



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.110 OF 2014**

**ABRAHAM MUTHEMWA KILONZO ..... PLAINTIFF**

**VERSUS**

**SIMON KIOKO MAKATO ..... 1<sup>ST</sup> DEFENDANT**

**MUTHAMA MAKATO .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed instant suit on 7.10.2014 vide a **Plaint** dated **7.10.2014** seeking specific performance. Contemporaneously he filed **Notice of Motion dated 7.10.2014** seeking orders of prohibition to stop dealings/subdivision of Land Parcel **No. Kithimani 'A' 1192** pending hearing and the determination of the suit.
2. The Defendants through J.T. Nzioki & Co. Advocated filed Defence on 18.12.2014 dated 8.12.2014 together with Notice of Preliminary Objection dated 27.10.2014. On 20.11.2014 the Defendants filed P.O. on 19.11.2014. On 10.12.2014 the Defendant filed grounds of objection dated 8.12.2014. The Applicant had appeared earlier in court on 7.10.2014 under certificate of urgency and the court granted interim orders sought in the motion to preserve the status quo. The Respondents sought leave to file replying affidavit but they never filed same but opted to rely on their preliminary objections filed.
3. The Plaintiff's case is that the Defendants are the administrators of their deceased father estate Mativo Kitivo. Through an agreement dated 6.9.2014 the Applicant bought 1.2 acres at a price of KShs.740,000/- whereof he deposited KShs.660,000/- on signing of the agreement. KShs.80,000 was to be paid during the transfer. When the Applicant asked the defendants to transfer the bought land, the same refused to do it and persist to refuse.
4. He realised that the Defendants were selling the same land to another person and thus lodged the instant suit. The Applicant states that he has been utilizing and developing the bought portion of land. He seeks to preserve the property pending hearing of the suit. The Defendants in their grounds of objections, state that, application is vexatious and an abuse of the court process. They also state that there is no valid sale of the land in question. They further state that there is no prima facie case established with probability of success. They further state that the suit is defective as there were no letters of administration obtained on the estate.

The Defendants' preliminary point of law raises more or less the same grounds save that in addition they state that land adjudication consent was not procured before or after institution of the suit as the area is under adjudication. After going through the material before the court, the court finds the following issues emerging:

1. Whether the suit is defective?
2. Whether order of specific performance is available in the instant suit?
3. What is the appropriate order in the instant suit?
4. What is the order as to cost?

The Respondent have not filed any replying Affidavit to rebut the sworn averment in the supporting affidavit dated 7.10.2014 and the annexed documents. The Respondents have not impugned any of the attached 3 annexures and instead they are relying on the technical hiccups of the suit.

5. What emerges is that the Respondents are still holding KShs.660,000/- paid to them by the Applicants in the sale transaction of the suit land. The unfortunate part of the Plaintiff's claim is that the suit property is in the names of their deceased father. There are no grants to enable the Defendant to be sued to effect transfer of the suit land or even sell the same.

6. They entered into the transactions while aware that they were not administrators of their deceased father's estate. Instead of refunding the purchase price they are mounting legal technicalities to deny the Applicant land and the money paid. In view of the facts that the Defendants have no authority to sell their deceased father's land before they are appointed legal representatives' disables the Applicant's claim for specific performance. However, in the case of **MOSES MARANGU AND ANOTHER –VS- ESTHER NTHIRA & OTHERS** *Nyeri Civil Appeal No.90*. The court held that:

***“Where specific performance claim fails and claimant cannot get land on ground such as for want of consent of Land Control Board, the claimant can still get the refund of the purchase price paid even when the same is not pleaded or prayed in the plaint”.***

7. The Plaintiff can still amend the suit herein and breathe fresh life to the suit and be able to claim the refund of the purchase price to avoid multiplicity of the suits. The court thus finds that the invocation of Article 10(2) (b) of Constitution of Kenya to do justice and equity, Article 159 (2) a, b, d and the overriding objective in Section 1A and 1B of the Civil Procedure Act Cap 21 (2010) and also Section 13 (7) of ELC Act, it is only fair the court allows the Plaintiff who is acting in person to amend pleadings to claim refund of the purchase price.

8. The court makes the following orders:

1. The Applicant to amend plaint to claim refund of purchase price and any other relief within 30 days.
2. The order of prohibition in terms of paragraph 2 of the Notice of Motion dated 7.10.2014 to remain in force till suit is heard and determined.
3. That costs to the Plaintiff/Applicant.
4. The parties to comply within 45 days and fix hearing dates.

**Dated and Delivered at Machakos this 13<sup>th</sup> day of March, 2015.**

**CHARLES KARIUKI**

**JUDGE**