



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO. 55 OF 2017**

**PRIME ALMS LIMITED.....PLAINTIFF**

**VERSUS**

**JOHN NZIOKA MAKAU.....1<sup>ST</sup> DEFENDANT**

**JANE MBITHE NZIOKA.....2<sup>ND</sup> DEFENDANT**

**MBUKONI HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 21<sup>st</sup> May, 2002, the Plaintiff has averred that by a written agreement dated 24<sup>th</sup> June, 1998, the 1<sup>st</sup> Defendant agreed to sell to him all that property known as L.R. No. 12715/1 Syokimau Farm measuring five (5) acres at a purchase price of Kshs. 2,500,000.
2. The Plaintiff averred that upon signing the sale agreement, he paid to the Defendant Kshs. 510,000 and took vacant possession of the land and that the balance of the purchase price was payable upon successful registration of the transfer on or before the completion date of 30<sup>th</sup> September, 1998.
3. It was averred by the Plaintiff that with the consent of the 1<sup>st</sup> Defendant, he carried out survey works on the suit property and sub-divided it into seventeen (17) sub-plots for sale to third parties; that the 1<sup>st</sup> Defendant breached the agreement by failing to transfer the property to him and that the 1<sup>st</sup> Defendant should be ordered to transfer the suit property to him.
4. In the Defence, the 1<sup>st</sup> Defendant denied that he sold the suit property to the Plaintiff. It is the 1<sup>st</sup> Defendant's case that he sold the suit property to one Kioko Kivanguli; that the purchase price was Kshs. 2,100,000/- out of which he was paid Kshs. 410,000 and that the said Kioko Kivanguli breached the agreement by failing to pay the agreed purchase price.
5. The Plaintiff filed an Amended Plaintiff dated 7<sup>th</sup> March, 2012 in which it included the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the suit. Other than repeating the averments in the original Plaintiff, the Plaintiff averred that in the year 2008, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants trespassed on the suit property.

**The Plaintiff's case**

6. When this matter came up for hearing on 8<sup>th</sup> June, 2021, the Plaintiff's advocate informed the court that the 1<sup>st</sup> Defendant died in the year 2006, and that she had served the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with a hearing notice. The matter proceeded for hearing in the absence of the Defendants.
7. The Plaintiff's Secretary, Pw1, informed the court that vide a written agreement dated 24<sup>th</sup> June, 1998, the 1<sup>st</sup> Defendant agreed to sell to the Plaintiff L. R. No. 12715/1 Syokimau measuring five (5) acres at a price of Kshs. 2,500,000 and that upon signing the agreement, the Plaintiff paid the 1<sup>st</sup> Defendants a deposit of Kshs. 510,000.
8. Pw1 informed the court that the balance of the purchase price was to be paid upon successful registration of the suit property in favour of the Plaintiff and that the Plaintiff was in peaceful occupation of the suit property until the year 2019 when the 1<sup>st</sup> Defendant trespassed on the land.

9. It was the evidence of Pw1 that the 1<sup>st</sup> Defendant refused to transfer the suit property to the Plaintiff; that the 1<sup>st</sup> Defendant entered into another agreement with a third party in respect of the same property and that when he conducted a search, he discovered that the suit property had been transferred to one George Nguni Kariuki.

10. In his submissions, the Plaintiff's advocate submitted that the cause of action arises from a breach by the 1<sup>st</sup> Defendant to honour a sale agreement for the purchase of land entered into with the Plaintiff.

11. It was submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been sued for trespassing on the suit property and sub-dividing the same; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file Defences and that the Plaintiff's suit should be allowed.

12. The claim by the Plaintiff is in respect of land known as L. R. No. 12715/1 (the suit property). In the Amended Complaint, and the oral testimony of Pw1, the Plaintiff stated that he entered into an agreement of sale in respect to the suit property dated 24<sup>th</sup> June, 1998 at a consideration of Kshs. 2,500,000.

13. Pw1 stated that after paying a deposit of Kshs. 510,000, the Plaintiff took vacant possession of the land and had the same sub-divided into seventeen (17) portions. However, the 1<sup>st</sup> Defendant declined to transfer the land to the Plaintiff. The main prayer in the amended Complaint is for;

***“An order that the 1<sup>st</sup> Defendant do transfer to the Plaintiff L. R. No. 12715/1 and in default the Registrar of this court do execute the necessary transfer documents and in the alternative the 1<sup>st</sup> Defendant be ordered to refund to the Plaintiff the sums stated in paragraph 5 and 6 of the Complaint together with interest at 20% from 1<sup>st</sup> August, 1998.”***

14. From the pleadings and the evidence adduced in this court, the Plaintiff's claim is as against the 1<sup>st</sup> Defendant. Indeed, the agreement dated 24<sup>th</sup> June, 1998 was between the Plaintiff and the 1<sup>st</sup> Defendant.

15. The agreement dated 24<sup>th</sup> June, 1998 can only be enforced as against the 1<sup>st</sup> Defendant. Other than signing the said agreement, it is the 1<sup>st</sup> Defendant who was paid a deposit of Kshs. 510,000 and the balance of Kshs 1,990,000 was to be paid to the 1<sup>st</sup> Defendant upon successful registration of the transfer.

16. In addition to the sale agreement and the payment vouchers, the Plaintiff produced in evidence a copy of the official search certificate which shows that L. R. No. 12715/1 was transferred to one George Nguni Kariuki on 18<sup>th</sup> July, 2008. The said George Nguni Kariuki is not a party to this suit.

17. The Plaintiff's advocate informed the court that the 1<sup>st</sup> Defendant died in the year 2006, meaning that this suit abated as against the 1<sup>st</sup> Defendant sometimes in the year 2007. The Plaintiff neither applied for the revival of the suit as against the 1<sup>st</sup> Defendant nor made an application for the substitution of the deceased 1<sup>st</sup> Defendant.

18. To the extent that the Plaintiff's claim is as against the 1<sup>st</sup> Defendant, who was the owner of the suit property as at 24<sup>th</sup> June, 1998, when he entered into an agreement with the Plaintiff and the suit having abated as against the 1<sup>st</sup> Defendant, it is the finding of the court that the suit is a non-starter, and cannot succeed as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

19. Indeed, despite the Plaintiff knowing that the suit property was transferred to one George Nguni Kariuki on 18<sup>th</sup> July, 2008, the Plaintiff did not join the said George Nguni Kariuki in these proceedings. This, in addition to the fact that the suit as against the 1<sup>st</sup> Defendant abated in the year 2007 makes the suit incompetent.

20. For those reasons, it is the finding of the court that the Plaintiff's suit is a non-starter, bad in law and incompetent. The Plaintiff's suit is struck out with no order as to costs.

**Dated, signed and delivered virtually in Machakos this 3<sup>rd</sup> day of February, 2022.**

**O. A. Angote**

**Judge**

**In the Presence of:**

Ms Musa for the Plaintiff

No appearance for the Defendants

Court Assistant: Okumu