



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Case 124 of 2005**

**DAVID KAHINDI KATANA ..... PLAINTIFF**

**- Versus -**

**MASHA DENA MASHA ..... DEFENDANT**

**Coram: Before Hon. Justice L. Njagi**

**Mr. Ngaira h/b for Chidzipha for plaintiff**

**Court clerk – Kinyua**

**J U D G M E N T**

The plaintiff prays against the defendant for a declaration that the parcel of land which is the subject matter of this suit belongs to the plaintiff; an order of mandatory injunction compelling the defendant to forthwith execute the transfer of the suit parcel of land in favour of the plaintiff; general damages for breach of contract and costs of this suit.

His case is that by a sale agreement made between him and the defendant, the defendant agreed to sell to him some 4 acres of land for a consideration of Kshs. 240,000/=. He duly paid the purchase price but the defendant declined to keep his part of the bargain – hence, this suit.

This suit was filed on 23<sup>rd</sup> June, 2005. According to the affidavit of service sworn by Michael Thoya M’bwana on 5<sup>th</sup> August, 2005, the defendant was served on 1<sup>st</sup> July, 2005. Upon the defendant’s failure to enter appearance or file a defence within the prescribed period, the plaintiff applied for interlocutory judgment on 25<sup>th</sup> July, 2005, and this was duly entered on 3<sup>rd</sup> October, 2005. The matter thereafter came for formal proof before this court on 12<sup>th</sup> October, 2006.

The plaintiff gave sworn evidence in which he testified that by an agreement made on 1<sup>st</sup> May, 2002 between him and the defendant, the defendant agreed to sell to the plaintiff some 4 acres of land to be subdivided and transferred from plot No. 242, Vipingo Settlement Scheme. The total consideration payable was Kshs. 240,000/= at the rate of Kshs. 60,000/= per acre. The agreement was witnessed by 8 people including the area Senior Chief, Raphael Karisa, and the Senior Sub Chief, Joseph C. Ndurya. A copy thereof was produced as plaintiff’s exhibit No.1.

The parties thereafter appeared before the Bahari Land Control Board which first approved the transaction for the subdivision of the suit land and then approved the sale and transfer transaction. The two documents evidencing the two transactions were also produced as plaintiff's exhibits 3 and 4.

The plaintiff duly paid the entire purchase price of Kshs. 240,000/=. He produced a schedule of payments showing that he paid the last instalment on 18<sup>th</sup> September, 2003, bringing the total sum paid to Kshs. 240,000/=. The schedule was witnessed by members of the seller's family, along with Senior Chief Raphael B. Karisa, and the Sub Chief. It was also produced in evidence as plaintiff's exhibit No.2.

From the above evidence, which the court believed, and which was not controverted in any manner, I find that there was a contract between the plaintiff and the defendant for the sale by the defendant to the plaintiff of 4 acres of land. The purchase price was the agreed sum of Kshs. 240,000/=. The parties obtained the requisite consent of the Land Control Board, and the plaintiff paid the entire consideration as agreed. By so doing, he performed his part of the contract. Thereafter, the defendant seems to have developed cold feet and became reluctant to let go the land. But he cannot have his cake and eat it. He cannot pocket the plaintiff's money and still retain the land.

In those circumstances, I find that this is a fair and proper case for the court to order specific performance. The defendant should not be allowed to have it both ways. I accordingly make the following orders –

- 1. The plaintiff is entitled to 4 acres of land from the defendant's original plot No. 242, Vipingo Settlement Scheme.**
- 2. An order of mandatory injunction be and is hereby issued compelling the defendant forthwith to execute the transfer of the said 4 acres of land within 30 days from today. In default the Executive Officer of this court to sign all the relevant documents in place of the defendant.**
- 3. The defendant to pay the costs of this suit.**

Dated and delivered at Mombasa this 27<sup>th</sup> day of October, 2006.

L. NJAGI

JUDGE