



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO. 6 OF 2019**

JOHN NDEGWA MAINA.....1<sup>ST</sup> PLAINTIFF  
STEPHEN KAMAU NDERITU.....2<sup>ND</sup> PLAINTIFF  
DANIEL WAHOME MAINA.....3<sup>RD</sup> PLAINTIFF  
JOHN KURIA KIMANI.....4<sup>TH</sup> PLAINTIFF  
JENIFFER WANJIRU MWAURA.....5<sup>TH</sup> PLAINTIFF  
ANN. W. MBOGO.....6<sup>TH</sup> PLAINTIFF  
HANNAH W SIMON.....7<sup>TH</sup> PLAINTIFF  
KARIUKI MUCHIRI.....8<sup>TH</sup> PLAINTIFF  
MARGARET W THUO.....9<sup>TH</sup> PLAINTIFF  
ELIJAH MAINA.....10<sup>TH</sup> PLAINTIFF  
SULEIMAN NG'ANG'A WANJIKU.....11<sup>TH</sup> PLAINTIFF  
JANE WANJIRU GITAHU.....12<sup>TH</sup> PLAINTIFF

**VERSUS**

JOHN NDUN'GU MWAURA.....1<sup>ST</sup> DEFENDANT  
MICHAEL WAIHENYA MWAURA.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. Vide a Plaint dated the 18<sup>th</sup> February 2019, the Plaintiff herein sought for the following orders that;

- i. A declaration that the Defendants are not entitled to evict the Plaintiffs from title No. Sipili/Donylop Block/2/757 (Mutukanio) as the same is held in trust on their behalf.
- ii. An order of dissolution of the said trust and transfer to the Plaintiffs their respective entitlement out of title No.Sipili/Donylop Block/2/757(Mutukanio) forthwith and in default the honorable Court Deputy Registrar do execute all the necessary documents to facilitate subdivision and transfer thereof.
- iii. Costs of the suit plus interest thereon at Court's rate
- iv. Any other or better relief deemed fit by the honorable Court.

2. In response to the said Plaintiff, the Defendants herein filed their joint statement of Defence and Counterclaim on the 25<sup>th</sup> March 2019, wherein in their defence, they denied the allegations contained in the Plaintiff's Plaintiff and sought for the following orders in their Counterclaim;

i. An order of declaration that the Defendants are the rightful and/or lawful owners of L.R. Sipili/Donylop Block/2/757(Mutukanio) and are entitled to quiet possession and enjoyment thereof.

ii. An order of declaration that the Plaintiffs are illegally and unlawfully in possession and using portions of No. Sipili/Donylop Block/2/757(Mutukanio) as trespassers.

iii. An order of declaration that the Notice to Vacate dated 26<sup>th</sup> October 2018 to the Plaintiffs pursuant to the Land Act, 2012, and the Rules thereof was properly given to the Plaintiffs and an order for eviction to issue against the Plaintiffs from No. Sipili/Donylop Block/2/757(Mutukanio) and deliver vacant possession thereof to the Defendants.

3. The Plaintiffs thereafter filed their reply to the defence and defence to counterclaim on the 12<sup>th</sup> May 2019 denying the Defendants assertion and reiterating on the contents of their Plaintiff.

4. Subsequently after both parties complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

#### **Plaintiff's case**

5. Elijah Githinji Charara testified as PW 1 to the effect that he was an Agent with Agmar Agencies and that he had been selling land since the year 1997. That he had come to know the 1<sup>st</sup> Defendant, John Ndungu Mwaura in the year 2007, through one Samson who was his employee, when he sought to sell 3 acres of land reference No Sipili/Donyoloip Block 2/757. That thereafter, he had sought out the 1<sup>st</sup> Defendant in his home where he had met him and his wife.

6. That the 1<sup>st</sup> Defendant had confirmed to him that he was wanted to sell of his land which was to be subdivided into plots measuring 50 x 100ft each.

7. That they had then agreed vide an agreement executed before the Chief of Sipili that each plot would be sold at Kshs.35,000/-out of which he was to be paid a commission of Ksh 2,000/- for each plot.

8. That later in the year 2008 he had come to learn that the 2<sup>nd</sup> Defendant, Michael Waihenya Mwaura, had transferred the land to somebody else despite the fact that the people to whom he had sold to the 16 parcels of the land, were already in occupation of their respective parcels of land.

9. That it had been because of this state of affair, which he termed as a breach of their contract that he had then refused to pay the 1<sup>st</sup> Defendant a balance of Ksh. 318,000 /- money which was the consideration of the sold parcels of land. The matter had then been referred to Sipili Location Chief where the 2<sup>nd</sup> Defendant did not attend.

10. PW 1 further testified that although he had also paid the 1<sup>st</sup> Defendant Ksh 242,000/- for the Land Board Consent, they had not attended the same.

11. He further denied the fact that parties had agreed to jointly sell the land with Michael whom he had only met at the Chiefs office. That further he had no problem paying the Ksh. 318,000/- but that it would be only after the Defendants transferred the land to the people he had sold it to.

12. He testified that he had written a demand letter to the 1<sup>st</sup> Defendant on 15<sup>th</sup> January 2011 who had failed to transfer the land but who had later responded with a letter dated the 10<sup>th</sup> February 2017 asking him to collect his refund of Ksh 242,000/- from his Counsel's office.

13. That he did not go for the money because he was still willing to pay for the land. That subsequently, all the 16 people to whom he had sold the land to had been issued with notices, dated 21<sup>st</sup> April 2017, to vacate the same but that they had refused to do so.

14. To buttress his evidence, PW1 produced the following exhibits

i. Pf Exhibit 1 an agreement dated the 13<sup>th</sup> May 2008 between him and the 1<sup>st</sup> Plaintiff.

ii. Pf Exhibit 2 an agreement dated 11<sup>th</sup> January 2010 between him and the 2<sup>nd</sup> Plaintiff

iii. Pf Exhibit 3 an agreement dated the 21<sup>st</sup> April 2009 between him and the 3<sup>rd</sup> Plaintiff

iv. Pf Exhibit 4<sup>th</sup> an agreement dated the 15<sup>th</sup> May 2008 between him and the 4<sup>th</sup> Plaintiff.

v. Pf Exhibit 5 an agreement dated the 17<sup>th</sup> January 2007 between him and the 5<sup>th</sup> Plaintiff.

vi. Pf Exhibit 6, an agreement between him and 6<sup>th</sup> Plaintiff dated 18<sup>th</sup> June 2008

vii. Pf Exhibit 7, an agreement dated the 17<sup>th</sup> January 2007 between him and 7<sup>th</sup> Plaintiff

viii. Pf Exhibit 8, an agreement between him and the 8<sup>th</sup> Plaintiff dated 16<sup>th</sup> February 2008.

ix. Pf Exhibit 9, an agreement between him and 9<sup>th</sup> Plaintiff dated 9<sup>th</sup> July 2010.

x. Pf Exhibit 10, an agreement between him and 10<sup>th</sup> Plaintiff dated 17<sup>th</sup> May 2007.

xi. Pf Exhibit 11, an agreement between him and 11<sup>th</sup> Plaintiff dated 28<sup>th</sup> July 2008

xii. An agreement between him and the 12<sup>th</sup> Plaintiff dated 12<sup>th</sup> September 2008 as Pf Exhibit 12.

xiii. He also produced the demand letter dated 15<sup>th</sup> January 2011 as Pf exhibit 13, the response to the same dated the 10<sup>th</sup> February 2017 as Pf Exhibit 14, as well as his response dated 21<sup>st</sup> February 2017 stating that he was ready to pay the balance of Ksh 318,000/-, as Pf Exhibit 15.

15. PW1 also produced the notice dated 21<sup>st</sup> April 2017 issued to the Plaintiffs to whom he had sold to the land, as Pf Exhibit 16, a Notice of eviction dated the 3<sup>rd</sup> September 2018 as Pf Exhibit 18 and another Notice dated 26<sup>th</sup> October 2018 issued to the Plaintiffs by the Defendants as Pf Exhibit 18.

16. He testified that the land had been subdivided into 16 plots wherein some of the Plaintiffs had bought 2 plots. That further the Plaintiffs had already built on the plots. He produced some of the pictures depicting the buildings as Pf Exhibit 19 (a-g) and proceeded to testify that none of the Plaintiffs had a balance with him and thus they now awaited for their respective titles.

17. PW1 testified that he got permission to sell the land from the 1<sup>st</sup> Defendant wherein after he had sold the same and the Plaintiffs had taken possession, of their respective plots, there had been no objection from anybody.

18. That the Defendants had started asking the Plaintiffs to vacate the land vide the 1<sup>st</sup> Notice of 10<sup>th</sup> February 2017. He asserted that the Plaintiffs had a right to seek for transfer and titles to their respective plots.

19. In cross-examination, PW1 reaffirmed that he was Agent to the 1<sup>st</sup> Defendant and that their relationship had been cordial until he refused to pay him his money. That although he had the agency agreement, he had not produced the same in Court but was categorical that the 1<sup>st</sup> Defendant had been the one who had breached their agreement.

20. He also confirmed that although he did not comply with the terms of the agreement dated 21<sup>st</sup> October 2009 made between himself and the 1<sup>st</sup> Defendant that he would give him his money by the 30<sup>th</sup> May 2010, they had entered into another agreement on the 2<sup>nd</sup> June 2010 wherein he had agreed to leave as security his log book for a motor vehicle Pickup Reg No. KDR 326, make Daihatsu, and a title deed for land plot No. SA 322 – 260 as security.

21. That after entering into the said 2<sup>nd</sup> agreement, to which he was to pay the 1<sup>st</sup> Defendant Ksh 318,000/- by the 18<sup>th</sup> January 2011, the 1<sup>st</sup> Defendant never went for the money from the chief and therefore he had not breached the agreement.

22. He also confirmed that although the 1<sup>st</sup> Defendant did not deal with the Plaintiffs, yet it is not true that he was liable to them through a suit.

23. He confirmed that agreement between himself and the 1<sup>st</sup> Defendant had been entered into at the time the 2<sup>nd</sup> Defendant, Michael was the registered the proprietor of the suit land.

24. In re-examination, PW1 testified that the Plaintiffs had a right to demand for their titles from him as well as from the Defendants. That the items he had given out as security were to be sold in default of the terms of the agreement dated the 2<sup>nd</sup> June 2010 but that although the Defendants refused to go for their money, they had neither sold the car nor the land.

25. The next Plaintiff witness was PW 2, John Ndegwa Maina, and the 1<sup>st</sup> Plaintiff herein who testified on his behalf and on behalf of all the Plaintiffs pursuant to an authority to do so dated the 18<sup>th</sup> February 2019.

26. His testimony was to the effect that they had filed the present suit so that they could be issued with their respective titles to land situate at Sipili area, Laikipia West Sub-County, Laikipia County, land which they had bought through PW1's Agency after he had advertised the sale of the same on a black board in his office.

27. He further testified that the land was No. 757 (Mutukanio) measuring 50 x 100ft, and that each plot was going for Ksh 35,000/- wherein he had bought two (2) plots.

28. He testified that upon the purchase of the plots, they had signed agreements to that effect wherein he had paid the whole sum of Kshs.70,000/-. That at the time he had gone to see the land, there were about 6 people thereon, the 3<sup>rd</sup> Plaintiff included, people who had already bought their respective parcels of land and one (1) person had already built his house.

29. He confirmed that he had also built on the suit land and that whereas Pf Exhibit 19 (e) was a picture his semi-permanent house, Pf Exhibit 19 (g) was a picture of the 5<sup>th</sup> Plaintiff's house.

30. He also confirmed that all the houses in the pictures produced as Pf Exhibit 19 were on the ground and that they did not meet the owner of the plots at the time they purchased the same. That he had only met the owner after he had built his house.

31. That nobody had objected to him building his house and that the 1<sup>st</sup> notice he had received was the one dated the 21<sup>st</sup> April 2017 (Pf Exhibit 16.)

32. He confirmed that Pf Exhibit 17 and Pf Exhibit 18 were notices asking them to vacate from the land within 4 months because they owed money. He however denied owing any money and testified that the person who had sold to them the land was the one who had a debt.

33. That vide a notice produced as Pf Exhibit 16, they had been given 14 days to vacate the land wherein they had gone to the Agent who had informed them that the case had been between him (PW1) and the owner of the land to whom he owed money. He also confirmed that it had been the 1<sup>st</sup> Defendant, John Ndung'u, who had asked PW 1 to sell to them the land.

34. PW2 testified that indeed they had been to the Chief's office twice, the first time in the month of October 2009 wherein at the time, John Ndung'u demanded for Ksh 318,000/- from the Agent PW1 who then promised to pay the money by 30<sup>th</sup> May 2010.

35. That the 2<sup>nd</sup> time they had gone before the Chief was on the 2<sup>nd</sup> June 2010 where the 1<sup>st</sup> Defendant was in attendance along with his brother the 2<sup>nd</sup> Defendant. That on that date, PW1 had confirmed that he had the 1<sup>st</sup> Defendant's debt of ksh 318,000/- wherein he and the entered into an agreement with him promising that he would pay the same in installments. PW1 had then been asked to deposit as security, a log book and title to his land wherein the District officer who was also present had then informed the Plaintiffs to wait for PW1 and 1<sup>st</sup> Defendant to sort themselves before they could be issued with their titles.

36. That in the year 2017 they were shocked to learn that the dispute at the Chief's office had not been finalized to the effect that they had now been caught in a fight between the PW1 and the Defendants

37. During cross-examination, PW2 confirmed that he had built his house in the year 2009 whereas the house in Pf Exhibit 19 (f) was commenced in the year 2018 and that it had not been true that they built their houses hurriedly so that they could claim development fee. That they had filed suit against the 1<sup>st</sup> Defendant because he had been the one who had sent them the eviction notice despite him not having any agreements with them.

38. He testified that since the Defendants had received part of their money totaling to Ksh 242,000/=it was incumbent of them to issue the Plaintiffs with their respective title deeds. The Plaintiffs thus closed their case.

#### **Defendant's case**

39. The 1<sup>st</sup> Defendant, John Ndung'u Mwaura, testified as DW1 on his behalf and on the behalf of his brother the 2<sup>nd</sup> Defendant wherein he adopted his statement of defence recorded on the 22<sup>nd</sup> March 2019. He testified that he had no relationship with the Plaintiffs and that he never sold to them land. He confirmed that indeed it had been PW1 who had sold to them the suit land upon an agency agreement entered between himself and PW1 to sell the land on his behalf.

40. He testified that after PW1 had sold the land, he had given him only Ksh 105,000/- wherein after, it had taken about 1 year as he sought for PW1 to clear his debt.

41. That in October 2009 when he met PW1 and demanded to be paid the monies owed, he had been shocked to be summoned by the Chief of Sipili on allegations that he had asked the Plaintiffs to leave his land. During the said meeting, the chief had found that PW1 was not truthful as he was the one who had owed him money.

42. That on the 21<sup>st</sup> October 2009 they had recorded an agreement herein produced as Df Exhibit 1, wherein PW1 had committed himself to pay the money owed by 30<sup>th</sup> May 2010 in default to which, he and the people he had sold the land to would vacate the same. PW1 failed to honor the agreement.

43. That on the 2<sup>nd</sup> June 2010 they had gone back to the Chief, where PW1 had committed himself to pay and had even given out his log book and title to his land as security.

44. DW1's testimony was to the effect that by the time they got into the agreement with PW1, the suit land, Sipili/Donyoloip Block 2/757, which measured 6 acres had been registered to his name. That they had sold 3 acres out of the 6 acres. That thereafter PW1 had sought to be given the work to sell the remaining 3 acres.

45. At this juncture the Defendant's Counsel sought time to refresh his client's memory wherein the Court obliged her and DW1 was stood

down and the matter adjourned.

46. On the 3<sup>rd</sup> February 2020, when the matter resumed hearing, DW1 proceeded with his evidence in chief to the effect that he had taken shares from Nakuru Mutukanio Farmers Company Limited for 6 acres of land which parcels of land were joint with his brother the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> parcel of land was No. 756 and had no problems.

47. That initially the title to the suit land being No. 757 had been registered in his name but had subsequently been transferred to his brother's name.

48. That initially PW1 was selling 756 wherein later he had asked to be given plot No. 757 so that he could sell it. That at the time, he had been dealing with his wife and when he went to pick her, DW1 had asked him to sell it to the 'Sisters of little Daughters of St Joseph' wherein PW1 had asked him to give him the suit land to sell so that he could get a commission after subdividing it.

49. He denied that the suit land had not been subsequently registered in the name of Michael Wahenya so that they could commit fraud. That he had no intension of breaking the contract, but that PW1 (at this juncture the 1<sup>st</sup> Defendant started referring to PW1 as Michael)...that 'Michael' had written to the Chief on 3 occasions wherein he had reported him of not having given him the title deed. At the time PW1 had only paid him Kshs.105,000/-

50. He confirmed the fact that indeed he was selling land but 'Michael' had refused to pay him his money. He also confirmed that his name was not in the Plaintiffs' contracts and that 'Michael' had undertaken to vacate the suit land with his people if he did not pay him his money. That when the money was not forthcoming, he had returned the money that PW1 had paid him to his Counsel wherein his Counsel had called PW1 to collect it but PW1 had refused to pick it, as evidenced in a letter dated 10<sup>th</sup> February 2017 herein produced as Pf Exhibit 14.

51. That he had wanted PW1 to either vacate from his land with his people or to pay him the money he owed him at the current rate.

52. That is was pursuant to this state of affairs that the Plaintiffs had embarked on building on the suit land whilst the matter was pending in Court. That the Plaintiffs had no cause of action against him as he did not sell any land to them that their cause of action lay with against PW1.

53. Dw1 then produced the abstract of title to parcel No. Sipili/Ndonyoloip/Block 2/757 (Mutukanyo) as Dfe Exh 1 and the title which was registered in the name of Michael Wahenya (2<sup>nd</sup> Defendant) as Df Exhibit 2. He also produced a receipt No. 4833769 for Ksh 2,500/-and dated the 3<sup>rd</sup> July 2017 in payment for the green card as Df Exhibit 3.

54. DW1 further produced the letter to the Chief dated the 21<sup>st</sup> October 2009 as DF Exhibit 4 and the agreement dated 2<sup>nd</sup> June 2010 as DF Exhibit 5 (A letter which was in kikuyu language and which Counsel had promised to provide a translated version but failed to do so) .

55. He also produced a demand letter dated the 15<sup>th</sup> January 2010 by his Counsel as Df Exhibit 6 and an agreement dated 9<sup>th</sup> February 2011 wherein his brother (2<sup>nd</sup> Defendant) had given him permission to receive money from PW1 on his behalf, after the sale of the land, was produced as Df Exhibit 7.

56. DW1 proceeded to give his testimony that after PW1 had refused to take the money back, he had gone to his counsel who had then written a demand letter dated the 21<sup>st</sup> April 2017, herein produced as Df exhibit 8 (a – l) to the Plaintiffs and the PW1 asking them to vacate from the suit land, a notice which DW1 sought that the Court assists him to execute.

57. In cross-examination, DW1 confirmed that both he and his brother the 2<sup>nd</sup> Defendant were members of the Mutukanio Farmers' Co-operative Ltd and that both of them had each been given 3 acres of land and that same was joint. That his land was No. 757, and situate near the road while the 2<sup>nd</sup> Defendant's land was No.756, land which was in the interior and which had been sold to the 'Sisters of little Daughters of St Joseph' although PW1 had sought to buy the same instead.

58. That during the transfer of plot No. 756, there had been a mix-up wherein the 'Sisters of little Daughters of St Joseph' had been given plot No. 757 by mistake and therefore there had to be transfer so that they could be transferred to his brother's land.

59. DW 1 denied the fact that after the mix up, they had decided to interchange the titles and stated that it had been after the land had been sold to the 'Sisters of little Daughters of St Joseph,' that PW1 had asked to be given plot No. 757 to sell.

60. That in the year 2008, and with his permission, his wife and PW1 had agreed orally that 2 acres be excised from Plot No 757 so that the same could be subdivided to enable PW1 to sell the resultant plots.

61. That after PW1 started selling the land on an understanding that each plot measuring 50x100 be sold at Kshs.35,000/-, he had given his (Dw1) wife Ksh 105,000/- for 3 plots of land, on the 21<sup>st</sup> October 2009 which monies he had received from her. That at that time, only one (1) person had bought and had started building.

62. He reiterated that he did not know how his plot had been registered to his brother's name, but that the same was by mistake. That further that he did not give the land to the 2<sup>nd</sup> Defendant to sell as he (2<sup>nd</sup> Defendant) was in Mombasa but that he (2<sup>nd</sup> Defendant) had given him the authority to sell his land. That if PW1 had paid him all his money after the sale, he would not have had any issues with the people the land had been sold to.

63. He stated that by then the plots were going for Ksh 35,000/- but now the rates had gone up and the same plots were now being sold for Ksh 250,000/- and above and that there were new developments thereon.

64. He confirmed that indeed they had had a meeting at the chief's office on the 2<sup>nd</sup> June 2010 wherein PW1 had given out a logbook and title as security to which they had recorded a 2<sup>nd</sup> agreement because he had not fulfilled the terms of the 1<sup>st</sup> agreement.

65. That the terms of the 2<sup>nd</sup> agreement were to the effect that were PW1 to fail to pay the Ksh 318,000/-owed then his car and land would be sold. That he had neither been paid nor executed the agreement because the logbook and the title deed which had been kept by the chief were later returned to PW1.

66. That he had not asked the Plaintiffs to stop building on his land although they knew that there was a case before Court and he had raised an objection with the chief. He testified that in the year 2009, the Plaintiffs had not put up any buildings on the land and further that he would not agree to take back his money and that PW1 should pick the Ksh. 242,000/-he had returned, monies which was held by his advocate.

67. He further confirmed that the total monies that he was to be paid was Ksh 560,000/- wherein PW1 was to be given a commission of one plot after he had paid the survey fee. That at the time PW1 owed him Ksh. 318,000/-.

68. In re-examination he corrected himself and stated that PW1 was to get his commission from the monies he had collected from the sale of the plots. The Defence then closed its case wherein Counsel filed their respective written Submissions.

#### **Plaintiff's submissions.**

69. Upon summarizing the Plaintiff's evidence, it was their submission that the gist of their case was that the Defendants were at all material times relevant to the suit registered as proprietors of all that parcel of land known as Title No. **Sipili/Donyoloip Block 2/757 (Mutukanio)** land which was situate within Laikipia County and hereinafter referred to as the suit land.

70. That on diverse dates between 17<sup>th</sup> January 2007 and 22<sup>nd</sup> May 2011, they purchased various portions out of the suit land from PW1 who was acting as an Agent of the 1<sup>st</sup> Defendant during the sale. Pursuant to the said purchases, they took vacant possession of the suit land and effected various developments thereon without any interruption by the Defendants whatsoever.

71. On or about 2<sup>nd</sup> April 2017, they had received notices from the Defendants to vacate and deliver vacant possession of the suit land on the basis that the sale transactions entered into with PW1 was null and void by operation of law.

72. It was their case that being purchasers for valuable consideration, the Defendants were not entitled to evict them from the suit land since the same was now held in trust on their behalf.

73. The Plaintiffs framed their matters for determination as follows:

- i. Whether the Plaintiffs have proved their case on a balance of probabilities to warrant granting the reliefs sought.
- ii. Whether the Defendants have proved their counterclaim to warrant the reliefs sought.
- iii. Who is liable to pay costs of the suit?

74. In response to their matters for determination, the Plaintiffs submitted that PW1 who acted as an Agent to Defendants during sale of the suit land produced the sale agreements entered between him and each Plaintiff and testified on the circumstances leading to his appointment as an Agent

75. That he had confirmed that indeed he had received the full consideration from the Plaintiffs pursuant to which he put each of them into actual possession of the suit land. That each plot was selling at Kshs.35,000/= out of which he was entitled to Kshs 2,000/= per plot as the sale commission. He sold the 16 plots and paid a total of Kshs.242,000/= to the 1<sup>st</sup> Defendant on diverse dates.

76. That before he could pay the balance, he realized that the 1<sup>st</sup> Defendant had transferred the suit land to the 2<sup>nd</sup> Defendant but by this time, all the purchasers had taken possession of their respective parcels of land.

77. That on 15<sup>th</sup> January 2011 when he wrote a demand letter to the 1<sup>st</sup> Defendant asking him to apply for consent to subdivide and transfer the suit land, the 1<sup>st</sup> Defendant had failed to comply claiming that he wanted to refund the amount already received by him. That PW1 was ready and willing to pay the balance of Kshs.286,000/= to the 1<sup>st</sup> Defendant who should in turn subdivide and transfer the suit land to the Plaintiffs.

78. PW 1 denied breaching the second agreement stating that the 1<sup>st</sup> Defendant did not turn up for the money. He denied that the Plaintiffs ought to have pursued him saying that the suit land was still registered in the 1<sup>st</sup> Defendant's name when he sold it to the Plaintiffs.

79. That the evidence of PW2 on his own behalf and on behalf of his co-Plaintiffs corroborated PW1's evidence where he had confirmed that he settled on the suit land in 2009 and that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Plaintiffs had also constructed their residential houses on the suit land while the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Plaintiffs had been cultivating on their respective plots.

80. It was PW2's evidence that their possession and development of the suit land have been open and within the knowledge of the Defendants who had never raised any objection thereto.

81. That the Notices to vacate and deliver vacant possession were first issued on 21<sup>st</sup> April 2017 but they justifiably failed to comply therewith. A second notice was issued on 3<sup>rd</sup> September 2018 giving 3 months to vacate. Even before expiry of the said notice, the Defendants had issued the Plaintiffs with a third notice on 26<sup>th</sup> October 2018 giving them 3 months to vacate the suit land. That it was against the said background that the instant suit was filed.

82. The Plaintiffs submitted that they had proved their case on a balance of probabilities. That there was no dispute that they had bought various portions out of the suit land from the Defendants' undisputed Agent wherein they had paid the full consideration and had taken possession of the suit land.

83. That the 1<sup>st</sup> Defendant had received a total sum of Kshs.242,000/= from their Agent wherein the balance of Kshs 318,000/= had been withheld by the Agent after it turned out that the 1<sup>st</sup> Defendant had transferred the suit land to the 2<sup>nd</sup> Defendant.

84. Their submission was that the said transfer could therefore not affect the agency contract nor the land sale agreements entered thereto. That the failure by the Agent to pay the balance of consideration to the Defendants could not have the effect of voiding the sale agreements entered between the Plaintiffs and the Defendants' Agent. They relied on the case of **Karanja vs Phoenix of E.A Assurance Co. ltd [1991] eKLR** to buttress their submission and further to state that the only legal recourse available to the Defendants was to sue the Agent for the balance of consideration but not to nullify the sale agreements entered by him on their behalf.

85. On the second issue as to whether the Defendants held the suit land in trust for the Plaintiffs, it was the Plaintiff's submission that the answer to the question was in the affirmative and in so submitting, they relied on the holdings in the cases of:

**i. Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR**

**ii. Sammy Likuyi Adiema vs Charles Shamwati Shisikani [2014]eKLR**

**iii. Willy Kimutai Kitilit vs Michael Kibet [2015]eKLR and**

**iv. William Kipsoi Sigei vs Kipkoech Arusei & Another [2019] eKLR**

86. Their submission further was that the Defendants were estopped from avoiding their obligation under the land sale contracts having admitted that PW1 was acting as their duly authorized Agent during sale of the suit land.

87. That the Defendants were also are not entitled to the reliefs sought in their counterclaim and the same ought to be accordingly dismissed.

88. That as to the issue of costs, the Plaintiffs submitted it was the Court's discretion although the same always followed the event. That they were entitled to be awarded costs of the suit since the Defendants ought to have pursued their Agent for payment of the balance of consideration instead of serving the impugned notices upon the Plaintiffs.

#### **Defendants Submission**

89. The Defendants on the other hand submitted that the issue of the sale of the suit land was not in contention but rather the completion/honor of the contract to sell by the Agent Elijah Githinji Charara, PW1.

90. The Defendants framed their issues for determination as follows;

i. Who breached the agency contract for the sale of LR Sipili/Donylop Block/2/757 (Mutukanio)

ii. Have the Defendants proved their counterclaim on a balance of probability

iii. Whether the Plaintiffs are entitled to the prayers sought in the Plaintiff

iv. Who should pay the costs of this suit.

91. On the first issue for determination, it was the Defendants' submission and in reiteration of the evidence adduced by DW1 that the land Agent, PW1 had allegedly sold 16 plots out of the suit land but had only handed over to DW1 only Ksh 105,000/- being the sum paid for 3 plots, wherein after, he had declined and/or refused to pay the balance of the 13 plots thus breaching the Agency contract as a result of which the agreement between the Plaintiffs and the said Agent became void and unenforceable by operation of the law.

92. That by the time this breach occurred, only the one Plaintiff had put up a temporary house but the rest of the Plaintiffs decided to put up their homes to defeat the Defendants from enforcing the remedy of eviction and delivering vacant possession.

93. That the Defendants had never authorized any of the Plaintiffs take possession and/or build their houses on the suit land and had severally warned them not to occupy or develop the same, as evidenced by the letter dated 21<sup>st</sup> April 2017, but that they had been adamant. That

pursuant to the breach by the agency, the 1<sup>st</sup> Defendant had revoked their contract and had demanded for delivery of vacant possession of the land to them. The Defendants relied on the case of **Branwhite vs Worcester Works Finance Ltd [1969]1 A.C 552 at 587**

94. The Defendants further submitted that pursuant to the demand notices to the Plaintiffs to vacate the suit land and deliver vacant possession to them, the Plaintiffs had failed to comply and as such were unlawfully occupying and using the suit land as trespassers.

95. That further the Plaintiffs' claim was time barred as the same was based on a contract.

96. That the alleged sale agreement(s) between the Plaintiffs and PW1 was void and unenforceable by the operation of the law.

97. The Defendants further submitted that the Plaintiffs were non-suited against the Defendants and if any, they ought to pursue the said land Agent for the appropriate legal redress and that their case should be dismissed or struck out with costs.

98. They further sought that the Court upholds the orders sought in their counterclaim and also grant them orders of permanent injunction against the Plaintiffs by themselves, their Agents, servants, employees, members of their families or anyone acting under their instructions restraining them from using, developing, occupying, claiming ownership and/or interfering with Sipili/Donylop Block/2/757 (Mutukanio) or any part thereof. They also sought that the Plaintiffs pay mesne profit lost by the Defendants from the use of the land.

### **Determination**

99. Having considered the testimony of the parties herein, the Documents produced, the applicable laws, the authorities cited as well as the submitted submissions, I must point out the undisputed facts herein being that:

100. The suit land herein LR Sipili/Donylop Block/2/757 (Mutukanio) was registered to DW1 on the 4<sup>th</sup> April 2007 upon a transfer from Nakuru Mutukanio Farmers Company Limited.

101. That while the land was still registered in DW1's name, an Agency agreement was entered into between DW 1 and PW1, Elijah Githinji Charara to whom he tasked to look for prospective purchasers of the same. The land had then been subdivided into 16 plots measuring 50 x 100ft each where DW1 and PW1 had agreed that each plot would be sold at Kshs.35,000/-out of which PW1 was to be paid a commission of Ksh 2,000/- from every plot.

102. It is also not in dispute that after PW1 had sold the 16 plots to the Plaintiffs vide sale agreements dated between the years of 2007 and 2010 respectively agreements which were produced as Pf exh 1-12, he had only remitted Kshs.105,000/= to DW1, being the consideration for 3 plots and had declined and/or refused to remit the balance of Ksh 318,000/= being the consideration of 13 plots.

103. It is further not in dispute that the suit land herein changed hands and was registered to the 2<sup>nd</sup> Defendant, a brother to DW1, on the 4<sup>th</sup> April 2008 and that on 9<sup>th</sup> February 2011, the 2<sup>nd</sup> Defendant authorized and/or gave his consent to the DW1 to sell the suit land, which had already been sold anyway.

104. That upon PW1's refusal to remit the balance for the consideration of 13 plots and despite him undertaking to do so vide an agreement dated 21<sup>st</sup> October 2009 herein produced as Df Exh 1, the Defendants found his action to be in breach of the agency agreement and hence DW1 revoked the said contract between him and PW1. That DW1 had then issued demand notices and Notices of eviction herein produced as Pf Exhibit 16, Pf Exhibit 17 and Pf Exhibit 18 respectively demanding delivery of vacant possession of the suit land by the Plaintiffs, notices which the Plaintiffs ignored and subsequently filed the present suit.

105. Given the above facts herein I find the issue arising herein for determination before the Court as being:-

- i. Whether the breach of the Agency contract between PW1 and DW1 affected the land sale agreements entered between Plaintiffs and PW1 herein.
- ii. Whether the Plaintiffs have proved their case on a balance of probabilities to warrant granting the reliefs sought.
- iii. Whether the Defendants hold the suit land in trust for the Plaintiffs
- iv. Whether the Defendants have proved their counterclaim to warrant the reliefs sought.
- v. Who is liable to pay costs of the suit?

106. Before making a determination of the issues herein this Court is guided by the decision of the Court of Appeal in **National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2.EA 503** where the Court held that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract. I also must remind the parties that they are bound by their pleadings as filed.

107. As noted earlier, it is not in contention that DW1 who had been the registered proprietor of the suit land herein had entered into Agency agreement with PW1 to whom he had tasked to sell the land for him. That pursuant to their agreement, PW1 had sold the parcel of land to the Plaintiffs herein while the contract between him and DW1 was still valid, wherein he had remitted part of the monies paid to him in consideration of the purchase and had failed and/or refused to remit the rest of the money to DW1 as agreed. Thereafter PW1 and DW 1 fell

apart resulting into a rescission of their contract by DW1.

108. It is trite law that the Principal is liable on an Agent's contract only if the Agent was authorized by the Principal to make the contract. Such authority can either be express, implied, or apparent. *Express* means made in words, orally or in writing; *implied* means the Agent has authority to perform acts incidental to or reasonably necessary to carrying out the transaction for which (s)he has express authority. *Apparent authority* arises where the Principal gives the third party reason to believe that the Agent had authority.

109. In the agency relationship, the Agent's actions in dealing with third parties will affect the legal rights of the Principal. What the third party knows about the agency agreement is irrelevant to the Agent's legal authority to act. The authority runs from Principal to Agent and as long as an Agent has authorization, either express or implied, he may bind the Principal legally.

110. *In the present case, I find that there was express contract between DW1 and PW1 which contract subsequently created a privity of contract between them. Although a privity of contract refers to the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so yet the requirement of privity of contract has been relaxed under modern law, statutory as well as constitutional law, and doctrines of implied warranty and strict liability which now allow a third-party beneficiary or other foreseeable user to sue. See Black's Law Dictionary, Ninth Edition.*

111. For instance, the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) cap 405 of the laws of Kenya provides a statutory exception to the doctrine of privity of contract of insurance for the benefit of third parties. Similarly, where a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement.

**112. In the case of Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR**, the Court of Appeal while considering the concept of third party rights under a contract held as follows:-

“There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.”

113. The contract herein was between PW1 and Dw1 and in the circumstances of this case thereof, the same was the benefit of the Plaintiffs who were third party purchasers of subdivided plots from the suit property. The said Contract/agreement expressly gave the PW1 authority to sell Dw1's subdivided plots LR No. Sipili/Donylop Block/2/757 (Mutukanio) to third parties. It was executed by PW1 and therefore by the said execution, DW1 had given his consent for PW1 to transact the sale on his behalf, which affected the relationship with the Plaintiffs herein being the third parties.

114. Accordingly, I find and hold that, the contract/agreement between PW1 and DW1 expressly benefited the third-party purchasers, and, therefore, there was a presumption that the contracting parties intended the third-party purchasers to have a right of enforcement. **What this means is that despite** the arguments by Dw1 that PW1 breached the contract between them, prima facie, the Plaintiffs could sue on the said agreement.

115. I also find that the transaction between DW1 and PW1 created a constructive trust in favour of the Plaintiffs herein who had paid the purchase price of their respective parcels of land.(see the case of **Macharia Mwangi Maina & 87 Others(supra)**)

116. I note from the Defendants' submission an introduction of new issues to the case in issue to the effect that the Plaintiffs' claim was time barred as the same was based on a contract and further that the alleged sale agreement between the Plaintiffs and PW1 was void and unenforceable by the operation of the law.

118. In the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

118. I associate myself with the said finding. The end result is that I find in favour of the Plaintiffs having proved their case on a balance of probabilities in their main Plaint and proceed to dismiss the Defendants' defence and counterclaim altogether.

119. The upshot therefore is that Court finds as follows:

i. It is herein declared that the Defendants are not entitled to evict the Plaintiffs from title No. Sipili/Donylop Block/2/757 (Mutukanio) as the same is held in trust on their behalf.

ii. An order is granted for the dissolution of the said trust and transfer to the Plaintiffs their respective entitlement out of title No.Sipili/Donylop Block/2/757(Mutukanio) forthwith and in default the honorable Court Deputy Registrar do execute all the necessary documents to facilitate subdivision and transfer thereof.

iii. The Plaintiffs are further granted the costs of the suit and Counter-claim plus interest thereon at Court's rate.

It is so ordered.

**Dated and Delivered at Nyahururu this 3<sup>rd</sup> day of June 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**