



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 621 OF 2017**

**LAWRENCE MUCHIRI KWENJA & 23 OTHERS.....PLAINTIFFS**

**VERSUS**

**MARY WAITHIRA GACHECHA.....1<sup>ST</sup> DEFENDANT**

**KIMURU HOUSING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a *Plaint* dated 22<sup>nd</sup> June 2017, the Plaintiffs herein have sought for Judgment against the Defendants jointly and severally for:-

- a) *An order for specific performance compelling the Defendants to facilitate the processing and issuance of the title deeds in respect of Ruiru-Kiu Block 7/90.*
- b) *A permanent order of injunction stopping the Defendants, their agents or servants from entering or demolishing any structures or in any way dealing with land parcel Ruiru-Kiu Block 7/90 within Githurai area.*
- c) *Costs of this suit and interest at court rates.*
- d) *Any other relief this Honourable Court may deem fit and expedient to grant..*

In their claim, the Plaintiffs had averred that they are the lawful owners of land parcel *No.Ruiru/Kiu Block 7/90*, measuring about **0.8188 Hectares** which they purchased from the 2<sup>nd</sup> Defendant after it was subdivided into plots measuring **40 x 60 ft** on various dates between **1995 to 2016** and they then immediately took actual possession and have been in possession of the said plots up to date.

Further, the Plaintiffs averred that the 2<sup>nd</sup> Defendant through its authorized agents and/or servants has failed and/or refused to transfer or cause to be transferred the said subdivided parcels of land to the Plaintiffs according to their shares and portions purchased. They also averred that due to the said Defendants' action, the Plaintiffs have suffered loss and damage as they are unable to enjoy the security offered by possession of title deeds, they are unable to use the property as collateral for financial accommodation, lack of title deeds restrict the Plaintiffs ability to utilize the property including developing it substantially and has diminished the monetary value of the property and its attractiveness for sale.

It was further averred that the Defendant's actions are unlawful and infringe the Plaintiffs' rights of quiet possession and use of property. They also alleged that despite demand and Notice of Intention to Sue, the Defendants have refused, failed and/or neglected to make good the Plaintiffs' claim.

The Defendants were served with Summons to enter appearance as per the *Affidavit of Service of Lawrence Gichane*, a *Process Server* but they failed to enter appearance nor file their defence. The matter proceeded for *Formal Proof* on 14<sup>th</sup> November 2018, wherein two witnesses gave evidence for themselves and on behalf of the other Plaintiffs.

**Plaintiffs' Case**

**PW1 – Lawrence Muchiri Kwenja**, who is the 1<sup>st</sup> Plaintiff gave evidence and stated that he lives in *Githurai Mwihoko Estate*. He further stated that the 2<sup>nd</sup> Defendant sold to the Plaintiffs their distinct parcels of land which were subdivisions of *Ruiru/Kiu Block 7/90*. He further testified that the said parcels of land were offered for sale to the Plaintiffs on diverse dates between the year **1995 and 2012**. It was his testimony that by the **year 2012**, all the plots had been sold but the title deeds were never issued to them. He alleged that the Plaintiffs carried a Search and noted that *Margaret Gathecha*, one of the Directors of 2<sup>nd</sup> Defendant, was related to *Mary Gathecha*, in whose name the mother title was in. Further that the Plaintiffs realized that the land was not officially demarcated. However, they did the cadastral work

with the help of a **Private Surveyor** whom they contracted and paid him about **Kshs.500,000/=** upon completion of the work. That after that they went back to 2<sup>nd</sup> Defendant and the Directors asked them for transfer documents. Even after presenting the same, the title deeds were never issued. He also testified that they sent various demands letters to the Defendants but all that was in vain. Further, that they heard rumours that the suit land is now on sale and that is when they filed the present suit.

He also testified that the Defendants have refused with the mother title and that the Plaintiffs have all the documents for the work already done. He urged the Court to allow their claim and compel the Defendants to transfer the suit property to the Plaintiffs as they have lived on the said land for long and they are at various stages of development. It was his allegations that they live like squatters since they do not have title deeds to their respective parcels of land and the rumours are live that the suit property is out for resell.

**PW2 – Denis Waitthaka Kamau** also from **Mwihoki** area testified that he bought his parcel of land from 2<sup>nd</sup> Defendant in the **year 1995**. He further confirmed that he was issued with certificate of ownership and receipt and that he bought the parcel of land for **Kshs.40,300/=**. That after the said payment of the purchase price, he was to be issued with title deed by 2<sup>nd</sup> Defendant but he has never been issued with the same. That even the other purchasers who are Plaintiffs herein have never been issued with the title deeds. It was his testimony that they hired a Surveyor who did cadastral work on the suit property **Ruiru/Kiu Block 7/90**. The **Mutation Forms** were taken to the Lands Officer but since they did not have the Mother title, they never got their respective title deeds. However, they received their respective plot numbers. Thereafter, they wrote demand letter to **Kimuri Housing Co. Ltd** to transfer the land to them using the survey work already done. However, the 1<sup>st</sup> Defendant declined to release the mother title and therefore the **Green Cards** have not been opened.

That though they have lived on the suit property for long, they live like squatters since they do not have title deeds to their respective parcels of land. Therefore, they cannot obtain loans using their respective parcels of land as security. He further testified that when they carried the Search, they noted that the mother title was in the name of the 1<sup>st</sup> Defendant and she declined to transfer the land to them and thus this suit. Though they sent several demand letters to the Defendants, the Defendants did not make good the said demand and he urged the Court to allow their claim. He produced his receipt in court to show that he had a nil balance and he also identified various ownership certificates for the Plaintiffs to confirm that they purchased their respective plots from the 2<sup>nd</sup> Defendant.

After the close of the *viva voce* evidence, the Plaintiffs filed their written submissions through the **Law Firm of Moronge & Co. Advocates** on **14<sup>th</sup> March 2019**. The Plaintiffs relied on several decided cases and urged the Court to allow their claim.

The Court has carefully considered the pleadings in general, the exhibits thereto and the evidence adduced in court by the two witnesses. The Court has also considered the cited authorities and the Court finds that the issues for determination are as framed by the Plaintiffs. These issues are:-

- i. Whether the Plaintiffs purchased the suit property from the Defendants.*
- ii. Whether the Defendants were to transfer the said plots to the Plaintiffs upon completion of payment of the purchase price.*
- iii. Whether the Defendants failed and or neglected to transfer the said plots to the Plaintiffs herein.*
- iv. Whether the Plaintiffs are entitled to the prayers sought.*
- v. Who should bear the costs of the suit.*

From the available evidence, there is no doubt that vide an advertisement carried out in the **Daily Nation** of **6<sup>th</sup> December 1995**, plots measuring **40 x 60 ft** were being sold for **Kshs.40,300/=** at **Githurai-Kimbo area**. PW2 told the Court that he saw the said advertisement and applied for purchase of one of the plots for **Kshs.40,300/=** which he paid in full. Further that the said plots were subdivisions of **Ruiru/Kiu Block 7/90**, which is registered in the name of the 1<sup>st</sup> Defendant but were being sold by the 2<sup>nd</sup> Defendant. It is evident that the said plots of **40 x 60 ft** were purchased by various individuals between the **year 1995 to 2012**. Various share certificates bearing the Letter Head of 2<sup>nd</sup> Defendant have been produced in court as exhibits. The said share certificates are for confirmation that individuals bearing the said certificates had fully paid for various plots of **40 x 60 ft** in respect of **LR.No.Block 7, 118 & 119 & 90**.

The Defendants did not appear in court to dispute or confirm the authenticity of such share certificates and the court will have no reason to doubt the said exhibits. Further there is no doubt that the bearer of the said certificates are the Plaintiffs herein who paid various amount of money as transfer fees to the 2<sup>nd</sup> Defendant as is evident from the various receipts produced in court bearing different dated and having a Rubber Stamp of 2<sup>nd</sup> Defendant.

Further, it is evident that vide a letter dated **4<sup>th</sup> February 2013**, the Ministry of Lands informed the 1<sup>st</sup> Defendant about the provisional approval for proposed subdivision of **Ruiru/Kiu Block 7/90**, subject to the conditions stated thereon. The said subdivision was done by **Boma Surveys** as can be discerned from the letter dated **May 2013** to **Director of Surveys**. Further an **Amended Registry Index Map (R.I.M)** for the said **Ruiru/Kiu Block 7/90**, was forwarded to the **Chairman of National Land Commission** on **1<sup>st</sup> November 2013**, by the **Director of Surveys**. It is also not in doubt from certificate of official search, that the suit property **Ruiru/Kiu Block 7/90** is registered in the name of **Mary Waitthera Gathecha**, the 1<sup>st</sup> Defendant herein. It is also evident that vide a letter dated **29<sup>th</sup> August 2016**, the members of **Kizito Block 7/90**, forwarded a **Registry Index Map** to the Director of the 2<sup>nd</sup> Defendant. The said letter was received in the office of 2<sup>nd</sup> Defendant on **30<sup>th</sup> August 2016**. The said members were seeking for processing of title deeds for **Ruiru/Kiu Block 7/90**. However, it seems the said title deeds were never processed because vide a letter dated **28<sup>th</sup> February 2017**, the advocate for the Plaintiffs wrote a demand letter to the Director of the 2<sup>nd</sup> Defendant demanding surrender of the original title for purpose of presenting the same to the **Land Registrar Thika** for processing of **Green Cards** and title deeds for the various plots purchased by the Plaintiffs. It is evident that the said demand letter was

not acted on and as a result, the Plaintiffs filed this suit herein.

The Defendants did not enter appearance nor file defence and the Plaintiffs' evidence remain unchallenged. However, the Plaintiffs had a duty to prove their case on the required standard since they are the ones who have alleged. This is a duty placed on a person who alleges by **Section 107(1) and 109** of the **Evidence Act** which provides:-

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

**109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.**

The Court will now embark on determination of the issues set out by the Plaintiffs herein.

***i) Whether the Plaintiffs purchased the suit property from the Defendants?***

The Plaintiffs in their claim have alleged that they purchased their respective plots measuring **40 x 60 ft** from the Defendants herein. Only PW1 and PW2 gave evidence on behalf of the other Plaintiffs because this is a representative suit and other Plaintiffs had given their consent under **Order 4 Rule 1(3)** of the **Civil Procedure Rules** to the two authorizing them to appear on their behalf in a representative capacity in these proceedings. In their list of documents, the Plaintiffs produced the advert for sale of **40 x 60 ft** land at **Githurai Kimbo area**. The Plaintiffs thereafter produced share certificates issued by the 2<sup>nd</sup> Defendant to various Plaintiffs certifying that they were registered proprietors of various plots of **40 x 60 ft** in the said Company and were fully paid up. The said share certificates were not disputed by the Defendants since they did not appear in court to offer their side of the story. Further the Plaintiffs produced receipts to show that they paid for transfer fees and that the Defendants put them in possession of their respective plots and that they are now in various stages of development.

Though **Section 38(1)** of the **Land Act** provides that:-

**“No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto”**

it is apparent that the Plaintiffs were put into possession and occupation of their respective plots by the Defendants. Even if the Plaintiffs did not produce any written **Sale Agreements** as provided by **Section 3** of the **Law of Contract Act Cap 23 Laws of Kenya** and which provisions have been replicated in **Section 38(1)** of the **Land Act**, quoted above, the Court finds that the action of the Defendants amounted to a creation of a constructive trust. The Court is guided in making the above findings in the case of **Macharia Mwangi Maina & 87 Others...Vs... Davidson Mwangi Kagiri(2014) eKLR**, where the Court held:-

**“The Respondent having put the Appellant in possession of the suit property created an overriding interest in favour of the Appellant and further the Respondent created an implied or constructive trust in favour of those people who had paid the purchase price pending the sale of all the 240 plots”.**

In this case, the Court finds that the Plaintiffs having paid the purchase price and having been issued with share certificates and having paid the transfer fees and having taken possession of their respective purchased plots, then the Plaintiffs indeed purchased the suit property from the Defendants.

***ii) Whether the Defendants were to transfer the said plots to the Plaintiffs upon completion of payment of the purchase price?***

It is logical that once the purchase price is fully paid, then the vendor has a duty to transfer the purchased land to the purchasers. The Defendants herein did issue the Plaintiffs with share certificates confirming that the Plaintiffs were registered proprietors of their respective plots measuring **40 x 60 ft** and they had paid up. A person can be deemed to be a registered proprietor once his details are entered in the **Register** held by the Land Registrar in a respective land registry and upon issuance of a certificate of registration of title deeds. The Defendants after receiving the purchase price and putting the Plaintiffs into possession had a duty to ensure that transfers of the said plots to the Plaintiffs were completed. However, it is evident that the Defendants herein failed to do so and the Plaintiffs took it upon themselves to hire a Surveyor who undertook the cadastral work of the area. However, registration could not be completed because the Defendants failed to produce the mother title. The Court finds that the Defendants failed in their cardinal duty and thus this suit. Indeed the Defendants were supposed to transfer the said plots to the Plaintiffs after completion of payment of purchase price.

***iii) Whether the Defendants failed and/or neglected to transfer said plots to the Plaintiffs herein.***

It is evident that the Defendants failed to honour their duty of transferring the suit property to the Plaintiffs. The Plaintiffs even tried to carry out the survey work on their own but they faced a hitch because of unavailability of mother title. The Plaintiffs wrote a demand letter to the

Defendants which demand letter was not honoured. It is therefore evident that the Defendants herein failed and/or neglected to transfer the suit property to the Plaintiffs.

***iv) Whether the Plaintiffs are entitled to the prayers sought in the Plaint?***

The Plaintiffs have sought for the equitable relief of specific performance. It is trite that specific performance is available to a litigant who had met his/her part of the bargain. As has been submitted by the Plaintiffs, Halsbury Laws of England, 4<sup>th</sup> Edition states as follows:-

***“A Plaintiff seeking the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implications and which he ought to have performed at the date of the writ in the action, however, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has filed in internal performance or is in default in some non-essential or unimportant term, although in such cases it may grant compensation”.***

The Plaintiffs herein did adduce evidence showing that they had completed payment of the purchase price and the Defendants even allowed them to take actual, physical possession and occupation of their specific plots wherein they have developed and constructed thereon. The Court finds that the Plaintiffs herein have proved that they are entitled to the prayers of specific performance.

The Court will further concur with the findings in Steedman...Vs.... Steedman (1976) AC 536, where the Court held that:-

***“If one party to an agreement stands by and lets the other party incur expenses or prejudice has 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”.***

Though the Defendants have not challenged the Plaintiffs claim, the Court finds that the Defendants did allow the Plaintiffs to take possession of the suit property after paying their respective purchase prices. The Plaintiffs are therefore entitled to the equitable remedy of specific performance and also to an award of permanent injunction as prayed in the Plaint.

***v) Who bears costs of the suit?***

Though Section 27 of the Civil Procedure Act provides that costs are awarded at the discretion of the court. However, it is evident that costs do follow the event and are ordinarily awarded to the successful litigant. The Plaintiffs are the successful litigants and are awarded costs of this suit.

Having now carefully considered the available evidence herein, the written submissions and the cited authorities, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally as prayed in the Plaint in terms of prayers No.(a), (b) and (c).

It is so ordered.

***Dated, Signed and Delivered at Thika this 3<sup>rd</sup> of May 2019.***

**L. GACHERU**

**JUDGE**

**3/5/2019**

In the presence of

M/s Matunda for Plaintiffs

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Lucy - Court Assistant

**Court** – Judgement read in open court in the presence of the above advocate.

**L. GACHERU**

**JUDGE**

**3/5/2019**