



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 435 OF 2017**

**JULIUS NGEWA.....PLAINTIFF**

**VERSUS**

**JULIUS NZUKI MUINDI.....DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 31<sup>st</sup> October, 2017, the Plaintiff averred that in the year 1989, he entered into an Agreement with the Defendant in respect of parcel of land known as Muvuti/Kimutwa/788; that he paid to the Defendant the purchase price and that on 2<sup>nd</sup> September, 2002, the Land Control Board gave its consent for the sub-division of the suit land into Muvuti/Kimutwa/1853 and 1852.
2. According to the Plaintiff, the land he purchased was parcel number 1852; that the Defendant has refused to appear before the Land Control Board for the issuance of a consent to transfer the suit land to the Plaintiff and that an order of specific performance should issue compelling the Defendant to transfer the land to him.
3. The Defendant filed a Defence in which he averred that the Plaintiff is not entitled to the suit land and that the prayers sought cannot be granted for lack of the consent of the Land Control Board.
4. The Plaintiff, PW1, informed the court that he bought from the Defendant a portion of parcel of land known as Muvuti/Kimutwa/788; that the said land was then sub-divided and parcel number 1852 was hived off and that the Defendant has since refused to transfer to him portion number 1852.
5. PW1 informed the court that he has been in possession of parcel number 1852 where he has been farming and that the Defendant should be compelled to transfer the said land to him.
6. PW2, informed the court that he is a licensed Surveyor; that he was instructed by the Plaintiff and the Defendant to partition land known as Muvuti/Kimutwa/788 and that he sub-divided the said land into two portions, namely, Muvuti/Kimutwa/1852 and 1853. It was the evidence of PW1 that the Defendant has declined to procure the consent of the Land Control Board to transfer the suit land, which is parcel number 1852, to the Plaintiff.
7. On his part, the Defendant, DW1, informed the court that he sold to the Plaintiff a portion of his land to enable him create a road to his land; that he only discovered later on that the Plaintiff had sub-divided his land into two portions without his knowledge and that he reported the issue to the police.
8. In cross-examination, DW1 stated that he signed the Agreement of 4<sup>th</sup> February, 1989; that he did not sign the mutations that were produced in evidence by PW2 and that parcel number 788 was sub-divided into two portions.
9. In his submissions, the Plaintiff's advocate submitted that the jurisdiction of specific performance is based on the existence of a valid, enforceable contract; that both parties confirmed that they entered into an Agreement of Sale of the suit land and that the Plaintiff is a Purchaser for value. The Defendant did not file submissions.
10. The evidence before this court shows that on 4<sup>th</sup> February, 1989, the Plaintiff entered into an Agreement of Sale with the Defendant of unregistered parcel of land. The purchase price of the said land was paid in instalments, with the last instalment being paid on 30<sup>th</sup> July, 1992. The Defendant acknowledged that he indeed signed the Agreement of Sale with the Plaintiff.
11. Although the suit property was sub-divided into two portions in the year 2002, there is no evidence before me to show that indeed the Defendant signed the mutation forms. In any event, the Agreement that the Plaintiff produced does not show that he purchased a portion of

land measuring 0.66 Ha, which is shown in the mutation form that was produced by PW2.

12. In any event, the Agreement that the Plaintiff is relying on was prepared in 1989, while the consent to sub-divide parcel number 788 was issued on 26<sup>th</sup> September, 2002. The Plaintiff has not explained to this court why he did not file the suit for specific performance within twelve (12) years, either from the date the Agreement of Sale was entered into, or from the date that parcel number 1852 was registered, which must have been either in the year 2002 or before.

13. Section 7 of the Limitation of Actions Act provides as follows:

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”***

14. The Plaintiff should have brought this action within twelve (12) years from the date when the Agreement of 1989 was entered into. Having failed to do so, the present suit is time barred, and the Agreement of 1989 is not enforceable.

15. The Plaintiff did not also obtain the consent of the Land Control Board within six (6) months from the date that he entered into the 1989 Agreement with the Defendant. Indeed, there is no evidence before me to show that even after obtaining the consent of the Board to sub-divide parcel number 788 in the year 2002, the Plaintiff sought for the consent of the Board to have the suit land transferred to him. Section 6(1) (a) of the Land Control Board Act provides as follows:

***“6 (1) Each of the following transactions that is to say—***

***(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”***

16. Having failed to obtain the consent of the Board within six (6) months and having failed to apply for the extension of time within which to obtain the consent of the Board, the Plaintiff's only recourse is to pursue the amount of money he paid to the Defendant. The order for specific performance cannot issue in the circumstances of this case, and especially in a situation where there is no evidence that the Plaintiff was put in possession of the land.

17. For those reasons, I dismiss the Plaintiff's Plaint dated 31<sup>st</sup> October, 2017 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**