



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE 126 OF 2001**

**JONAH KISESE NTHENGE ..... 1<sup>ST</sup> PLAINTIFF**

**JOEL M NTHENGE ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NEEMA WELFARE ASSOCIATION ..... 1<sup>ST</sup> DEFENDANT**

**JAMES NJOROGE KABEREGE ..... 2<sup>ND</sup> DEFENDANT**

**EVANSON MUTUOHORO NJIHIA ..... 3<sup>RD</sup> DEFENDANT**

**JACKSON WAINAINA KAMAU ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 24/8/2001, the Plaintiffs aver that at all material times, they were the respective owners of plots nos.437 and 428 Lukenya Ranching & Farming Co-operative Society Ltd within Machakos District. That on or about 19/10/1998, the Defendants executed sale agreements for the purchase of the two plots each measuring 40 acres at an agreed purchase price of Kshs.2,600,000/= per plot. One of the terms of the agreement was that payments would be by instalments and the last such instalment was to be paid on or before 30/2/1999. That the Defendants thereafter paid only Kshs.510,000/= and then neglected or refused to pay the balance of the purchase price despite numerous promises to do so.

2. It is also the Plaintiffs' averment in the Plaint that the Defendants' lawyers, M/S Maira & Ndegwa Advocates have retained the original documents relating to the plots and have refused to release them and in the meantime, the Plaintiffs have been put to great loss and damage and they claim special damages as follows:-

(a) "Transport expenses      Kshs.    18,000/=

(b) Subsistence                Kshs.    8,600/=

(c) Telephone                 Kshs.    580/=

(d) Postal                      Kshs.    230/=

**TOTAL                        Kshs.    27,410/=**

3. The Plaintiffs also other seek orders as follows:-

**a. “Orders rescinding the sale agreements entered on 19/10/98 between the Plaintiffs and the Defendants over Plot Nos.437 and 428 Lukenya Ranching and Farming Co-operative Society Ltd belonging to the Plaintiffs respectively and that the Plaintiffs’ letters of allotment be returned to them.**

**b. Orders that the Defendants do pay the Plaintiffs general damages for breach of the contracts and that the instalments of the agreed purchase prices paid to the Plaintiffs be forfeited to the Plaintiffs.**

**c. Special damages of Kshs.27,410/=.**

**d. Costs.**

**e. Interests.”**

4. In their Statement of Defence filed on 15/11/2002, the Defendants aver that whereas the sale agreements were admitted, the Defendants intended to charge the Plaintiffs’ title documents “to obtain the necessary finances to pay off the Plaintiffs the agreed consideration.” That the title documents given by the Plaintiffs could not secure those finances and that fact was then communicated to them.

5. The Defendants also averred that all the special damages pleaded and claimed were paid for by the Defendants and that claim should be dismissed. Further, that when the Defendants were unable to secure the necessary finances, they demanded a refund of the monies paid to the Plaintiffs in exchange for the documents aforesaid but the Plaintiffs refused to refund those monies. They seek that all the claims by the Plaintiffs be dismissed with costs.

6. When the suit was set down for hearing, both Plaintiffs testified and their evidence was consistent with all the averments in the Plaint as reproduced above and added that although no transfer of the land had been made, the Defendants had taken possession thereof and their advocates had refused to release the documents. The Plaintiffs produced the sale agreements (P. Exh.1), Allotment Letter dated 27/10/1999 (P.Exh.2), Letters of Demand dated 3/4/1999 (P. Exh.3), 4/10/2000 (P. Exh.4) and a bundle of correspondence between the parties’ advocates (P Exh.5 and 6).

7. On the day the Defendants were to call their witnesses, and after half a day’s wait, neither Mr Kuria for the Defendants nor the Defendants themselves appeared as he had earlier indicated and I deemed that no evidence was being tendered on their behalf and I proceeded to order parties to make submissions. None were filed or made on behalf of the Defendants and I retired to write this judgment.

8. Have the Plaintiffs made out any case on a balance of probabilities? In my view, the claim for special damages of Kshs.27,410/= must fail because it is trite that such a claim once pleaded must be strictly proved and there are enough authorities on the subject. No evidence whatsoever was produced in support thereof and so prayer (c) of the Plaint must fail and is hereby dismissed.

9. Regarding the prayer that the sale agreements dated 19/10/1998 in respect of Plots Nos.437 and 428 Lukenya Ranching & Farming Cooperative Society Ltd be rescinded and that the letters of allotment in the hands of M/S Maira & Ndegwa be returned to the Plaintiffs, I have seen letters dated 29/3/2001 (P. Exh.6 (b) and one dated 6/7/2001 (P. Exh.6 (a) from M/S Maira & Ndegwa Advocates addressed to M/S Mwangangi & Co. Advocates and all the Defendants respectively. In those letters, the said advocates in the latter letter gave notice to the Defendants that they would release the allotment letters to the Plaintiffs if parties do not agree on how to amicably settle the matter. It is also intimated clearly therein that “the purchasers be given 3 months within which to clear the outstanding balance or purchase price failing which the sale agreements shall be rescinded.”

10. I agree with that proposition and since the purchase price has admittedly not been paid in full, it

follows that the only logical order to make is that the agreements must be rescinded and the reasonable consequence would be that the letters of allotment would have to be returned as prayed.

11. Turning now to the prayer for damages for breach of contract, the circumstances for grant of such an order cannot apply here and perhaps a prayer for specific performance would have been apt but it has not been sought. The twin contracts between the parties do not have any clause relating to termination of the contract and the consequences thereof. No clause relating to damages or any other penalty exists. It would be improper of this court to impose such a penalty and the law as I understand it would not give me any discretion in the matter. However and having so said, there is the matter of the Kshs.510,000/= paid to the Plaintiffs. The Plaintiffs claim that money and I have seen no opposition to that claim and so it is granted.

12. In the event, judgment is entered for the Plaintiff in terms of prayers (a) of the Plaint and prayer (b) is allowed only to the extent that the instalments of the purchase price totaling Kshs.510,000/= shall be forfeited to the Plaintiffs. The prayers for special damages and general damages for breach of contract are dismissed.

13. Costs of the suit and interest thereon shall be paid by the Defendants to the Plaintiffs.

14. Orders accordingly.

Dated and delivered at Machakos this 11<sup>th</sup> day of November 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: Mr Kamolo h/b for Mrs Mwangangi

N/A for Defendant

**ISAAC LENAOLA**

**JUDGE**