



REPUBLIC OF KENYA



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Musau & another v Muindi; Kilonzo & another (Interested Parties) (Environment & Land Case 30 of 2013) [2022] KEELC 4846 (KLR) (19 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4846 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 30 OF 2013
CA OCHIENG, J
SEPTEMBER 19, 2022

BETWEEN

MARGARET KALONDU MUSAU 1ST PLAINTIFF

JOHN MUOKI MUSAU 2ND PLAINTIFF

AND

JOHNSON MUSAU MUINDI DEFENDANT

AND

KAVANDI KILONZO INTERESTED PARTY

JOHN MUKHUA NYOTA INTERESTED PARTY

JUDGMENT

1. By a Plaint dated the October 24, 2007 and amended on February 18, 2020 the Plaintiffs pray for Judgment against the Defendant for:
 - a. An order that the agreement between the parties herein dated November 27, 2002 is null and void for all practical purposes.
 - b. An order compelling the Defendant to re-transfer back to the Plaintiffs plot number 37C, 37D, 38C and 38D Mlolongo.
 - c. In the alternative and without prejudice to the above, an order directing the clerk, Mavoko Municipal Council and/or Mavoko Land Development Co. Ltd to transfer the said plot number 37C, 37D, 38C and 38D to the Plaintiffs.
 - d. Costs of this suit.
 - e. Any other relief that this Honourable Court may deem expedient.



2. The Defendant filed his Amended Statement of Defence including Counter-claim dated the March 21, 2018 against the Plaintiffs where he sought for the following prayers:
 - a. Payment of rent lost for the plots number 37C, 37D and 38D registered in the Defendant's names from the year 2004 occupied by the Plaintiffs at Kshs 20,000 per month for each plot until the date the Plaintiffs vacate vacant from the plots.
 - b. Eviction order against the Plaintiffs from plots 37C, 37D and 38D owned and registered in the names of the Defendant and removal of all temporal structures thereon and allow peaceful occupation of the Defendant.
 - c. Costs and interests of the suit.
3. The Interested Parties filed a Joint Statement of Defence including Counter-claim where they sought for dismissal of the Plaintiffs' suit with costs including entry of Judgment in their favour in the following terms:
 - a. A declaration land parcels known as Plot Nos 40D and 40D Phase 1 at Mlolongo lawfully belong to the 1st and 2nd Interested Parties respectively.
 - b. An order of permanent injunction restraining the Plaintiffs and the Defendant (now the 3rd Defendants in the Counter-claim) either by themselves and or their agents and or their servants and or their assignees and or their surrogates and or any one claiming through them from trespassing into, encroaching upon or in any way whatsoever interfering with the Interested Parties (Plaintiffs') quiet possession of the parcels of land known as Plot Nos 40D and 39D Phase 1, within Mlolongo.
 - c. Costs of this Counter-claim.
4. The Plaintiffs filed a reply to Defence and Defence to Counter-claim where they denied the averments in the Interested Parties' Statement of Defence and contended that they are the ones who have tenants in plots 39D, 40D, 37C, 37D, 38C and 38D who operate Salvation Army Church, Harvest Church, Seed of Hope Ministry as well as Kings Brook Academy. Further, that the 1st Plaintiff was the legal owner of plot numbers 39D and 40D being a member of Quarry Site Self Help Group and was issued with membership cards which Johnson Musau Muindi fraudulently used to transfer the two plots to himself. They denied the particulars of fraud and insist the Interested Parties have never been in occupation of plots 39D and 40D.
5. The matter proceeded for hearing where the Plaintiffs had four witnesses, the Defendant called three witnesses while the Interested Parties had three witnesses.

Evidence of the plaintiffs

6. The Plaintiffs testified that they entered into a Sale Agreement dated the November 27, 2002 with the Defendant, which was prepared by an advocate Francis Mwanza Mulwa (PW1). They explained that the aforementioned Sale Agreement was in respect to four plots, at Mlolongo in exchange for land parcel number Athi River Block 1/1475. Further, that the four plots being 39C, 39D, 40C and 40D belonged to the 1st Plaintiff while plots 37C, 37D, 38C and 38D were owned by the 2nd Plaintiff. PW1 testified that the Defendant issued him with a cheque dated the September 30, 2003 but the same was stopped. Further, that the Agreement dated the November 27, 2002 was never completed. In cross-examination it was his testimony that he confirmed the Plaintiffs owned the aforementioned plots through a search he had conducted from the ballot papers they gave him. In re-examination, he clarified



that the aforementioned plots were initially not registered but allocated to Mavoko Development Company Limited which was earlier known as Mavoko Municipal Council Land Trust Self Help Group. PW2 who is the 1st Plaintiff herein confirmed that on November 27, 2002 together with the 2nd Plaintiff who is her husband, they entered into a Sale Agreement with the Defendant on the terms that they would transfer plots 39C, 39D, 40C and 40D in exchange for land parcel number Athi River/ Athi River Block 1/ 1475 which belonged to the Defendant. Further, that each plot was valued at Kshs 250,000 while the Defendant's parcel of land was valued at Kshs 600,000. She explained that they had agreed to transfer the four aforementioned plots to the Defendant who was to pay an additional Kshs 400, 000 towards the purchase price. Further, that out of the agreed sum, the Defendant issued a Cheque Number 000037 dated the October 18, 2003 for Kshs 20,000 which bounced. She claimed the Defendant was also to pay school fees amounting to Kshs 9,600 to Kithituni Secondary School for their son Bernard Mwendwa Musau and he issued a Cheque No 00014 dated September 30, 2003 which also bounced. She contended that the Defendant misrepresented to them that he made other payments to Mr Mulwa advocate and school but these were false. She further testified that out of the Kshs 400,000, the Defendant only paid Kshs 4,000 and never transferred the land parcel number Athi River/ Athi River Block 1/1475 to them, although they had given him their ownership cards for the aforementioned plots. Further, that they discovered that land parcel number Athi River/ Athi River Block 1/1475 did not belong to him. She testified that the Defendant later brought them a different title for land parcel number Athi River/ Athi River Block 1/345 in exchange for Athi River/ Athi River Block 1/1475 claiming there was a mix up but upon undertaking a search at the offices of Katelembo Society, they confirmed the said land did not belong to him. Further, they learnt the Defendant had fraudulently transferred plots 39C, 39D, 40C and 40D yet they never signed any transfer documents to him. It was her testimony that the Defendant later came with another agreement dated the November 27, 2002 claiming it had been written by F M Mulwa Advocate, asked her to sign but she declined and when she shared a copy with the said Advocate, he denied drafting it. She insists they have always been in occupation of their plots which are developed and have a value in excess of Kshs 10,000,000. In cross-examination, she confirmed that the value of each plot was Kshs 250,000 and she signed the Sale Agreement in the Lawyer's office. She was emphatic that the Defendant took her to the land which it later turned out did not belong to him. Further, even the alternative land he offered belonged to a third party. She explained that they obtained allotments after they had entered into the aforementioned Sale Agreement. She did not know if the Defendant pays rates as he never occupied the said plots.

7. PW3 who is the 2nd Plaintiff reiterated the averments of PW2 in his evidence in chief. PW4 Paul Ngei Mbevi confirmed that the Plaintiffs owned plots 39C, 39D, 40C, 40D, 37C, 37D, 38C and 38D. He confirmed that the land was allocated by the Council. He explained that they had formed Mavoko Quarry Self Help Group in which he was an official. Further, that they subdivided land in 2000 to all the members. In cross-examination, he confirmed he showed the Plaintiffs' their plots but was not sure if they sold them.
8. The Plaintiffs produced the following documents as exhibits: Agreement dated November 27, 2002; Copy of Cheque Number 00003 dated October 18, 2003 and note from Standard Chartered Bank dated October 25, 2003; Copy of Cheque Number 00014 dated September 30, 2003; Certificate of Official Search dated September 29, 2004; Copy of Title Deed for Athi River/ Athi River Clock 1/345; Copy of Letter dated the March 27, 2006; Copy of unsigned Agreement for Sale; Photographs and Lease for Kings Academy dated May 8, 2013; Police Abstract dated the June 24, 2019; Lease Agreement dated the February 6, 2015 to 2nd June, 2020; Letter from the District Officer Athi River dated the December 17, 2002; Letter from the Chief Katani Location dated the December 16, 2002; Proceedings of Civil Suit no 14066 of 2006 between Zakayo Mutisya Musyimi Vs John Musau Muoki; Settlement



Agreement dated May 28, 2015 concerning Plot No 38C; Sale Agreement of Plot 39C and 40C; Letter from Director of Kings Brook Academy and Photographs of Kings Brook Academy.

Evidence of the Defendant

9. The Defendant as DW1 confirmed he bought plots 37C, 37D, 38C and 38D but upon payment, when he was taken to the land, he realized plot 37C had been sold to someone else, hence he remained with three plots. It was his testimony that the Agreement they entered into was null and void since he only remained with three plots. He stated that each plot was valued at Kshs 200,000 and he paid a sum of Kshs 638,000. Further, that he was to exchange his plot valued at Kshs 600,000 as part of the purchase price and he signed an agreement including application for consent as well as transfer form but left it with the lawyer. He testified that he paid Kshs 200,000 to make a total of Kshs 800,000. He was emphatic that he bought plots from Margaret Musau, transfers were effected in his name and he was given the letters of allotment. He explained that he was given a Certificate and discovered the plots were not paid for, hence he paid for them and obtained Letters of Allotment. He insists he has never been in occupation of the suit plots and is demanding Kshs 20,000 per month from the Plaintiffs who have rented them out to an Academy as well as a Church.
10. In cross-examination, he confirmed entering into an Agreement with the two Plaintiffs for the purchase of the plots and states that the same was done by a lawyer. He explained that the Agreement shows plots 37C, 37D, 38C and 38D but there was a mistake which they were supposed to rectify which they did not. He contended that his title is Plot 202. He averred that he did not transfer the land although he signed the Transfer Form. He further confirmed that the 1st Plaintiff did not sign some documents but only signed the Petty Cash Vouchers. It was his testimony that he has never been in occupation of the plots but has collected rent from the Kings Academy from the year 2015. He further testified that he did not have any documents to prove the rental income therefrom was Kshs 20,000 per month. He was not aware that the Cheques he issued were dishonoured. He denied issuing the cheque dated the October 18, 2003 by Kibwezi Mining (2002) Limited. He further explained that the plots were 40x60 feet each. Further, that he has plots 39D and 40D while Kings Brook Academy are in possession of one plot which is bigger than 40 x 60 feet.
11. DW2 Amos Kilonzo confirmed he was a director of Mavoko Land Development Co. Ltd and explained that plots 37C - 40D have owners. He stated that the 1st Plaintiff got an Allotment Letter and that she sold Plot 38C to someone called Stephen but it had a dispute. Further, that plot 38C is in the name of Richard while 39D is in the name of Johnson. In cross examination he confirmed that the Plaintiffs owned plots 37C, 37D, 38C, 38D, 39C, 39D, 40C and 40D but the said plots no longer belong to them. He explained that it was Margaret Kalondu who sold plots to the Defendant, Erastus and George. Further, that the plots were both residential and commercial. He reiterated that plot 39D belongs to Johnson Nyota while 40D is owned by Kavandi Kilonzo.
12. DW3 Leah Kavuti testified that she met the 2nd Plaintiff who showed her a block of plots and told her to occupy four of them. Further, that they entered into an Agreement dated the February 6, 2015 in respect to plots 39D, 38C, 40C and 40D. She testified that she was paying Kshs 60,000 per term. Further, that the plots were vacant and she put up buildings thereon but in 2006, the Defendant stopped her from constructing, claiming ownership of the said plots. However, she continued occupying the land until 2015. She was emphatic that she had paid the Plaintiffs rent from 2006-2015. In cross-examination, she testified that she occupies plots 37C, 37D, 38C and 38D while the Lease refers to plots 39D, 38C, 40C and 40D. Further, that she currently occupies plots 38D, 39D and 40D which belong to John, Kavandi and George. She explained that she demolished her buildings and had paid the 1st Plaintiff rent of Kshs 60,000 per term and not per month. The Defendant



produced the following documents as exhibits: Copy of Agreement dated the November 27, 2002; Application for Consent dated November 27, 2002; Copy of Title for Athi River, Athi River Block 1/202; Bundle of Petty Cash Voucher payments; Copy of Handbook payments made to Plaintiffs; Copy of Defendant's prepared payment List to the Plaintiffs; Copy of the Transfer Card of the plots by the Plaintiffs dated August 23, 2003; Copy of ownership Certificate issued to the Defendant by Mavoko Land Development Company Limited; Copies of Allotment Letters from Mavoko Municipal Council for plots 37C, 37D and 38D. Bundle of receipts of payment to Mavoko Land Development Company Limited; Bundle of receipts of payment of land rates to the Mavoko Municipal Council; Occurrence Book report to Mlolongo Police Station; Copy of approved perimeter wall plan for plots; Copy of Notice to vacate by the Plaintiffs' Advocates to Kings Brook Academy; Copy of the Lease Agreement between Kings Brook Academy with the Plaintiffs from the February 6, 2015; Copy from Mavoko Land Development Company Limited to the Directors King Brook Academy dated the September 10, 2015; Copy of Letter from Machakos County Office dated the December 7, 2015; Copy of Letter from Plaintiffs' Advocates dated the November 7, 2017; Copy of Mavoko Municipal Council Letter of Temporary Allotment dated the December 5, 2002 to Kavandi Kilonzo for plot No 40D Phase 1; Copy of rates payment by Kavandi Kilonzo to the Mavoko Municipal Council dated July 16, 2004; Copy of Ownership Certificate by Mavoko Land Development Company to Kavandi Kilonzo dated June 4, 2008; Copy of payment made by Kavandi Kilonzo to Mavoko Land Development Company Limited dated May 30, 2008; Copy of Warrants of Arrest in execution against 2nd Plaintiff dated August 1, 2013; Copy of the Consent Milimani CMCC No 14066 of 2006 between Zakayo Mutisya Musyimi Vs John Musau Muoki (*2nd Plaintiff*); Copy of the Transfer of Land by the 2nd Plaintiff to Zakayo Mutisya Musyimi at Mavoko Land Development Company Limited; Copy of Ruling in Machakos ELC No 64 of 2017 between John Muoki Musau Vs Mavoko Land Development Company Limited and Photographs taken on plots 37C, 37D and 38D.

Evidence of the Interested Parties

13. The 1st Interested Party Kavandi Kilonzo testified that he owns plot No 40D wherein his tenant is called Leah. He sought for his land to be struck off this suit as it was mistakenly added herein. In cross-examination, he was emphatic that he owns plot 40D which was allocated to him in 2002 by Mavoko Land Development Company Ltd who referred him to Mavoko County Council that issued him with a Letter of Allotment. He explained that before registration of Mavoko Land Development Company Ltd, it was called Mavoko Quarry Self Help Group. Further, that people allocated land were members of the Mavoko Quarry Self Help Group. He confirmed that he did not have documents to prove he was a member of Mavoko Land Development Company Ltd. He testified that he was an ordinary member and not a committee member. He insisted that the 1st Plaintiff was not allocated plot 40D as she claimed. Further, that plot 40 D was allocated to him on December 5, 2002. In further cross-examination, he said the Plaintiffs never told him they were selling plot 40D and he has never had a dispute with them. Further, that he is in possession of the suit plot and leased it to a school.
14. 2nd Interested Party's father George Nyota Mukuha testified that in 2017 he transferred plot 39D Ngwata Phase 1, Mlolongo to his son. Further, that the plot is rented by a school Kings Brook Academy. He sought for the plot to be struck off this suit. In cross examination he was emphatic that he owned Plot 39D which is registered in his son's name John Nyota Mukuha. He had an agreement which he entered into with Kings Brook Academy in 2015 in respect to renting the said Plot. He was not aware their previous landlord was the 1st Plaintiff. He insisted he was the original allottee of plot 39D and did not know Mavoko Quarry Self Help Group who allocated him the said plot. However, when he got the plot, he became their member. He further testified that he used to meet Committee members in the office but never saw the 1st and 2nd Plaintiffs. He stated that he had initially leased his



plot to Simon Mulwa from 2003 upto 2005 who was taking care of it on his behalf. He denied selling his plot and was categorical that they have never had a dispute with the Plaintiffs.

15. The 2nd Interested Party John Mukuha Nyota testified that in June 2017 his father transferred to him plot 39D which he has leased to a school for five years. Further, that he pays rates for the plot and wanted the said plot struck off, from these proceedings. In cross-examination, he confirmed that in 2003, his father leased the plot to Simon Mulwa whom he did not know. He explained that he had leased the plot to Kings Brook Academy and was not aware that they had initially been the Plaintiffs' tenants. In further cross-examination, he testified that he had not gone to Mavoko Land Development office and no one had claimed his plot. Further, that he had not subdivided the suit plot nor leased it to third parties. To support their evidence, they produced the following documents as exhibits: Allotment Letters for Plot No 40D Phase 1 Ngwata and 39D; Agreements to Lease to Simon Mulwa dated February 10, 2003; Agreements to Lease to Kings Brook Academy dated September 16, 2015; Copy of Certificate for Mavoko Land Development Company Limited; Ownership Certificates dated the June 4, 2008; Receipts for payment for land rates and dues; Letters confirming ownership dated the September 10, 2015 and March 9, 2018; Court Order dated November 2, 2017 and Transfer for Plot No 39D Phase 1 Ngwata.

Submissions

16. The Plaintiffs in their submissions reiterated their testimonies and contended that the Defendant had breached the Agreement dated the November 27, 2002. They argued that the courts cannot rewrite the terms of a contract between parties and neither can they imply its terms. Further, that the Defendant by his words and conduct evinced an intention to no longer be bound by the contract. They reiterated that the Defendant never had a good title to pass to them as the parcel of land he presented, did not belong to him but the government. Further, that they are entitled to the orders as sought. To support their averments, they relied on the following decisions: *Machakos District Cooperative Union Vs Philip Nzuki Kiilu* CA No112 of 1997; *Rufale Vs Umon Manufacturer Co. (Ramsboltom)* (1918) L.R IKB 592 and *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009) 1WLR 1980 at Page 1993.
17. The Defendant in his submissions relied on his evidence and contended that the Sale Agreement dated the November 27, 2002 had only three plots registered in the Plaintiffs names and not four. Further, that despite paying the full purchase price and Plaintiffs voluntarily effecting transfer, they have refused, since the year 2003 to grant him vacant possession but instead leased the plots. He further submitted that from the documents tendered, he is the registered owner of plots 37C, 37D and 38D as the Plaintiffs have not provided any documents to prove ownership. He reaffirms that he is entitled to the orders sought as per the Counterclaim. To buttress his averments, he relied on the following decisions: Thika ELC Case No 201 of 2017 *Catherine Njeri Angote Vs Lucy Wangari Ngugi & Another and Omar Yakub & another Vs Attorney General* (2021) eKLR.
18. The Interested Parties in their submissions insist the Plaintiffs have never been lawful owners of plot numbers 39D and 40D, hence they had no capacity to exchange including assign the said plots to third parties. They contend that they remain the owners of the said plots as their ownership was confirmed by the Municipal Council of Mavoko which issued them with Letters of Allotment dated the December 5, 2002 and December 9, 2002 respectively. They aver that the Agreement dated the November 27, 2002 between the Plaintiffs and the Defendant was an act of fraud against them and the court should declare the same invalid.



Analysis and Determination

19. Upon consideration of the Plaintiff, Defence including Counter-claim, Interested Parties' Joint Defence including Counter-claim, testimonies of the witnesses, exhibits and rivaling submissions, the following are the issues for determination: Whether the Defendant fulfilled the terms of the Agreement dated the November 27, 2002 and legally acquired plots 37C, 37D and 38D from the Plaintiffs. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff. Whether the Defendant is entitled to the orders sought in the Counter-claim. Whether the Interested Parties are entitled to the orders sought in the Counter-claim.
20. As to whether the Defendant fulfilled the terms of the Agreement dated the November 27, 2002 and legally acquired plots 37C, 37D and 38D from the Plaintiffs.
21. Before I proceed to analyze the evidence presented, I wish to reproduce an excerpt of the signed Sale Agreement dated the November 27, 2002 between the Plaintiffs and the Defendant, which forms the fulcrum of the dispute herein:

"Whereas

1. the 1st vendor is the allottee of 4 parcels numbered 39C, 39D, 40C and 40D in the Mavoko Municipal Council Land Trust Self Help Group (hereinafter called 'the SHG')
2. The 2nd Vendor is the allottee of 4 parcels numbered 37C, 37D, 38C and 38D in the S.H.G.
3. The Purchaser is the registered proprietor of a piece of land known as Athi River/ Athi River Block 1/1475.
4. The parties have agreed to sell, purchase and/or exchange as the case may be in the manner set hereunder.

Now it is hereby agreed among the parties as follows:-

1. The value of each of the Vendors' plots is Kenya Shillings Two Hundred Thousand (Kshs 250,000)
2. The value of the Purchaser's land is Kenya Shillings Six Hundred Thousand (Kshs 600,000)
3. The vendor shall sell and assign unto the Purchaser and the Purchaser shall buy the following plots:-
 - a. Plot numbers 39C, 39D, 40C and 40D allotted to the 1st Vendor.
To hold the same unto the Purchaser in the same capacity as the vendors immediately before the signing of this agreement.
4. The consideration of the said plots, that is to say 39C, 39D, 40C and 40D is Kenya Shillings One Million (Kshs 1,000,000) to be accounted in the manner hereinafter appearing (the receipt whereof the vendors do hereby acknowledge)
5. The purchaser shall transfer the land title number Athi River/athi River Block 1/1475 to one or both of the vendors at their option and for the purpose of that transfer the Purchaser herein will be deemed to be the Vendor herein.



6. The difference between the Vendors Plots and Title Number Athi River/athi River Block 1/1475 being Kenya Shillings Four Hundred Thousand (Kshs 400,000) shall have been paid in full before the signing of these presents (the receipt whereof the Vendors do hereby acknowledge)
 7. The Purchaser shall join in obtaining the Land Control Board Consent in order to facilitate timeous transfer of this title to the Vendors or any one of them as they may decide.”
22. The Plaintiffs as PW2 and PW3 respectively testified that on November 27, 2002 they entered into a Sale Agreement with the Defendant on the terms that they would transfer plots 39C, 39D, 40C and 40D in exchange for land parcel number Athi River/Athi River Block 1/1475 which belonged to the Defendant. Further, that each plot was valued at Kshs 250,000 while the Defendant’s parcel of land was valued at Kshs 600,000. PW2 and PW3 further testified that they had agreed to transfer the four aforementioned plots to the Defendant who was to pay an additional Kshs 400,000 towards the purchase price. Further, that out of the agreed sum, the Defendant issued Cheque Number 000037 dated the 18th October, 2003 for Kshs 20,000 which bounced. They claimed the Defendant was also to pay school fees amounting to Kshs 9,600 to Kithituni Secondary School for their son Bernard Mwendwa Musau and he issued a Cheque No 00014 dated September 30, 2003 which also bounced. They contended that the Defendant misrepresented to them that he made other payments to Mr. Mulwa advocate and school but these were false. They insisted that out of the Kshs 400,000, the Defendant only paid Kshs 4,000 and never transferred the land parcel number Athi River/ Athi River Block 1/1475 to them, although they had given him their ownership cards for the aforementioned plots. Further, that they discovered that land parcel number Athi River/Athi River Block 1/1475 did not belong to him but the Defendant later brought them a different title for land parcel number Athi River/Athi River Block 1/345 in exchange for Athi River/Athi River Block 1/1475 claiming there was a mix up but on undertaking a search at the offices of Katelembo Society, they confirmed the said land did not belong to him. It was their testimony that they later discovered that the Defendant had fraudulently transferred plots 39C, 39D, 40C and 40D to himself, yet they never signed any transfer documents to him. They stated that the Defendant later came with another agreement dated the November 27, 2002 claiming it had been written by F M Mulwa and asked the 1st Plaintiff to sign but she declined and when they shared a copy with the said Advocate, he denied drafting it. PW1 who was the advocate handling the transaction confirmed the Defendant’s aforementioned cheque that was issued to him was returned unpaid. Further, that the Defendant never concluded the transaction.
23. The Defendant as DW1 confirmed he bought plots 37C, 37D, 38C and 38D from the Plaintiffs but upon payment, when he was taken to the land, he realized plot 37C had been sold to someone else, hence he remained with three plots. He insisted that the Agreement they entered into with the Plaintiffs was null and void as one plot was missing. He contended that each plot was valued at Kshs 200,000 and he paid Kshs 638,000. Further, that he was to exchange his plot valued at Kshs 600,000 as part of the purchase price and he signed an agreement including application for consent as well as transfer form but left it with the lawyer. He testified that he paid Kshs 200,000 to make a total of Kshs 800,000. He explained that he was given a Certificate and discovered the plots were not paid for, and he proceeded to pay for them after which he obtained Letters of Allotment. He insists he has never been in occupation of the suit plots and is demanding Kshs 20,000 per month from the Plaintiffs who have rented them out to an Academy as well as a Church. In cross-examination, he explained that the Agreement shows plots 37C, 37D, 3C and 38D but there was a mistake which they were supposed to rectify which they did not. He contended that his title is Plot 202. He confirmed he did not transfer the land to the Plaintiffs although he signed the Transfer Form. He further confirmed that the 1st Plaintiff did not sign certain documents at page 21 of his bundle of documents but insisted that she signed the Petty Cash Vouchers.



He however did not have any documents to prove the rental income therefrom was Kshs 20,000 per month. He was not aware that the Cheques he issued were dishonoured. He denied issuing the cheque dated the October 18, 2003 by Kibwezi Mining (2002) Limited. It was his further testimony that he owns plots 39D and 40D while Kings Brook Academy are in possession of one plot which is bigger than 40 x 60 feet. He reaffirmed that the school has been paying him rent since 2015.

24. On perusal of all the exhibits presented by the respective parties, I note the Defendant produced various petty cash vouchers claiming he paid the purchase price as evident therein. I note there are also cheques issued to PW1 dated October 18, 2003 and one dated September 30, 2003 issued to Kithituni Secondary School for Kshs 9,600 in payment of the purchase price. The Defendant claims he fully paid the purchase price and obtained the Letters of Allotment. Except for the Sale Agreement, the Defendant failed to produce transfer forms to demonstrate the legal process he adhered in acquiring the Letters of Allotment in respect to the suit plots. The Defendant admitted in his evidence that he never transferred land to the Plaintiffs as per the terms of the Sale Agreement but insists he paid through the petty cash vouchers. I note DW2 in his evidence claims the 1st Plaintiff sold land to the Defendant but did not inform court whether he was present when the full purchase price was paid. It is trite that parties are bound by the terms of their agreement which in this instance is the signed Sale Agreement dated the November 27, 2002. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows:-

"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

25. See also the decision in *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR.
26. Based on the evidence presented including the exhibits produced while relying on the decisions cited, I find that in this instance the Defendant sought to change the terms of the contract to suit him. Insofar as he has Letters of Allotment for the suit plots, I find that he did not demonstrate how he acquired the same since he never produced transfer forms. Further, he actually admitted that he never transferred his aforementioned land as had been agreed between the parties. Further, the Defendant produced another Sale Agreement dated November 27, 2002 which was not signed by the Plaintiffs and contained certain handwritten corrections which I note contained terms which were different from the Sale Agreement produced by the Plaintiffs that was signed by all the parties. Even the petty cash vouchers produced contain different signatures and one is unsigned. I note there is a letter dated the August 23, 2003 written by one Michael Mbithi from Mavoko Quarry Site Self help Group which was produced by the Defendant, which indicated the 1st Plaintiff has sold plots 37C, 37D, 38D to him and that he had paid Kshs 19,200 for transfer. However, as per the petty cash vouchers produced it emerges that the Defendant sought for transfer of the alleged plots before finalizing the payments as there are about seven payments made thereafter. Except for the letter dated the August 23, 2003, there is no letter from the Plaintiffs consenting to the transfer nor that the terms of the Sale Agreement changed. To my mind, I find there was an element of fraud and or collusion between the Defendant, DW2 as well as some third parties in enabling the Defendant acquire the suit plots before finalizing the payment of the purchase price. I opine that if the Defendant felt certain terms of the contract ought to have been changed, the parties should have done so before he proceeded to obtain Letters of Allotment without the Plaintiffs participation. In the circumstances, I find that the Defendant did not fulfill the terms of the Sale Agreement dated the November 27, 2002 and hence did not legally acquire plots 37C, 37D and 38D from the Plaintiffs. It however emerged in evidence that plot 38C was transferred to Zakayo Mutisya vide consent orders made in Nairobi CMCC No 14066 of 2006. I hence find that the Plaintiff is entitled to the orders sought in the Plaintiff save for transfer of plot 38C to them as the same had been transferred to a third party.



27. Whether the Defendant is entitled to the orders sought in the Counter-claim. The Defendant claims to have purchased plots 37C, 37D, 38D vide the Sale Agreement dated the November 27, 2002. He produced petty cash vouchers to claim he paid the full purchase price. The Defendant produced three temporary Letters of Allotment all dated the September 26, 2003 for plots 37C, 37D and 38D respectively. I note from the petty cash vouchers that the alleged last payment to the Plaintiffs which they deny was made on October 15, 2003 which was after the Letters of Allotment had been procured. Further, the figures indicated as final payment amounts to Kshs 632,180 which is not the full purchase price. He has sought for payment of lost rental income from the Plaintiffs as well as an order of eviction. I note in the Transfer Form dated the November 27, 2002, it indicates the transaction named therein was in respect to exchange of plots 37C, 37D, 38C and 38D with Athi River/ Athi River Block 1/202 which was different from land mentioned in the Sale Agreement. However, since I have already held that the Defendant did not legally acquire the suit plots as he failed to adhere to the terms of the contract and never paid the full purchase price nor did the Plaintiffs consent to the transfer, he is not entitled to the orders as sought.
28. As to whether the Interested Parties are entitled to the orders sought in the Counter-claim.
29. The Interested Parties claim to be owners of plots 39D and 40D and have Letters of Allotment to that effect. They sought for orders of injunction to restrain the Plaintiffs including their agents from dealing with plot numbers 39D and 40D Phase 1 at Mlolongo. The 1st Interested Party Kavandi Kilonzo testified that he was allocated Plot No 40D on December 5, 2002 by Mavoko Land Development Co. Ltd wherein he has a tenant called Leah. Further, that it is the said company that referred him to Mavoko County Council which issued him with a Letter of Allotment. He explained that before registration of Mavoko Land Development Company Ltd, it was called Mavoko Quarry Self Help Group. It was his testimony that people allocated land were members of the Mavoko Quarry Self Help Group. He confirmed that he did not have documents to prove he was a member of Mavoko Land Development Company Ltd. He insisted that the 1st Plaintiff was not allocated plot 40D as she claimed. In further cross-examination, he said that he is in possession of the suit plot and leased it to a school. The 2nd Interested Party's father George Nyota Mukuha testified that in 2017 he transferred plot 39D Ngwata Phase 1, Mlolongo to his son. Further, that the plot is rented by a school Kings Brook Academy. In cross-examination, he was emphatic that he owned Plot 39D which is registered in his son's name John Nyota Mukuha. He had an agreement which he entered into with Kings Brook Academy in 2015 in respect to renting the said Plot. He was not aware their previous landlord was the 1st Plaintiff. He insisted he was the original allottee of plot 39D and did not know Mavoko Quarry Self Help Group who allocated him the said plot. He further testified that he used to meet Committee members in the office but never saw the 1st and 2nd Plaintiffs. He stated that he had initially leased his plot to Simon Mulwa from 2003 upto 2005 who was taking care of the said plot on his behalf. He denied selling his plot and was categorical that they have never had a dispute with the Plaintiffs. The 2nd Interested Party John Mukuha Nyota reiterated his father's testimony but confirmed that he was not aware the Plaintiffs were once the landlords of the school. He further confirmed that he did not know Mulwa whom the father had leased to the suit plot earlier on. DW2 who was an official of Mavoko Land Development Co Ltd confirmed that the Plaintiffs were initially allocated plots 39D and 40D but did not currently own them. It further emerged in evidence that the Plaintiffs were committee members of the aforementioned Self-help Group that subdivided the land and allocated plots to members. Further, that the Interested Parties were not the initial members of the aforementioned Self Help Group. Which brings in the question that how did they acquire the said plots from the Plaintiffs who were the initial allottees. From the evidence tendered except for producing the temporary letters of allotment, they have not produced any documents to demonstrate how they acquired the said plots from the



said Self Help Group. Further, from an aforementioned letter dated December 17, 2002 which the District Officer wrote to the Machakos District Commissioner, the District Officer confirmed that the Plaintiffs were owners of plots 39D and 40D. In absence of any evidence to prove that the Plaintiffs who were the initial allottees transferred plots 39D and 40D to the Interested Parties, I find that they have not proved their claim as against the Plaintiffs and will hence decline to grant them the orders as sought.

30. It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and will enter Judgment in their favour. I will proceed to dismiss the Defendant's including Interested Parties' Counter-claim and make the following final orders:
- i. An order be and is hereby issued that the agreement between the Plaintiffs and Defendant herein dated November 27, 2002 is null and void for all practical purposes.
 - ii. An order be and is hereby issued compelling the Defendant to re-transfer back to the Plaintiffs plot number 37C, 37D, & 38D Mlolongo within ninety (90) days from the date hereof, failure of which the clerk, Mavoko Municipal Council and/or Mavoko Land Development Co. Ltd to transfer the said plot number 37C, 37D and 38D to the Plaintiffs.
 - iii. The costs of the suit is awarded to the Plaintiffs and to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

