

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. E011 OF 2024

MANYA WILLIAMS NYASILI.....PLAINTIFF

VERSUS

OKWARA MUKOLWE.....

.....DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced by a plaint dated 22nd May 2024 whereof the plaintiff sought against the defendant the following orders;

a) An order for extension of time within which to obtain consent of the Land Control Board beyond the statutory six (6) months for a further six (6) months from the date of judgment;

b) An order compelling the defendant to execute the necessary Land Control Board consent application forms, transfer forms and all the necessary documents within seven (7) days from the date of

service of the order and in default the Deputy Registrar to execute such forms.

c) An order compelling the defendant to attend the necessary Land Control Board meeting as he will be directed, in the alternative the necessary Land Control Board to give consent for the intended subdivision and transfer.

d) In the alternative a report as to damages for breach of the sale agreement on at the plaintiff's option an account and refund to the plaintiff all sums of purchasing and or developing that said suit property plus interest thereto at current market value; and or and order of damages amounting to Kshs. 1, 500, 000/=.

e) Costs and interest thereon;

f) Any other reliefs that the honourable court may deem fit.

2. The plaintiff stated that vide sale agreements dated 24th April 2017 and 27th July 2018, he purchased a portion of land measuring 0.5 acres from parcel No. Marama/Lunza/325 at an agreed purchase price of Kshs. 175, 000/=, which amount he paid in full. That in 2019, the defendant allowed him to take vacant possession of

the purchased portion of land, and undertook to avail completion documents. That he put up a home on the land where he lives with his family and planted maize, bananas, trees, Napier grass and keeps cattle. That the defendant executed an application for the Land Control Board consent but failed to attend the board, thus frustrating the transfer process and has refused to transfer the suit property to the plaintiff. That the defendant, his wife and children are now hostile to the plaintiff and have threatened to evict him. That as a result of the foregoing, the plaintiff was unable to obtain consent of the land control board within 60 days. That it is imperative that the defendant is compelled to perform his obligations under the contracts of sale.

3. Despite service, the defendant did not enter appearance or file defence.
4. The matter was heard by way of viva voce evidence.

Plaintiff's evidence

5. The plaintiff, PW1 testified as the only witness in the matter. He adopted his witness statement as his evidence

in chief. His testimony was that by agreements dated 24th April 2017 and 27th July 2018, he purchased a portion of 0.5 acres to be excised from parcel No. Marama/Lunza/325, from the defendant at a consideration of Kshs. 175, 000/= which he paid in full. That he took possession of the land in 2019 and put up a home, planted crops, grass and trees and lives there with his family. That the defendant has been adamant in completing the transfer process and that up to now he has not attended the Land Control Board for the necessary consent. That the court should compel the defendant to complete the transfer process.

6. He produced copies of sale agreements, search, green card, application for consents for subdivision, minutes and proceedings of 15/1/2021 and 2/3/2021, letter dated 24/10/2019, notice for removal of caution dated 24/10/2019 and demand letter dated 26/1/2022.

7. The plaintiff filed submissions dated 25th April 2025 in support of his case.

Plaintiff's submissions.

8. Counsel for the plaintiff submitted that the plaintiff proved that he entered into two land sale agreements with the defendant for sale of 0.5 acres of land to be hived from parcel No. Marama/Lunza/325 at a consideration of Kshs. 175, 000/= which amount was paid in full. That he also proved that he took possession of the purchased portion and that the defendant has failed to transfer the land to him.

9. Reliance was placed on Article 159 (2) (e) of the Constitution of Kenya, Section 8 of the Land Control Act and section 95 of the Civil Procedure Act. It was submitted that this court has the necessary jurisdiction to extend time for the parties to attend the Land Control Board. That the plaintiff produced two letters showing when the defendant was to attend the Land Control Board his son had placed a caution on the suit property which led to a notice of removal of caution dated 24/10/2019. That the provincial administration intervened in the dispute with the defendant promising to transfer the suit property to the plaintiff but failed to do so. Counsel referred the court to the case of **Aliaza v Saul [2022] e**

KLR for the proposition that the provisions of the Land Control Act should not be used by a vendor of land to steal a march on the purchaser. Further reliance was placed on the cases of **Willy Kimutai Kitilit v Michael Kibet [2018] e KLR**, **Philip Kiprotich Tuitoek v Edan Jebiwott Kiplagat (2019) e KLR** and **Carolyn Cheron Kirui v Liner Cheron Towett [2018] e KLR**, among others authorities, for the argument that the court has jurisdiction to extend time for grant of consent by the Land control Board and that the Land Control Act was never meant to be an instrument of unjust enrichment.

Analysis and determination.

10. The court has carefully considered the plaint, evidence as well as submissions. The only issue that arise for the court's determination is whether the plaintiff deserves the orders sought.

11. The defendant did not enter appearance or file defence in this matter despite service. That notwithstanding, the burden of proof is still on the plaintiff to prove his claim.

12. Section 107 of the Evidence Act places the burden of proof in a claim on the plaintiff, whether or not a suit is defended
13. In the case before me, the plaintiff's complaint is that he purchased 0.5 acres of land to be hived from parcel Marama/Lunza/325 at a consideration of Kshs. 175, 000/= which he paid in full. That the defendant has failed to complete the transfer process in his favour. In short, what the plaintiff is seeking from court, are orders of specific performance.
14. Specific performance is an equitable remedy granted where there exists a valid enforceable contract, where the plaintiff has performed his or her obligations under the contract and where an award of damages would be inadequate in the circumstances of the case.
15. In the case of **Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited (2006) eKLR** the court set out what ought to be considered when determining a claim for specific performance as follows;

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

16. Similarly, in the case of **Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998** the court held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot

obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

17. Regarding validity of a land sale agreement, section 38 of the Land Act provides as follows;

Validity of contracts in sale of land

- (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—**
- (a) The contract upon which the suit is founded—**
- (i) Is in writing;**
- (ii) is signed by all the parties thereto; and**
- (b) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.**
- (2) Subsection (1) shall not apply to—**
- (a) A contract made in the course of a public action;**
- (b) The creation or operation of a resulting, implied or a constructive trust; or**
- (c) Any agreement or contract made or entered into before the commencement of this Act, provided that—**

- (i) The verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and**
- ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.**

18. Essentially, a valid land sale agreement should be in written, duly executed by the parties to the agreement and attested by two witnesses.

19. In the instant case, the plaintiff produced two sale agreements dated 24th April 2017 and 27th July 2018 respectively, executed by both the purchaser and vendor and attested by several witnesses. The green card shows that the mother title for parcel No. Marama/Lunza/325 is in the name of the defendant and an application for the Land Control Board was duly executed by the defendant. It is therefore clear to me that the sale agreements entered into by the parties herein are valid and enforceable land sale agreements and in compliance with section 38 of the Land Act.

20. From the proceedings before the Provincial administration, the defendant confirmed having entered

into the said sale agreements and conceded to have received the entire consideration but stated that it was his family members who were objecting to the sale. Thus, the plaintiff's evidence that he paid the entire consideration was not controverted as the defendant never offered any evidence to the contrary. I am therefore satisfied that the plaintiff performed his part of the agreement and the only person in breach of the sale agreements is the defendant as he has failed to obtain consent from the land Control Board and also transfer the land to the plaintiff.

21. The plaintiff testified that he has put up a home on the suit property where he lives with his family and that he has planted assorted crops, trees and grass and kept several cattle. On that basis, I am satisfied that the plaintiff deserves orders of specific performance as damages may not be adequate compensation.

22. The section 8 of the Land Control Act requires that a consent of the Land Control Board be applied for within 6 months of the date of the transaction, but grants this court the jurisdiction to extend the six month period

where there is sufficient reason to do so. The plaintiff has explained that he purchased the suit property and the defendant executed application for consent of the Land Control Board but refused to attend the board. In proceedings before the Provincial Administration, the defendant conceded to have sold the land to the plaintiff and to have received the entire consideration. In addition, his testimony that he took possession of the land and put up a home thereon in 2019 and lives there with his family was not controverted. It is therefore clear to me that the plaintiff deserves extension of time as it appears that the defendant is keen to abuse provisions of the Land Control Act to unjustly enrich himself.

23. In the premises, I find and hold that the plaintiff has proved his case against the defendant on the required standard and I therefore enter judgment for the plaintiff against the defendant as follows;

a) An order is hereby issued extending time within which to obtain consent of the Land Control Board beyond the statutory six (6) months for a further six (6) months from the date of this judgment in respect of the sale of

land agreements dated 24/04/2017 and 27/7/2018 for purchase of 0.5 acres between the plaintiff and the defendant regarding parcel No. Marama/Lunza/325.

- b) An order is hereby issued compelling the defendant to execute the necessary Land Control Board consent application forms, transfer forms and all the necessary documents within thirty (30) days from the date of service of this judgment in respect of the plaintiff's purchase of 0.5 acres to be hived off parcel Marama/Lunza/325 and in default the Deputy Registrar of this court is authorized to execute such forms.**
- c) An order is hereby issued compelling the defendant to attend the necessary Land Control Board meetings as he will be directed, in respect of the sale of land agreements dated 24/04/2017 and 27/7/2018 for purchase of 0.5 acres between the plaintiff and the defendant regarding parcel No. Marama/Lunza/325, in default, the relevant Land Control Board to dispense with the defendant's attendance and proceed to give consents in respect of the intended subdivision and transfer.**

d)The costs of this suit are awarded to the plaintiff and shall be borne by the defendant.

24. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 19TH DAY OF NOVEMBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of

Mr. Biketi holding brief for Mr. Shitsama for the plaintiff

No appearance for the defendant

Court Assistant: Delphine