



**REPUBLIC OF KENYA**

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

**ELC CASE NO.109 OF 2018**

**KENNETH NJIRIRI MWANIKI ..... PLAINTIFF**

**VERSUS**

**DAVID CHIRA KAGIRI.....1<sup>ST</sup> DEFENDANT**

**JOYCE WANGARI KARIUKI.....2<sup>ND</sup> DEFENDANT**

**QUOTAN INVESTMENT LIMITED.....3<sup>RD</sup> DEFENDANT**

**EPHANTUS NGANGA NJIHIA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a *Plaint* dated *13<sup>th</sup> March 2017*, the Plaintiff herein brought a claim against the Defendants and sought for the following orders;

*a) An order restraining the defendants jointly their agents and servants from encroaching or otherwise interfering with Plaintiff's quiet user of 3 acres out of land parcel number 289 Munyu Settlement Scheme.*

*b) An order directing that the 1<sup>st</sup> Defendant to transfer 2 acres out of land parcel number 289 Munyu Settlement Scheme and or in the alternative a refund of Kshs.1,000,000/= paid to the 1<sup>st</sup> Defendant with interest as per the agreement and in default the executive officer of this court to effect the said transfer on behalf of the 1<sup>st</sup> Defendant.*

*c) Refund of the sum of Kshs.679,000/= to the Plaintiff by the 1<sup>st</sup> Defendant as per paragraph 7 of the Plaintiff *Plaint* above.*

*d) An order directing the 2<sup>nd</sup> Defendant to transfer 1 acre out of land parcel number 289 Munyu Settlement Scheme and or in the alternative a refund of Kshs.250,000/= plus interest as per paragraph 8 of the sale agreement paid to the 2<sup>nd</sup> Defendant and in default the Executive Officer of this Court to effect the said transfer on behalf of the 2<sup>nd</sup> Defendant.*

*e) General Damages for breach of contract.*

*f) Costs of the suit.*

*g) Interest on (b), (c) (d) (e) above.*

In his statement of claim the Plaintiff alleged that by two agreements in writing dated *28<sup>th</sup> March 2013* and *3<sup>rd</sup> December 2013*, It was agreed that *3 acres* out of the 1<sup>st</sup> Defendants interest in the land parcel number *289/ Munyu Settlement Scheme*, would be sold to the Plaintiff at a consideration of *Kshs.1,500,000/=* which the Plaintiff paid to the 1<sup>st</sup> Defendant in full settlement of the purchase price. Further by an agreement dated *5<sup>th</sup> December 2011*, the Plaintiff purchased from the 2<sup>nd</sup> Defendant out of her interest in the

said parcel number 1 acre of Land for a consideration of **Kshs.250,000/=** which was paid in full. That the Plaintiff took possession of the said parcel of land immediately after the execution of the agreement and has been in possession until **29<sup>th</sup> October 2016**, when the 3<sup>rd</sup> and 4<sup>th</sup> Defendants came and occupied the entire parcel of land and started excavating building materials.

The Plaintiff further alleged that the suit property was sold to him subject to **Thika Law Courts Succession Cause No.101 of 2010** but free from any encumbrance and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants being beneficiaries of the Estate of the deceased in the **Succession Cause** and they were to transfer the suit land upon completion of the said **Succession Cause**.

The Plaintiff further alleged that in breach of the agreement, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have refused to transfer the land and have prevailed upon the 3<sup>rd</sup> and 4<sup>th</sup> defendants to encroach on the suit Land. In **October 2016** the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by use of force entered the suit land and chased away the Plaintiff. The Plaintiff averred that he takes issue with the 1<sup>st</sup> Defendant as he has confirmed that his interest in the said parcel was **2 acres** as per the **Confirmed Grant** which fact was not disclosed to him and thus he demand a refund of **Kshs.679,000/=** being the excess money paid.

This suit is contested and the Defendants filed their defense dated **17<sup>th</sup> May 2017**, and denied all the allegations made by the Plaintiff. The 1<sup>st</sup> Defendant denied having been paid the entire purchase price and alleged that there remains a balance of **Kshs.95,000/=**. They further averred that the Plaintiff has never occupied the land purchased and denied there being any mode of transfer in the said agreement or any succession case.

The Defendants further denied that they are in breach of the agreement and that the Plaintiff has paid any excess amount. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants further denied evicting the plaintiff from the suit property. They contended that there is a pending suit in Muranga which is unheard and not withdrawn.

The matter commenced for viva voce hearing on the **31<sup>st</sup> of October 2017** and further for defense hearing on the **14<sup>th</sup> December 2017**. The Plaintiff called one witness and the Defendants called also called one witness.

#### **Plaintiff's Case**

**PW1 - Kenneth Njiriri Mwaniki** the Plaintiff herein testified and adopted his witness statement dated **15<sup>th</sup> March 2017**. He testified that he knows the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as they come from the same village. He testified that the 1<sup>st</sup> defendant sold **3 acres** of land to him while the 2<sup>nd</sup> Defendant sold to him **1 acre** of land. He further testified that he knows the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they have been cutting stones on his land under the authority of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He further testified that the 1<sup>st</sup> Defendant sold his interest in parcel **No.289** to him and that the said land belonged to their late father **Samuel Kagiri**. He testified that the first **Sale Agreement** was on the **28<sup>th</sup> March 2013** and the 2<sup>nd</sup> on **3<sup>rd</sup> December 2013**. He also testified that the 2<sup>nd</sup> Defendant sold to him, the 1 acre at **Kshs.250,000/=** and the 1<sup>st</sup> Defendant was selling one acre at **Kshs.500,000/=**, and he paid this money to the 1<sup>st</sup> Defendant in several instalments. He tabulated how he paid the stated amount and that by **2<sup>nd</sup> July 2013**, he had cleared payment of the said purchase price, though the same was to be cleared by **30<sup>th</sup> August 2013** as per the **Sale Agreement**.

The Plaintiff further testified that on **3<sup>rd</sup> December 2013** he executed another **Sale Agreement** for purchase of **2 acres** from the 1<sup>st</sup> Defendant at a consideration of **Kshs.1,000,000/=**. He later realized that he had paid an excess of **Kshs.160,000/=** in the first agreement by way of **Cheque** and **Mpesa**. He testified that at the execution of the 2<sup>nd</sup> Agreement, he paid **Kshs.120,000/=** and the balance was to be paid in monthly instalments.

It was his evidence that by **18<sup>th</sup> April 2016**, he had cleared the balance for the 2<sup>nd</sup> agreement. He further testified that he came to know that the 1<sup>st</sup> Defendant was the administrator of the estate of his father who owned the suit land and according to the Grant the 1<sup>st</sup> Defendant was entitled to **2 acres** and it was wrong for him to sell **3 (three) acres** to the Plaintiff.

It was his further testimony that he took possession of the purchased land and he was utilizing the said land but he is not utilizing it right now as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants later sold it to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who are in possession. He produced his list of documents as **Exhibits 1-9** and further produced his supplementary list as **Exhibit 10-13**. He urged the court to allow his claim and asked for refund of the purchase price plus the costs of the suit and interest.

On cross examination he stated that he is no longer interested with the land and he only wants the refund of the purchase of price. He also stated that he has the two Agreements and the one dated **3<sup>rd</sup> December 2013** states that the amount ought to be paid by **30<sup>th</sup>**

May 2014 and that there was balance of the purchase price by 30<sup>th</sup> May 2014 of **Kshs.331,000/=** and that he paid the balance after 30<sup>th</sup> May 2014. He further testified that he paid money in excess of **Kshs.150,000/=** and that it was an oversight on his part. It was his further testimony that he did not attend any **Land Control Board** and that no **Consent by Land Control Board** was given for the transaction.

### Defence Case

**DWI - David Chira Kagiri** the 1<sup>st</sup> Defendant herein testified that he knows the Plaintiff and that the Plaintiff had first entered into a **Sale Agreement** with his sister, the 2<sup>nd</sup> Defendant wherein the Plaintiff was to purchase one acre of the suit property at **Kshs.250,000/=** and the money was paid when it was supposed to be paid. It was his further evidence that there was another agreement dated 3<sup>rd</sup> December 2013 in which he was to sell 2 acres for **Kshs.1,000,000/=** and the sale agreement contained the mode of payment. At the execution of the agreement the Plaintiff paid **Kshs.120,000/=** and later paid **Kshs.140,000/=** every month and the said purchase price was to be cleared by **May 2014**. He further testified that the Plaintiff did not pay by the agreed date and the same was paid after 3 years and therefore the Plaintiff was in breach of the entered Agreement. He testified that clause 9 of the agreement provided that in breach a party was to pay 20% of the purchase price.

He also stated that he was demanding 20% from the Plaintiff .He testified that the purchase price so far paid is **Kshs.1,000,000/=**, **Kshs.100,000/=** and **Kshs.180,000/=**. He testified that he was ready to refund the purchase price minus the 20% penalty and the same should be paid or be deducted from the purchase price before he refunds to the Plaintiff. It was his further evidence that he has seen the Instalment plan produced by the Plaintiff and the last payment was on 4<sup>th</sup> April 2016 and the same was not done as per the agreement and the consent of the Land Control Board was not sought. He further testified that he is unable to pay the amount of money that the Plaintiff claims.

On cross examination he stated that he was ready to refund the purchase price but not the penalty. He testified that he got the suit land through succession and that he had told the Plaintiff that he would get 3 acres but he later obtained 2 acres through succession. It was his further testimony that the surveyor was brought in by the Plaintiff and that they did not go to the **Land Control Board** and the Plaintiff brought the suit before they could go. He confirmed that he was paid through **Mpesa** and **Cheques**. It was his further evidence that the Plaintiff did not take possession of the suit land but from the agreement he was to take immediate possession.

He further gave evidence that he did not know when the 3<sup>rd</sup> and 4<sup>th</sup> Defendants got in the suit land and confirmed that he has received **Kshs.1,500,000/=** from the Plaintiff and his sister has received **Kshs.250,000/=** and he further testified that he was not in breach of the agreement. He stated that he has filed a counter claim for **Kshs.300,000/=**.

Parties filed their written submissions wherein the Law firm of **R. Muthike Makworo & Co. Advocates** for the Plaintiff filed their submissions on 10<sup>th</sup> April 2018, and urged the court to allow their prayers. It was submitted that the Plaintiff did not breach the sale agreement as alleged by the first defendant and infact it is the 1<sup>st</sup> Defendant who breached the contract having leased the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He relied on the case of **Alg Hussein Establishment... Vs...Eston Collage (1991)IAller PP267** where the court held

***“The principle that in the absence of clear and express provisions in a contract to the contrary it was not to be presumed that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach....”***

He further relied on **Section 3 (3)** of the **Law of Contract** that provides;

***“all contracts must be in writing”***

And he further submitted that all parties must be bound by what is written in the contract.

The Plaintiff further submitted that the 1<sup>st</sup> Defendant ought to pay him **Kshs.1,679,000/= plus interest of 20%** while the 2<sup>nd</sup> Defendant should be liable to pay **Kshs.250,000/= plus the 20% interest**. The Court was urged to grant the Plaintiff's prayers.

The first defendant through the **Law Firm of Karuga Wandai & Co. Advocates** filed their written submissions on 25<sup>th</sup> of April

2018, and also on behalf of the other defendants. They submitted that the last instalment was to be *paid on or before 30<sup>th</sup> May 2014*. However the documents produced by the Plaintiff showed that the last payment was made after the *deadline through 2014 and 2015* showing that the Plaintiff was in breach.

They relied on Section 100 of the Evidence Act that provides;

*“When a language used in a document is plain and it applies accurately to the existing facts, evidence may not be given to show that it was not meant to apply to such facts”*

They further submitted that since the Plaintiff refused to an out of court settlement, he did not deserve any cost and urged the court to dismiss the Plaintiffs claim.

The Court has now carefully considered the available evidence and the exhibits thereto. The court too has considered the written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the Plaintiff herein entered into *Sale Agreements* with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are brother and sister and who were beneficiaries of the estate of their late father one *Kagiri Karugia* who owned the suit property *LR No.289/Munyu Settlement Scheme*. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are among the many beneficiaries of the late *Kagiri Karugia* (deceased) and they agreed to sell their interests to the Plaintiff herein. There is also no doubt that on the 5<sup>th</sup> December 2011, the Plaintiff entered into a sale agreement with the 2<sup>nd</sup> Defendant wherein the said *Joyce Wangari Kariuki*, was to sell to the Plaintiff one (1) acre which was her interest in plot *No.289/Munyu Settlement Scheme* and the purchase price was *Ksh.250,000/=*. The plaintiff alleged that he paid the full purchase price and the Defendants did not dispute that fact.

There is also no doubt that on *3<sup>rd</sup> December 2013*, the Plaintiff and the 1<sup>st</sup> Defendant entered into a *Sale Agreement* wherein the 1<sup>st</sup> Defendant was to sell two (2) *acres* from plot *No.289/Munyu Settlement Scheme* which parcel of land was owned by *Kagiri Karugia* (deceased) and the said sale was subject to *Succession Cause No.101 of 2010*, filed at *Thika Law Courts*. The purchase price was *Kshs.1,000,000/=* and the Plaintiff alleged that he paid the full purchase price to the 1<sup>st</sup> Defendant.

Further on *28<sup>th</sup> March 2013*, the Plaintiff and the 1<sup>st</sup> Defendant had also entered into another *Sale Agreement* for purchase of *one (1) acre* from the same plot *No.289/Munyu Settlement Scheme* for *Kshs.500,000/=*. This one acre was from the 1<sup>st</sup> Defendant interest on the suit property after finalization of the *Succession Cause No. 101 of 2010*, which was pending at *Thika Law Courts*. The Plaintiff also alleged that he paid all the purchase price.

From Clause No.6 of the said sale agreement the Plaintiff was to take physical possession of the said *one (1) acre* on execution of the said agreement. Further all the other two Agreements contained a clause that the purchaser who is the Plaintiff was to take physical possession of the purchased parcels of land.

Since parties are bound by their Agreements, the Court would not doubt that upon execution of the *Sale Agreement* dated *5<sup>th</sup> December 2011*, the Plaintiff took possession of *one (1) acre* which belonged to *Joyce Wangari Kariuki*, the 2<sup>nd</sup> Defendant herein. Again on execution of the sale agreement dated *28<sup>th</sup> March 2013*, the plaintiff who is the purchaser took possession of *one (1) acre* which allegedly belonged to the 1<sup>st</sup> Defendant and further on *3<sup>rd</sup> December 2013*, upon execution of the said sale agreement the Plaintiff took possession of *two (2) acres* which allegedly belonged the 1<sup>st</sup> Defendant. It is evident that the Plaintiff was to take immediate physical possession of the intended purchased portions of land upon execution of the sale agreement. See the case of *National Bank of Kenya Limited... Vs...Pipeplastic Samkolit (K) Ltd & Another, Court of Appeal No.95 of 1999 (2002) 2 EA 503*, where the Court held that:-

*“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded or proved.”*

From the above holding of the court and the facts of the case herein, the parties to the said *Sale Agreements* were bound by the terms of the contract. Therefore the court do believe that the Plaintiff herein took possession of the specified parcels of land.

Further there is no doubt that the parties herein entered into valid sale agreements as all the ingredients of a valid contract were visible. See the case of *Nelson Kivuvani... Vs....Yuda Komora & Another, Nairobi High Court Case No.956 of 1991*, where the

Court held that:-

*‘The agreement for sale of land containing the names of the parties, the number of the property the purchase price and the conditions attached thereto, the expectations express and implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.’*

The *Sale Agreements* herein were written and they therefore fit the description of a valid contract for sale of land as provided by Section 3 (3) of the *Law of Contract Cap 23 Laws of Kenya* as have been held in various Courts decisions. See the case of *Machakos District Co-operative Union Ltd....Vs...Philip Nzuki Kiilu, Court Appeal No.112 of 1997*, where the Court held that:-

*‘No suit can be brought upon a contract for disposition of interest of land unless;*

*(c) the contract upon which is founded*

*(1) Is in writing,*

*(2) Is signed by the parties thereto,*

*(3) Incorporate the terms which the parties have expressly agreed in the document; and*

*(4) The signature of each party signing has been attested by a witness who was present when the contract was signed by such party’*

The *Sale Agreements* herein met the above conditions and therefore they are valid sale agreements.

However it is also trite law that for a valid contract for sale of land to be enforceable, the *Consent* of the *Land Control Board* must be obtained. See the provisions of Section 6 of the *Land Control Board Act*, which provides:-

*‘Transactions affecting agricultural land;*

*1) Each of the following transactions that is to say—*

*(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the *Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961)* for the time being apply;*

*(c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the *Land Control Board* for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.’*

It is not in doubt that the *Consent* of the *Land Control Board* herein was not obtained therefore though the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into valid sale agreements for sale of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respective interest on *LR.NO.289/Munyu Settlement Scheme* the said *Sale Agreements* are not enforceable and are voidable for want of *Land Control Board consent*.

As provided by Section 7 of the said Act, the only recourse that the plaintiff has is refund of the purchase price. The said Section 7 provides as follows;

*‘If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under*

*this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”*

The Plaintiff in his Plaint sought for various prayers against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants among them was an order for specific performance that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be directed to transfer the purchased portion of land to the Plaintiff. However in his evidence in court and submissions he abandoned the prayers for specific performance and sought for refund of the purchase price plus interest as provided in the said *Sale Agreements*.

However the 1<sup>st</sup> and 2<sup>nd</sup> Defendants testified that they were ready to refund the already paid purchased price less 20% interest stated in the said sale agreements.

However as the court stated earlier, the sale agreements are unenforceable and voidable for want of *Land Control Board Consent*. However the Plaintiff is entitled to refund of the purchase price already paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The Plaintiff has alleged that he paid *Kshs.1,679,000/=* to the 1<sup>st</sup> Defendant and *Kshs.250,000/=* to the 2<sup>nd</sup> Defendant. However the 1<sup>st</sup> Defendant has alleged that he received *Kshs.1,750,000/=* from the Plaintiff and that should be the money that the plaintiff should be refunded less 20% as provided by the executed *Sale Agreements*.

This Court has found that the three *Sale Agreements* are not enforceable for want of *Land Control Board Consent*. The Court has considered the available evidence and it is indeed not in doubt that the Plaintiff paid *Kshs.1,670,000/=* to the 1<sup>st</sup> Defendant and *Kshs.250,000/=* to the 2<sup>nd</sup> Defendant. That is the amount that should be refunded to the Plaintiff herein.

Further it is evident that the Plaintiff had taken possession of the said property and later the 1<sup>st</sup> and 2<sup>nd</sup> Defendants leased and/or sold the said portions of land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Therefore the Plaintiff's expectation was thwarted and he is entitled to general damages for loss of expectation.

Having now carefully considered the available evidence, the *Court finds that the Plaintiff has proved his case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the required standard of balance of probability on the aspect of refund of the purchase price and recovery of general damages.*

For the above reasons the *Court enters Judgment for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants* on the following terms;

*i. The 1<sup>st</sup> Defendant to refund Kshs.1,670,000/= to the Plaintiff together with interests at the Court rate from the date of filing of this suit until payment in full.*

*ii. 2<sup>nd</sup> Defendant to refund Kshs.250,000/= to the Plaintiff plus interest at the Court rate from the date of filing of this suit to payment in full.*

*iii. The Plaintiff is also entitled to general damages of Kshs.200,000/= payable by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only.*

*iv. The Plaintiff is also entitled to costs of this suit to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein are not liable at all.*

It is so ordered

*Dated, Signed and Delivered at Thika this 10<sup>th</sup> day of December, 2018*

**L. GACHERU**

**JUDGE**

**10/12/2018**

In the presence of

Mr. Muriuki holding brief for Mrs. Makworo for Plaintiff

No Appearance for 1<sup>st</sup> Defendant

No Appearance for 2<sup>nd</sup> Defendant

No Appearance for 3<sup>rd</sup> Defendant

No Appearance for 4<sup>th</sup> Defendant

Lucy – Court Assistant

**L. GACHERU**

**JUDGE**

**10/12/2018**



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