



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 13 OF 2018**

**LANCASTER MUTUNE SILA.....1<sup>ST</sup> PLAINTIFF**

**MACKENZIE MUTISO SILA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMINICO COMPANY LTD.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 25<sup>th</sup> January, 2018, the Plaintiffs have averred that they are the beneficial owners of land measuring two (2) acres of land known as Matungulu/Sengani/3473 which had been exercised from Matungulu/Sengani/1311.
2. The Plaintiffs have averred that by a written Sale Agreement dated 27<sup>th</sup> March, 2008, the Defendant was to pay the Plaintiffs Kshs. 6,500,000 as the purchase price once the land was sub-divided, sold and transferred to third parties and that in total breach of the Agreement of 27<sup>th</sup> March, 2008, the Defendant transferred parcel of land known as Matungulu/Sengani/3473 to one Samuel Dominic Muathe, a shareholder and Director of the Defendant, who proceeded to sub-divide the land into twenty two (22) plots being Plot Nos. 3450-3502 and sold them to third parties.
3. According to the Plaintiffs' Plaintiff, the Defendant has refused to pay the balance of the purchase price of Kshs. 5,300,000 having paid only Kshs. 1,200,000. The Plaintiffs have prayed for the payment of the purchase price with interest as from 1<sup>st</sup> February, 2009 at commercial rates and for general damages for breach of contract.
4. Although the Defendant's Director was served with the Summons to Enter Appearance, he neither entered appearance nor filed a Defence. The matter proceeded for hearing in the absence of the Defendant's representative.
5. In his evidence, the 2<sup>nd</sup> Plaintiff, PW1, informed the court that he agreed to sell to the Defendant the family's land measuring 22 acres; that out of the 22 acres, they prepared a separate Sale Agreement in which they agreed to sell the same portion of land measuring two (2) acres for Kshs. 6.5 million and that the Defendant was to transfer the land after sub-division to third parties.
6. Despite signing the Agreement of 27<sup>th</sup> March, 2008, it was the evidence of PW1 that the Defendant did not pay up the balance of the purchase price; that the Defendant only paid them Kshs. 1.2 million and that the Defendant was to pay the balance of the purchase price after transferring the land to one Samuel Dominic Muathe.
7. The 1<sup>st</sup> Plaintiff, PW2, stated that parcel of land known as Matungulu/Sengani/1311 belonged to the family of the late Mutiso Sila (*his grandfather*); that on 27<sup>th</sup> March, 2008, Peter Mackenzie Mutiso Sila, as a trustee of the family of the late Sila Mutiso, entered into a Sale Agreement with the Defendant for the sale and purchase of parcel of land known as Matungulu/Sengani/3473 which was hived from parcel number 1311 and that the Defendant was to pay to the 2<sup>nd</sup> Plaintiff Kshs. 6,500,000 after transferring parcel number 3475 to a third party.
8. According to PW2, the Defendant transferred the whole land measuring 22 acres to one Mr. Muathe who sub-divided it and transferred it to third parties and that the Defendant only paid the 2<sup>nd</sup> Plaintiff Kshs. 1,200,000 of the purchase price.
9. In his submissions, the Plaintiffs' advocate submitted that the Defendant having transferred and sold the suit property to a third party, Dominic Muathe, who happens to be the Director of the Defendant's company, and who eventually sub-divided the land and sold to third parties, he should pay the balance of the purchase price.

10. The evidence by the Plaintiffs is that on 27<sup>th</sup> March, 2008, they entered into a Sale Agreement with the Defendant in which they sold to the Defendant parcel of land known as Matungulu/Sengani/3473; that in breach of the Agreement, the Defendant transferred the land to its Director, Mr. Muathe and that the Defendant should pay the balance of the purchase price.

11. The Plaintiffs produced in evidence an irrevocable Agreement and payment Guarantee dated 27<sup>th</sup> March, 2008 between the 1<sup>st</sup> Plaintiff and the Defendant. In the Agreement, the Defendant undertook to pay the 1<sup>st</sup> Plaintiff, or his appointees, Kshs. 6,500,000 being the “*agreed share emanating from the sale of Matungulu/Sengani/1311 plots*”. The Agreement further provided that the “*said payments will cover the cost of the said Mr. Mackenzie M. Sila incurred in preparing and perfecting the sale of the said plots.*”

12. The Agreement further provided that “*the amount here said is payable immediately Saminico Limited completes the process of transferring the plots to the new buyers/occupiers of all plots therein and the title documents are ready for transfer.*”

13. The Plaintiffs also produced in evidence the Mutation Form which shows that parcel number Matungulu/Sengani/1311 was sub-divided into six (6) portions. One of the portions of land is parcel of land known as Matungulu/Sengani/3473 whose title was issued in May, 2008 in the name of Samuel Dominic Muathe. The said land measures 0.77 Ha.

14. There is no evidence that was placed before me to show if indeed the remaining sub-divisions of parcel number 1311 have been registered in the names of third parties.

15. Considering that the Sale Agreement of 27<sup>th</sup> March, 2008 between the 1<sup>st</sup> Plaintiff and the Defendant was in respect to the entire land being parcel number Matungulu/Sengani/1311, the Plaintiffs should have produced in evidence the searches or the copies of the titles of the sub-divisions thereof to enable the court ascertain if indeed the sub-divisions have all been transferred to third parties.

16. In the absence of evidence to show that all the sub-divisions of parcel number 1311 have been transferred by the Defendant to third parties, I find and hold that the Plaintiffs have not proved their case on a balance of probabilities.

17. In the circumstances, I dismiss the suit but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**