



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 643 OF 2016

(FORMERLY CIVIL SUIT 1170 OF 2006)

FRANCIS MUTHUSI KIMINZA 1ST PLAINTIFF
ESTHER WAITHIEGENI KIAMA 2ND PLAINTIFF
FLORENCE MUTISYA..... 3RD PLAINTIFF
PAMELA OGOLA OPIYO 4TH PLAINTIFF
JOSEPH DIBWORO 5TH PLAINTIFF
CHARLES MUOKI 6TH PLAINTIFF
ANDREW KARIUKI NJOROGE 7TH PLAINTIFF
JASON MWANZIA 8TH PLAINTIFF
APOLLO MWANGI NJUGUNA..... 9TH PLAINTIFF
RAHAB MUTHONI MUGAMBI 10TH PLAINTIFF
FRANCIS MBUTHIA MUKUNA 11TH PLAINTIFF
ESTHER WACEKE MWANGI 12TH PLAINTIFF

VERSUS

AMBOSELI COURT LIMITED DEFENDANT

JUDGMENT

1. This suit was initiated by **eighteen (18)** plaintiffs through a plaint dated 6/11/2006. They subsequently filed an amended plaint dated 15/7/2010. A further amended plaint dated 15/8/2013 was filed in September 2013. The number of plaintiffs in the further amended plaint reduced from 18 to 12. This judgment therefore relates to the above twelve (12) plaintiffs.

2. The plaintiffs sought the following verbatim reliefs against the defendant-

(a) An order of temporary injunction to restrain the defendants, their servants, employees and or agents from alienating, charging, disposing, transferring and/or interfering with LR No. 15400/119 pending the hearing and determination of this suit.

(b) An order of declaration that the defendant's intention of increasing the sale price is illegal null and void.

(c) An order for specific performance directed to the defendant to compel the said defendants to effect transfer to the plaintiffs in respect of the plots sold to them.

(d) Cost of the suit.

(e) Any other or further relief that this honourable court may deem fit and just to grant.

(f) Damages for breach of contract.

(g) An order directing the defendant to refund the purchase sums and/or all deposits paid by the plaintiffs in respect of their various sub plots namely plot numbers 50, 46, 7, 94, 75, 56, 14, 35, 65, 98, 34 and plot number L.

(h) Special damages for loss sustained by the 1st plaintiff as a result of the demolition of his structure by Nairobi City Council on the instructions of the defendant.

3. The plaintiffs' case is contained in the further amended plaint dated 15/8/2013, the witness statements adopted as part of their sworn evidence-in-chief; the oral evidence tendered during trial; and the written submissions filed by their advocates. The defendant did not file a defence until February 2017 when they filed a defence dated 12/9/2017. The defendant did not tender evidence at the hearing. It, however, filed written submissions dated 29/11/2021. Its case is therefore contained in the said statement of defence and written submissions.

4. In summary, the case of the plaintiffs is that, on diverse dates between 1/1/1994 and 31/12/1996, the defendant sold to them the following respective plots:

(i) Plot No. 50 - sold to Francis Muthusi Kiminza

(ii) Plot Nos. 45 & 46 – sold to Rahab Muthoni Mugambi

(iii) Plot No. 7 - sold to Daphine Florence Mutisya

(iv) Plot No. 94 – sold to Esther Waithiegeni Kiama

(v) Plot No. 75 – sold to Andrew Kariuki Njoroge

(vi) Plot No. 56 – sold to Charles Muoki

(vii) Plot No. 14 – sold to Pamela Opiyo

(viii) Plot No. 35 – sold to Jason Mwanzia

(ix) Plot No. 65 – sold to Francis Mbuthia Mukuna

(x) Plot No. 98 – sold to Apollo Mwangi Njuguna -

(xi) Plot No. 34 – sold to Joseph Dibworo

(xii) Plot No. L – sold to Esther Mwangi

5. The plaintiffs contended that they duly paid the agreed purchase prices whereupon the defendant confirmed to them that they had completed paying the purchase prices and authorized them to commence development of their respective plots. It was their case that upon confirmation by the defendant that they had completed paying the purchase prices, the said purchase prices ceased to be provisional and the defendant was bound by the confirmation.

6. The plaintiffs added that pending completion of the sale by the defendant, a dispute arose between the defendant and a third party, culminating in **Nairobi HCCC No. 3130 of 1995**. Due to the dispute, the defendant was unable to complete the sale and convey the plots to the plaintiffs. Subsequently, in July 2008, the defendant wrote to the plaintiffs, confirming that all the pending suits had been concluded and the courts had affirmed the defendant's title. At the same time, the defendant sought to increase the purchase prices of the plots and threatened to sell the plots to third parties if the plaintiffs did not pay the additional money. Aggrieved the plaintiffs brought this suit.

7. In its defence dated 12/9/2017, the defendant averred that it offered the plaintiffs' plots within LR No. 15400. The offers and agreements entered into between it and the plaintiffs provided for provisional purchase prices but the full purchase prices were to be agreed upon once the defendant complied with the conditions set by the Commissioner of Lands, which included construction of public infrastructure within the subdivision scheme. The defendant denied confirming to the plaintiffs that they had completed paying the purchase prices. It denied unilaterally increasing the purchase prices, contending that what the plaintiffs paid were provisional purchase prices.

8. The defendant added the parcel of land from which the plots were carved was the subject matter of many suits. It denied breaching the sale agreements and averred that the plaintiffs were in breach of the express terms of the agreements. The defendant contended that an order of specific performance would be prejudicial to it because it was entitled to full purchase prices from the plaintiffs. The defendant urged the court to dismiss the plaintiffs' suit.

9. On 11/3/2019, counsel for the plaintiffs applied to withdraw prayers (a) and (c). She submitted that the plaintiffs were only seeking

damages and refunds of moneys paid to the defendant as purchase prices and deposits. The request was allowed.

10. Trial was conducted on 23/10/2019. **Francis Muthusi Kiminza** testified as **PW1**. He adopted his witness statement dated 25/1/2014. He produced a total of 20 exhibits, among them, receipt number 178 dated 20/9/1995 for **Kshs 102,000/-** and receipt number 1272 dated 16/2/1996 for **Kshs 103,000/-**, both issued to him by the defendant in acknowledgment of receipt of the above sums, totaling **Kshs. 205,000/-** in respect of **Plot No. 50**.

11. Daphine Florence Mutisya testified as **PW2**. She adopted her witness statement dated 1/4/2014. She produced a total of 26 exhibits, among them, receipt number 211 dated 1/11/1995 for **Kshs. 200,000/-**; receipt number 251 dated 9/1/1996 for **Kshs. 105,000/-**; receipt number 252 dated 9/1/1996 for **Kshs. 50,000/-**; and receipt number 429 dated 1/7/1999 for **Kshs. 200,000/-** all issued to her by the defendant in acknowledgement of receipt of purchase price totaling **Kshs. 555,000/-** in respect of **Plot No 7**.

12. Joseph Junga Dibuoro testified as **PW3**. He adopted his witness statement dated 30/1/2014. He produced a total of 11 exhibits, among them, receipt number 149 dated 8/9/1995 for Kshs. 103,000/-; receipt No. 177 dated 19/9/1995 for Kshs. 45,000/- and receipt No. 254 dated 11/1/1996 for Kshs. 57,000/- all issued to him by the defendant acknowledging receipt of purchase price totaling **Kshs. 205,000/-** in respect of **Plot No. 34**.

13. Charles Musyoki Muoki testified as **PW4**. He adopted his witness statement dated 14/8/2014. He produced a total of 9 exhibits, among them, a copy of cheque No. 011136 dated 9/10/1997 for **Kshs. 285,000/-** in respect of **Plot No. 56**.

14. Andrew Kamau Njoroge testified as **PW5**. He adopted his witness statement dated 1/8/2013. He produced a total of 4 exhibits, among them, receipt No. 176 dated 15/9/1995 for Kshs. 102,500/- and receipt No. 051 dated 2/5/1996 for Kshs. 103,000/- both issued to him by the defendant in acknowledgment of receipt of purchase price totaling **Kshs. 205,000/-** in respect of **Plot No. 75**.

15. Jason Mwanzia testified as **PW6**. He adopted his witness statement dated 3/2/2013. He produced a total of 27 exhibits, among them, receipt No. 110 dated 13/6/1994 for Kshs. 82,500; receipt No. 111 dated 13/6/1994 for Kshs. 20,000/-; receipt No. 120 dated 1/9/1994 for Kshs. 17,500/-; receipt No. 126 dated 24/10/1994 for Kshs. 17,500/-; receipt No. 131 dated 22/11/1994 for Kshs. 18,000/-; receipt No. 132 dated 4/1/1995 for Kshs. 18,000/-; receipt No. 135 dated 15/2/1995 for Kshs. 15,000/-; receipt No. 080 dated 22/4/1996 for Kshs. 16,500/-; receipt No. 094 dated 13/10/1996 for Kshs. 12,000/- and receipt No. 095 dated 16/10/1996 for Kshs. 33,000/- all issued to him by the defendant in acknowledgment of receipt of purchase price totaling to **Kshs. 250,000/-** in respect of **Plot No. 35**.

16. Apollo Mwangi Njuguna testified as **PW7**. He adopted his witness statement dated 2/4/2014. He produced a total of 15 exhibits, among them, receipt No. 374 dated 21/3/1997 for Kshs. 70,000/-; receipt No. 370 dated 25/2/1997 for Kshs. 45,000/-; receipt No. 369 dated 24/2/1997 for Kshs. 25,000/-; receipt No. 345 dated 23/4/1997 for Kshs. 18,000/- and receipt NO. 377 dated 4/4/1997 for Kshs. 100,000/- all issued to him by the defendant in acknowledgement of receipt of purchase price totaling to **Kshs. 258,000/-** in respect of **Plot No. 98**.

17. Rahab Muthoni Mugambi testified as **PW8**. She adopted her witness statement dated 10/4/2014. She produced a total of 27 exhibits, among them, receipt No. 200 dated 12/10/1995 for Kshs. 180,000/-; receipt No. 275 dated 6/3/1996 for Kshs. 50,000/- and receipt No. 237 dated 8/12/1995 for Kshs. 25,000/- all issued to her by the defendant in acknowledgment of receipt of purchase price totaling to **Kshs. 255,000/-** in respect of **Plot Nos. 45 and 46**.

18. Esther Wacheke Mwangi testified as **PW9**. She adopted her witness statement dated 5/2/2014. She produced a total of 10 exhibits, among them, receipt No. 097 dated 31/10/1996 for Kshs. 250,000/- and receipt No. 354 dated 10/12/1996 for Kshs. 100,000/- both issued to her by the defendant in acknowledgment of receipt of purchase price totaling to **Kshs. 350,000/-** in respect of **Plot No. L**.

19. Esther Waitiegeni Kiama testified as **PW10**. She adopted her witness statement dated 4/8/2013. She produced a total of 9 exhibits, among them, receipt No. 233 dated 4/12/1995 for Kshs. 125,000/- and receipt No. 285 dated 27/3/1996 for Kshs. 125,000/- both issued to her by the defendant in acknowledgment of receipt of purchase price totaling to **Kshs. 250,000/-** in respect of **Plot No. 94**.

20. There was no cross examination by the defendant's counsel. The plaintiffs, subsequently filed their submissions dated 15/1/2020, through the firm of *Koki Mbulu & Co. Advocates*. Counsel for the plaintiffs submitted that the following issues fell for determination in the suit: (i) ***Did the law envisage the resell of land already sold and sale/purchase sums remitted to the defendant?; and (ii) Is the suit statute barred?***

21. Counsel submitted that the defendant's conduct of purporting to resell the plots while pretentiously offering as credit the sums earlier receipted as full purchase price amounted to fraud. Counsel contended that the defendant having admitted receipt of the full purchase price, it was estopped from reselling the same plots to the plaintiffs at increased prices.

22. On whether the suit was statute-barred, counsel submitted that there was no valid defence to the suit because the defendant purported to file a defence 12 years "from the date of filing the suit" and the said defence was filed without leave of the court. Counsel added that the suit herein was governed by Section 7 of the Limitation of Actions Act which provides for a limitation period of 12 years. Counsel contended that time started running in 2006 when the defendant wrote to them letters purporting to re-sell the plots to them. Counsel urged the court to do justice to the plaintiffs.

23. The defendant filed its submissions dated 21/11/2020 through the firm of *Mbugua, Atudo & Macharia Advocates*. Counsel identified the following as the issues falling for determination: (i) ***Whether there was a valid agreement for sale between the defendant and the plaintiffs*** (b) ***Whether there was a breach of sale agreement on the part of the defendant;*** and (c) ***Whether the plaintiffs are entitled to the orders sought in the amended plaint.***

24. On whether there were valid agreements for sale between the plaintiffs and the defendant, counsel submitted that courts cannot re-write contracts for parties, and neither can they imply terms that were not in the contract. Counsel for the defendant added that the defendant

offered to sell to the plaintiffs plots that were hived from LR No. 15400, situated in Kayole, and subsequently entered into sale agreements with the plaintiffs between 1994 and 1997. It was the position of counsel for the defendant that there were valid agreements for sale between the defendant and the plaintiffs.

25. On whether there was breach of the agreements, counsel for the defendant submitted that because the prices stipulated in the sale agreements were provisional, the defendant was entitled to demand additional purchase prices, contending that the plaintiffs were aware of the express terms and conditions that were set out in the letters of offer and in the agreements for sale. It was the position of counsel for the defendant that the plaintiffs are the ones who breached the agreements by resorting to court action instead of pursuing arbitration.

26. On whether the plaintiffs are entitled to the remedies sought in the amended plaint, counsel for the defendant submitted that an injunction would be self-defeating as the defendant will not be able to process leases in favour of the plaintiffs. Counsel added that an order of specific performance would be prejudicial to the defendant because the plaintiffs still owed the defendant purchase prices. On special damages, counsel submitted that the loss suffered by the 1st plaintiff was caused by the Nairobi City Council and the defendant cannot not be held liable for that. Lastly, counsel submitted that general damages are not awardable in a plea for breach of contract.

27. I have considered the pleadings, evidence and submissions tendered in this suit. I have also considered the relevant legal framework and jurisprudence on the key issues in the suit. Parties did not agree on a common set of issues to be determined by the court. Secondly, the plaintiffs abandoned their plea for orders of specific performance. In the circumstances, the three key issues falling for determination are: **(i) Whether the defendant breached the respective sale agreements; (ii) Whether the plaintiffs are entitled to the reliefs sought in the plaint; and (iii) What order should be made in relation to costs of the suit.**

28. The first issue is whether the defendant breached the sale agreements between it and the plaintiffs. The ten plaintiffs who led evidence to support their claims tendered letters by the defendant confirming that the purchase prices had been paid in full. The letters did not allude to any other monies that were expected from the ten plaintiffs as additional purchase prices. If there were additional monies expected from the plaintiffs, the letters should have specified the monies. Indeed the letters confirming receipt of full purchase prices authorized the plaintiffs to take possession of the plots.

29. Secondly, the defendant filed a defence but did not lead any evidence in support of its defence. Similarly, the defendant elected not to subject the 10 plaintiffs' evidence to cross-examination. Without defence, evidence and without any challenge against the evidence tendered by the 10 plaintiffs, the court is satisfied that the decision of the defendant to demand more moneys from the 10 plaintiffs and to ultimately sell the plots to third parties constituted breach of the sale agreements relating to the 10 plaintiffs. There was, however, no evidence tendered to support the claims by **Pamela Agola Opiyo** and **Francis Mbuthia Mukuna**. Further there was no evidence tendered to support the 1st plaintiff's claim for special damages as prayer in (h).

30. On the reliefs available to the plaintiffs, it is noted that the plaintiffs abandoned the plea for orders of specific performance. Secondly, it is an established principle in our jurisprudence that general damages are not awardable in a claim founded on breach of contract. Consequently, the only relief available to the 10 plaintiffs is refund of the purchase prices or deposits paid to the defendant as per prayer (g) of the further amended plaint, which translates to the following sums:-

(i) Francis Muthusi Kiminza – Plot No. 50 – Kshs 205,000

(ii) Daphine Florence Mutisya – Plot No. 7 – Kshs 555,000

(iii) Joseph Junga Dibuoro – Plot No. 34 – Kshs 205,000

(iv) Charles Musyoki Muoki – Plot No. 56 – Kshs 285,000

(v) Andrew Kamau Njoroge – Plot No 75 – Kshs 205,000

(vi) Jason Mwanzia – Plot No. 35 – Kshs 250,000

(vii) Apollo Mwangi Njuguna – Plot No. 98 - Kshs 258,000

(viii) Rahab Muthoni Mugambi – Plot No. 45 and 46 - Kshs 255,000

(ix) Esther Wacheke Mwangi – Plot No. L – Kshs 350,000

(x) Esther Waithiegeni Kiama – Plot No. 94 – Kshs 250,000

31. Since the defendant elected to retain the money despite the fact that the plots were no longer available, they will pay interest at court rate on the sums from the date of filing this suit. The defendant will also bear costs of the suit.

32. In summary, the findings of the court on the three issues are that the defendant breached the sale agreements relating to **(i) Francis Muthusi Kiminza (ii) Daphine Florence Mutisya (iii) Joseph Junga Dibuoro (iv) Charles Musyoki Muoki (v) Andrew Kamau Njoroge (vi) Jason Mwanzia (vii) Apollo Mwangi Njuguna (viii) Rahab Muthoni Mugambi (ix) Esther Wacheke Mwangi (x) Esther Waithiegeni Kiama**. No evidence was tendered to support allegations of breach in respect of the sale agreements relating to **Pamela Agola Opiyo** and **Francis Mbuthia Mukuna**. Secondly, it is the finding of the court that the ten (10) plaintiffs are entitled to refunds of their moneys together with interest at court rate from the date of filing this suit.

33. In the end, judgment is entered in favour of the 10 plaintiffs who led evidence in this suit as follows:

(a) Refund of moneys paid to the defendant: -

(i) Francis Muthusi Kiminza – Plot No. 50 – Kshs 205,000

(ii) Daphine Florence Mutisya – Plot No. 7 – Kshs 555,000

(iii) Joseph Junga Dibuoro – Plot No. 34 – Kshs 205,000

(iv) Charles Musyoki Muoki – Plot No. 56 – Kshs 285,000

(v) Andrew Kamau Njoroge – Plot No 75 – Kshs 205,000

(vi) Jason Mwanzia – Plot No. 35 – Kshs 250,000

(vii) Apollo Mwangi Njuguna – Plot No. 98 - Kshs 258,000

(viii) Rahab Muthoni Mugambi – Plot No. 45 and 46 - Kshs 255,000

(ix) Esther Wacheke Mwangi – Plot No. L – Kshs 350,000

(x) Esther Waithiegeni Kiama – Plot No. 94 – Kshs 250,000

(b) Interest on the sums above at court rate from the date of filing this suit.

(d) The defendant shall bear the costs of the ten (10) successful plaintiffs.

34. The claims of the two plaintiffs who did not lead evidence are dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms. Koki Mbulu for the plaintiffs

Ms. Muhuri for the defendant

Court Assistant: Lucy Muthoni