



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.17 OF 2011**

**PENINAH NDEGE ..... PLAINTIFF**

**VERSUS**

**JOSEPH NYANGU BOGONKO ..... 1<sup>ST</sup> DEFENDANT**

**PENWEL N. NYAMWEYA ..... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. In a Plaint dated 25.1.2011 the Plaintiff lodged claim for General damages, declaration that sale transaction is null and void, surrender of title deed to the Plaintiff and special damages. The Defendant filed defence and counterclaim dated 30.8.2012 and prayed for specific performance for ½ acre he had bought of suit land, costs and any other remedy court may deem fit and applicable in the circumstances.

2. The Case was heard on 22.9.2015. The Plaintiff in short testified to the effect that she was to sell ½ acre of Kajiado/Kitengela/16917 at a price of KShs.600,000/- to the 1<sup>st</sup> Defendant. The terms were agreed and an agreement was to be entered into before an advocate. She testified that no agreement was signed but she acknowledged receipt of KShs.300,000/- as deposit of purchase price. The balance of KShs.300,000/- was to be paid after transfer of the ½ acre of suit land. She gave title deed to the 2<sup>nd</sup> Defendant to make a copy who she thought was an advocate. She testified that she never saw the title deed again. She sued as she never got balance purchase price or original title deed. She seeks the prayers in the Plaint.

3. On cross-examination she conceded being paid KShs.300,000/- but says that she failed to transfer land as she did not have original title deed. She now says that the 1<sup>st</sup> Defendant disappeared with the original title deed which she gave him. She says the agreement is dated 4.9.2010 and money was paid the same date. She says she does not trust the 1<sup>st</sup> Defendant as he never kept the promise as agreed in the sale transaction. She states that she reported to Rongai Police Station to be assisted to get her original title deed. She asserts that she cannot sub divide the land without an agreement. She closed her case at this point; and denies counterclaim.

4. On his part the 1<sup>st</sup> Defendant testified that on 4.9.2010 he and the Plaintiff entered into an agreement for sale of ½ acre of Kajiado/Kitengela/16917 at agreed price of KShs.600,000/-. The parties entered into an agreement signed by both and witnessed and he paid KShs.300,000/- consideration. He was to keep title as security for KShs.300,000/- deposited. There was no advocate in the sale transaction. They agreed the vendor PW.1 was to facilitate sub-division and 1<sup>st</sup> Defendant was to pay the requisite amount

but deduct from the sale price.

5. The 1<sup>st</sup> Defendant later called the Plaintiff to undertake sub-division but just to be summoned by the police alleging that he (1<sup>st</sup> Defendant) stole the title deed. After he narrated the circumstances he got the title deed, no charges were preferred against him. He was even taken to the permanent secretary lands office over the issue of alleged stolen title. The Plaintiff was told to give him his share of land he was buying. The 1<sup>st</sup> Defendant avers that both him and the Plaintiff signed the Agreement and thus claim in the counterclaim for specific performance.

6. On cross-examination he stated that since the Plaintiff had copy of the title deed of suit land, she could have done sub-division as agreed. In her submissions, the Plaintiff impugns the agreement as it was not drawn by an advocate and she was not advised by an advocate on the sale transaction. Further it is impugned on the basis of want of Land Board consent for sub-division and transfer. The Plaintiff submits that in any event the giving of title deed as a security was unprocedural as no undertaking was given in keeping of custody of it as security for money paid.

7. On the other side the Defendant submit that the agreement signed by parties contains the terms agreed on namely; the purchase price, payment and execution, in any case the deposit was agreed on the basis of the terms of the agreement and the balance was payable after sub-division and transfer as agreed. He submits that there was meeting of minds. After going through the parties, testimony and the pleadings and produced documents, I find that the issues raised are:

1. Whether the agreement subject of the instant dispute was valid?
2. Whether specific performance is to be ordered?
3. What are the appropriate orders in the circumstances?
4. What is the order as to costs?

8. The Agreement entered by parties though impugned by the Plaintiff seem to contain the core terms undisputed by the parties namely;

The sale was for ½ acre of Kajiado/Kitengela/16917. The price agreed was KShs.600,000/-. The deposit KShs.300,000/- was to be paid at the time of signing the agreement and it was paid. The balance was to be paid upon transfer of ½ portion bought within 90 days. Consents to sub-divide and transfer were to be procured.

9. The agreement was not blessed with either the consent to sub-divide or even transfer within 6 months of entering into the same. The same was caught up with by the provisions of Section 6 of Cap.302 Laws of Kenya. Thus becoming null and void. The parties did not even comply with the completion date of 90 days. So even without looking at other grounds used to attack the Agreement, same has been nullified by the operation of the law. The same could have been redeemed by possession if the 1<sup>st</sup> Defendant did take it in terms of **civil appeal No.6/11** as consolidated with **NYERI Civil Appeals No.26 and 27 of 2011** and bring into operation the doctrine of Constructive trust.

In **KARIUKI –VS- KARIUKI (1983) KLR 226** and **NJAMUNYU –VS- NYAGA (1983) KLR 286**, the court of appeal held that:

***“The agreement is only binding if consent is given within the prescribed period”.***

In **GITHU –VS- KATIBI 1990 KLR 634**, the Court of Appeal held that:

***“Sale transaction is null and void for want of Land Board consent”.***

In the instant suit there is no consent to sub-divide or transfer to the first defendant. It follows therefore that the agreement entered by party is null and void an unenforceable. Specific performance cannot obtain where the agreement is null and void.

10. It follows that prayer No. **b** of the Plaintiff is granted but No.**a**, **c**, and **d** are rejected. In the same breath prayers **a** and **b** of the counterclaim are also rejected. The issue remains as to what the court should order in the circumstances of the case. This is because the first Defendant is holding the original title in the Plaintiff's names and the Plaintiff is still holding the 1<sup>st</sup> Defendant's KShs.300,000/- since 2010. In **NYERI Court of Appeal No.95/09 M'IKIUGU MMWIRICHIA & ANOTHER –VS- ESTHER NTHIRA & 2 OTHERS (unreported)** the court invoked provisions of overriding objective to order return of consideration where specific performance failed and refund of consideration was not sought in the pleadings to avoid multiplicity of suits.

11. In the instant case, the court relying on same authority and Section 13(7) of ELC Act, makes the following orders:

1. The Plaintiff's case and counterclaim are both dismissed.
2. The Plaintiff to refund KShs.300,000/- plus interest from October, 2010 to date of payment at court rates.
3. The original title deed Kajiado/Kitengela/16917 to be released upon payment of KShs.300,000/- plus interest within 60 days, in default of payment the 1<sup>st</sup> Defendant be at liberty to sell same land to recover the amount.
4. The 2<sup>nd</sup> Defendant to be paid costs by the Plaintiff.

**Dated and Delivered at Machakos, this 20<sup>th</sup> day of February, 2015.**

**CHARLES KARIUKI**

**JUDGE**