



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 121 OF 2011**

**FRANCIS KISIVO WAMBUA.....PLAINTIFF**

**-versus-**

**SHEIKHA AHMED MOHAMED AL-JABIR**

**FARID AHMED MOHAMED..... DEFENDANTS**

**JUDGEMENT**

1. The Plaintiff filed this case on 4th November 2011 seeking the following orders:
  - i. Specific performance of the Agreement dated 21st July 2006.
  - ii. Exemplary damages for non-committal to the Agreement.
  - iii. Costs of the suit.
2. The Plaintiff averred that by Sale Agreement dated 21st July 2006, he entered into an agreement with the Defendants to buy a part of land known as Plot No. 1771 (Original No. 284/146) Section III MN (“the suit property”). The Plaintiff stated that the Defendants were the beneficial owners of the suit property at the material time.
3. The Plaintiff claimed that it was an express term of the Sale Agreement that upon payment of the purchase price, the Defendants shall commence the process of obtaining the Deed Plan for the excised portion in favour of the Plaintiff. That the Defendants did obtain a Deed Plan in August 2008 but declined to sign the Transfer in favour of the Plaintiff to enable him process the title deed in his name. The Plaintiff now seeks an order of specific performance to compel the Defendants to execute the transfer.
4. The Plaintiff was the sole witness for his side. He testified on 11th June 2015 and told court that on 1st June 2006, the 2nd Defendant, the 2nd Defendant's mother (the 1st Defendant herein) and other family members approached him (the Plaintiff) during which it was agreed that the Plaintiff would buy part of the suit property for Kshs. 600,000.00 to help in solving some problem that the 2nd Defendant had. The parties went to Musinga & Company Advocates on 21st July 2006 where the Sale Agreement was prepared and executed upon payment by the Plaintiff to the Defendants of Kshs. 600,000.00 in cash. The Plaintiff stated that his witness to the agreement was his brother Lawrence Wambua while that of the Vendor's was Salim Ahmed Mohamed.
5. The Plaintiff testified that after execution of the Sale Agreement and payment of the purchase price as aforesaid, he instructed a surveyor who obtained a Deed Plan in 2008. Thereafter, the Plaintiff stated, a Transfer was prepared by the Plaintiff's advocates, but which the Defendants have declined to execute.
6. According to the Plaintiff's testimony, the suit property was registered in the 1st Defendant's name but the 2nd Defendant is the one who was selling his portion. The Plaintiff told court that he had taken possession of the portion in issue by building certain structures thereon but which were

- subsequently demolished by the Defendants. He asked the court for compensation for the loss occasioned by the Defendants.
7. The Plaintiff testified that in April 2014, the Defendants put up a foundation on part of his plot which foundation he asked the court to be removed. The Plaintiff produced the following documents in support of his case:
    - i. Sale Agreement dated 21st July 2006
    - ii. Deed Plan dated 7th March 2008
    - iii. Transfer (Draft)
    - iv. Demand Letter dated 23rd August 2011
  8. The Defendants did not file any Statement of Defence. However on 11th June 2015 before the Plaintiff gave his testimony in court, there was no appearance for the 1st Defendant while the 2nd Defendant was present in person. The court explained to the 2nd Defendant the implication of failing to file a defence but the 2nd Defendant indicated that he was ready to proceed with the hearing notwithstanding the fact that they did not file any defence to the claim. The Plaintiff proceeded with his testimony which I have already highlighted above and the case was adjourned to 6th October 2015 on the request of the 2nd Defendant.
  9. On 6<sup>th</sup> October 2015, the 2nd Defendant testified and told the court that when he started a project of building a shop on the suit land, the Plaintiff approached him and offered to help him finance the construction. That the Plaintiff gave him the 2nd Defendant Kshs. 170,000/= towards the construction. That upon completion of the construction, the parties entered into an agreement to the effect that the Plaintiff recovers his money by using the shop and deducting Kshs. 4,000/= while paying to the plaintiff Kshs. 2,000/= with effect from 1<sup>st</sup> February 2001.
  10. The 2nd Defendant continued that the Plaintiff's brother known as Lawrence subsequently gave the 2nd Defendant Kshs. 129,000.00 to build him a hotel. Later, Lawrence asked him to go to Musinga & Company Advocates where he signed a document. He stated that he did not sell the land because it was not registered in his name. That it is his elder brother called Salim who forged the deed plan and sold the land to the Plaintiff. He asked the court to find that he never sold the land.
  11. On cross-examination by Mr. Lutta, learned counsel for the Plaintiff, the 2nd Defendant stated that when he visited the firm of Musinga & Company Advocates on the material dated, he was drunk and signed the agreement knowing it to be a lease. The 2nd Defendant stated that he is illiterate. The 1<sup>st</sup> defendant is the mother to the 2<sup>nd</sup> defendant and they all live on this land which family property. He is denied that any money was paid in cash. He admitted the plaintiff also lives on this land but because the plaintiff is deducting his money. The 2<sup>nd</sup> defendant then requested for adjournment to call his younger brother as a witness. The matter was rescheduled to 23<sup>rd</sup> October 2015 for further defence hearing. The defendant did appear but later went away without calling any further evidence hence his case was closed.
  12. The Plaintiff filed written submissions giving a summary of the case and highlighting facts supporting his prayers. He also relied on case law of **Reliable Electrical Eng Ltd vs Mantrac Kenya Ltd (2006)eKLR and Richard Okemwa Vs Kenya Power & Lighting Ltd (2013)Eklr**. The two case are however distinguishable from the present case in material aspects. The first case was a ruling made in regard to grant of mandatory injunctions. The second case is cited by the Plaintiff to support his claim for an award of general damages yet what was awarded was special damages of over Kshs 500000/.
  13. I have analysed the pleadings filed and the evidence rendered. To begin with, the facts pleaded by the plaintiff were not contradicted as the defendants did not file any statement of defence. Further, the 2<sup>nd</sup> defendant who gave evidence admitted signing the agreement which was produced as **PEX1**. His defence that he was drunk is not plausible because if he was drunk then he cannot again say that he knew he was signing a lease. Since the agreement was signed in the presence of an advocate, an inference is drawn that the 2<sup>nd</sup> defendant knew the contents of the document he was signing.
  14. As a result of the sale agreement, the original parcel was subdivided and a deed plan was processed in respect of the portion sold to the Plaintiff. The 2<sup>nd</sup> defendant stated that it his brother

who sold the land to the plaintiff which again contradicts his defence that he leased the plot to the Plaintiff. The 2<sup>nd</sup> Defendant did not produce any document to show the money given to him by the Plaintiff was to be recovered through rent. In all; I am satisfied that the Plaintiff has proved his case within the standards required by law.

15. The plaintiff prayed for an order that the defendants be ordered to sign a transfer in his favour. Since the claim is proved, I see no reason why the prayer cannot be granted. Consequently I allow the claim in terms of prayer (a) of the plaint. In regard to prayer for exemplary damages, the Plaintiff has been using the land since the time of sale. There is no evidence that the plaintiff attempted to undertake any development on the land and was interrupted by any of the Defendants. At paragraph 8 of the plaint, it is pleaded thus; **“That all this time the Plaintiff had taken possession of the excised premises and is even conducting a flourishing business”**. I do not see why the defendants can be ordered to pay damages in such circumstance. This claim fails and is hereby dismissed.
16. Costs follow the event. In spite of being served with summons to enter appearance, the defendants failed to execute the transfer documents causing the Plaintiff to incur legal costs. For that reason, this court awards the Plaintiff costs of this suit.

**Judgment dated and delivered at Mombasa this 17<sup>th</sup> February 2016**

**A. OMOLLO**

**JUDGE**