



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 112 OF 2009**

**JOSEPH MUTUA MUINDE.....1<sup>ST</sup> PLAINTIFF**

**DOMINIC MUSEI IKOMOBO (*Suing as trustees and on behalf  
of MITABONI KATANI CO. LTD*).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GEOFFREY KITHUKA MWANGANGI.....1<sup>ST</sup> DEFENDANT**

**HELLENA CHESEREM.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by way of a Plaint dated 20<sup>th</sup> April, 2009. In the Plaint, the Plaintiffs averred that by an agreement dated 7<sup>th</sup> December, 2007, between the Plaintiffs and the Defendants, parcel of land known as Mavoko Town Block 2/199 was sold to the Defendants for Kshs.3,420,000 whereupon the Defendants paid to the Plaintiffs Kshs. 342,000 as deposit.
2. In anticipation of the payment of the balance of the purchase price, the Plaintiffs have averred that they transferred to the Defendants the suit land; that the Defendants have failed to pay the balance of the purchase price and that the Plaintiffs are not bound by the terms of the agreement.
3. The Plaintiffs are praying for an order directing the Land Registrar, Machakos, to rectify the register in respect of the suit land by reinstating the Plaintiffs as the registered proprietors of the land as trustees of Mitaboni Katani Company Limited.
4. In their joint Defence and Counter-claim, the Defendants averred that no notice of this suit was ever served upon them; that the issues raised herein by the Plaintiffs were also raised in HCCC No. 65 of 2009 by way of Originating Summons and that this suit is therefore bad in law.
5. The Defendants finally averred that the Plaintiffs are in breach of Clause 14(1) of the Law Society Conditions of Sale, 1989; that the Plaintiffs are also in breach of Clause 6 of the Sale Agreement and that the Defendants have always been ready and willing to complete the Sale Agreement.
6. According to the Defendants, the Plaintiffs have refused to point to them the beacons of the suit land and that they have been unable to take up possession of the suit land.
7. The Defendants are seeking for general damages for breach of contract and for an order compelling the Plaintiffs to give them vacant possession for the suit land. The Defendants are also seeking for an order of the court compelling the Plaintiffs to point out to them the beacons in respect to the suit land.
8. The parties agreed to proceed with the suit by way of written witness statements and the filed documents. The parties further agreed on the two issues that the court should determine, which are:

***a. Was there a breach of contract and if so who was in breach of the same?***

***b. Have the Plaintiffs suffered any loss as a result of the transaction?***

**The Plaintiffs' case:**

9. The Plaintiffs' case is summarized in three witness statements. In his statement dated 27<sup>th</sup> January, 2014, the 1<sup>st</sup> Plaintiff, Joseph Mutua Muinde, stated that he is one of the directors of Mitaboni Katani Company Limited and a trustee in respect of land known as Mavoko Town Block 2/199 (*the suit land*).

10. According to the 1<sup>st</sup> Plaintiff, they entered into an agreement dated 7<sup>th</sup> December, 2007 with the Defendants for the sale of the suit land for Kshs. 3,420,000; that the Defendants paid a deposit of Kshs. 342,000 and that the Defendants have not paid the balance of the purchase price to date. This, according to the 1<sup>st</sup> Plaintiff, is in breach of the Sale Agreement which stipulated that the entire purchase price was to be paid on or before the completion date.

11. The 2<sup>nd</sup> Plaintiff's statement repeated verbatim the 1<sup>st</sup> Plaintiff's statement which I have summarized above. The documents that the Plaintiffs are relying on are the sale Agreement dated 7<sup>th</sup> December, 2007, the search certificate dated 12<sup>th</sup> June, 2008 and the List of Members of Mitaboni Katani Company Limited.

**The Defence case:**

12. The 1<sup>st</sup> Defendant filed two witness statements. One is dated 12<sup>th</sup> February, 2015 while the other one is dated 28<sup>th</sup> March, 2017.

13. It is the evidence of the Defendants that they purchased the suit land from the Plaintiffs vide an agreement dated 7<sup>th</sup> December, 2007 and paid a deposit of Kshs. 342,000. According to the Defendants, they are willing to pay the balance of the purchase price on condition that the Plaintiffs grant them vacant possession of the suit land, which they have failed to do.

14. The 1<sup>st</sup> Defendant stated in his statement that they have always been repulsed by people on the ground who claim to be members of the Plaintiffs' company.

15. It is the Defendants' case that the Plaintiffs have failed to perform a critical condition of the agreement and cannot therefore seek for rescission of the agreement.

16. In the second statement, the 1<sup>st</sup> Defendant stated that they have since learnt that the Plaintiffs issued to Nicholas Michael Kioko a certificate of ownership No. 003 dated 24<sup>th</sup> October, 2014 in respect of the suit land. The Defendants relied on the agreement of 7<sup>th</sup> December, 2007 and on several letters, together with Plaintiffs' minutes of 22<sup>nd</sup> August, 1992, the Transfer document, the consent letter of 15<sup>th</sup> April, 2008 amongst other documents.

**Submissions:**

17. The Plaintiffs' advocate submitted that the Sale Agreement of 7<sup>th</sup> December, 2007 provided that the completion of the transaction would be within ninety (90) days and that the sale was subject to the Law Society Conditions of Sale which at paragraph 4(2) (d) provides for payment of the purchase price to the vendor upon registration of the transfer.

18. Counsel submitted that it is the Defendants who breached the agreement when they failed to pay the balance of the purchase price and consequently, the Plaintiffs were discharged of any further obligations.

19. The Defendants' advocate submitted that the agreement of sale provided that "*the vendor guarantees that the property is vacant*"; that the Defendants have on several occasions asked the Plaintiffs to grant the Defendants vacant possession which they have refused to do and that the grant of vacant possession is critical in the transaction.

20. The Defendants' counsel finally submitted that in the year 2014, the Plaintiffs issued to other people share certificates who have started constructing permanent buildings on the suit land and that the Defendants have always been ready and willing to pay the balance of the purchase price.

**Analysis and findings:**

21. It is not in dispute that the Plaintiffs entered into a sale agreement with the Defendants on 7<sup>th</sup> December, 2007. According to the said Agreement, the Plaintiffs signed the agreement as Trustees of Mitaboni Katani Limited. The Defendants have produced in evidence the minutes of the company dated 22<sup>nd</sup> August, 1992 where the shareholders authorized the Trustees to sell the suit land.

22. After the signing of the agreement, the suit property was transferred to the Defendants on 13<sup>th</sup> May, 2008. However, other than the Kshs. 342,000 that the Defendants paid upon signing of the Sale Agreement, they have not paid the balance of the purchase price.

23. The Defendants' case is that until the Plaintiffs give them vacant possession, they cannot pay the balance of the purchase. The Defendants have argued that it was a fundamental term of the agreement that the Plaintiffs give them vacant possession of the suit land before they can pay the balance of the purchase price.

24. On the other hand, the Plaintiffs have contended that having failed to pay the balance of the purchase price within ninety (90) days, the Plaintiffs are in breach of the Agreement.

25. The Agreement of 7<sup>th</sup> December, 2007 provides that the balance of the purchase price was to be paid on completion date. The completion date was to be within ninety (90) days from the date of execution of the Agreement.

26. Clause 6 of the agreement provides that “*the vendor guarantees that the property is vacant and free from any encumbrances whatsoever.*”

27. It is therefore obvious that the Plaintiffs were under an obligation to hand to the Defendants vacant possession within the stipulated period, and the Defendants were to pay the balance of the purchase price within the same period.

28. In their letters of 2<sup>nd</sup> July, 2008, 10<sup>th</sup> July, 2008 and 15<sup>th</sup> July, 2008, the Defendants’ advocates implored the Plaintiffs to grant them vacant possession. However, the Plaintiffs did not respond to those letters.

29. The Defendants have exhibited a copy of the letter dated 2<sup>nd</sup> June, 2008 in which some purported members of Mitaboni Katani Company Limited informed them that the suit land belongs to the company and that any transaction that the Defendants could have entered into was illegal. That letter was copied to the Plaintiffs herein.

30. The Plaintiffs have not denied that indeed, the suit property is occupied by people who are claiming to be members of the Plaintiffs’ company. Indeed, the Plaintiffs, even after selling the land, went ahead to issue to one Nicholas Michael Kioko a certificate of ownership No. 003 for the same parcel of land on 24<sup>th</sup> October, 2014.

31. From the evidence before me, it is obvious that the suit land is not free of encumbrances. It was a fundamental term of the agreement that the Plaintiffs were selling the suit land free of encumbrances. The Plaintiffs were required to hand to the Defendants vacant possession of the land before being paid the full purchase price.

32. Having not denied that the suit property is occupied by other third parties, and having not handed to the Defendants the suit land free of encumbrances, I find that it is the Plaintiffs who are in breach of the agreement of 7<sup>th</sup> December, 2007.

33. In any event, even if the Defendants are the ones who are in breach of the Sale Agreement, the Plaintiffs cannot rescind the agreement of sale before service on the Defendants the requisite completion notice as provided for under Clause 4 of the Law Society Conditions of Sale (1989). It is only upon service of a completion notice that it shall become a term of the contract that the transaction shall be completed within twenty one (21) days of service and, in respect of such period, time shall be of the essence of the contract. Having not done so, I find that the suit was a non-starter *ab initio*.

34. For those reasons, I find and hold that the Plaintiffs have failed to prove their case on a balance of probability. On the other hand, the Defendants have proved that it is the Plaintiffs who are in breach of the agreement of 7<sup>th</sup> December, 2007.

35. In the circumstances, I dismiss with costs the Plaintiff’s Plaint dated 20<sup>th</sup> April, 2009 and allow the Defendants’ Counter-claim dated 2<sup>nd</sup> June, 2009 as follows:

***a. The Plaintiffs be and are hereby compelled to point out the beacons of land known as Mavoko Town Block 2/199 to the Defendants.***

***b. The Plaintiffs be and are hereby compelled to grant to the Defendants vacant possession of land known as Mavoko Town Block 2/199.***

***c. The Plaintiffs to pay the costs of the suit and the Counter-claim.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2<sup>ND</sup> DAY OF MARCH, 2018.**

**O.A. ANGOTE**

**JUDGE**