



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 22 of 2002**

**DANSON MUNENE KIBETU ..... PLAINTIFF**

**Versus**

**ELIUD NGARE MURAGE .....1<sup>ST</sup> DEFENDANT**

**SOLOMON JACOB MUREU .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff by his plaint seeks an order for declaration that he is the beneficial owner of land parcel no. KABARE/ MIKARARA/657 hereinafter called the suit property. He also seeks general damages for breach of contract and an order that the second defendant do transfer the suit property to him. The defendant denied the plaintiff's claim and counter claim. In the counter claim the defendant seeks the eviction of the plaintiff from the suit property and an award of general damages for trespass. The plaintiff in support of his case stated that on 6<sup>th</sup> March 2001 he entered into an agreement with the first defendant and two others namely Muchiri Kibure and Edward Muriithi Njage which agreement was reduced in writing. The agreement related to the plaintiff's purchase of eight acres of land from the three vendors. Muchiri and Edward had two acres whilst the first defendant had four acres. The price agreed was kshs.150,000 per acre. On execution the plaintiff was to pay kshs. 150,000. The balance kshs. 1,050,000 was payable after land Control Board consent was obtained. The plaintiff however stated that by the time the agreement was executed consent had been granted to transfer the property into the plaintiff's wife's name Pauline Muthoni Munene. It ought to be noted that the agreement was in respect of the land before subdivision. After subdivision each vendor obtained their own title. The suit property was registered in the name of the first defendant. The plaintiff produced a consent to transfer the suit property into his wife's name dated 15<sup>th</sup> February 2001. The plaintiff in respect of that consent said that it had been given to him by the vendors. After investigations he found out the land control board of Gichugu did not sit on 15<sup>th</sup> February 2001. He however found out that the tribunal sat on 22<sup>nd</sup> February 2001. On further investigations he found that the transaction relating to the suit property alongside with the other parcels of land of the other vendors was recorded in the land control board register. The register indicated that consent was obtained in respect of those parcels of land including the suit property on 22<sup>nd</sup> February 2009. He stated that by that consent the land control board authorized the transaction between the first defendant and his wife. He referred to minutes of the land control board which he noted that it had parts of it rubbed out. As a consequence the aforesaid transactions were not reflected. From the minutes it was clear that transactions numbers 157, 158 and 159 had been obliterated. Further to the agreement of sale on 15<sup>th</sup> March 2001 he paid kshs. 100,000 which amount was received by all the three vendors. Similarly on 23<sup>rd</sup> March 2001 they received from him kshs. 180,000. He also made payment to the vendors as follows:-

- **18<sup>th</sup> April 2001 – Kshs. 9,000**
- **17<sup>th</sup> April 2001 – Kshs. 12,000**
- **11<sup>th</sup> May 2001 – Kshs. 12,000**
- **21<sup>st</sup> May 2001 – Kshs. 10,000**
- **28<sup>th</sup> May 2001 – Kshs. 50,000**
- **15<sup>th</sup> June 2001 – Kshs. 315,000**

On making those payments the balance that remained owing to the vendors was kshs. 59,000. He produced an acknowledgement indicating that these amounts was received by the first defendant on 15<sup>th</sup> June 2001. He stated that thereafter the second defendant offered the vendors to pay them a price higher than he had offered that is kshs.170,000 per acres for their property. He stated that three parcels of land were registered in the second defendant's name as a preliquisite to the vendors obtaining payment by banker's cheque from Equity Bank. The three parcels of land which included the suit property were transferred to the second defendant. The three vendors on receiving their banker's cheque from Equity Bank on behalf of the second defendant those cheques were countermanded. The three vendors inquired from the second defendant why the cheques had been countermanded and in his response the second defendant said that he would retransfer the three parcels of land back to them. He however required that he be paid his out of pocket expenses of transferring those parcels into his name. In circumstances that were not clear to the court the plaintiff paid to the second defendant kshs. 293,000. On receiving that payment the second defendant transferred only two parcels of land but failed to transfer the suit property. Todate the plaintiff said that the suit property was still registered in the second defendant's name. During that period he said that the first defendant filed a case in High Court Nairobi being HCCC No. 1074 of 2001 against the plaintiff. The first defendant in that suit alleged that the police were forcing him to sell his property to a person he did not want to. A year after filing the case the first defendant withdrew it. The plaintiff said that by a letter dated 11<sup>th</sup> June 2001 the three vendors sought to revoke their agreement with him dated 6<sup>th</sup> March 2001. They sent to him a bankers cheque of kshs.480,000 being the refund for that transaction. The plaintiff returned the cheque to the vendors advocate. Later the first and second defendant sent to him a cheque of kshs. 260,000 being the first defendant's refund to the plaintiff. Again he declined. The plaintiff paid a further sum on 19<sup>th</sup> June 2001 to the three vendors of kshs. 359,000. That amount brought the payment of the purchase price to an end. The three vendors after that payment signed an acknowledgement that the payment was the full purchase price. He said that he took possession of the suit property when they first executed the sale agreement. He had carried out extensive development on the suit property whereupon he had planted trees and was commercially growing bananas. He therefore prayed that the suit property be transferred into his name. The first defendant in cross examination delved in great detail over the difference in the dates of the consent to transfer the suit property into the plaintiff's wife's name. As stated before the consent was dated 15<sup>th</sup> February 2001. The plaintiff in evidence however produced the land control board register which showed that the consent was granted on 22<sup>nd</sup> February 2001. In my view whether or not the date reflected on the consent was the correct date is not material. The law requires that where property is agricultural land a consent be obtained. It suffices for the present transaction that a consent was issued. That consent was produced by the plaintiff and for all intent and purpose it is a valid consent. The second defendant in cross examining the plaintiff on the issue of the refund cheque the plaintiff responded that he declined to take the cheque because he had paid the vendors much more money and because the vendors were claiming that he had failed to pay the purchase price. The plaintiff accepted that he met the second defendant in the presence of his wife and asked the second defendant to transfer the suit property into his name. The plaintiff rejected suggestion by the counsel for the second defendant that there was an agreement that he was to retain two parcels of land of two acres each whilst the second defendant was to retain on parcel of land of 4 acres. He responded to question by saying that he was in possession of the suit property which he had fenced. That an injunction had been issued against him to stop trespassing the suit property but the court

subsequently issued an order that status quo be maintained. He believed that the second defendant was aware of his transaction with the vendors. He described the second defendant as a friend and a neighbour. That the second defendant would often pass by the suit property. He however said that the second defendant offered the vendors more money than he had offered. The plaintiff said that the second defendant was aware of how much he had offered the vendors. PW 2 was Edward Muriithi one of the three vendors. He confirmed that he together with two others amongst them was the first defendant agreed to sell to the plaintiff property KABARE/MIKARARA/61. This parcel of land was before the subdivision of the three parcels of land in each of their names. On executing the agreement they each obtained their subdivided parcel of land. It was the first defendant who introduced the plaintiff to them. On executing the sale agreement the plaintiff obtained vacant possession of the property. He obtained possession around February 2001. The plaintiff subsequently paid the full purchase price to the three of them. He however at one time delayed in making payment that they looked for another buyer. That was when they entered into an agreement with the second defendant. The second defendant paid them by banker's cheque after they had transferred their parcels of land into his name. Those cheques however were stopped. He said that he never received any money on the second defendant. Those cheques were returned to equity bank. On making inquiry the second defendant intimated that he would re transfer those parcels if his expenses were paid. The vendors went to the plaintiff in June 2001 and the plaintiff paid to them the full purchase price. On the second defendant being paid his expenses he transferred two parcels of land into the plaintiff's name. The first defendant however colluded with the second defendant and failed to transfer his parcel of land that is the suit property into the plaintiff's name. On being cross examined by the first defendant this witness stated that the plaintiff had been in breach of the agreement. He did not clarify when the breach occurred. He further said that it was the plaintiff who compensated the second defendant of his expenses but the second defendant refused to transfer the suit property. PW 3 was a clerk at Gichugu DO's office. In setting out the procedure followed by the land control board he said that it is the board agenda which guides the board on which application for consent it was considering. Once consent were issued by the board an entry was made in the boards register. A secretary thereafter typed out the minutes with the aid of that register. He confirmed that the register produced by the plaintiff was a true copy of the original. He also noted that the minutes had been tampered with in that they were rubbed out in part. In his view the minutes did not reflect what was contained in the register. The first defendant in support of his case said that the suit property was registered in the second defendant's name around 23<sup>rd</sup> May 2001. He said that the plaintiff failed to pay him as per the agreement dated 6<sup>th</sup> March 2001 and when he enquired from him the plaintiff said that he had no money. He approached the plaintiff's wife who wrote a letter which in his view indicated that the plaintiff had no money to pay. I have looked at that letter however and it is not clear what the import of it is. That letter in my view is of no evidential value to the first defendant. He said that the three vendors met and agreed to get another buyer. They thereafter entered into an agreement with the second defendant. The plaintiff's agreement had however not been terminated. The second defendant paid him the agreed purchase price and his cheque was honoured. By a letter dated 6<sup>th</sup> November 20001 he sought to terminate the agreement with the plaintiff. He sent a refund cheque to the plaintiff. He also filed a case HCCC 1074 of 2001 against the plaintiff. In that plaint he set out the amount owed to him by the plaintiff. I have examined that plaintiff which is dated 29<sup>th</sup> June 2001. The first defendant in that plaint stated that the suit property was registered in his name. However as it becomes clearer later the suit property was registered in the second defendant's name on 28<sup>th</sup> May 2001. In further evidence the first defendant denied that he attended a land control meeting on 22<sup>nd</sup> February 2001. On being cross examined by second defendant he said that he informed the second defendant on 8<sup>th</sup> May 2001 that they had an agreement with the plaintiff. He accepted on further cross examination that in the plaint dated 29<sup>th</sup> June 2001 he had stated that both the plaintiff and the second defendant owed him a balance of their respective purchase price. The first defendant stated earlier that the second defendant had paid him in full on 23<sup>rd</sup> May 2001. That evidence contradicted the plaint in HCC 1074 OF 2001 which was filed and supported by a verifying affidavit in which suit the first defendant claimed not to have received the full purchase price from the second defendant. He further stated that the plaintiff owed him kshs. 320,000 as per the agreement. In support of his case the second defendant stated that on 23<sup>rd</sup> May 2001 he entered into an agreement with the three vendors to purchase the three parcel of land. They agreed that the purchase price was to be paid once those parcels of land were transferred into his name. Equity Bank on his behalf gave undertaking to pay the vendors the purchase price. Subsequently after the bankers

cheque had been released to the vendors he got to know that the plaintiff had arranged for the arrest of two vendors and that a caveat had been registered on the suit property. It was then that an order countermending the cheques was made. It should however be noted that the issue of arrest of the two vendors was not put to the plaintiff when he was being cross examined. For that reason the court will take it that it was merely an afterthought by the second defendant. The second defendant produced his bank statement with equity bank with a view to showing that he had the funds when the cheques were issued. This statement was not certified as true copy of the original by the bank and it therefore of no evidential value to the second defendant. He said that it was the plaintiff who pleaded with him not to allow him to loose his money. As a result they agreed to share the parcels of land with the plaintiff getting two parcels and him getting the suit property. To that end he signed two blank transfers. He fenced the suit property but a week later the fence was destroyed. He said that the plaintiff was in possession and had refused to move out. He said that he had known plaintiff for 20 years. On cross examination he accepted that he had never taken possession of the suit property. That the vendors had mentioned an earlier agreement of sale which they had entered with another person but the vendor said that the agreement had lapsed. He then said :-

***“I knew it was plaintiff who transacted with the vendors”.***

That is the end of the evidence that was presented before me. The one issue for consideration by this court is whether the agreement between the vendors and the defendants was still in force when the vendors entered into an agreement with the second defendant. The sale agreement entered between the plaintiff and the vendors dated 6<sup>th</sup> March 2001 provided a completion date of 15<sup>th</sup> March 2001. The vendors accepted that before entering into an agreement with the second defendant they had not terminated the plaintiff's agreement. What however is material is the fact that on 21<sup>st</sup> May 2001 the vendors jointly received from the plaintiff kshs. 10,000 towards the purchase price. By that act the parties must be take to have accepted the extension of the agreement of 6<sup>th</sup> March 2001. The vendors therefore could not in law have entered into a subsequent agreement with the second defendant. What becomes very clear from the evidence is that the second defendant had knowledge of the agreement between the plaintiff and the vendors. He said as much in his evidence. The second defendant therefore cannot be said to be a bonafide purchaser of legal estate for value without notice. The second defendant apart from carrying out a search from the lands office had an obligation to take notice of equitable interest that existed on the suit property. Having been told of the transaction of the plaintiff and the vendors he did not show to this court that he took all reasonable care or that he made inquiries to that end. The fact that he had notice of the plaintiff's transaction he cannot raise a defence that he is a purchase without notice. The plaintiff gave evidence that he had paid the full purchase price to the vendors. That evidence was not subjected to cross examination by the defence. The court therefore takes notice that it is acceptance of that evidence. PW 2 support the plaintiff's evidence in that regard. Because the purchase by the second defendant was with notice his title cannot be said to be impeachable. The consent dated 22<sup>nd</sup> February 2001 was subject of much cross examination. As I have stated before this court is not obliged to go behind a consent to determine its validity. The fact that there was a consent suffices for this court. The agreement of 6<sup>th</sup> March 2001 was to the effect that the suit property was to be transferred into the name of Pauline Muthoni Munene. The evidence has shown that the said Pauline is the wife of the plaintiff. The plaintiff did not in his plaint pray for the suit property to be transferred to her name. All the parties however in this case have accepted that the agreement they entered into was to the effect that the property was to be transferred to her name. The plaintiff was the contradicting party to that agreement which provided that title was to be in the name of Pauline Muthoni Munene. In the interest of justice the court will give effect to that agreement. The judgment of this court is as follows:-

***1. The court hereby orders the cancellation of title no. kabare/mikarara/657 which is registered in the name of SOLOMON JACOB MUREU.***

***2. The court orders that a new title be issued of title no. KABARE/MIKARARA/657 in the name of Pauline muthoni munene. In issuing the new title in her name the land registrar will dispense with the necessity having the original title in the name of SOLOMON JACOB MUREU.***

***3. The plaintiff is awarded the costs of this suit to be paid by the defendants.***

**MARY KASANGO**

**JUDGE**

***Dated and delivered this 14<sup>th</sup> day of May 2009.***

**M. S. A. MAKHANDIA**

**JUDGE**