



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 162 OF 2012

DR.FRANCIS INWANI MALWEYI.....1ST PLAINTIFF

IRENE WAMBUI INWANI.....2ND PLAINTIFF

VERSUS

HENRY KARANJA NGUGI.....1ST DEFENDANT

ANDREW MUTHEE GATIMU.....2ND DEFENDANT

FLORENCE ELIZABETH WANJIRU.....3RD DEFENDANT

AGNES WAMBUI NJERU.....4TH DEFENDANT

SUPER MICRO VETURE SELF HELP.....5TH DEFENDANT

JUDGMENT

The Plaintiffs filed this suit on **10th April 2012** seeking for judgment against the defendants jointly and severally for :-

- a. ***Specific performance in that the defendants be compelled to immediately effect the transfer of the suit property.***
- b. ***In the alternative the defendants be compelled to refund the entire sum of Ksh 800,000/= plus 25% was of liquidated damages being Ksh 200,000/=***
- c. ***The plaintiff be awarded general damages for breach of contract by the defendants.***
- d. ***The plaintiffs be awarded interest on (b) above at prevalent commercial rates of 20% p.a from 23rd August 2010 until payment in full.***
- e. ***Costs of this suit***
- f. ***Interests on (c), (d), and (e) above at court rates from the date of filing this suit until payment in full.***

The facts of the case are that by an agreement dated **27th September 2010** the plaintiffs and the **1st 2nd 3rd and 4th defendants** while acting on behalf of the 5th defendant entered into an agreement to sell land

which at all material times relevant to this suit, the defendants were the registered owners of land parcel No. **Ruiru KIU Block 2 (Githunguri)319** situated within **Super Micro Venture Scheme in Githunguri Ranching Co. Limited, Ruiru Municipality** and more particularly **plot No 10** within the same parcel. The plaintiffs allege that the price for the plot agreed at price of **Ksh.800,000**. That they paid **Ksh 200,000/=** onto the defendants account at the time of executing the agreement on and the remaining **Ksh 600,000/=** was paid within **90 days** The two payments were done on **23rd August 2010** wherein they paid **Ksh 200,000/=** and on **24th October 2010** wherein they paid **Ksh 600,000/=**. They averred that they were to take possession of the suit property upon execution of the sale agreement adding that it was a term of the contract that in the event of breach by any party, then that party would pay the other party 25% of the purchase price by way of liquidated damages. That after paying the full amount the defendants refused to grant possession to the plaintiffs and later offered an alternative piece of land which they did not grant possession. They therefore want the court to grant them the orders stated above.

The 1st 2nd and 3rd defendants filed their statement of defence on **24th May 2012** wherein they denied the plaintiffs allegations. They however admit that a sale agreement of the suit property was entered into on **27th September 2010** between the plaintiffs and the **1st 2nd and 3rd** defendants who were the executive committee of the 5th defendant and that before the transaction could be completed they were voted out of the office and a new executive committee elected. They further averred that according to the constitution of the 5th defendant, it was only the executive committee that was mandated to transact on behalf of the self help group. And that they duly handed over to the elected officials and that they did not transact in their individual capacities and pray that the suit against them be dismissed with costs.

In the reply to the defence filed by the plaintiffs on **4th June 2012**, the plaintiffs joined issues with the **1st 2nd and 3rd** statements of defence and reiterated the contents of their plaint. They stated that the claim by the defendants that there were new elected officials was a ploy aimed at passing culpability to the new office members which would result in a whole charade of passing responsibility to defend the ends of justice and that the defendants were individually liable as the 5th defendant was not a corporate entity and had no legal capacity to sue or be sued.

Despite the **4th and 5th defendants** being served with and plaint as summons to enter appearance on **30th April 2012**, they failed to enter appearance and to file defence within the stipulated time and as such the plaintiff on **28th February 2013**, filed a request for judgment and on **22nd August 2013** the court entered interlocutory judgment against the **4th and 5th defendants**.

The 1st defendant and 2nd defendants filed their witness statements and filed it in court on **16th October 2013** wherein they stated that on **27th September 2010** the plaintiffs sought to buy a plot from the 5th defendant and at that time they were chairman and vice chairman respectively of the 5th defendant. They stated that the secretary to the self help group led a splitter group that called for elections without their participation and were subsequently voted out in absentia. That a new executive committee was elected and as such they were mandated to transact on behalf of the self help group therefore they handed over all the assets and liabilities to the self help group. They contended that the plaintiffs should have done a search at Kiambu Ministry of Gender office and sued the executive committees whom they handed over to and were currently transacting on behalf of the 5th defendant. They further stated that the 1st 2nd and 3rd defendants did not transact in their individual capacities and sought that the case against them be dismissed with costs and the current executive committees be pursued in this matter.

This suit was set down for the hearing of formal proof by the plaintiffs. **PW1 Dr Francis Inwani Malweyi**, a medical doctor testified in court that the dispute with the defendants is that he entered into a sale agreement .He further testified that he saw the land along the bypass and agreed to buy the same. That he bought the land for **Ksh 800,000/=** and paid it in two installments but was never given the title deed after completing the payment of the purchase price .He stated that he asked for the refund of the purchase price and they agreed to pay him back the purchase price .He also testified that he has never been in possession of the property he purchased and neither has he seen the title deed. He therefore urged

the court to order the refund of the money he had paid and damages for the loss and costs to this suit. He further stated that since he had taken a loan the interest should be charged at 25% so as to reimburse him.

In their written submissions, the plaintiffs submitted that the case was on a breach of contract on the defendants' part pursuant to a sale agreement. They submitted that a contract is binding and once entered by two or more people they cannot escape from their contractual obligations. The plaintiff submitted that since the defendants acknowledged that there was a sale agreement and that since they had paid the purchase price they were entitled to possession of the suit property and completion documents. They relied on the case of Charles Mwirigi Miriti-vs- Thananga Tea Growers Sacco Ltd & Another.

On damages the plaintiffs relied on the case of Hudley's Paxendale [1854]9 Exch 341 where the court held that,

“Where two parties have made a contract which one of them had broken, the damages which another party ought to receive should be such as may fairly and reasonably be considered wither naturally that is in accordance to the usual course of things from such breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contracts as the probable result of the breach of it”

It is not in dispute that the Plaintiff and Defendant entered into a sale agreement with respect to the suit property. It is also not in dispute that the 5th defendant is currently registered as owner of the suit property, and has possession thereof. The issues in dispute revolve around whether the said sale agreement between the Plaintiff and Defendants with respect to the suit property is whether the plaintiffs can claim a refund of **Ksh 800,000/=** the money they had paid as consideration of the suit property, and whether the plaintiffs are entitled to the reliefs they seek.

I have considered the Plaintiffs case as pleaded and the evidence tendered in proof thereof. I am satisfied that the Plaintiffs have proved their case against the defendants on a balance of probability. The Plaintiffs have proved that they entered into an agreement for sale of the suit property with the defendants under which the defendants agreed to sell to the Plaintiffs the suit property at a consideration of **Kshs. 800,000.00**. The Plaintiffs have proved further that although they paid the full purchase price to the defendants, they failed to make necessary arrangements to have the suit property transferred to the Plaintiffs. Precisely, the Plaintiffs have proved that the defendants have breached the agreement for sale dated **27th September 2010**, that was entered into between the Plaintiffs and the defendants. It is clear therefore that what the Plaintiffs are entitled to recover the purchase price that they paid to the defendants for the suit property. The Plaintiffs has sought in addition to the purchase price, the payment of liquidated damages. I have noted in the agreement for sale dated that it provided for the payment of a sum of **25%** as liquidated damages by any party in default in the fulfillment of his obligations under the agreement. The Plaintiffs are therefore entitled to recover from the defendants the purchase price of **Kshs. 800,000/=** and the said sum of **Kshs. 200,000/=** as liquidated damages.

Further the Plaintiffs are also entitled to recover general damages for the breach of contract. Having considered the circumstances of this case, the Court finds that an award of **Kshs.500,000/-** is sufficient as general damages for breach of contract.

Consequently, the Court enters judgement for the Plaintiffs against the Defendant in the following terms.

- i. ***Refund of purchase price of Kshs.800,000/= plus 25% as liquidated damages being Kshs.200,000/= thus a total of Kshs.1000,000/=.***
- ii. ***General damages of kshs.500,000/= for breach of contract***
- iii. ***Interest on i & ii above from the date of this judgement until payment in full at the Court's rate.***
- iv. ***Costs of the suit.***

It is so ordered.

Dated, Signed and Delivered this 20th day of May, 2015

28 days Right of Appeal

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant

None attendance for the Defendant

Court Clerk: Hilda

Court:

Jugement read in open Court in the absence of the above parties.

L.GACHERU

JUDGE