



**Githirwa v Marui & 2 others (Environment & Land Case  
838 of 2017) [2023] KEELC 18733 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 838 OF 2017**

**JG KEMEI, J**

**JULY 6, 2023**

**BETWEEN**

**GIDRAPH GIKONYO GITHIRWA ..... PLAINTIFF**

**AND**

**PAUL GICHOHI ELIJAH MARUI ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION (NLC) ..... 2<sup>ND</sup> DEFENDANT**

**THE KENYA NATIONAL HIGHWAY AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendant vide a Plaint filed on November 27, 2017 seeking the following orders:-
  - a. An order compelling the 1<sup>st</sup> Defendant to surrender all original documents and especially allotment letter for the Plot No 52 Juja Township to the Plaintiff.
  - b. In the alternative of (a) above an order of specific performance compelling the 1<sup>st</sup> Defendant to honour his part of the agreement.
  - c. An order restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from compensating the 1<sup>st</sup> Defendant herein.
  - d. In the alternative to (c) above, an order of specific performance compelling the 1<sup>st</sup> Defendant to refund the full purchase price plus the compensation price paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (if any) to the Plaintiff with interest accrued thereon.
  - e. The OCS Juja Police Station does assist in the exercise.
  - f. Costs of this suit.
  - g. Any other relief that this Honourable Court may deem fit and just to grant.



2. The Plaintiff avers that he and the Defendant entered into an Agreement of Sale on December 28, 2014 for the sale and purchase of Plot No 52 Juja Township at the purchase price of Kshs 3.2 Million. The Plaintiff paid the sum of Kshs 2 Million on December 28, 2012 and the balance of Kshs 1.2 Million was acknowledged on December 28, 2014 avers that the Defendant has refused, ignored and or to surrender the requisite documents including allotment letter and other original documents of title to the said plot.
3. The 1<sup>st</sup> Defendant denied the claim of the Plaintiff vide his amended defence where he admitted the transaction but argued that he surrendered all the documents to the Plaintiff's lawyer.

### **The Evidence**

4. The Plaintiff's case was prosecuted by Gidraph Gikonyo Githirwa who testified as PW1. The witness testified online from his residence in Aouraro in the City of Chicago-Illinois in the United States of America. He stated that he is a Real Estate Agent in the city of Illinois. He relied on his witness statement filed on 22/7/2017 as his evidence in chief. He also produced documents in support of his case marked as PEX 1 – 6.
5. The witness stated that he purchased plot No 52 Juja Township in or about December 2012 from Paul Gichobi Elijah Marui, the 1<sup>st</sup> Defendant at a cost of Kshs 3.2 Million which he paid in two instalments on diverse dates. That the Defendant refused to avail the completion documents forcing him to report the matter to Juja Police Station after noticing that the Defendant was in the process of constructing on the suit land. It was his case that the Defendant has continued to ignore his calls for completion documents hence the filing of the suit. He informed the Court that he is not in possession of the suit land. That before entering into agreement with the 1<sup>st</sup> Defendant he sent an emissary to inspect the plot and was satisfied with the feedback on the state of the property. That he also caused a search to be carried on the suit property. Being satisfied with the due diligence he then entered into an agreement of sale. That it was a term of the agreement that upon completion of the purchase price the 1<sup>st</sup> Defendant was to submit the completion documents to pave way for the registration of the suit property in his name. He stated that the 1<sup>st</sup> Defendant had insisted on the payment of the full purchase price before handing over the completion documents. Further he informed the Court that he has paid the land rates and rent in respect to the suit property. In answer to the question posed by counsel for the 2<sup>nd</sup> Defendant the witness clarified that the dispute before Court is between the Plaintiff and the 1<sup>st</sup> Defendant and as such he has no claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
6. In re-examination the witness informed the Court that the land was transferred to his name at the offices of the County Government of Kiambu. He insisted that the land is still registered in the name of the 1<sup>st</sup> Defendant at the Lands Offices.
7. PW2 Hellen Njeri Njema also testified before the Court online from the City of Aouraro in the City of Illinois in the United States of America. She introduced herself as practising Nurse working for gain in the United States of America. She relied on her witness statement dated November 28, 2018 as her evidence in chief. She informed the Court that the Plaintiff is her husband and together they purchased the suit land from the 1<sup>st</sup> Defendant. By and large she reiterated the evidence as given by PW1 to the effect that they purchased the suit land from the 1<sup>st</sup> Defendant, paid the full purchase price and that the Defendant has refused to hand over completion documents nor possession of the suit land ten years later. She stated that the title should be registered in their names to enable them get compensation from the 3<sup>rd</sup> Defendant.



8. In cross examination by Mr Maruti, Counsel acting on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, the witness confirmed to the Court that the dispute is between the 1<sup>st</sup> Defendant and the Plaintiff and they have no claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
9. The evidence of 1<sup>st</sup> Defendant was led by DW1 namely Paul Gichobi Elish Marui, the 1<sup>st</sup> Defendant. He relied on his witness statement dated December 1, 2020 as his evidence in chief in support of his defence he produced documents marked PEX No.,1.
10. The witness testified that he entered into an agreement with the Plaintiff whereby he sold to him plot No 52 Juja Township in December 2021. It is his evidence that he surrendered all the documents of ownership of the suit land to the Plaintiff's advocate in exchange of the balance of the purchase price in line with terms and conditions of the sale agreement. He argued that for the Plaintiff's advocate to pay him the balance of the purchase price he had to surrender the completion documents and that the Plaintiff's averment that he has refused to surrender the completion documents is false and misleading.
11. The witness further stated that he handed over the original allotment letter to the Plaintiff's Advocate namely David Gichuki upon which he was paid the full purchase price. That the plot has no title. He also stated that the Plaintiff caused the transfer of the land to his name at Thika County offices. Further he stated that the acquisition of the land by the Government of Kenya after he had sold it to the Plaintiff and that he could not be compensated because he is no longer the owner of the land.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants informed the Court that they would not be calling any witness or offering any evidence in rebuttal to the Plaintiff's claim.

#### **Witten submissions**

13. The Plaintiff filed the submissions on March 25, 2023 and stated that before the hearing commenced the 2<sup>nd</sup> Defendant gained compulsory acquisition of the suit land for the use by the 3<sup>rd</sup> Defendant for construction of a matatu stage. It was further submitted that vide the sale agreement dated December 28, 2012 the 1<sup>st</sup> Defendant sold to the Plaintiff Plot No 52 Juja Township for the amount of Kshs 3.2 Million which amount was paid in full in two instalments. It was a condition of the agreement of sale that upon conclusion of the sale, the 1<sup>st</sup> Defendant would effect transfer of the Plot to the Plaintiff. After completion of the payment of the purchase price, the 1<sup>st</sup> Defendant failed to surrender to the Plaintiff and or execute the requisite documents for transfer which included the letter of allotment and other original documents of title to the said plot. That the 1<sup>st</sup> Defendant denied the Plaintiff access to the land and proceeded to place building materials on site in anticipation of construction on the suit premises to the detriment of the Plaintiff. That despite demand through the firm of David Gichuki & Co. Advocates the 1<sup>st</sup> Defendant elected to ignore forcing the Plaintiff to file a complaint with the Juja Police Station. As to whether there existed a sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff answered in the affirmative. The 1<sup>st</sup> Defendant has not challenged the agreement and in fact has admitted the same. The Plaintiff paid the 1<sup>st</sup> Defendant the full purchase price and the 1<sup>st</sup> Defendant was bound to honour his obligations of agreement of sale //inter alia execute all relevant transfer documents to effect transfer of the suit land to the Plaintiff. It is the Plaintiff's submission that the 1<sup>st</sup> Defendant has failed to comply with the terms of the agreement.
14. The Plaintiff further submitted that the 1<sup>st</sup> Defendant is in breach of the sale agreement dated December 28, 2012, in particular with respect to the submission of the completion documents together with the transfer in favour of the Plaintiff. In addition, that the 1<sup>st</sup> Defendant has continued to utilise the said premises for his own benefit to the detriment of the Plaintiff. Consequently, the 1<sup>st</sup> Defendant being in breach of the sale agreement is obligated to pay the Plaintiff a penalty equal to 20%



of the contract sum. That if any refund has to be made by the 1<sup>st</sup> Defendant must be at the market value of the property. Thirdly, that should the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have trespassed on the property, he ought to compensate the Plaintiff for loss, use and damage.

15. It was further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants never obtained permission to enter into the suit land and the construction of a matter stage or terminus on the suit land was without the Plaintiffs knowledge, consent and any legal justification occasioning irreparable damage to the Plaintiff. That the occupation of the suit land is illegal and unlawful. The Plaintiff is entitled to general damages arising thereof. Finally, in conclusion the Plaintiff submitted that its interest over the suit property is not contested and his case is merited and made in good faith.
16. The 1<sup>st</sup> Defendant filed his submission on March 28, 2023 and contended that he surrendered all documents of ownership of the suit land to the Plaintiffs Advocate in exchange of the suit land in line with the terms of the sale agreement. The 1<sup>st</sup> Defendant submitted that they entered into a valid sale agreement with the Plaintiff and that he deposited the original letter of allotment and other documents of title with the Plaintiffs Advocate M/s Gichuki Advocate in compliance with the terms of sale agreement. That in return he was paid the balance of the purchase price and argues that if he had failed to surrender the original documents, the Plaintiff would not have paid the balance of the purchase price.
17. It is the 1<sup>st</sup> Defendant's position that the Plaintiff should demand the completion documents from his Advocate. Further he explained that the Plaintiff has already transferred the property to his name at the offices of County Council of Thika and even proceeded to pay land rates as evidenced by the copy of the application for change of ownership dated May 29, 2014 and also rates clearance certificate showing that the Plaintiff and his wife are the owners of the land. It was his contention that upon completion of the sale transaction possession of the suit property vested on the Plaintiff. The 1<sup>st</sup> Defendant submitted that the Plaintiffs are not entitled to the orders sought in the Plaintiff for the reasons that; the 1<sup>st</sup> Defendant performed his part of the sale agreement; surrendered all original documents to the Plaintiffs Advocate; complied with all other obligations under the agreement.
18. With respect to whether or not he was compensated by the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant answered in the negative arguing that he could not be compensated because he holds no interest in the suit property having transferred the same to the Plaintiff. Secondly the acquisition process by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took place in the year 2021 long after the sale transaction was completed. The 1<sup>st</sup> Defendant ceased to have an interest in the suit property in 2014 when he applied for change of ownership and consequently the property was registered in the name of the Plaintiff and his wife. There is therefore no basis to warrant compensation in favour of the 1<sup>st</sup> Defendant for the acquisition of the suit property.
19. In conclusion the 1<sup>st</sup> Defendant contends that the Plaintiff did not prove his case on a balance of probabilities and therefore not entitled to the prayers sought in the Plaintiff. The Court was urged to dismiss the Plaintiffs' case with costs.

### **Analysis and determination**

#### **Whether the 1<sup>st</sup> Defendant surrendered the documents to the Plaintiff.**

20. It is not in dispute that the parties entered into an agreement for sale; purchase price was fully paid. The Plaintiff contends that the 1<sup>st</sup> Defendant failed to complete the agreement by surrendering the completion documents pursuant to paragraph 4 of the agreement of sale. The 1<sup>st</sup> Defendant contends that he surrendered the documents to the Plaintiff's lawyer who released the balance of the purchase price to him. He argues that there is no way the Plaintiff's lawyer would have paid the balance of the



purchase of price in the absence of documents. That sounds almost convincing however the burden to proof that he actually surrendered the documents rested with the 1<sup>st</sup> Defendant. None of the parties called the lawyer to testify as to whether or not he was given the completion documents. The Court did not have the opportunity to receive evidence on the matter. On a probability of balance it is the holding of the Court that that the 1<sup>st</sup> Defendant did not comply with the terms of the agreement of sale to surrender the completion documents to the Plaintiff. To the extent that the 1<sup>st</sup> Defendant had an obligation to provide completion documents, the 1<sup>st</sup> Defendant breached the contract of sale. I shall make the appropriate orders in the end.

21. The next question is whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have trespassed onto the land? It was the Plaintiffs averment that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have through compulsory acquisition acquired the suit land for purposes of building a matatu terminus. That the 1<sup>st</sup> Defendant has withheld the documents in anticipation of compensation from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The old adage that he who asserts must proof applies in this case. There is no iota of evidence presented by the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Indeed during evidence the PW1 and PW2 reiterated that they had no case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It is the finding of the Court that the Plaintiff failed to lead evidence nor proof his case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**Whether the Plaintiff is entitled to orders sought.**

22. In this case the Plaintiff has not presented any documents with respect to the land. There is no Letter of Allotment. The Court will not know whether a valid interest was acquired by the 1<sup>st</sup> Defendant and whether a good title was passed to the Plaintiff other than receipts showing that the Plaintiff is the registered owner of the land. Equally the 1<sup>st</sup> Defendant's contention that the Plaintiff was registered as owner of the land at the Council is not sufficient evidence of ownership in the circumstances of this case. The 1<sup>st</sup> Defendant did not show any documents reflecting the interest he sold in the agreement of sale. Due to the uncertainty respecting the land, the Court is unable to grant specific performance as in my view will course hardship in the execution of the Judgment. Moreover the Plaintiff stated that he is yet to be put in possession of the land and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have constructed a matatu terminus.
23. That said I find that specific performance to transfer the land is not available to the Plaintiff. The Plaintiff luckily is not without a remedy. I find that he is entitled to a refund of Kshs 3.2 Million and I therefore grant the alternative prayer of refund in terms of prayer No (d) of the Plaint at Court rates till Judgment in full.
24. I order the 1<sup>st</sup> Defendant to pay costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6<sup>TH</sup> DAY OF JULY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**Kamonjo for Plaintiff**

**Mwaniki for 1<sup>st</sup> Defendant**

**Maruti HB Kisengese for 2<sup>nd</sup> Defendant**

**Maruti for 3<sup>rd</sup> Defendant**



**Court Assistants – Kevin & Lilian**

