



**Nduruhu & another v Okesa & another (Environment & Land Case 235 of 2011) [2023] KEELC 18887 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18887 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 235 OF 2011**

**LN MBUGUA, J  
JULY 13, 2023**

**BETWEEN**

**DAVID KIMANI NDURUHU ..... 1<sup>ST</sup> PLAINTIFF**

**ANTHONY JUMA WAGOKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOACKIM MWANDALE OJIAMBO OKESA ..... 1<sup>ST</sup> DEFENDANT**

**TIM OKWARO T/A TIM OKWARO & CO ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated May 20, 2011 and amended on August 26, 2011, the plaintiffs claim that they jointly entered into a sale agreement with the 1<sup>st</sup> defendant for the sale of the parcel of land known as Nairobi / Block 110/442 located in Thome Estate. That they paid the 1<sup>st</sup> defendant the entire consideration of ksh.4, 700,000/= and the sale agreement was drawn and witnessed by the 2<sup>nd</sup> defendant.
2. The plaintiffs aver that it later came to their knowledge long after payment of the last instalment that the 1<sup>st</sup> defendant had on unknown dates prior to the said transaction purported to sell the suit land to one Lucy Wanjiku Muchiri which fact was concealed by the defendants. They add that the said Lucy filed HCCC No. 368 of 2010 against them and the 1<sup>st</sup> defendant herein seeking an injunction restraining them from interfering with the suit land.
3. The plaintiffs further aver that the 1<sup>st</sup> defendant informed the plaintiffs that the title deed to the suit land was in the custody of the Deposit Protection fund which was not due to a charge but problems which the 1<sup>st</sup> defendant would sort out once payment was made, yet the 1<sup>st</sup> defendant never redeemed the said title.
4. They aver that the transaction herein has turned out to be a fraudulent conspiracy to deprive them of their hard earned money and went ahead to particularize allegations of fraud against the defendants.



- They point out that the 2<sup>nd</sup> defendant breached his fiduciary duty as an advocate by knowingly attesting to 2 different sale agreements in respect of the same parcel of land. They also aver that the 1<sup>st</sup> defendant acted fraudulently by failing to obtain consent to transfer the suit land and failing to complete the sale.
5. They pray for judgement to be entered against the defendants jointly and severally for;
    - a. An order for specific performance of the contract dated November 28, 2008.
    - b. In the alternative to (a) above, an order for the refund of ksh.4,700,000/= by the defendants to the plaintiff.
    - c. Costs of this suit.
    - d. Interest of (b) and (c) above at court rates until payment in full.
  6. The 1<sup>st</sup> defendant opposed the plaintiff's claim vide his statement of defence dated 23.10.2019. He states that even though the plaintiffs showed interest to purchase the land known as Nairobi/Block 110/442 from him, the contract between them became a nullity due to breach on the plaintiffs' part. He also argues that after the plaintiff's breach, he was free to seek other prospective purchasers like Lucy Wanjiku Muchiri. He adds that due to the plaintiff's breach, it was impossible for him to salvage the title to the suit land from the Deposit Protection Fund.
  7. The 2<sup>nd</sup> defendant filed a statement of defence dated August 15, 2011 denying the allegations made against it and contends that the plaintiffs were aware that it was also a victim of fraud by the 1<sup>st</sup> defendant who had presented to him that he had two properties namely LR No. Nairobi /Block 110/442 and L.R. Nairobi Block 110/443.

#### **The plaintiffs' case.**

8. David Kimani Nduru, the 1<sup>st</sup> plaintiff testified as PW1. He adopted his witness statement filed on May 25, 2011 as his evidence. He produced documents running from page 8-20 of their trial bundle as P. Exhibit 1-10. He states that together with his co-plaintiff, they got interested to purchase the parcel of land known as Nairobi/Block 110/442, Thome Estate from the 1<sup>st</sup> defendant whom the parcel was registered to. That the 1<sup>st</sup> defendant represented himself to possess the legal documents of the said parcel and took them to the offices of the 2<sup>nd</sup> defendant who drafted their sale agreement on November 28, 2008.
9. They agreed on ksh.4.7 million as the purchase price and they paid ksh.2 million in cash upon signing the sale agreement. The rest of the money was paid in instalments being ksh.1.7 million vide cheque number 318750 and ksh.200, 000/= vide cheque number 62204 while ksh.100, 000/= was paid in cash. The 1<sup>st</sup> defendant acknowledged receipt of the same.
10. Subsequently, they fenced the suit property but to their dismay, they found a cell phone number affixed on the fence. Upon calling the number, they talked to one Lucy Wanjiku Muchiri who in turn confirmed that she had purchased the subject land at a cost of ksh.3.7 million at the offices of the 2<sup>nd</sup> defendant herein who failed to disclose to them as an advocate that there was a subsequent sale of the suit land to the said Lucy Wanjiku Muchiri.
11. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> defendant called any witnesses in evidence.
12. After closing their case, the plaintiffs filed written submissions dated June 19, 2023. They submit that the 1<sup>st</sup> defendant should refund them the sum of ksh.4.7 million as he does not deny having received the full purchase price. They rely on the case of [\*Beatrice Mathio Nzioka v Charles Akelo Ong'wen\* \[2014\]](#)



- eKLR to submit that even if the 1<sup>st</sup> defendant repudiated the contract of sale, he was obliged to ensure parties had been restored to their former position.
13. They also point out that while the sale transaction had a completion date of 31.11.2009, they had paid the full purchase price by July 28, 2009. They rely on section 7 of the Land Control Act as well as the case of William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR to submit that consideration paid in the course of controlled transaction that becomes void under the Act is recoverable as a debt.
  14. I have considered all the evidence adduced herein as well as the submissions of the plaintiff. The issue for determination is whether the claim of the plaintiff as set out in the plaint is merited.
  15. I have considered the sale agreement made between the plaintiffs and the 1<sup>st</sup> defendant for the purchase of parcel Nairobi /Block 110/442 dated November 28, 2008. It was drawn and witnessed by the 2<sup>nd</sup> defendant. Unknown to the plaintiffs, the 1<sup>st</sup> defendant had also entered into another sale agreement with one Lucy Wanjiku Muchiri. The said transaction was also apparently drafted and witnessed by the 2<sup>nd</sup> defendant.
  16. The plaintiffs have established that they paid the entire purchase price agreed between them, ksh.4.7 million. To this end, the 1<sup>st</sup> defendant signed an acknowledgement on July 28, 2009 acknowledging that he had received the final instalment of the total consideration. The plaintiffs were never handed over vacant possession. The evidence of the plaintiffs has not been rebutted by the defendants who failed to avail any evidence despite filing the statement of defences.
  17. In the Court of Appeal case of Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment); it was held that;

“...The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.”
  18. The plaintiffs demonstrated that they paid the entire purchase price but the 1<sup>st</sup> defendant refused to complete the transaction. The 1<sup>st</sup> defendant failed to prove that the plaintiff was in breach of the sale contract.
  19. Considering that the plaintiffs never took possession and the suit property had apparently been sold to one Lucy Wanjiku Muchiri as evidenced in pleadings filed in ELC No. 638 of 2010, the order of a refund of ksh.4.7 million is reasonable.
  20. I find that the conduct of the 2<sup>nd</sup> defendant of drawing and witnessing 2 separate sale agreements over the same parcel of land is conduct unbecoming of an Advocate. Nevertheless, the amount of sh. 4.7 million was actually received by the 1<sup>st</sup> defendant. Further, no particular orders have been sought against the 2<sup>nd</sup> defendant in the final prayers in the plaint.
  21. In the final analysis, I allow plaintiffs claim in the alternative prayer such that the 1<sup>st</sup> defendant is hereby directed to refund the sum of Sh.4.7 million to the plaintiff. The 1<sup>st</sup> defendant is hereby condemned to pay costs of the suit plus interests thereof at court’s rate from the date of filing the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.**



**LUCY N. MBUGUA**  
**JUDGE**

