



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 124 OF 2017**

**VERONICA NDITI NZOMO.....1<sup>ST</sup> PLAINTIFF**

**GEORGE NZOMO MUINDI NTHENGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SIMON MUEMA NZAU .....1<sup>ST</sup> DEFENDANT**

**STEPHEN PATRICK MUTUA MUEMA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In their Plaint dated 2<sup>nd</sup> December, 2013, the Plaintiffs averred that on 13<sup>th</sup> July, 1999, the 1<sup>st</sup> Defendant and his wife jointly sold to them a parcel of land measuring 0.48 acres of land known as Muputi/Kaani/1610 that the 1<sup>st</sup> Defendant transferred the said land to the Plaintiffs and that after obtaining the Title Deed, they settled on the land.
2. According to the Plaintiffs, they purchased a further portion of land which was part of parcel number Muputi/Kaani/1128 from the 1<sup>st</sup> Defendant vide an Agreement dated 8<sup>th</sup> January, 2005. After paying the full purchase price, the Plaintiffs averred that they took possession of the said portion.
3. The Plaintiffs have averred that on 8<sup>th</sup> July, 2006, the 1<sup>st</sup> Defendant, together with the 2<sup>nd</sup> Defendant, entered into another Sale Agreement with the Plaintiffs and agreed to sale to them another portion of parcel number Muputi/Kaani/1128 measuring 0.283 Hectares for Kshs. 190,000, which, upon paying the purchase price, they took possession of the same.
4. According to the Plaintiffs, it was a fundamental term of the Agreements that the Defendants would seek and obtain the requisite consent of the Land Control Board to sub-divide and transfer the suit land to them; and that the Defendants have declined to honour the said obligation.
5. On conducting an official search, the Plaintiffs averred that they discovered that the 1<sup>st</sup> Defendant had sub-divided parcel of land known as Muvuti/Kaani/1128 into parcels number 1788 and 1789; that the portions of land that they purchased are within parcel number 1789 and that the 1<sup>st</sup> Defendant's son has since registered a caution on parcel number 1789 claiming "purchasers interest".
6. In addition to purchasing the suit properties, the Plaintiffs averred that they loaned to the 1<sup>st</sup> Defendant Kshs. 60,000 to enable him survey and sub-divide the suit land and that they should be refunded the said money.
7. The Plaintiffs are seeking for an order of specific performance against the 1<sup>st</sup> Defendant compelling him to honour the Sale Agreements in respect of the land he sold to them; an order compelling the 1<sup>st</sup> Defendant to appear before the Land Control Board and obtain the consent of the Board to sub-divide and transfer the said land to the Plaintiffs and for a permanent injunction to issue.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence in which they averred that they entered into an Agreement with the Plaintiffs for the sale of two portions of land to be excised from parcel number Muputi/Kaani/1128 for Kshs. 350,000 and 265,000 respectively and that the Plaintiffs never paid the entire purchase price as alleged.
9. The Defendants averred that it is the 1<sup>st</sup> Plaintiff who frustrated efforts by the 1<sup>st</sup> Defendant in obtaining the consent of the Land Control Board by refusing to surrender the signed Application for the consent of the Board; that the size of the land that the Plaintiffs bought was not 0.567 Ha and 0.283 Ha and that although the portions that the Plaintiffs bought are within parcel number 1979, the measurements stipulated

in the Plaintiff are exaggerated.

10. In their Statement of Defence, the Defendants acknowledged that they owe the Plaintiffs Kshs. 30,000 and are ready and willing to refund the same; that the Plaintiffs owes them Kshs. 75,000 being the balance of the purchase price for the second portion of land and that the Plaintiffs are in possession of a third portion of land within parcel number 1789 which the 1<sup>st</sup> Defendant and his family have never sold to them.

11. In the Counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are claiming for an order compelling the Plaintiffs to release to the 1<sup>st</sup> Defendant the Title Deed of Muputi/Kaani/1584 upon being paid Kshs. 30,000 and to deliver vacant possession of the third portion of land which the Plaintiffs are in possession.

12. The Defendants are also seeking for an order that the government Valuer do value the land that the Plaintiffs bought so that they can transfer it to the Plaintiffs.

#### **The Plaintiffs' case:**

13. The 1<sup>st</sup> Plaintiff, PW1, informed the court that she is married to the 2<sup>nd</sup> Plaintiff. It was the evidence of PW1 that on 13<sup>th</sup> July, 1999, the 1<sup>st</sup> Defendant with his wife, Yula Muema Semeon, sold to them land measuring 0.48 acres being parcel of land known as 1610 and that the said land was transferred to them. That is the land that they have developed by putting up a permanent house.

14. According to PW1, the 1<sup>st</sup> Defendant sold to them a neighbouring piece of land, which was a portion of parcel of land known as Muvuti/Kaani/1128 for Kshs. 350,000, which amount they paid in full. It was the evidence of PW1 that she first paid to the 1<sup>st</sup> Defendant Kshs. 170,000 by way of a cheque of Kshs. 150,000 and Kshs. 20,000 in cash. The balance was then paid as follows: - Kshs. 85,000 to the 1<sup>st</sup> Defendant by way of a cheque and Kshs. 78,000 to his son by way of a cheque.

15. PW1 informed the court that after paying up the purchase price, they planted 23 sisal plants to mark the agreed boundary; that they later on fenced the said portion with a chain link fence; that the activity of demarcating the boundary was reduced into writing and that the land they bought measures approximately 0.567 Ha.

16. It was the evidence of PW1, that on 8<sup>th</sup> July, 2006, they entered into another Sale Agreement with the Plaintiffs in which he agreed to sell to them another portion of parcel number Muputi/Kaani/1128 measuring approximately 0.283 Ha for Kshs. 190,000. Again, after paying the 1<sup>st</sup> Defendant fully, a boundary was demarcated showing the purchased portion land.

17. PW1 stated that on 13<sup>th</sup> October, 2007, the 1<sup>st</sup> Defendant obtained from them Kshs. 30,000 on the understanding that he will use the money to finance the cost of securing a consent to sub-divide and transfer the suit land to them; that on 21<sup>st</sup> May, 2011, the 1<sup>st</sup> Defendant borrowed from them a further sum of Kshs. 30,000 and that as security for the said money, the 1<sup>st</sup> Defendant gave them the original Title Deed for a parcel of land known as Muvuti/Kaani/1584 as a lien.

18. PW1 informed the court that the 1<sup>st</sup> Defendant, without any lawful cause, has refused to appear before the Board to seek and obtain the requisite consent to sub-divide and transfer to them land measuring 0.567 Ha and 0.283 Ha respectively.

19. It was the evidence of PW1 that the 1<sup>st</sup> Defendant sub-divided parcel of land number Muvuti/Kaani/1128 to create parcels number 1788 and 1789; that the portions of land that they purchased lie within parcel number 1789; that the 1<sup>st</sup> Defendant's son registered a caution against the said land and the said son signed the Agreements that the Plaintiffs entered with the 1<sup>st</sup> Defendant and that the caution should be vacated.

20. Having been put in possession of the suit land, and having developed the same extensively, the Plaintiffs have prayed for an order of specific performance to issue and for a refund of Kshs. 60,000 that they loaned the 1<sup>st</sup> Defendant.

21. In cross-examination, PW1 stated that the Agreements that they entered into with the 1<sup>st</sup> Defendant do not show the acreage of land that they bought; that a sketch was drawn and that the sketch shows the acreage that they purchased from the 1<sup>st</sup> Defendant.

22. The Treasurer of the Atwii clan in which the Defendants belong to, PW2, informed the court that the 1<sup>st</sup> Defendant's family agreed to have the suit property sold to the Plaintiffs; that the clan marked the land that the 1<sup>st</sup> Defendant's family was selling to the Plaintiffs and that the said land was sold for Kshs. 190,000.

23. It was the evidence of PW2 that in the meeting of 15<sup>th</sup> July, 2006 of which he attended, the 1<sup>st</sup> Plaintiff paid the entire purchase price of Kshs. 190,000 and that thereafter, they planted sisals to mark the boundary. PW2 informed the court that the Plaintiffs took possession of the said parcel of land and fenced it.

24. The Assistant Chief of the area, PW3, informed the court that he was present when the Defendants signed the Agreement for the sale of the suit land to the Plaintiffs; that he participated in the demarcation of the boundaries of the land that the Plaintiffs bought and that the Plaintiffs fenced the entire land with a chain linked fence and have since developed it.

#### **The Defence case:**

25. The 1<sup>st</sup> Defendant informed the court that he sold to the Plaintiffs parcel of land number 1610 and had the same transferred to them. That later on, he sold to them a portion of parcel number 1128 which has since been sub-divided to create portions numbers 1788 and 1789.

26. According to DW1, he sold to the Plaintiffs two portions of land for Kshs. 350,000 and Kshs. 265,000 respectively. It was the evidence of DW1 that the Plaintiffs extended the boundaries of the first portion of land that he sold to them. In respect of the second portion, DW1 stated that instead of being paid Kshs. 265,000, he was only paid Kshs. 190,000.

27. It was the evidence of DW1 that he borrowed Kshs. 30,000 from the Plaintiffs and gave them a Title Deed for parcel number 1584 to hold it as a lien and that the other amount of Kshs. 30,000 that he was paid was used to survey parcel of land number 1610 which has since been transferred to the Plaintiffs.

#### **Submissions:**

28. The Plaintiffs' advocate submitted that the 1<sup>st</sup> Defendant, together with his family, sold to the Plaintiffs a portion of land vide an Agreement dated 8<sup>th</sup> January, 2005 for Kshs. 350,000; that the said amount was duly paid by the Plaintiffs; that the land was sold with the consent of the 1<sup>st</sup> Defendant's family and that the boundaries were clearly demarcated.

29. Counsel submitted that the second portion of the suit land was bought by the Plaintiffs vide an Agreement dated 8<sup>th</sup> July, 2006 for Kshs. 190,000, which amount was fully paid.

30. All these transactions, it was submitted, were reduced in writing and conformed with Section 3(3) of the Law of Contract Act. Counsel relied on numerous authorities which I have considered.

31. The Defendants' advocate submitted that the 1<sup>st</sup> Defendant does not dispute that he sold the suit land to the Plaintiffs; that the only issue in contention is the size of the land that he sold and that no document was produced to show that the Plaintiffs bought land measuring 0.567 Ha and 0.283 Ha respectively.

#### **Analysis and findings:**

32. It is not in dispute that vide an Agreement dated 13<sup>th</sup> July, 1999, the Plaintiffs purchased from the 1<sup>st</sup> Defendant a parcel of land known as Muputi/Kaani/1610. The 1<sup>st</sup> Defendant transferred the title to the Plaintiffs. The Plaintiffs have since built a home on the land.

33. In any effort to have more space, the Plaintiffs entered into two other Agreements with the 1<sup>st</sup> Defendant to purchase portions of land neighbouring parcel number 1610. The portions of land that the Plaintiffs intended to buy formed part of land parcel number Muputi/Kaani/1128.

34. The first Agreement that the Plaintiffs entered into with the 1<sup>st</sup> Defendant to purchase a portion of parcel number Muputi/Kaani/1128 is the one dated 8<sup>th</sup> January, 2005. In the said Agreement, the land that the Plaintiffs were buying is described as follows:

***“a piece of his land located below his house at a price of Kshs. 350,000.”***

35. The Agreement provided that the *“sisal marking the boundary will be planted on 9<sup>th</sup> January, 2005.”* The Agreement further provided that Kshs. 170,000 had been paid to the 1<sup>st</sup> Defendant. The outstanding balance of Kshs. 180,000 was to be paid to the 1<sup>st</sup> Defendant's wife and her children. The Plaintiffs informed the court that indeed, the said amount of Kshs. 180,000 was paid to the 1<sup>st</sup> Defendant's wife and children as agreed.

36. The Plaintiffs produced in evidence the Agreement dated 10<sup>th</sup> October, 2005 in which the 1<sup>st</sup> Defendant's children and wife acknowledged receipt of the said amount of Kshs. 180,000. The said Agreement was witnessed by the clan elders and the Assistant Chief. Indeed, DW1 acknowledged that the entire purchase price for the said portion of land was paid by the Plaintiffs.

37. The Plaintiffs also produced the Agreement dated 15<sup>th</sup> October, 2005 in respect of the 23 sisals that the elders planted demarcating the first portion of the suit land that the Plaintiffs bought. The said Agreement was duly signed by the elders, the Chief and the 1<sup>st</sup> Defendant.

38. Having signed the Agreement of 15<sup>th</sup> October, 2005, the 1<sup>st</sup> Defendant cannot now allege that the acreage of the land he sold to the Plaintiffs cannot be ascertained. Indeed, the acreage of the said land can be ascertained if the Surveyor or the Land Registrar is involved for the purpose of parceling out the said land.

39. The 1<sup>st</sup> Defendant has admitted that he sold a second portion of parcel number 1128 to the Plaintiffs vide an Agreement dated 8<sup>th</sup> July, 2006. In the said Agreement, the 1<sup>st</sup> Defendant, his wife, Mary Yula and their children Mutua Muema and Michael Mutinda agreed to sale to the Plaintiffs *“a piece of land extending from the portion we sold to the depression and bordering the portion belonging to Mr. Musau.”*

40. The Agreement of 8<sup>th</sup> July, 2006 shows the purchase price of the said portion of land to be Kshs. 190,000 which was paid on the date of signing the Agreement. The 1<sup>st</sup> Defendant informed the court that indeed they were paid the said money. However, according to him the actual purchase price should have been Kshs. 265,000 and not Kshs. 190,000.

41. It is not clear to this court why the 1<sup>st</sup> Defendant is of the view that the purchase price for the second portion of land was Kshs. 265,000 and not Kshs. 190,000. The Agreement clearly described the portion of land that the Plaintiffs were buying and the purchase price thereof. The issue of the purchase price being Kshs. 265,000 does not therefore arise.

42. The 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff entered into a further Agreement dated 15<sup>th</sup> July, 2006, in which the 1<sup>st</sup> Defendant acknowledged receipt of Kshs. 190,000 for the second portion of the suit land. In the said Agreement, the 1<sup>st</sup> Defendant acknowledged that he had witnessed the planting of sisal demarcating the purchased land.

43. The Agreement of 15<sup>th</sup> July, 2006 further provided that the 1<sup>st</sup> Defendant was to procure the consent of the Land Control Board to have parcel number 1128 sub-divided and transfer the land the Plaintiffs had bought to them.

44. Although the 1<sup>st</sup> Defendant caused parcel number 1128 to be sub-divided into two portions, to wit, portion number 1788 and 1789, he did not curve out the two portions that the Plaintiffs bought. Indeed, to date, the 1<sup>st</sup> Defendant has not obtained the consent of the Board to sub-divide parcel number 1789, in which the two portions of the suit land fall, and transfer the same to the Plaintiffs, contrary to the Agreements signed.

45. The evidence before me shows that the portions of the land that the Plaintiffs bought were clearly demarcated on the ground. The boundaries of the said land were demarcated by the 1<sup>st</sup> Defendant's clan, in the company of the Assistant Chief and the 1<sup>st</sup> Defendant. After the said demarcation, the Plaintiffs had the land fenced with a chain linked fence and developed the same.

46. That being the case, the fenced portions of land should be curved out of parcel of land number 1789, which is a sub-division of parcel number 1128, and be transferred to the Plaintiffs forthwith. That is the most appropriate equitable relief that this court can issue. Indeed, having paid up the entire purchase price, and the suit land having been clearly demarcated on the ground, with the concurrence of the 1<sup>st</sup> Defendant, the Plaintiffs are entitled to the relief of specific performance.

47. The circumstances under which an order of specific performance can issue is stated in Halsbury's Laws of England, Volume 44(1), 4<sup>th</sup> Edition at paragraph 840 as follows:

***“Where it is sought to enforce specific performance of a contract, the court must be satisfied (1) that there is a concluded contract which would be binding in law if all proper formalities had been observed and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of contract, and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract.”***

48. Although Section 6 of the Land Control Act regulates transactions in agricultural land, including prohibiting the sub-division and transfer of such land without the consent of the relevant Land Control Board, the Court of Appeal has held that the Act is inapplicable in a situation where the seller has received the full purchase price and has been put in possession of the land. This position is a departure from the previous decisions of the court that the failure to obtain the Land Control Board consent renders any Agreement void and unenforceable for all intents and purposes (*See Kehia vs. Nganga [2004] 1EA 75, Onyango & Another vs. Luwayi (1980) KLR 513-516*).

49. Indeed, in a situation where a contract is void for want of the consent of the Land Control Board, courts have held that an order of specific performance cannot issue. (*See Omuse Onyapu vs. Lawrence Opuko Kaala, Civil Appeal No. 21 of 1992 and Kariuki vs. Kariuki, (1983) KLR 225 at page 227*).

50. However, like the present case, where a party has received the full purchase price and allowed the seller to take possession of the suit land, and developed the same, courts have been invited to impose the doctrine of constructive trust to remedy the default of a scrupulous seller in failing to obtain the consent of the Board to transfer the suit land. The concept of remedial constructive trust grants the courts the discretion to deliver justice on the facts of the case where the rules are strict (*See George P. Costigan, 'The classification of Trusts as Express, Resulting and Constructive' (1914) 27 Harvard Law Journal 437*).

51. The imposition of the doctrine of constructive trust to defeat the provisions of Section 6 of the Land Control Act is borrowed from the long cherished proposition that if one party to an Agreement stands by and lets the other party incur expense or prejudice his position on the faith of the Agreement being valid, he will not be allowed to turn around and assert that the Agreement is unenforceable.

52. Consequently, and on the basis of the decisions of the Court of Appeal in the cases of ***Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kegori (2014) eKLR*** and ***Willy Kimutai Kililit vs. Michael Kibet (2018) eKLR***, the suit property, which comprises the two portions of Parcel No. 1789 that the Plaintiffs bought vide the Agreements of 8<sup>th</sup> January, 2005 and 8<sup>th</sup> July, 2006, which are clearly demarcated on the ground, should be transferred to the Plaintiffs. The Plaintiffs having paid the full purchase price, taken possession and developed the suit land, the title to the land should pass to the Plaintiffs notwithstanding the absence of the consent of the Land Control Board.

53. The Plaintiffs also proved by way of an Agreement dated 21<sup>st</sup> May, 2001 that they advanced to the 1<sup>st</sup> Defendant Kshs. 30,000, of which they have a Title Deed for parcel of land known as Muvuti/Kaani/1584 held as security. This amount was admitted by the 1<sup>st</sup> Defendant. The same is therefore payable by the 1<sup>st</sup> Defendant.

54. For the reasons I have given above, I dismiss the Defendants' Counter-claim dated 16<sup>th</sup> March, 2014 and allow the Plaintiffs' Plaint dated 2<sup>nd</sup> December, 2013 as follows:

*a. An order of specific performance be and is hereby issued against the first Defendant compelling him to honour the terms of the Agreements entered between himself and the Plaintiffs and in particular transfer the portions of land sold to the Plaintiffs out of Title Number Muvuti/Kaani/1789 (previously Muvuti/Kaani/1288) measuring approximately 0.567 Hectares and 0.283 Hectares or thereabouts with an aggregate total of approximately 0.850 Hectares or thereabouts.*

*b. Further and or in the alternative and without prejudice to the foregoing, an order be and is hereby issued authorizing the Deputy Registrar of this court to execute such documents as may be necessary to transfer the above two portions measuring approximately 0.567 Hectares and 0.283 Hectares or thereabouts with an aggregate total of approximately 0.850 Hectares or thereabouts which portions are clearly marked on the ground and are part of the title number Muvuti/Kaani/1789 (previously Mutuvi/Kaani/1288) to the Plaintiffs.*

*c. An order be and is hereby issued directing the second Defendant to withdraw the caution registered on 26<sup>th</sup> March, 2012 in his favour against title number Muvuti/Kaani/1789 so as to pave way for the sub-division and transfer of the Plaintiffs' parcels of land measuring 0.567 Hectares and 0.283 Hectares respectively or thereabouts with an aggregate total of approximately 0.850 Hectares or thereabouts.*

*d. Alternatively, and without prejudice to the generality of the foregoing, an order be and is hereby issued directing the District Land Registrar, Machakos to remove the caution registered in favour of the second Defendant on 26<sup>th</sup> March, 2012 against title number Muvuti/Kaani/1789 so as to pave way for the sub-division and transfer of the Plaintiffs' parcels of land measuring 0.567 Hectares and 0.283 Hectares respectively or thereabouts with an aggregate total of approximately 0.850 Hectares or thereabouts.*

*e. A permanent injunction be and is hereby issued restraining the Defendants, their servants and or agents jointly and or severally from trespassing, transferring, mortgaging, leasing, alienating, disposing or in any manner from interfering with the Plaintiffs' peaceful use, occupation and or enjoyment of the said land.*

*f. The 1<sup>st</sup> Defendant to refund to the Plaintiffs the sum of Kshs. 30,000 whereafter the Plaintiffs shall handover to the 1<sup>st</sup> Defendant the original Title Deed for parcel of land known as Muvuti/Kaani/1584.*

*g. The 1<sup>st</sup> Defendant to pay to the Plaintiffs the costs of the suit.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE