



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Oddianga & another v Mwamunga & another (Environment & Land Case
116 of 2016) [2023] KEELC 30 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 30 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 116 OF 2016
SM KIBUNJA, J
JANUARY 18, 2023**

BETWEEN

STEPHEN ODDIANGA 1ST PLAINTIFF

TSAVO ACADEMY COMPANY LIMITED 2ND PLAINTIFF

AND

ELIUD MWAMUNGA 1ST DEFENDANT

VOI DEVELOPMENT COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. Stephen Oddianga commenced the suit against Hon. Eliud Mwamunga through the plaint dated the May 20, 2016 seeking for orders compelling the defendant to release to him title deed, completion documents for plot numbers 83 and 84 and costs. The defendant opposed the claim through the statement of defence dated September 8, 2016 averring that the sale agreement was between him and Tsavo Academy, owned by one Lucas Obiero and not the plaintiff, who has no right to claim the parcels. That pursuant to the leave granted on the December 7, 2017, an amended plaint dated the December 14, 2017 among others introducing Tsavo Academy Company Limited and Voi Development Company Limited as the 2nd plaintiff and 2nd defendant respectively in the suit was filed. The prayers in the amended plaint remained the same as in the initial plaint, but this time jointly and severally.
2. Ms Omollo Onyango & Company Advocates entered appearance for the 2nd defendant through the memorandum dated the February 22, 2018. The said firm of advocates then filed the chamber summons dated the February 24, 2021 on the March 2, 2021 seeking to cease acting for the defendants. The proceedings of May 5, 2021 shows that the application was served upon counsel for the plaintiffs. On that same date, the claim against the 1st defendant was marked as abated for he had passed on two years earlier.



3. The plaintiffs filed a further amended plaint dated the June 23, 2021, against defendants seeking for the following prayers against the 2nd defendant;
 - a. An order compelling the defendant to release the deed plans, transfer and all other completion documents including the title deeds of plot LR No 15030/77 and 15030/78 Voi, to the 1st plaintiff for registration.
 - b. A declaration to issue that plots No LR 15030/77 and 15030/78 belongs to the 1st plaintiff.
 - c. An order to issue compelling defendant to cause the title deeds for plot Numbers LR No 15030/77 and LR No 15030/78 Voi to be transferred to the 1st plaintiff and if the defendant fails the Land Registrar Mombasa to sign all the completion documents and issue a title to the 1st plaintiff.
 - d. In the alternative, an order to issue compelling the 2nd defendant to hand over the title for plot Numbers LR 15030/77 and LR 15030/78 and all other completion documents to the 1st plaintiff.
 - e. Costs and interests of this suit at court rates.
 - f. Any other relief that this honourable court may deem fit and just to grant.

The plaintiffs aver that the 2nd defendant had through its managing director, the 1st defendant, entered into a handwritten sale agreement with the 1st plaintiff, selling to him two land parcels numbers 15030/77 and 15030/78 at Voi for Kshs 300,000. That the 1st plaintiff paid a deposit of Kshs 180,000 and the balance of Kshs 120,000 was to be paid on signing a sale agreement and transfer. The plaintiffs took possession of the plots and have since done developments thereon worth Kshs 85 million. That upon request a further Kshs 50,000 was paid to the 1st defendant, and the balance of Kshs 70,000 was to be paid on delivery of completion documents and transfer. The 1st plaintiff also paid survey fees of Kshs 16,000 which was receipted by the surveyor. That though the 2nd defendant issued receipts for the payments made through the 1st defendant, neither the formal sale agreement was executed nor the completion and transfer documents delivered as agreed. This suit was then filed.

4. The record further shows that the chamber summons application dated the February 24, 2021 that was filed on the March 2, 2021 by counsel to cease acting for the defendants was not prosecuted and was subsequently dismissed on the June 28, 2022 and hearing date of the main suit fixed.
5. During the hearing, Stephen Oddiaga, the 1st Plaintiff, testified as PW1. He adopted the contents of his statement dated the June 23, 2021 as part of his evidence in chief and testified that he was a director to the 2nd plaintiff. That the plaintiffs had entered into a sale agreement for purchase of two plots at Kshs 300,000 in 2005 from the defendants, and paid Kshs 180,000 as deposit. The balance of Kshs 120,000 was agreed to paid after transfer and issuance of titles. An informal agreement was written at the back of the deposit cheque and signed by both the 1st plaintiff, his father in law called Lucas and the 1st defendant. Pw1 told the court that he later had a formal sale agreement prepared as agreed and sent it to the 1st defendant but despite several reminders, the defendants never executed it. That in 2006, the 1st defendant asked him to visit Kiguro Surveyors and pay the survey fees for the two plots so that their deed plans could be released to him. He paid Kshs 16,000 to the said surveyor and the amount was receipted, but the deed plans were not released to him as agreed. Then about 2008/2009, he paid the 1st defendant Kshs 50,000 following his request received through Lucas, even though the defendants were



yet to transfer the plots despite frequent enquiries. He disclosed that the 1st defendant had through his advocate written to him on the 8th September 2016 informing him that the titles for the 2nd plaintiff were ready, but when he asked that the titles be released, to him as 2nd plaintiff had ceased operations after Lucas passed on in 2009, the defendants did not do so. That after filing this suit, the defendants filed documents including a letter of offer dated the July 4, 2005 that was signed by the 1st defendant as executive director to the 2nd defendant, confirming that the 2nd defendant had allocated the 2nd plaintiff plots numbers 77 and 78. That the plots and developments thereon have been valued at more than 100 million. PW1 prayed for the 2nd defendant to be ordered to issue him with titles for plots 77 and 78, costs and interests. He also sought for directions on how to pay the outstanding purchase price of Kshs 70,000 to the 2nd defendant. Responding to questions during cross examination, PW1 told the court the two payment cheques were issued in the name of 1st defendant but the receipts were from the 2nd defendant. That the writings at the back of cheque was to the effect that he will prepare agreement and send it to the 1st defendant. He agreed that the writings did not indicate or mention who was selling or buying the land.

6. That the 2nd defendant did not attend court during the hearing and its case was marked closed without any evidence being tendered.
7. The learned counsel for the plaintiff then filed their written submissions dated the November 22, 2022, which the court has considered.
8. The following are the issues for the determinations by the court;
 - a. Whether there was a valid land sale agreement between the 1st plaintiff and the 2nd defendant that is enforceable.
 - b. If the answer to (a) above is in the affirmative, whether the 2nd defendant is in breach of the said agreement.
 - c. Whether the 1st plaintiff has proved his claim against the 2nd defendant to the standard required by the law.
 - d. Who pays the costs of the suit.
9. The court has carefully considered the pleadings filed, evidence tendered by 1st plaintiff, learned counsel's submissions, superior courts decisions cited, and come to the following determinations;
 - a. This 1st plaintiff's claim is dependent on the court making a finding that he had a valid sale agreement over the suit parcels with the 2nd defendant. One of the main requirements in determining whether an agreement for disposition of land is valid, and therefore enforceable, is that it must be in writing. Section 3(3) of the [Law of Contract Act](#) chapter 23 of Laws of Kenya that provides that;

“ No suit brought for the disposition of an interest in land unless-

 - a. the contract upon which the suit is founded-
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:



Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap.526), nor shall anything in it affect the creation or operation of a resulting, implied or constructive trust.”

On this issue of whether or not there exists an enforceable sale agreement between the 1st plaintiff and 2nd defendant, paragraph 6 and 8 of the further amended plaint are relevant, where the plaintiffs averred as follows;

- (6) The plaintiffs state that the late Hon. Eliud Mwamunga had on behalf of the defendant entered into an initial hand written agreement with the 1st plaintiff for sale of two parcels of land at Voi whose purchase price was Kshs 300,000/- for both at Ksh.60,000/- per acre.
- (8) The plaintiffs further state that a formal agreement was to be prepared and signed by the defendants but this was never done and when the 1st plaintiff prepared an agreement and forwarded it to the Hon. Eliud Mwamunga he never corrected nor sign it. Such that no formal agreement was ever signed for reason that the defendants regened (sic).”

When the 1st plaintiff testified in court, he disclosed the initial sale agreement to be the one he wrote at the back of the deposit cheque on the 27th April 2005 and which he produced as exhibit. It reads as follows;

“Cheque issued in part payment of purchase price of portion of plot LR 9665 CRNO15030/83, 84 amounting to 5 acres situated at Voi town. A sale agreement to be prepared later. Balance of Ksh.100,000/- to be paid on transfer. Purchase to be at liberty to start development.”

PW1 confirmed during cross examination that what he called the sale agreement does not specify who was the vendor and the purchaser. To the right edge of the above writings is what PW1 said was a signature by E.T.Mwamunga (vendor), himself (purchaser) and Joseph Obiero as witness.

- b. That though no evidence was called by the defendants, PW1 in his testimony referred to the letter of offer filed by 1st defendant, dated the 4th July 2005, and signed by the 1st defendant as executive director of the 2nd defendant. The letter is addressed to “Ms Tsavo Academy (Mr. Lucas Obiero) Proprietor” and among others states as follows;

“Voi Development Co. Ltd

Box. 183

Voi C/O Tel 043-30705

Date; 4/07/2005

To. M/S TSAVO ACADEMY.

(MR. LUCAS OBIERO) PROPRIETOR.

“RE: AGRICULTURAL HOLDINGS/PLOTS, SOUTH OF VOI RIVER LR NO 9665/R VOI – ALLOTMENT LETTER.



We refer to your enquiry about plots available for sale.

We are pleased to advise you that you been allotted plot/plots No 15030/77 & 15030/78 measuring approximately 5 acres. The price per Acre is Kshs 60,000/-

The allotment is subject to Land Control Board Consent. You are required now to pay a minimum of 50% of the total purchase price to be given possession of the plot and the balance is payable upon transfer. All payments must be made in bankers Cheque drawn in favour of M/S VOI DEVELOPMENT CO. LTD.

Or cash in cash of commission agent is involved.

This offer is valid for 45 days from the date of this letter.

All payments will be acknowledged by Official Company receipts.

Yours Faithfully,

For VOI DEVELOPMENT CO. LTD

[signed]

CHAIRMAN/EXECUTIVE DIRECTOR

+ Your payment of Kshs 180,000/- was acknowledged vide our receipts No NM 093 dated 4th July 2005.”

The copy of the receipt No NM 093 dated the 4th July 2005 that PW1 produced as exhibit, indicates it is a deposit of ksh.180,000/- for 5 Acres, being LR Numbers 15030/77 and 15030/78 and was issued to M/S Tsavo Academy by Voi Development Co. Ltd. This is the receipt referred to as a note at the foot of the letter of offer. The letter of offer and receipt both dated 4th July 2005 do not appear to have any relationship with the writings at the back of the cheque dated 27th April 2005 that has been referred to in (a) above, and which PW1 called the initial or informal sale agreement between him and the 2nd defendant. Had they have been related, then the letter of offer would have preceded the issuance of the deposit cheque. The letter of offer would also have been addressed to the 1st plaintiff [PW1] and the receipt would have been issued to him and not the 2nd plaintiff.

- c. That while the writings at the back of the cheque leaf dated the 27th April 2005 would probably have passed as a sale of land agreement between the 1st plaintiff and the 1st defendant over a portion of LR 9665, CR 15030/83 and 84, it does not in any way amount to a sale agreement between the 1st plaintiff and the 2nd defendant over parcel 15030/77 and 78. The cheque and the writings thereon shows it was made on the 27th April 2005, vendor was E.T.Mwamunga, the purchaser Stephen Oddiga, and balance after payment of deposit of Kshs 180,000/- was Kshs 100,000/-. The total purchase price though not specifically mentioned was therefore Kshs 280,000/-. That as the plaintiffs' pleadings in the further amended plaint leaves no doubt that the claim thereon is by the 1st plaintiff, and the reliefs sought were against the 2nd defendant, Voi Development Company Limited, and noting that he has failed to tender any evidence to show the existence of any sale of land contract over LR Numbers 15030/77 and 78, his suit has no basis.



- d. The court has further noted that the order of 5th May 2021 marking the plaintiffs' claim against the 1st defendant, Hon. Eliud Mwamunga, as abated, following his death more than two years' prior, has not been disputed or challenged by any of the parties herein. Interestingly however, the plaintiffs retained the Hon. Eliud Mwamunga as the 1st defendant in their further amended plaint dated the 23rd June 2021, which was filed after more than six (6) weeks after their case against him was marked abated. The further amended plaint should have had only one defendant, Voi Development Company Limited, after the abatement order of 5th May 2021.
- e. That the further amended plaint has at paragraphs 2 and 4 described the 2nd plaintiff and 2nd defendant respectively as limited liability companies. Companies are legal entities for purposes of suing and being sued and acts following directors' resolutions through the authorized officers/agents. The pleadings have not disclosed what position the 1st plaintiff holds in the 2nd plaintiff if any, and whether he was authorized by the 2nd plaintiff to testify on its behalf. The court has noted that when PW1 testified, he informed the court that though his father in law Lucas, who was operating the 2nd plaintiff had died in 2009, the 2nd plaintiff was still a legal entity. Though the 1st plaintiff has at page 9 of the submissions indicated that he was not opposed to the court directing the suit parcels being transferred to the 2nd plaintiff, it is trite that parties are bound by their pleadings. There is no averments or pleadings in the further amended plaint to suggest that the plaintiffs had sought for any reliefs in favour of the 2nd plaintiff, and submissions are not a method recognized by the law commencing or initialing a claim.
- f. That though the defendant did not call any witnesses, the plaintiffs still had the responsibility to establish or prove his claim under sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya, to the standard required of on a balance of probabilities, to succeed. As the plaintiffs have failed to establish the existence of a valid and enforceable contract between the 1st plaintiff and 2nd defendant, that the later could be said to have breached for specific orders to issue in favour of the former, the suit herein fails.
- g. That pursuant to section 27 of the Civil Procedure Act, chapter 21 of Laws of Kenya, the 1st plaintiff will meet the defendants' costs, as the pleadings and proceedings show he was the main proponent/driver of the suit.

10. That flowing from the above conclusions, the court finds and orders as follows;
 - a. That the plaintiffs suit against the 2nd defendant be and is hereby dismissed.
 - b. The 1st plaintiff to pay the Defendants' costs.
 - c. For ease of reference and record purposes it is hereby noted that the plaintiffs' claim against the 1st defendant was marked abated on the May 5, 2021.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 18th DAY OF JANUARY 2023.

S.M. KIBUNJA, J.

ELC MOMBASA.



In the presence of;

Plaintiffs: Absent

Defendants: Absent

Counsel : M/s Mwanzia for Plaintiffs

Wilson .. Court Assistant.

S.M. KIBUNJA, J.

ELC MOMBASA.

