



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 134 OF 2019(OS)**

**FRANCIS MUNYALO & 68 OTHERS.....PLAINTIFFS**

**VERSUS**

**JANE MBAIRE GITAU.....1<sup>ST</sup> DEFENDANT**

**KIMSON HOLDINGS CO. LTD.....2<sup>ND</sup> DEFENDANT**

**PRIMELAND HOLDINGS (K) LTD.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In the Originating Summons dated 5<sup>th</sup> December, 2019, the Plaintiffs have asked for the determination of the following questions:

- a. Whether in the year 2001 the 1<sup>st</sup> Defendant sub-divided her land known as L.R. No. 7340/18 situated at Mavoko in Machakos County into one hundred and twenty (120) plots.*
- b. Whether the Defendant offered the said plots for sale through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the Plaintiffs purchased the same on various dates between 2002 and 2008.*
- c. Whether the Defendants were paid the sale price in full for the plots by the Plaintiffs.*
- d. Whether the Defendants issued the Plaintiffs with Certificates of Ownership.*
- e. Whether it was a term of the contract of sale that the Defendant will facilitate issuance of Title Deeds to the Plaintiffs within a reasonable time.*
- f. Whether the Defendants have failed, refused and or neglected to obtain the necessary clearances and consents and execute transfers in favour of the Plaintiffs in order for them to obtain titles.*
- g. Whether the 1<sup>st</sup> Defendant should be ordered to complete the sale by obtaining the necessary clearances and consents and executing the transfers within a specified period.*
- h. Whether the Deputy Registrar of this Honourable Court should be mandated/ordered to execute the transfer instruments in the event the 1<sup>st</sup> Defendant declines to do so.*
- i. Whether the Chief Lands Registrar should be ordered to issue Title Deeds to the Plaintiffs.*

2. The Originating Summons is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that the 1<sup>st</sup> Defendant is the registered owner of land known as L.R. No. 7340/18 measuring 4.010 Ha; that in the year 2001, the 1<sup>st</sup> Defendant caused the said land to be sub-divided into 120 plots and that in the year 2002, the 1<sup>st</sup> Defendant, through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants offered to the Plaintiffs the said plots.

3. The 1<sup>st</sup> Plaintiff deponed that he personally purchased plot number 73; that it was a term of the contract that the 1<sup>st</sup> Defendant will process individual Title Deeds for the Plaintiffs as soon as he has sold all the plots and that on purchase, the Defendants gave them possession of the suit properties.

4. The 1<sup>st</sup> Plaintiff deponed that over the years, they have developed residential and commercial properties on their respective plots; that they began agitating for their title documents in the year 2009 and that for unknown reasons, the Defendants have frustrated them.

5. Although the Defendants were served with the Originating Summons, they neither entered appearance nor filed a Replying Affidavit. The matter proceeded for hearing in their absence. When PW1 testified, he relied on the depositions in the Affidavit which I have summarized above. PW1 also produced in evidence the annexures on the Affidavit.

6. In his submissions, the Plaintiffs' advocate submitted that the provisions of the Law of Contract Act and the Land Act that any disposition of land must be in writing, signed by the parties and witnessed are not absolute and that there is a proviso that this requirement does not affect the creation of a resulting, implied or constructive trust.

7. Counsel submitted that the doctrines of constructive trust and proprietary estoppels are equity's interventions to provide relief against unconscionable conduct of parties to a contract and that there was a common intention between the parties in relation to the suit property. Counsel relied on the case of **Yaxley v. Gotts (2000) Ch. 162**.

8. The copy of the title produced in this court shows that the 1<sup>st</sup> Defendant is the registered proprietor of land known as L.R. No. 7340/18 measuring 4.010 Ha. The said land was registered in favour of the 1<sup>st</sup> Defendant on 23<sup>rd</sup> March, 1992.

9. According to the Plaintiffs, the 1<sup>st</sup> Defendant caused the said land to be sub-divided into 120 plots, which plots the 1<sup>st</sup> Defendant, through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, sold them to the Plaintiffs.

10. The Plaintiffs have produced in evidence the sub-division plan of L.R. No. 7340/18 which shows how the suit property was sub-divided. According to the Plaintiffs, it was a term of contract that the Defendants will process individual titles after selling all the plots.

11. The Plaintiffs have produced in evidence the Certificates of Ownership that were issued to them by the 2<sup>nd</sup> Defendant upon purchase of their respective plots. Indeed, the Defendants have not denied that they sold to the Plaintiffs the suit properties. The Defendants have also not denied that after selling the said plots to the Defendants, they put them in possession of the same.

12. Although the Plaintiffs did not exhibit the Sale Agreements, the law of constructive trust and proprietary estoppel are equity's interventions to provide relief against unconscionable conduct by parties to a contract. In this case, there was a common intention between the parties in relation to the sale of the suit properties. In the case of **Yaxley v. Gotts (2000) Ch. 162**, the court held as follows:

*“An oral agreement whereby the purchaser of a house... though void and unenforceable under Section 2 of the Act of 1989 was still enforceable on the basis of constructive trust... In my view, the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trusts effectively excludes from operation of the cases in which an interest in land might equally will be claimed by relying on constructive trust or proprietary estoppel.”*

13. Considering that the Defendants have not denied that they sold the suit properties to the Plaintiffs, and in view of the fact that the suit properties that the Plaintiffs bought are identifiable, and the Plaintiffs are in possession of the same, it is my finding that the Plaintiffs have proved their case on a balance of probabilities.

14. For those reasons, the Originating Summons dated 5<sup>th</sup> December, 2019 is allowed as follows:

***a. The 1<sup>st</sup> Defendant, Jane Mbaire Gitau, is hereby ordered to complete the contract of sale of the sub-divisions of L.R. No. 7340/18 by obtaining all the necessary clearances and executing the transfer to the Plaintiffs within sixty (60) days of this Judgment.***

***b. In default, the Deputy Registrar of this court to execute any documents and instruments as may be necessary to effect the transfers of the sub-divisions of L.R. No. 7340/18 and the Chief Land Registrar to issue to the Plaintiffs with the Certificates of Title.***

***c. The 1<sup>st</sup> Defendant to pay to the Plaintiffs the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**O.A. ANGOTE**

**JUDGE**