



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.271 OF 2013

PAMELA ATIENO1ST PLAINTIFF

KENNEDY JUMA CHACHA.....2ND PLAINTIFF

VERSUS

EVANS OTIENO NYAMA.....DEFENDANT

JUDGMENT

1. This suit was filed by **Pamela Atieno Obongo, and Kennedy Juma Chacha**, the Plaintiffs, against **Evans Otieno Nyama**, the Defendant, through the plaint dated 7th October 2013 and amended on 21st March 2014 seeking for the following;

- a. Declaration that the contract for sale of a portion of **Kisumu/Kasule/3666** has failed and the said agreement be revoked.
- b. Eviction of the Defendant from the suit parcel and the removal of the structures erected thereon.
- c. Costs.
- d. Any further relief the court deems fit.

2. The 1st Plaintiff avers that on or about 7th November 2008 she entered into a land sale agreement with the Defendant in respect to a portion of **Kisumu/Kasule/3666**, then registered in her name but now in the 2nd Plaintiff's name. That the portion was 0.02 hectares and the consideration was Ksh.130,000/=. That the Defendant paid Ksh.100,000/= as part payment leaving a balance of Kshs.30,000/=. That the balance was to be paid upon obtaining the land control board consent after which the 1st Plaintiff would place the Defendant in possession. That the 1st Plaintiff gave the Defendant's Advocate the original title, application to the land control board forms, PIN certificate and passport size photographs in anticipation of the completion process. That the Defendant has declined to meet the costs prerequisite to the subdivision and transfer of the portion to himself and in further breach, took possession of the land and commenced construction. That the 1st Plaintiff has since disposed the land to the 2nd Plaintiff.

3. The 1st Plaintiff testified as PW1 while the 2nd Plaintiff testified as PW2 on the 4th October 2017. Their testimony is that after the 1st Plaintiff and Defendant entered into the sale agreement on the 7th November 2008 for a portion measuring 0.02 hectares out of **Kisumu/Kasule/3666**. The Defendant paid Ksh.100,000/= leaving a balance of ksh.30,000/=. That the 1st Plaintiff gave title deed, consent for subdivision and other documents to the advocate who promised to call them for subdivision to the Land

office. That after about one year without any communication, she went to the advocate who asked her to call the Defendant. That she went to call the Defendant and found that he had taken possession of the land and built a house. That when she returned to the advocate, she was chased away. She lodged a complaint with the chief who advised her to go back to the advocate for the documents. That when she contacted the advocate through a different advocate, she was notified that the documents had got lost. That arrangements were made to have the lost title document gazatted and she was reissued with another title deed. That the 1st Plaintiff then sold and transferred the land to the 2nd Plaintiff before filing this suit.

4. That following are the issues for determination;

- a. Who between the 1st Plaintiff and the Defendant is in breach of their sale agreement dated 7th November 2008; or
- b. Whether the sale agreement of 7th November 2008 between the 1st Plaintiff and Defendant has been frustrated, and if so, which party is to blame.
- c. Whether the Plaintiffs are entitled to the prayers sought.
- d. Who pays the costs of the suit.

5. The court has carefully considered the pleadings filed by the Plaintiffs, oral and documentary evidence tendered by the Plaintiffs and come to the following conclusions;

- a. That though the Plaintiffs at paragraph 7 and 10 of the amended plaint, and in their evidence blame the Defendant for breaching the terms of the sale agreement by failing to meet the costs incidental to the transfer, there is no evidence tendered to show that the Defendant was ever asked to meet any specific payment and declined. The evidence tendered by the 1st Plaintiff is that after leaving the documents with the advocate who promised to call them to the land office, but the advocate did not do so. That after one year she made some follow up and the advocate disclosed that the documents had got lost. The Defendant cannot be blamed for the loss of the documents as the advocate, M/S Anne Omollo, was acting for both parties to the sale agreement of 7th November 2008.
- b. That as the Defendant could not have had the land subdivided to create the 0.02 hectares that he was buying without the 1st Plaintiff, as the registered proprietor of the mother title, obtaining consent for subdivision, signing and registering the resultant mutation forms, the Plaintiffs must have been misled to believe that the subdividing responsibility belonged to the Defendant.
- c. That paragraphs 4 of the sale agreement dated 7th November 2008, on the vendor (1st Plaintiff) delivering to the purchase (Defendant) the original title deed, executed transfer and application for consent forms, copy of PIN certificate and one passport size photograph was to enable the Defendant process the transfer of the 0.02 hectares out of **Kisumu/Kasule/3666** to his names. Though the Defendant did not participate in these proceedings, there is no way the 1st Plaintiff could have signed the transfer form, and filled the application for consent to transfer, without first having the subdivision of the mother title done out of which the portion to be transferred to the Defendant would be created and registered. The 1st Plaintiff did not tender any evidence to that effect and the court cannot assume that she had forwarded duly executed transfer form for the portion of 0.02 hectares to the Defendant. There is actually no evidence that any of the said documents were ever handed over to the Defendant.
- d. That the evidence adduced by the 2nd Plaintiff is to the effect that the houses on the land he bought from the 1st Plaintiff belongs to both the 1st Plaintiff and Defendant. That he has never met the Defendant on the land as the only person he found in the house is the Defendant's estranged wife who is not a party in this proceedings.

e. That the 1st Plaintiff, having confirmed that the documents she had left with their advocates had got lost, the court is of the considered view that she owed the Defendant a duty to notify him ones the title documents were reissued, and to convey her preparedness to complete the transactions. That what the court gathers from the pleadings and oral evidence is that after loss of the title deed was gazatted on 12th November 2013 and reissued, the 1st Plaintiff entered into a land sale agreement for the whole of **Kisumu/Kasule/3666** and another parcel to the 2nd Plaintiff on the 27th June 2013. That on the 1st July 2013 the parcel was transferred to the 2nd Plaintiff and title deed issued.

f. That when the Plaintiffs were transacting over the suit land, they were well aware that the Defendant was already in occupation of the land having constructed a residence and settled on it after the sale agreement of 7th November 2008. There is no evidence of any legal steps having been taken to have the Defendant vacate or evicted from the portion of **Kisumu/Kasule/3666** in his occupation before the sale agreement and transfer between the Plaintiffs was done.

g. That the foregoing shows that it is indeed the 1st Plaintiff who has breached the sale agreement she entered with the Defendant by failing to obtain the land control board consent to subdivide **Kisumu/Kasule/3666**, to create the portion to be transferred to the Defendant. That the 1st Plaintiff has further failed to execute the transfer form, fill the land control board application forms for consent to transfer, and forward them, or indicate her readiness to forward them to the Defendant, together with the copy of the PIN certificate and passport photograph in addition to the title deed for the portion.

h. That it is the 1st Plaintiff who has frustrated the sale agreement that she entered with the Defendant on the 7th November 2008 by transferring the whole **Kisumu/Kasule/3666** to the 2nd Plaintiff without excising and registering the portion to be transferred to the Defendant.

6. That from the foregoing, and even though the Plaintiffs have failed to discharge their duty of proof, in respect of prayer (a), the court exercising its discretion under prayer (d) and in accordance of the provisions of **Article 159 (2) (b), Sections 3(1) of the Environment and Land Court Act No.19 of 2011, Sections 1A, 1B, and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya** finds that this is an appropriate case where orders aimed at settling the issues raised, without undue regard to technicalities, and with the aim of attaining just, expeditious, proportionate and affordable resolution should be issued and orders as follows;

a. That the sale of land agreement between the 1st Plaintiff and Defendant of 7th November 2008, not having received the statutory land control board consent in six months as required under **Section 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya**, is hereby declared null and void, but the Defendant is entitled to a refund of the purchase price paid in accordance of **Section 7 of the said Act**, with interest.

b. That the Plaintiffs do refund to the Defendant Ksh.100,000/=(one hundred thousand) with interest at courts rate from the 7th November 2008 till payment in full.

c. That the Defendant do give vacant possession of the portion of land parcel, **Kisumu/Kasule/3666** in his possession in three (3) months after receiving the whole payment ordered in (b) above, and in default eviction order do issue.

d. The Plaintiffs to bear their own costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER 2017

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/12/2017

13/12/2017

S.M. Kibunja Judge

Joane/Oyugi court assistants

Parties absent

Counsel absent

Court: The judgment dated and delivered in open court in absence of all counsel and parties. The Deputy Registrar to notify the parties/counsel of the delivery. File be closed.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/12/2017