



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 589 OF 1977**

**JOSPHAT K. MWANGI.....PLAINTIFF**

**VERSUS**

**MATHENGE MWENJATHI.....DEFENDANT**

**JUDGMENT**

Mr Josphat K Mwangi, the plaintiff, is an M’Kikuyu and he lives at Tudor in Mombasa because he works for the Cargo Handling Services Limited. Mr Mathenge Mwenjathi, the defendant, lives at Rukanga which is in the Mwea Division of Kirinyaga District.

The defendant owns some agricultural land which is 13.90 acres in area and known as parcel No 461 Rukanga/Kiine. On or about March 15, 1973 the plaintiff paid the defendants Kshs 3,900. This was a reasonable price because in those days one acre in that division was worth Kshs 650.

They went to some advocates in the nearby town of Nyeri called Macharia & Njage and made an agreement (Exhibit 1) on November 24, 1975, which is about 2 1/2 years after the event. The defendant is described as the vendor of six acres from his 13.9 acres. The plaintiff is described as the purchaser of those six acres. The price is set out and the payment of Kshs 3,900 on March 15, 1973 is acknowledged by the defendant. The vendor undertook to have the land subdivided and to have a separate title issued to the purchaser for the six acres. He also agreed to apply for the consent of the local Land Control Board for this transfer immediately after the execution of the agreement. Completion date was to be as soon as the application for consent had been granted by the Board. Finally if the application was not consented to by the Board the vendor acknowledged that he must repay the purchaser Kshs 3,900.

The defendant dragged his feet and did not attend when the application for consent came before the local Land Board. The plaintiff went to the local assistant chief on about April 3, 1976 and the sub-chief had written out in Agikuyu the following statement (Exhibit 2).

“The committee of this sub-location finds that Kimani has purchased a garden from Mathenge Mwenjathi and Kimani has paid Mathenge Mwenjathi the purchase price in full. They have made their agreement before an advocate. The witnesses were: Kunyonga Wakaruga, Mbuthi, Kabuu, Muthiutuku, Wonzeinyiu.”

This was not enough for the plaintiff who also persuaded the advocates, Macharia & Njage to write a letter on April 5, 1975 to the defendant. They called upon the defendant to transfer these six acres within the next week and come to their chambers in Nyeri to discuss damages and if not they would file an action for the plaintiff against the defendant.

The defendant took no notice and the plaintiff filed in the High Court at Nyeri, Civil Suit 32 of 1976 the same sort of claim that he has filed in this court in this suit on August 25, 1977. The plaintiff found that trailing up and down to Nyeri from Mombasa was very expensive so he withdrew the action in Nyeri on or about August 20, 1977.

The defendant allowed the plaintiff to go on to the six acres in early March 1973 and for the last seven years or so the family of the plaintiff and he has cultivated five of the six acres with beans and maize. They have constructed one large house and one small house with corrugated iron sheets as the roof and timber and mudwalls. The larger one cost Kshs 15,000 to build in 1973 and the smaller one Kshs 2,100. They have on those six acres now, six local sheep, four goats and thirty hens. He has been able to reap about Kshs 5,000 worth of crops each year from those six acres over the last seven years.

The plaintiff has not persuaded the defendant to transfer these six acres to him. The local Land Control Board has not consented to this transaction. The plaintiff claims from the defendant specific performance of the agreement of sale, or the return of Kshs 3,900, Kshs 455 for the agreement of sale and the cost of putting a caution on the land at the registrar's office and another Kshs 19,100 for the improvements which he has made to those six acres in the last seven years.

The defendant relied on the provisions of the Land Control Act (Cap 302) and he did not give evidence. His learned advocate has also discovered the unreported judgment of Simpson J of April 2, 1976 in Nairobi High Court Civil Suit 16 of 1969: *Peter Kiarie Murigi v Nginyo Kariuki & 2 Others*.

Before I reach those matters of law I must declare that the plaintiff gave his evidence carefully and calmly and what he said was credible so I believed him. The defendant elected to give no evidence and so as far as I can tell he and his learned advocate accepted what the plaintiff said was true with maybe some reservations as to the value of those two buildings and the crops that were culled from the garden each year.

Unfortunately, the law is against the case of the plaintiff. These six acres were within a land controlled area. Their sale from the defendant to the plaintiff was a transaction which was void for all purposes because the Land Control Board for that division did not give its consent for that transaction within three months after the making of the oral agreement in March 1975 or a written one in November 1975. The claim for specific performance is therefore untenable.

The entry of the plaintiff into possession of these six acres and his remaining there might be punishable under Section 22 of the same Land Control Act. This was a controlled transaction and it was avoided by Section 6 and he went into and remained in possession of this land. All this was in furtherance of a void transaction. The Act makes that a criminal offence.

Without prejudice to all that, however, if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid: Section 7.

Simpson, J in *Peter Kiarie Murigi v Nginyo Kariuki & 2 Others* though it followed that the plaintiff cannot claim for improvements or mesne profits. The learned advocate for the defendant in this action has made the same submission. I am content to follow with respect what Simpson J said in the 1976 case.

The upshot is that the plaintiff fails in all his claims. The action must be dismissed with costs which, if not agreed, will have to be taxed. There will be an order for repayment of the Kshs 3,900 deposited in court by the defendant to the plaintiff. This means that the plaintiff and his family and his livestock will all have to be moved off the six acres and I trust the defendant will give them time to do this and not impede them in any fashion.

Suppose I am wrong on the claim for improvements? Then I would have found that the plaintiff had made out his claim for not only the return of the purchase price of Kshs 3,900 but also for value of his improvements less what he had been able to get from using land which I would value at the round figure

of Kshs 15,600.

**Dated and Delivered at Mombasa this 14th day of May 1980.**

**A.A.KNELLER**

**JUDGE**