



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 48 OF 2017**

**GABRIEL MUTIE KIVUNGI .....PLAINTIFF**

**VERSUS**

**MARGARET KAMENE MANGENGE.....DEFENDANT**

**JUDGMENT**

1. By his plaint dated 03<sup>rd</sup> November, 2016 and filed in court on 21<sup>st</sup> March, 2017 the Plaintiff prays for judgment against the Defendant for:-

**(a) Damages for lost opportunity and use of the suit property for the last two (2) years.**

**(b) Mandatory order compelling the Defendant to hand over vacant possession of the suit property to the Plaintiff and/or an eviction order against the Defendant from the suit property.**

**(c) An order of Specific Performance directing the Defendant to complete the transaction herein.**

**(d) Cost of the suit and interest on (a) above.**

**(e) Any other and/or further relief that this court may deem fit and just to grant in the circumstances.**

2. In paragraph 6 of the plaint, the Plaintiff has averred that by an agreement dated 21<sup>st</sup> March, 2014 the Defendant agreed to sell the whole of LR P/No.170 and 169 situated at Ngulu – Kikumbulyu Location, Kibwezi Division in Makueni to the Plaintiff who was to take possession of the land on Wednesday 12 March, 2014. That the Defendant did not comply with the terms of the sale. This is despite the fact that the Plaintiff had paid Kshs.540,000/= on the date of entering into the agreement with the defendant as is averred in Paragraph 4 of the plaint.

3. The Plaintiff's claim is denied by the Defendant who in paragraph 9 of her defence has averred that the Plaintiff is in breach of contract. Particulars of the breach of contract have been stated in the defence.

4. On the 10<sup>th</sup> May, 2018 the Plaintiff filed a reply to the defence dated 20<sup>th</sup> September, 2017. In the said reply to the defence, the Plaintiff reiterated the content of his plaint.

5. During the hearing, the Plaintiff adopted his statement dated 31<sup>st</sup> March, 2017 and filed in court on 03<sup>rd</sup> November, 2017 as his evidence. He went on to produce the three (3) documents in his list of documents as P.Exhibit Nos.1, 2 and 3 respectively.

6. Briefly stated, the Plaintiff's evidence was that as per the terms of the sale agreement between himself and the Defendant, he paid her Kshs.540,000/= on the 12<sup>th</sup> March, 2014 and later paid Kshs.100,000/= in December, 2014 leaving a balance of Kshs.160,000/= which the Defendant has avoided and or refused to take. That the agreement concerned land parcels number LR P/No.170 and 169 situated at Ngulu-Kikumbulyu Location, Kibwezi Division in Makueni County.

7. His evidence in cross-Examination was that the purchase price was Kshs.800,000/=. He said that he did not pay the full amount of the purchase price and that he paid Kshs.540,000/= as at the date of the agreement. He said that he was not supposed to pay the full amount on the said date. He said that the reason why he was unable to pay the full amount was because he could not get hold of the Defendant. That when he saw her in December, 2014, he paid her Kshs.100,000/= but admitted that he had nothing to show the payment of the latter sum. He denied having ever breached the sale agreement. He said that he was not aware that the land which is the subject of this suit has been sold to someone else.

8. In his evidence in re-examination, the Plaintiff said that he paid Kshs.640,000/= leaving a balance of Kshs.160,000/=.

9. The Defendant in her evidence adopted her statement filed in court on 12<sup>th</sup> September, 2017 as her evidence in chief. Her evidence was that the purchase price of her portion of land known as LR P/No.170 situate in Ngulu-Kikumbulyu Location in Kibwezi division in Makueni County was Kshs.800,000/= as per the sale agreement dated 12<sup>th</sup> March, 2014. That the terms were very clear that she would only transfer the suit land to the Plaintiff upon payment of the full sum of Kshs.800,000/= by him. She said that the Plaintiff paid her Kshs.540,000/= on 12<sup>th</sup> March, 2014 when the two signed the agreement which was witnessed by Robert Kiio Mutiso (DW1) as well as her son Benson Mwendwa and her daughter Francisca Mueni. She said that the balance of Kshs.260,000/= was to be paid within 42 days from 12<sup>th</sup> March, 2014 upon which she would give the Plaintiff vacant possession. That the Plaintiff failed to do so as a result of which she sold the land to someone else.

10. The Defendant's evidence in cross-examination was that the balance remaining is Kshs.260,000/=. She said that their transaction did not reach the Land Control Board and neither did she receive a further Kshs.100,000/= from the Plaintiff.

11. The Defendant called Robert Kiio Mutiso (DW1) as her witness. Mutiso (DW1) adopted his statement dated 22<sup>nd</sup> June, 2018 and filed in Court on 27<sup>th</sup> June, 2018 as his evidence. His evidence was that he witnessed the sale agreement between the Plaintiff and the Defendant on 12<sup>th</sup> March, 2014. That the purchase price was Kshs.800,000/= of which the Plaintiff paid Kshs.540,000/= leaving a balance of Kshs.260,000/= which was to be paid to the seller within 42 days from the date of the agreement. That after 42 days, the Defendant told him that the Plaintiff had not paid the balance as agreed.

12. Mutiso's (DW1) evidence in cross-examination was the land which was subject of the sale agreement were 170 and 169. He said that he was not aware that the Plaintiff later paid Kshs.100,000/= to the Defendant.

13. In their submissions, the Counsel for the Plaintiff submitted that even though the Defendant has indicated that she sold the suit land to someone else, no sale agreement or transfer documents were produced in evidence. The Counsel cited **Section 26(b) of the Land Registration Act** which provides that:-

*"1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-*

*(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme."*

The Counsel further submitted that even though the Defendant has stated that no consent was obtained from the Land Control Board, Article 10(2)(b) of the Constitution brings in equity as a principle of justice which courts are required to protect and promote. The Counsel relies on the case of **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR** where the Court of Appeal held that:-

*"As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.*

*[28] For the foregoing reasons, the appeal is dismissed with costs to the respondent."*

It was also the Counsel's submissions that the Defendant intends to willfully and unjustly enrich herself by selling the suit land to a different person and she should be compelled to hand over vacant possession of the same to the Plaintiff. The Counsel relied on the case of **Paul Mwova Mulee v John Mutunga Muthuku [2018] eKLR** where this court held as follows:-

*"Being satisfied that the Plaintiff has on a balance of probabilities shown this court that he has a cause of action against the Defendant, I hereby proceed to enter judgment and against the Defendant as herein under:-*

*a) An order that the Defendant be compelled to transfer and hand over vacant possession of the parcel of land known as Makueni/Kako/258 to the Plaintiff herein.*

*b) Kshs.100,000/= being general damages.*

*c) Interest.*

*d) For good measure, plus costs in case the Defendant fails to transfer 7 acres out of land parcel number Makueni/Kako/258, the Deputy Registrar of this court is unauthorized to transfer the necessary transfer forms.*

*It is so ordered."*

14. On the other hand, the Counsel for the Defendant submitted that the sale agreement cannot be upheld for lack of consent from the Land Control Board as is provided for by Section 6 of the Land Control Act. The Counsel went on to submit that the effect of lack of such consent in land transactions has been adjudicated upon by several courts and is now a settled matter. The Counsel cited the case of **Simiyu vs. Watambamala [1985] KLR 852**. The Counsel further cited the case of **Kariuki vs. Kariuki [1983] KLR 225 at page 227**, where **Law J.**

A. held as follows:-

*“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.”*

15. Regarding the prayer for specific performance, the Defendant’s Counsel submitted that the same is rarely granted unless the Plaintiff is able to show that damages would not be adequate remedy. The Counsel cited the case of **Joseph Ngunjiri Gachimu vs. Josephine Wairimu Kagunda & 2 others [2015] eKLR** where Mary M. Gitumbi J expounded on specific performance of follows:-

*“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”*

The Counsel went on to submit that the Plaintiff did not produce certificate of official search to show that the suit land is still registered in the name of the Defendant. The Counsel was of the view that the Plaintiff could only get an order of refund of Kshs.540,000/= which prayer has not been pleaded.

From the evidence on record, it is not in doubt that the parties herein did enter into a sale agreement in respect of land parcel number LR P/No.170 situated in Ngulu-Kikumbulyu location, Kibwezi Division in Makueni County on 12<sup>th</sup> March, 2014. The agreement does not mention plot number LR P/No.169. The purchase price was Kshs.800,000/= of which that Plaintiff paid Kshs.540,000/= leaving a balance of Kshs.260,000/= which was to be paid within 42 days from the date of the agreement as can be seen from the Plaintiff’s documents number P.exhibit No.2 and 3 respectively. There is no evidence that the balance was ever paid within 42 days. Kshs.100,000/= which the Plaintiff says that he paid in December, 2014 was clearly outside the window period of 42 days. Of importance to note is that the latter payment is unacknowledged as opposed to the payment that was made on the 12<sup>th</sup> March, 2014. Possession was to take effect upon the Plaintiff paying the balance of Kshs.260,000/= within 42 days from 12<sup>th</sup> March, 2014. Whereas I agree with the Plaintiff’s Counsel that the Defendant should not hide under Section 6(1) of the Land Control Act Chapter 302 of the Laws of Kenya to deny the Plaintiff what he has rightfully bought from her, it is clear that the Plaintiff did not take possession of the suit land upon payment of Kshs.540,000/= towards the purchase. **Section 6(1)(C) of the Land Control Act, Chapter 302 of the Laws of Kenya** provides as follows;

*“Each of the following transactions that is to say –*

*(a) –*

*(b)*

*(c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in private company or co-operative society which for 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”*

16. Secondly, the Plaintiff did not avail any documents to show that the suit property is registered in the name of the Defendant. As such, this court cannot give effect to the equitable principles and more particularly constructive trust. It was upon the Plaintiff to prove that even though the Defendant claimed to have sold the suit land to another person, the land was still registered in her name.

17. Thirdly, it is clear that the Plaintiff did not fulfill the terms of the agreement dated 12<sup>th</sup> March, 2014. Whereas he said that he paid Kshs.100,000/= to the Defendant in December, 2014, that was clearly outside the terms of the agreement. I do not believe the Plaintiff when he says that after entering into the agreement, the Defendant evaded him as there is no evidence of him having ever gone to look for her in her homestead or even sought the assistance of witnesses to the said agreement. I fully associate myself with the sentiments of Mary G. Gitumbi J in **Joseph Ngunjiri Gachimu vs. Josephine Wairimu Kagunda & 2 others [2015] eKLR** that the equitable remedy of specific performance is not available to the Plaintiff herein owing to the fact that the Plaintiff is in breach of the sale agreement dated 12<sup>th</sup> March, 2014.

18. The above being the case, I am in agreement with the Defendant’s Counsel that the only remedy available to the Plaintiff is for refund of Kshs.540,000/= which he paid to the Defendant. However the same is not one of the prayers in the plaint and parties are bound by their own pleadings.

19. The upshot of the foregoing is that I am not satisfied that the Plaintiff has a cause of action against the Defendant. In the circumstances, I hereby proceed to dismiss his suit with costs to the Defendant.

Signed, dated and delivered at **Makueni** this 24<sup>th</sup> day of **April, 2019**.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Mwangangi holding brief for Mr. Loki for the Defendant

No appearance for the Plaintiff

Plaintiff is present

**MBOGO C.G, JUDGE,**

**24/04/2019.**