



**Gichuki & 2 others v Mwangi t/a Henmwa Investment (Environment & Land
Case 657 of 2017) [2022] KEELC 15089 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 657 OF 2017
BM EBOSO, J
NOVEMBER 21, 2022**

BETWEEN

**BETH NJERI GICHUKI 1ST PLAINTIFF
SIMON NDUNGU KIHU 2ND PLAINTIFF
MOSES KARINGA GICHUKI 3RD PLAINTIFF**

AND

FRANCIS KIMANI MWANGI T/A HENMWA INVESTMENT DEFENDANT

JUDGMENT

1. Through a plaint dated May 5, 2017, the three plaintiffs in this suit sought the following verbatim reliefs against the defendant:
 - a. The transfer and granting of vacant possession of plot number 252 to the 2nd and 3rd plaintiffs, plot 253 to the 2nd plaintiff and plot 62 to the 1st plaintiff all to be exercised from LR No Thika Municipality Block 29/379.
 - b. That in the alternative to (a) above the refund of Kshs 470,000 to the plaintiffs as per the agreements herein above mentioned.
 - c. Interest on 'b' above from 23rd day of October 2010 till payment in full.
 - d. Costs and interest of the suit.
2. The case of the 1st plaintiff was that, vide a sale agreement dated July 4, 2011, the defendant sold to her what she described as "plot No 62 – Kiganjo/Muthaiga, Thika Municipality" measuring 40x80 feet out of what was described in the plaint as "Land Reference No 379 Block 29 Thika Municipality B" at a consideration of Kshs 150,000 which she paid to the defendant in full. The case of the 2nd plaintiff was that, vide a sale agreement dated October 24, 2010, the defendant sold to him plot No



253 in the same scheme, measuring 40x80 feet, at a consideration of Kshs170,000, which he duly paid to the defendant. In addition, the 2nd and 3rd plaintiffs contended that, vide a sale agreement dated October 23, 2010, the defendant sold to the two of them jointly, plot No 252 in the same scheme, measuring 40x80 at a consideration of Kshs 150,000, which they duly paid to the defendant. The three defendants contended that despite paying the above consideration to the defendant, the defendant had failed to complete the sales in terms of the agreements.

3. The defendant filed a statement of defence dated September 28, 2020. The defence was amended on January 21, 2021. He admitted entering into the three agreements but denied receipt of the purchase prices. The defendant added that he had furnished the plaintiffs with share certificates relating to the three transactions, namely, share certificate numbers 388, 385 and 714, relating to plot numbers 252, 253 and 62 respectively. He denied the allegation that he had failed to honour the terms of the agreements for sale. He contended that he was in the process of “issuing title deeds for the subject plots which process was delayed by factors beyond” his control. It was his case that the plaintiffs’ claims were premature. He denied service of notice of intention to sue. He urged the court to dismiss the plaintiff’s suit.
4. When the suit came for trial on September 28, 2022, the defendant did not attend the hearing. Satisfied that the plaintiff’s advocates had served the defendant’s advocates with a hearing notice, the court allowed the plaintiffs to tender their evidence. Moses Karinga Gichuki [the 3rd plaintiff] testified on his own behalf and on behalf of the other two plaintiffs. He adopted his written statement dated May 5, 2017 and produced the 8 documents itemized in the list of documents dated May 5, 2017. It was his case that all the three plaintiffs were no longer interested in the plots and that all they wanted was a refund of their moneys together with interest because the plots had since been turned into a dumping ground.
5. The plaintiffs filed written submissions dated November 8, 2022 through M/s Kanyi Kiruchi & Co Advocates in which they identified the following as the issues that fell for determination in the suit: (i) Whether the defendant stands in breach of the agreements entered into with the plaintiffs; (ii) Whether the plaintiffs have proved their case on a balance of probabilities; and (iii) What order should be made in relation to costs of the suit? Counsel submitted that contrary to clause 4 of the said agreements, the defendant had neither engaged a surveyor to undertake excision of the sold plots nor processed titles for the sold plots, hence he was in breach of the agreements. Counsel added that the plaintiffs’ evidence stood unchallenged and therefore the plaintiffs had discharged their burden of proof. Counsel urged the court to award the plaintiffs their plea for refund of purchase prices together with interest. Counsel further urged the court to award the plaintiffs costs of the suit in tandem with the general principle on costs.
6. I have considered the parties’ pleadings and the plaintiffs’ evidence and submissions in this suit. The defendant did not attend trial. Further, the defendant did not file submissions. There is common ground that the defendant sold to the plaintiffs the three plots. The sale agreements indicate that the defendant presented himself as trading under the name Henmwa Investment Limited. The defendant denied receipt of the purchase prices but at the same time contended that he duly issued to the plaintiffs share certificates “being proof of ownership” of the plots by the plaintiffs. Further, the defendant contended that he was in the process of issuing to the plaintiffs’ title deeds relating to the three plots.
7. In light of the above pleadings, the three issues that fall for determination in this suit are: (i) Whether the agreed purchase prices were paid to the defendant by the plaintiffs; (ii) Whether the plaintiffs are entitled to refunds of the said purchase prices together with interest and, if so, at what rate and from which date? and (iii) What order should be made in relation to costs of this suit? I will make brief sequential pronouncements on the three issues.



8. On whether the agreed purchase prices were paid, the plaintiffs produced the three sale agreements. In the sale agreement dated October 23, 2010, relating to plot no 252, the defendant acknowledged in clause 2 that he had received a deposit of Kshs 70,000 from the 3rd defendant. Further, the plaintiff produced receipt number 1298 dated October 24, 2010 for Kshs 70,000; receipt number 1564 dated February 11, 2011 for Kshs 70,000; and receipt number 0419 dated November 3, 2010 for Kshs 10,000. In addition, in the Share Certificate which the defendant contended that he caused to be issued to the 3rd plaintiff, it was acknowledged that the 2nd and 3rd plaintiffs had paid full purchase price relating to plot no 252. There is therefore conclusive evidence that the purchase price relating to plot number 252 was fully paid.
9. In relation to plot No 253, the defendant acknowledged in clause 2 of the sale agreement dated 24/10/2010 that he had received a deposit of Kshs 70,000. The agreement was produced as an exhibit. Further, PW1 produced receipt number 1299 for Kshs 70,000 and receipt number 1563 for Kshs 100,000 as evidence of payment of purchase price. In addition, the plaintiffs produced Share Certificate No 385 relating to plot No 253 in which payment of purchase price was acknowledged by the defendant. There is therefore conclusive evidence that the purchase price relating to plot number 253 was paid in full.
10. In relation to plot No 62, the plaintiffs tendered as evidence, the sale agreement dated 4/7/2011 in which receipt of a deposit of Kshs 100,000 was acknowledged at clause 2. Further a bank deposit slip dated June 28, 2011 was produced showing that a sum of Kshs 100,000 was deposited onto the defendant's account held in Equity Bank. Certificate No 714 acknowledged that purchase price relating to plot No 62 had been paid in full by the 1st plaintiff. Lastly, receipt number 2596 for Kshs 100,000; receipt number 2724 for Kshs 20,000; receipt number for Kshs 10,000 and receipt number 2788 for Kshs 20,000 were produced as evidence of payment of purchase price in relation to plot No 62. There is therefore conclusive evidence that the purchase price relating to plot no 62 was paid in full.
11. The totality of the above evidence is that the plaintiffs paid the agreed purchase price as directed by the defendant and the defendant acknowledged receipt and issued receipts and share certificates relating to the transactions. Indeed, he would not have had any basis for issuing share certificates to the plaintiffs as proof of ownership of the plots if the plaintiffs had not paid purchase price in full. The court is therefore satisfied that the plaintiffs have proved that they paid to the defendant full purchase prices in pursuance of the three agreements. That is my finding on the first issue.
12. The second issue is whether the plaintiffs are entitled to refunds of the purchase prices together with interest and if so, at what rate? The plaintiffs paid purchase prices in full. It was the obligation of the defendant as the proprietor to procure excision of the sold plots through a subdivision survey exercise. He did not do that. The plaintiffs presented evidence demonstrating that the defendant, instead, allowed the plots to be turned into a dumpsite. Given the above uncontroverted evidence, the court is satisfied that the plaintiffs have demonstrated that the defendant failed to complete the sales. In the circumstances, the plaintiffs are properly entitled to refunds of the purchase prices.
13. The plaintiffs prayed for interest from October 23, 2010. There was evidence that not all payments were made on October 23, 2010. In the circumstances, the purchase prices will attract interest from the date when payments were completed. The 1st plaintiff completed paying the purchase price of Kshs 150,000 on October 8, 2012. That will be the effective date for reckoning interest payable to her. Payment relating to plot No 62, which was purchased by the 2nd plaintiff alone, was completed on October 25, 2010. That will be the effective date for reckoning interest on the sum of Kshs 170,000 paid by the 2nd plaintiff. Payment relating to plot No 252 which was purchased by the 2nd and 3rd



plaintiffs jointly was completed on March 11, 2011. That will be the effective date of reckoning interest. In the absence of evidence on the rate of interest to be applied, the court will apply court rate.

14. On costs, there are no special circumstances which would justify a departure from the general principle in section 27 of the *Civil Procedure Act*, to the effect that costs follow the event. The plaintiffs are accordingly awarded costs of the suit.
15. In the end, the court finds that the plaintiffs have proved their claims against the defendant. Consequently, judgment is entered in favour of the plaintiffs against the defendant as follows:
 - a. A refund of Kshs 150,000 together with interest at court rate from October 8, 2012 to the 1st plaintiff, Beth Njeri Gichuki.
 - b. A refund of Kshs 170,000 together with interest at court rate from October 25, 2010 to the 2nd plaintiff, Simon Ndungu Kihiu.
 - c. A refund of Kshs 150,000 together with interest at court rate from March 11, 2011 to the 2nd and 3rd plaintiffs [Simon Ndungu Kihiu and Moses Karinga Gichuki] jointly.
 - d. Costs of the suit.

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

B M EBOSO

JUDGE

In the Presence of: -

Ms Muchemi for the Plaintiffs

Court Assistant: Ms Osodo

