchase price to the advocates and that the balance of the purchase price is with her advocate.
11. The 1<sup>st</sup> Defendant, DW1, informed the court that the agreement in question was not signed by the 2<sup>nd</sup> Defendant; that the 2<sup>nd</sup> Defendant declined to sign the agreement and that so far, he has only been paid Kshs. 2,600,000 by the Plaintiff for the suit land.
12. According to DW1, the entire purchase price was to be deposited on his account by the Plaintiff and that he has been unable to convince the 2<sup>nd</sup> Defendant to sign the Agreement of Sale.
13. The Plaintiff's advocate submitted that the consideration for the sale of the suit land had passed and that the Defendants were under an obligation to ensure that they deliver the completion documents as provided for in the Sale Agreement of 30<sup>th</sup> July, 2012.
14. Counsel submitted that the Plaintiff has demonstrated that she upheld the terms of the Sale Agreement and that the order for specific performance should issue.
15. The Defendants' counsel submitted that the agreement was clear that the 1<sup>st</sup> Defendant did not have the authority of transacting alone; that no consent of the Land Control Board has been sought and that the Sale Agreement has become null and void.
16. The Defendants' counsel finally submitted that the agreement offends the provisions of Section 3(3) of the Law of Contract Act and that although the agreement provided that all the monies should be deposited in the Defendants' account, that did not happen.
17. The Plaintiff is seeking to enforce the Agreement of 30<sup>th</sup> July, 2012. According to the said Agreement, the Vendors, Pius Omweri Nyaberi and Rebecca Nyaboke Omweri purportedly agreed to sell to the Plaintiff land known as L.R. No. 27770/761 for Kshs. 4,000,000.
18. The agreement states that the Plaintiff shall pay a deposit of Kshs. 1,000,000 into the Defendants' account upon execution of the agreement with a further sum of Kshs. 2,000,000 being deposited in the Vendor's account on or before 6<sup>th</sup> August, 2012. The balance of Kshs. 1,000,000 was to be paid upon completion of the transfer of the land to the Plaintiff.
19. Although the agreement was signed by Francis Nyaberi, the 1<sup>st</sup> Defendant, the same was not signed by Rebecca Nyaboke, the 2<sup>nd</sup> Defendant
20. Considering that the title to the suit land is registered in the names of the two Vendors, the Agreement of 30<sup>th</sup> July, 2012 is unenforceable without the signature of Rebecca Nyaboke.
21. Considering that one of the Vendors did not execute the Sale Agreement, it does not matter that the Plaintiff is willing to pay the balance of the purchase price. The most that the Plaintiff can do is to recover the money paid to the Defendants and not otherwise.
22. For those reasons, I dismiss the Plaintiff's Plaint dated 9<sup>th</sup> October, 2013 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**