



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC CASE NO.455 OF 2017

(FORMERLY MILIMANI ELC.373 OF 2011)

PETER KIMANI WAINAINA.....1ST PLAINTIFF

PETER NJOROGE NGANGA.....2ND PLAINTIFF

SUSAN WANGARI MITHAMO.....3RD PLAINTIFF

-VERSUS-

DECON ENTERPRISES LIMITED.....DEFENDANT

JUDGEMENT

By a *Plaint* dated 25th July 2011, the Plaintiffs herein sought for various orders against the Defendants. The orders sought are:-

- a) *An Order directing the Defendant to make and compensate the Plaintiffs with the full current market value of Thika Mun/Block 34/44, 45, 46, 85, 84, 164 & 162.*
- b) *General damages for breach of contract.*
- c) *Cost of the suit.*
- d) *Interests on (a), (b) and (c) above at commercial rates of 20% from the year 2000 till payment in full.*
- e) *Any other order that this Honourable Court may deem fit to grant in the circumstances.*

The Plaintiffs averred in their claim that in the *year 2000*, the Defendant entered into a *Sale Agreement*, with the Plaintiffs for sale and subdivision of *Plot No.LR.No.20695, Decon Estate*, whereby they did pay the entire purchase price in five instalments as per the agreements of sale. They further stated that upon payments of the deposits of the purchase price by the Plaintiffs and upon the execution of the sale

agreements, the Defendant allocated the Plaintiffs pre-survey plots as follows;-

- *1st Plaintiff – Plots No.166, 49 & 176*
- *2nd Plaintiff – Plots No.95 & 96*
- *3rd Plaintiff – Plots no.94 & 47*

However, after the Plaintiffs paid the entire purchase price, the Defendant declined to honour the sale agreement and breached its duties wherein it went ahead and transferred the same pieces of land to third parties without the Plaintiffs' knowledge and/or consent. The Plaintiffs also alleged that upon completion of the sale transaction, the Defendant became evasive and refused to surrender to the Plaintiffs

completion documents and after conducting an official search in **March 2011**, the Plaintiffs discovered that the plots of land they had bought namely **Thika Mun/Block 34/44, 45, 46, 85, 84, 164 & 162** were fraudulently transferred by the Defendant to third parties. The particulars of fraud were particularized in paragraph 12 of the **Plaint** among them transferring the said pieces of land to third parties while at the same time retaining the Plaintiffs' monies.

It was their contention that the Defendant's actions were fraudulent and intended to unjustly enrich the Defendant with the Plaintiffs' monies. They further contended that they are entitled to full current value of the respective pieces of land. That despite **Demand** and **Notice of intention to sue**, the Defendant refused to act upon the Plaintiffs' demands.

The Defendant was served with **Summons to Enter Appearance** and did enter appearance through the **Law Firm of Mungu & Co. Advocates** on **12th October 2017**. However, the Defendant did not file any defence nor attend any of the court sessions.

On **30th November 2017**, the matter proceeded for hearing *ex parte* since the Defendant's Advocate, **Mungu & Co. Advocates** were served with a hearing **Notice** as is evident from the **Affidavit of Service** of **Danson Mbiti, Court Process Server**, but he failed to turn up or send any representation.

The Plaintiffs called one witness, **Peter Kimani Wainaina**, the 1st Plaintiff herein who testified on his own behalf and on behalf of the other Plaintiffs. He adopted the filed witness statements as his evidence in court and further confirmed that the Plaintiffs purchased their respective parcels of land from the Defendant who owned **LR.No.20696**. Each plot was being sold at **Kshs.160,000/=** and after completion of the payment of the purchase price, the Defendant failed to transfer the purchased plots to Plaintiffs but transferred them to other third parties. Certificates of official search were produced in court to confirm that indeed the suit properties are now registered in the names of other parties. Therefore, the Plaintiffs urged the Court to order that they be compensated at the current market price per plot which can be discerned from **Valuation Report** produced as **Exhibit 1**. The Plaintiffs also prayed for cost of the suit and general damages for breach of contract.

After close of the *viva voce* evidence, the Plaintiffs filed **written submissions** and relied on various decided cases. Of particular importance is the case of **William Kazungu Karisa...Vs...Cosmas Angora Chanjera (2006) eKLR**, where the Court held that:-

“The basic rule of Law on Contract is that parties must perform their respective obligation in accordance with the terms of the contract executed by them”.

They further relied on the case of **Kariuki Kinuthia...Vs...Job K. Chirchir & 3 Others (2013) eKLR**, where the Court held that:-

“The contractual effect of representation of fact in contract for the sale of land is stated in Halsbury Laws of England, fourth Edition, volume 42 at Para 57 as follows:-

“The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which either by the description in the contract (including any particulars of sale) or by representation of facts made by the vendor, the purchaser expected to get....”

The Court has now carefully considered the available evidence and the exhibits thereto. The Court has also considered the written submissions and the cited authorities and renders itself as follows:-

It is evident that the Defendant did not file its defence to controvert the Plaintiffs allegations. However, the Plaintiffs are the ones who have alleged and the onus is upon them to prove their case on the required standard of balance of probabilities. Section 107 of the Evidence Act places such onus on he who alleges. **Section 107** and **109** of the **Evidence Act** provides as follows:-

107(1) 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.

There is no doubt that the Plaintiffs herein did purchase some pieces of land from the Defendant herein. The Plaintiffs have alleged that after the completion of payment of the purchase price, the Defendant did not transfer the suit properties to them but did transfer to other parties. The Defendant also did not refund the purchase price. The Plaintiffs did produce exhibits to show that the parcels of land that were meant for them were transferred to other third parties. The Defendant did not file its defence to challenge that allegation. The Court finds that the Plaintiffs evidence was not controverted and this Court finds no reason to doubt the same.

It is therefore evident that the Defendant was in breach of the sale agreements as it failed to perform its respective obligations in accordance with the terms of the said sale agreement. The failure to honour its obligation goes against the basic rule of the Law of Contract. Since the Defendant is in breach of the terms of the sale agreements entered with the Plaintiffs, then it is bound to pay damages. The damages herein that the Defendant should pay is compensation to the Plaintiffs of the full and current market values of the suit properties. The Plaintiffs did produce a **Valuation Report** stipulating the market value for each of the plots. The said **Valuation Report** was not challenged and the Court will rely on it fully. This Court will be persuaded by the two cases relied upon by the Plaintiffs in their submissions, being the case of **Milicent Perpetua Atieno...Vs...Alouis Onyango Otieno (2013) eKLR**, where the Court held that:-

“Where it is the vendor who wrongfully refused to complete the measure of damage is similarly, the loss incurred by the

purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...”

And *Hadley...Vs...Baxendale(154) 9 Exch, 241* which states as follows:-

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive.... should be such as may fairly and reasonably be considered either as arising naturally, i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made a contract as the probable result of a breach of it”.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probability. Consequently the Court enters Judgement for the Plaintiffs against the Defendant in the following terms:-

a) The Defendant to compensate the Plaintiffs with the full and current market value of Thika Mun/Block 34/44, 45, 46, 85, 84, 164 & 162 in the following terms:-

i. Block 34/44 – Kshs.2,200,000/=

ii. Block 34/45 – Kshs.2,200,000/=

iii. Block 34/46 – Kshs.2,200,000/=

iv. Block 34/84 – Kshs.2,700,000/=

v. Block 34/85 – Kshs.2,500,000/=

vi. Block 34/86 – Kshs.2,200,000/=

vii. Block 34/162 – Kshs.2,400,000/=

viii. Block 34/164 – Kshs.2,000,000/=

b) General damages of Kshs.500,000/= for breach of contract.

c) Costs of the suit.

d) Interest on (a),(b) and (c) at courts rates from date of this Judgement to payment in full.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Ajika holding brief for M/S Savini for Plaintiffs

No appearance for Defendant

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above advocate and in the absence of the Defendant.

L. GACHERU

JUDGE

27/4/2018