



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 192 OF 2011

ABDALLAH ALI BAJABER.....PLAINTIFF

VERSUS

MANGALE DZOMBO NGOKA.....1ST DEFENDANT

KENGA GIBSON KAHINDI.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff has filed this suit against the Defendants jointly and severally for;

- a. Specific performance of the agreement dated 17th December 2010 entered into between the Plaintiff and the 1st and 2nd Defendants.
- b. All necessary accounts and inquiries.
- c. Damages for breach of contract in lieu of or in addition to specific performance.
- d. An injunction to permanently restrain the 1st and 2nd Defendants and or any other third parties, by themselves or their servants and/or agents, and or employees or howsoever from either entering upon, occupying constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever or howsoever interfering with the Plaintiff's rights as purchaser thereof or the Plaintiff's possession and title thereof dealing with or transacting with the property, the subject matter of this suit and/or in any other manner whatsoever from dealing with and/or interfering with and or remaining on or continuing in occupation of all that piece or parcel of land the property known as Kadzongo/Kawala Adjudication "B" Plot No. 18 measuring 1.6353 hectares together with all buildings and developments thereon if any or by any other on future number or description that may be accorded to it.
- e. An order directing the commissioner of lands and the Registrar of Lands to ensure that no other titles are registered on transfers effected or any dealings in the suit land initiated registered or noted that in any way from or shape or derogate from or subtract or extinguish or in any other manner whatsoever diminishes or prejudices the title and or ownership rights of the Plaintiff to and in the said suit property hereinabove described.
- f. Further or other relief as this Honourable Court may deem fit to grant.

g. Costs and interest in all the above.

2. By a joint statement of defence dated 18/8/2011 the Defendants denied each and every allegation of breach of contract in the plaint.

3. Instead they attributed the breach to Plaintiff. In paragraph 9 of the statement of defence the particulars of breach of contract or the part of the Plaintiff are given as follows;

- i. Having failed to pay the consideration as per the stipulated period.
- ii. Having failed to notify the Defendants of the anticipated delay in writing.
- iii. Having acted dishonestly and maliciously by filing a suit when parties were negotiating.

4. In their counterclaim on paragraph 13 of the statement of defence, they seek specific performance of the agreement in terms of completing the agreement and in the alternative an order of the court permitting the Defendants to sell off the property and refund the deposit paid since the intention of the sale has been overtaken by events by refusal to pay by the Plaintiff yet the Defendants are people of very modest means. They pray that the suit against them be dismissed with costs and judgment be entered in their favour in the counterclaim against the Plaintiff.

5. By an application dated 23/3/2015, the Defendants' advocates M/s Mwahunga, Mtana And Company Advocates sought to cease acting for the Defendants citing lack of further instructions. The said application was allowed on 12/7/2016.

6. By another application dated 21/3/2017, the Plaintiff sought leave of the court to effect service upon the Defendants by way of substituted service. The application was allowed on 27/4/2017. Thereafter the Plaintiff fixed the matter for hearing on 7/11/2017.

7. When the matter came up for hearing on 7/11/2017, Mr. Taib for the Plaintiff informed the court that the Defendants had been served through their last known address. There is an affidavit of service shown by Reynard B. Ochieng on 5/10/2017 to this effect. There is also another affidavit sworn by Hassan Jefwa Katana on the 31/10/2017 confirming that the hearing notice was posted on the court notice board. The court was satisfied that the Defendants had been duly served and directed that the matter do proceed exparte.

8. P.W.2 Abdullah Ali Bajaber, the Plaintiff told the court that he entered into a sale agreement with the Defendants on 17/12/2010 to purchase land Parcel Number Kadzonzo/Kawala Adjudication Section "B" Plot No. 18, Kaloleni, Kilifi District, measuring approximately 1.6353 hectares. The purchase price was Kshs.1.8 million per acre making a total of Kshs.7.2 million. A deposit of Kshs720,000/= was paid on 18/12/2010. He also paid Kshs.500,000/= on 24/1/2011 and Kshs.1,000,000/= on 17/3/2011.

9. That despite making these payments the Defendants have not given him a title deed in his names. He produced:-

1. A copy of Agreement of sale dated 17/12/2010.
2. A copy of search of Plot No. 18 located at Kadzonzo/Kawala "B" Adjudication section issued by the land and Adjudication department on 26/4/2010.
3. A copy of the plan for Plot No 18 located at Kadzonzo/Kawala "B" Adjudication section.
4. Copies of National Identify Cards of the Defendants.
5. A copy of handwritten acknowledgment dated 18/12/2010 on receipt of the deposit of the purchase price by the Defendants.

6. A copy of acknowledgement on receipt of Kshs.500,000/= dated 24/1/2011 paid to the Defendants.

7. A copy of acknowledgement of receipt of Kshs1,000,000/= dated 17/3/2011 paid to the Defendants.

8. A copy of letter dated 10/1/2011 by the Defendants.

9. A copy of letter dated 30/5/2011 written by the District Land Adjudication and Settlement Officer – Kilifi.

10. A copy of a letter dated 21/4/2011 written by the Law firm of M/s Mwahunga, Mtana and Company Advocates.

11. A Copy of an e-mail print out dated 20/5/2011.

12. Also in the Plaintiff's supplementary list of documents dated 28/1/2015 – a valuation report dated 12/8/2014 prepared by D.J Fawcett. The Plaintiff produced these documents as exhibits 1 to 12 respectively.

10. P.W 1, Shaibu Hamisi Mtuwa confirmed what the Plaintiff told the court. He told the court that he was requested by the Defendants to get them a buyer for the suit property. He then approached the Plaintiff and arranged for a meeting between the parties.

11. I have considered the Plaintiff's case. I find that it is uncontroverted. He has made a good case as against the Defendants. I enter judgement in his favour as against the Defendants jointly and severally as follows:-

a. Specific performance of the agreement dated 17th December, 2010 entered into between the Plaintiff and the 1st and 2nd Defendants.

b. All necessary accounts and inquiries.

c. I decline to award damages for breach of contract because the court was not guided on how much should be awarded, secondly, the Plaintiff admits that he has not paid the full purchase price.

d. A permanent injunction do hereby issued to restrain the 1st and 2nd Defendants or nay other third parties by themselves, or their servants and/or agents and/or employees or howsoever from either entering upon, occupying, constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever or howsoever interfering with the Plaintiff's rights as purchaser thereof or the Plaintiff's possession and title thereof dealing with or transacting with the property. the subject matter of this suit and/or in any other manner whatsoever from dealing with and/or interfering with and/or remaining or continuing in occupation of all that piece of parcel of land the property known as Kadzonzo/Kawala Adjudication "B" Plot No. 18 measuring 1.6353 hectares together with all buildings and developments thereon if any or by any other on future number or description that may be accorded to it.

e. An order is hereby issued directing the commissioner of lands and the Registrar of Lands to ensure that no other titles are registered or transfers effected or any dealings in the suit land and initiated, registered or noted that in any way form or shape or derogate form or substract on extinguish or in any other manner whatsoever diminishes or prejudices the title and or ownership rights of the Plaintiff to and in the said suit property hereinabove described.

f. Costs and interest.

It is so ordered.

Dated, signed and delivered at *Mombasa* on the 23rd day of *January* 2018.

L. KOMINGOI

JUDGE

23/1/2018