



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC. CASE NO. 320 OF 2017**

***(Formerly Machakos ELC. Case No. 33 of 2013)***

**WIKIO INVESTMENT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**PURITY KIMWATI IKAYO.....1<sup>ST</sup> DEFENDANT**

**JULIUS KIPOLONKO MULEI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated the 12<sup>th</sup> July, 2013 the Plaintiff sought for the following orders:

- a) Specific Performance of the contract signed on the 15<sup>th</sup> May, 1984 between the Plaintiff and the Defendants.***
- b) Declaration that part of the 100 acres of the said parcel of land Title No. Kajiado/Ololoitokoshi/Kitengela/2088.***
- c) That injunction does issue restraining the Defendants by themselves, their servants or agents or otherwise whosoever from transferring the Said Title No. Kajiado/Ololoitokoshi/Kitengela/2088.***
- d) That general on punitive scale is awarded to the Plaintiff as against the Defendants for breach of contract.***
- e) Costs of the suit.***
- f) Any other relief the court deems fit to grant.***

The Defendants filed a Defence dated 10<sup>th</sup> December, 2018 and admitted the descriptive and jurisdiction of the court. They denied ever being a party to the Sale Agreement dated 15<sup>th</sup> June, 1984 and contended that the Plaintiff could not take advantage of their misinformation. They confirmed that title number KJD/KITENGELA/2088 was indeed registered in the name of Malei Ole Kanka Mapelu and Tapoi Malei Kanka but explained that the said Title Deed did not exist as it had been sub-divided amongst the beneficiaries. They insisted that at the time of signing the Sale Agreement, the 100 acres being sold were not ascertained since there was no Title Deed for KJD/OLOOLOITIKOSHI/KITENGELA/2088. They reiterate that the Plaintiff has not demonstrated any cause of action against them.

The matter proceeded for hearing where the Plaintiff had two witnesses but the Defendants never tendered any evidence.

**Evidence of the Plaintiff**

PW1 Kamau Karuma Kuria, on examination in chief testified that he was a member of the Plaintiff Investment Company Limited which was registered to aid in purchase of land. He stated that he is the current Chairman of the company as the previous one Samuel Kioge died in May 1984. It was his testimony that one maasai called Lopolo Ole Logira agreed to get land for the Plaintiff to purchase and introduced them to the vendor. It averred that on 9<sup>th</sup> May, 1984 they met with the vendor in the Plaintiff's office who took them to the land which was called Kitengela Group Ranch situated in upper Kitengela past the Prisons. Further, on 11<sup>th</sup> May, 1984 they agreed that the purchase price was Kshs. 4,000/= per acre and total would be Kshs. 400,000 for the 100 acres of land; after which they executed a Sale Agreement on 15<sup>th</sup> June, 1984. He testified that the agreement was witnessed by Munyaka, Josephat Kipumpa and Matabaso, two people who signed the agreement are since deceased except for Munyaka. PW1 stated that upon signing the agreement they paid Kshs.100,000/= via bankers' cheque dated

15<sup>th</sup> June, 1984. PW1 testified that after signing the agreement, the surveyor was to demarcate the 100 acres and return the map to Kajiado Land Registry. Further, that the vendor wrote a letter dated 14<sup>th</sup> June, 1984 to authorize it. He averred that the surveyor demarcated the land in the portions they had purchased indicating the beacons. He further testified that they made further payments as follows: Kshs.100,000/= on 13<sup>th</sup> July, 1984; Kshs.100,000/= on 3<sup>rd</sup> January, 1985 and Kshs.50,000/= on 31<sup>st</sup> January, 1985. He contended that they were told the parcel they had purchased was LR No. Kajiado/Ololoitokoshi/Kiitengela/2088. He explained that in 1985 there were tribal clashes where Kikuyus were forced to leave the portions of land they had purchased. Further, the suit land was not transferred to their names due to political clashes and when they attempted to follow up on the issuance of the title in 2003 after the said clashes, by going to look for Munyaka so as to get the Vendor, they discovered the vendor had died. He confirmed that they looked for the vendor's family members and found his wife who informed them they were estranged. Further, they later found the vendor's children on the suit land on 7<sup>th</sup> January, 2011 but the said children were dishonest and failed to transfer the suit land to the Plaintiff. He insisted that the two Defendants were the vendor's children. Further, on 7<sup>th</sup> January, 2011, they met the 2<sup>nd</sup> Defendant and informed him of the transaction including Sale Agreement.

PW2 Munyaka Ntakusa Nkaka confirmed being the elder brother of the deceased vendor Malelu ole Nkaka. He testified that his deceased brother had land in upper Kitengela which emanated from Ololoitokoshi Group Ranch. He stated that he accompanied his brother who entered into a sale agreement with the Plaintiff's director. He explained that upon the demise of the vendor, he prevailed upon the deceased's seven (7) children to have the 100 acres the Plaintiff had purchased from the deceased transferred to it but they declined without asserting any reason to the contrary. He claimed to have been one of the witnesses who executed the sale agreement in the company of two others and he recalled payment being made.

The Plaintiff produced the following documents as exhibits: Agreement dated 15<sup>th</sup> June, 1984; Letter addressed to the District Surveyor dated 14<sup>th</sup> June, 1984; The letter from the Planning Committee of North Kajiado allocating the 1<sup>st</sup> Defendant's late father plot number 91; The map of the whole Ololoitokoshi/Kitengela Group Ranch; Cheque No. 700028 from Barclays Bank Kenya Limited for Kshs. 100,000.00; Letter requesting the cheque from the Directors of Wikio Investments Company Limited dated 15<sup>th</sup> June, 1984; Letter of acknowledgment of money received dated 13<sup>th</sup> July, 1984 for Kshs. 100,000.00; Letter of acknowledgment of money received dated 13<sup>th</sup> September, 1984 for Kshs. 100,000.00; Letter of acknowledgement of money received dated 3<sup>rd</sup> January, 1985 for Kshs. 50,000.00; Bundle of Filed Diagrams of the observation on the site as drawn by the Surveyor; Filed Mutation form; Wikio Investments Limited Certificate of Incorporation; Demand letter dated 10th May, 2012; Caution dated 6<sup>th</sup> September, 1989; and Letter of acknowledgement of Kshs. 5,000.00.

#### **Evidence of the Defendant**

The Defendants filed a Defence but failed to cross examine the Plaintiff nor attend court to tender evidence in support of their case.

#### **Analysis and Determination**

Upon consideration of the Plaintiff, Defence, Witness testimonies, exhibits and submissions, the issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff in its submissions reiterated its claim and contended that it had proved its case on a balance of probability. Further, that evidence it tendered was at all material times uncontroverted by the Defence. It sought for the court to allow the prayers as sought.

The Defendants in their submissions insisted that the Plaintiff had not shown through documentary evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the administrators of the deceased's estate so as to claim the deposit of the purchase price on execution of the agreement. Further, that the sale agreement entered on 5<sup>th</sup> June, 1984 could not be enforced and was void on the account of the agreement referring to non-existent property since no title deed had been issued by the then OLOOLITIKOSHI GROUP RANCH and also no written document had been produced by the said group ranch to show the agreement was valid. They insisted the sale agreement executed on 15<sup>th</sup> June, 1984 between Malelu Ole Nkaka & another and Wikio Investment Company Limited was time barred and in contravention of the Limitation of Action Act Cap 22, as claim for actions to recover land is 12 years. Further, no Land Control Board consent to sub-divide had been obtained as required by the Land Control Board Act and the Plaintiff had not produced any document to show that the validity of the sale agreement of 15<sup>th</sup> June, 1984 had been extended. To support their arguments, they relied on the following decisions: **Francis Mugo Ndegwa v Amboseli Court Limited (2012) eKLR and Thrift Homes Ltd v Kenya Investment Ltd (2015) eKLR.**

In this matter, the Defendants despite filing a Defence never tendered any evidence to buttress the Plaintiff's averments. The Defendants further never cross examined the Plaintiff and only filed their submissions.

In the Plaintiff, the Plaintiff has sought for specific performance and injunction to restrain the Defendants from transferring the suit land. The Plaintiff claims to have purchased 100 acres of land from the Defendants' late father. It produced the Sale Agreement and Proof of Payments to confirm these averments. PW1 explained that on 15<sup>th</sup> May, 1984 they had agreed that the total purchase price was Kshs.400,000/= for the 100 acres after which they executed a Sale Agreement with the vendor dated 15<sup>th</sup> June, 1984, which was witnessed by Munyaka (PW1), Josephat Kipumpa and Matabaso. Further, upon signing the agreement they paid Kshs.100,000/= via bankers cheque dated 15th June, 1984. PW1 testified that after signing the agreement, the surveyor was to demarcate the 100 acres and the vendor wrote a letter dated 14<sup>th</sup> June, 1984 to authorize it. Further, the surveyor demarcated the said portion of land they had purchased and indicated the beacons. He confirmed that they made further payments as follows: Kshs.100,000/= on 13<sup>th</sup> July, 1984; Kshs.100,000/= on 3<sup>rd</sup> January, 1985 and Kshs.50,000/= on 31<sup>st</sup> January, 1985. He confirmed that the parcel they had bought was LR No. Kajiado/Ololoitokoshi/Kiitengela/2088. He explained that in 1985 there were tribal clashes where Kikuyus were forced to flee from the portions of land they had purchased. Further, the suit land had not transferred to their names by then and when they attempted to follow up the issue of the titles in 2003 after the said clashes by going to look for Munyaka so as to get the Vendor, they discovered the vendor had died. PW2 who is the Defendants' uncle confirmed that his late brother sold 100 acres of land to the Plaintiff and he was a witness to the Agreement. Further, that his brother died soon thereafter before effecting the transfer to the Plaintiff. It was his testimony that he had implored the Defendants to transfer the 100 acres of land to the Plaintiff but in

vain. The Defendants never controverted these averments.

On the prayer for specific performance, I will proceed to highlight various cases in respect to the same. **In the case of Gurdev Singh Birdi & Marinder Singh Gatora vs. Abubakar Madhubuti, where the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”**

While in the case of **Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR**, the court stated that, “specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. **The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality.** Even where a contract is valid and enforceable, **specific performance will not be ordered where there is an adequate alternative remedy.** The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”

Further in **Steadman vs. Steadman (1976) AC 536, 540**,

*“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”*

**See also the decisions in Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others [2018] eKLR; Anne Murambi v John Munyao Nyamu & another [2018] eKLR and Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR**

From the evidence before Court, PW1 and PW2 confirmed the Plaintiff signed a Sale Agreement on 15<sup>th</sup> June, 1984 with the deceased for sale of 100 acres of land. The Defendants admit the suit land was registered in the name of the deceased and one Tapoi Malei Kanka. Further, the Plaintiff confirms they paid the full purchase price and handled their part of the bargain. I note the deceased Malei Ole Nkaka Mapelu actually wrote a letter dated the 14<sup>th</sup> June, 1984 to the District Surveyor, Kajiado authorizing him to subdivide his portion of land out of Kitengela Group Ranch 50 and register 100 acres in the name of the Plaintiff. The said letter was copied to the Land Registrar, Kajiado, Land Adjudication officer, Kajiado and District Commissioner Kajiado. Further, he even received further payments from the Plaintiff on 8<sup>th</sup> August, 1989. I note the deceased died before effecting the transfer and it emerged that his children were minors by then. The Defendants in their submissions contend that the suit is statute barred and further no consent of the Land Control Board was obtained. I note these issues were neither pleaded in the Defence nor tendered in evidence. It is trite that parties are bound by their pleadings and cannot raise new issues in submissions. Further, submissions must flow from evidence and pleadings. Since the deceased died before effecting the transfer, noting that the Defendants later proceeded to subdivide the suit land amongst the beneficiaries in 2010 as evidenced by the Mutation form, it is my view that this could not have been possible without Letters of Administration Intestate. Further, it is trite that when a vendor dies before effecting a transfer, time stops running and the issue of limitation only kicks in when his estate has been distributed, which date the Defendants have failed to divulge, but could have been around 2010 as per the Mutation form.

Based on the facts before me while associating myself with the decisions cited above, I find that the Plaintiff is indeed entitled to orders of specific performance for the 100 acres of land that it purchased from the deceased, from his estate or from the Defendants who signed the Mutation forms in 2010. Be that as it may, I note the said land no longer exists as the Defendants admitted that the same was distributed to the deceased beneficiaries. Further, PW2 confirmed that he informed the deceased children of the Sale Agreement but they feigned ignorance and declined to effect the transfer. Since the Defendants failed to effect transfer even though they knew 100 acres had been sold to the Plaintiff and equity follows the law, it is my considered view that the Plaintiff is entitled to the said 100 acres from all the resultant subdivisions of the suit land, or in the alternative a refund of the purchase price from the deceased estate, plus interest until payment in full. On the issue of injunction, since the suit land has been subdivided and the Plaintiff has not provided details of the owners and in line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I am unable to grant the said orders as sought. It is against the foregoing that I find that since the Defendants are beneficiaries of the deceased estate and subdivided the suit land and distributed it among themselves, they are liable to effect transfer of the 100 acres of land to the Plaintiff or in the alternative refund it the purchase price together with interest.

On who should bear the costs. Since the Plaintiff is the inconvenienced party, I will award it costs.

It is against the foregoing that I find the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement in its favour. I will make the following final orders:

***i. An order be and is hereby made that the Plaintiff is entitled to Specific Performance of the Sale Agreement signed on the 15<sup>th</sup> June 1984 between the deceased Malei Ole Nkaka Mapelu, and itself.***

***ii. The Defendants including all the beneficiaries of the estate of Malei Ole Nkaka Mapelu are hereby directed to transfer hundred (100) acres of land to be excised from Kajiado/Ololoitokoshi/Kitengela/2088 or any resultant sub-divisions therefrom to the Plaintiff, within 90 days from the date hereof.***

***iii. Should the Defendants fail to effect transfer, the Plaintiff is entitled to a refund of the Kshs. 400,000 being the purchase price paid, with interest at court rates from 8<sup>th</sup> August, 1989, from the deceased estate or the beneficiaries therefrom, until payment in full.***

***iv. Costs of the suit is awarded to the Plaintiff.***

DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE