REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 356 OF 2017

(FORMERLY MACHAKOS HCCC NO. 93 OF 2014)

SAMMY AKIFUMA...1ST PLAINTIFF

JOYCE AKIFUMA..2ND PLAINTIFF

VERSUS

KAPOSHI NJOROGE NAKUMANIA......................1ST DEFENDANT

JONATHAN KAPOSHI..2ND DEFENDANT

NTEENE OLE KAPOSHI..3RD DEFENDANT

KENNETH OBIMBO ODHIAMBO.........................4TH DEFENDANT

JUDGEMENT

By a Plaint dated the 24th September, 2014, the Plaintiffs' seek judgement against the Defendants in the following terms:

i. A declaration that the Defendant is bound to specifically perform his part of the Agreement.

ii. A mandatory injunction restraining the Defendants by himself, his agents or otherwise from selling, charging or in any other way alienating the land sold to the Plaintiffs.

iii. A mandatory injunction compelling the Defendants to obtain title and transfer to the Plaintiffs their parcel of land.

iv. In the alternative the Land Registrar Kajiado be pleased to execute any and all documents required to give effect to the transfer of the land portion from the Defendants to the Plaintiffs

v. Costs of this suit

The 1st, 2nd and 3rd Defendants filed a Defence dated the 6th October, 2014 where they claimed it is the Plaintiffs' who defaulted and breached the terms of the agreement. The 1st Defendant denied being elusive, unobtainable and receiving the completion notice. They denied the allegations of fraud and contended that they do not see a nexus between the Plaintiffs and the Rift Valley Railways who are not parties to this suit. Further, that they have not received any notice of compulsory acquisition or proposal of any payment and avers that if the suit is motivated by some imaginary huge payments from Rift Valley Railways then it is misconceived and ought to be struck out summarily.

The matter proceeded to hearing on 29th November, 2017.

Evidence of the Plaintiffs

PW1 Sammy Akifuma who is the 1st Plaintiff herein, during examination in chief adopted his witness statement dated the 24th September, 2014. He confirmed entering into various sale agreements with the 1st Defendant wherein the 1st Defendant sold to the Plaintiffs' hundred (100) acres of land which was to be excised from part of the 1st Defendant's land that was within the ILMANEN Ranching Scheme. He claimed it was an express term of the agreement that the Defendants would cause the said parcel of land to be surveyed within a reasonable time to obtain a land reference number and to thereafter effect legal transfer of the same to the Plaintiffs. PW1 contended that the 1st

Defendant finally obtained his title with the land being registered as KAJIADO /KAPUTIEI – CENTRAL / 839. Further that despite the 1st Defendant's assurance that he would cause the subdivision and issuance of a title to them, he has failed, refused as well as neglected to do so. They subsequently learned that the 1st Defendant had subdivided land title number KAJIADO / KAPUTIEI – CENTRAL / 839 to smaller portions namely KAJIADO / KAPUTIEI – CENTRAL / 2345; KAJIADO / KAPUTIEI – CENTRAL / 2346; KAJIADO /KAPUTIEI – CENTRAL / 2347 as well as KAJIADO / KAPUTIEI – CENTRAL / 2348 and fraudulently and to the exclusion of the Plaintiffs transferred the same to the 2nd Defendant. He averred that there is ongoing compulsory acquisition of the suit land by the Rift Valley Railways for purposes of building the Standard Gauge Railway and as Plaintiffs' they stand to suffer innumerably if the Defendants are compensated for the suit land to their exclusion. He sought for the court's intervention to restrain and prohibit the Defendants' from selling, charging or in any other way alienating the parcel of land or any portion thereof to the Plaintiffs' exclusion. Further that any payments made during the compulsory acquisition over the suit land be held in escrow by the paying authority.

During cross-examination, PW1 confirmed that he bought hundred (100) acres of land from the 1st Defendant in 1989 and completed the process in 1992. He stated that they had several sale agreements but drafted two Sale Agreements to summarize the aforementioned transaction. The first Sale Agreement was in 1989 while the second one was in 1992. He claimed he paid Kshs. 120,000 in 1989 for sixty (60) acres and in 1992 he paid Kshs. 80,000 for fourty (40) acres. He confirmed he was paying Kshs. 2,000 per acre and recognized the agreement dated the 6th January, 1990 which was part of the several agreements but not the summarized one. Further, that the agreement made on 14th September, 1991 refers to sixty (60) acres but the two main agreements were made in 1991 and 1992 respectively. He contended that these two agreements are contained in his affidavits but were not part of the bundle of documents he had filed in Court. Further, that the agreements were signed by the 1st Defendant with the first one being witnessed by Justus Muchiti while the second one witnessed by Muli as well as Koilekerio respectively. He further confirmed that the agreement dated the 6th January, 1990 was done by an advocate and it summarized the transaction and clause (J) therein indicated the completion date to be in 1990 but could not complete the same as parcel of land had not been adjudicated. He reiterated that the transaction is not completed because after demarcation, the 1st Defendant who got his title in 2010 started avoiding them. Further that vide Machakos Misc No. 320 of 2012, he sought for an extension of time to apply for the Land Control Board Consent, which extension was granted for 30 days from 30th May, 2012 but he still did not manage to obtain it. PW1 did not produce as an exhibit the original copy of the Sale Agreement made in 1992. He further confirmed taking possession of the portion, built a structure thereon, but could not fence the whole of it. He averred that the said portion he purchased had been encroached upon by the 1st Defendant but he had tilled the suit land until he retired, with the structure he had constructed thereon vandalized but he did not report to the Police. He affirmed that the 1st Defendant had sold the suit land to other people he did not know, but he seeks his title for the hundred (100) acres. He stated that they even paid monies towards the Surveyor's fees and taking possession was part of the terms of the agreement. He advised his lawyers to send a demand letter to the 1st Defendant for specific performance and for the issuance of the title deed but he failed to adhere to it. He reaffirmed that he cannot take action against the persons who purchased land from the 1st Defendant and explained that his understanding of possession meant once he had paid for the hundred (100) acres of land, he was entitled to move into it but has not been able to do so, due to insecurity. He reiterated that part of the suit land had been compulsorily acquired by Rift Valley Railways and that was his reason for annexing the gazette notice. Since he did not have a title, which the Rift Valley Railways insisted upon before paying for compensation, they advised him to lodge a complaint before the monies could be paid. He confirmed that his name was not appearing in the gazette notice and there was no land reference number appearing in the Sale Agreement as at the time they entered into it, the land was still registered in the name of Group Ranch in which the 1st Defendant belonged to. He got information about the demarcation in 2008/2009 but the 1st Defendant was evasive in effecting the transfer. He learnt that the 1st Defendant's parcel of land was registered as KAJIADO / KAPUTIEI – CENTRAL / 839 which was later subdivided and transferred to the 2nd Defendant who is the 1st Defendant's son. Further, that the register for KAJIADO/ KAPUTIEI – CENTRAL/ 839 was opened on 26th January, 2012 but in 1991 when he purchased the 100 acres the 1st Defendant did not have a title but promised to transfer the land to him once he got his title. He never registered a caution over the land and insisted he had even constructed a house for the 1st Defendant as part of the consideration amounting to Kshs. 70,000.

In reexamination, PW1 confirmed he purchased hundred (100) acres from the 1st Defendant and paid both cash and materials over a period of time. He entered into two agreements and that there is confirmation by the 1st Defendant vide Machakos HCCC No. 299 of 2012 at paragraph 13 of his replying affidavit that he sold him the land. He reiterated that the 1st Defendant could not transfer the suit land to him as he did not have title at the time of the purchase. He took long as the 1st Defendant never informed him when he obtained the title deed to the suit land so as to curve out the hundred (100) acres and process the title deed to him. He confirmed that they had already identified a Surveyor and that receipts in his custody were given to him by one Daniel Nyukia a Land Surveyor, on 18th November, 1991 after paying surveying fees. Further that the 1st Defendant obtained title in 2001 with the Green Card opened on 18th October, 2001. PW1 said he advised his lawyers to send the 1st Defendant a demand letter seeking specific performance and issuance of title for the hundred (100) acres they had purchased but in vain. Further that parcel numbers KAJIADO / KAPUTIEI – CENTRAL/ 2348; KAJIADO / KAPUTIEI – CENTRAL/ 2347; KAJIADO / KAPUTIEI – CENTRAL/ 2346 and KAJIADO / KAPUTIEI – CENTRAL/ 2345 were resultant subdivisions from KAJIADO / KAPUTIEI – CENTRAL/ 839, which initially belonged to the 1st Defendant but no longer exists. Three portions of the resultant subdivisions are registered in the name of the 2nd Defendant who is a son to the 1st Defendant while the fourth one is owned by the 4th Defendant. These registrations were undertaken in 2012 after PW1's lawyers sent the 1st Defendant a demand letter. He reiterates that the 1st Defendant wanted to defraud him of the land and that is why he transferred the land to a third party and it was his duty to obtain consent to transfer as well as title to the land. Although he obtained extension of time to obtain consent from the Land Control Board, he was unable to do so since the 1st Defendant was uncooperative. He referred to the 2nd Defendant's affidavit dated the 6th April, 2017 where he confirmed being the owner of land parcel number KAJIADO / KAPUTIEI – CENTRAL/ 2345 which is an excision from KAJIADO / KAPUTIEI – CENTRAL/ 839. He explained that Muli who is one of his witnesses is the one who introduced him to the 1st Defendant and that Muli has also sued the 1st Defendant in respect of the suit land. He sought for prayers as stated in the Plaint.

The Plaintiffs' thereafter closed their case.

Evidence of the Defendants

DW1 Jonathan Kaposhi who is the 2nd Defendant herein stated during his examination in chief that he resides in Kajiado East on land parcel number KAJIADO/ KAPUTIEI – CENTRAL/ 2343 together with his father, mother and other siblings. He confirmed that the 1st Defendant is his father, the 3rd Defendant his mother while the 4th Defendant is a purchaser. Further, that his parents gave him authority to represent them in the instant suit. He claims he learnt about this suit in September 2014 when there was an application filed against his father who was in possession of a Sale Agreement dated the 17th November, 1990 which is in his List of Documents. He stated that as per the said Sale Agreement the land sold was fourty five (45) acres for a purchase price of Kshs. 2,000 per acre and that his parents were parties to the Sale Agreement and Kshs. 20,000 was paid in cash at the time of the execution. DW1 disputed the agreements dated the 7th February, 1992 and 6th January, 1990 respectively and insisted the amount paid is not clear as it had been altered. He confirmed that his father admitted knowing the Plaintiffs and acknowledged entering into an agreement with them dated the 17th November, 1990 and that Kshs. 20,000 was paid at the time of executing the agreement, with the balance meant to be paid used for construction of the house. He insisted the Plaintiffs did not complete the construction of the house and denied ever meeting them nor receiving the demand letter sent in 2010. He confirmed that the subdivisions from the suit land were registered in his name as he is the eldest son, and he is holding it in trust for his other siblings. He claimed the mother suffers from severe depression while the father is old and forgetful. Further that the father sold land to the 4th Defendant who has a title to it. DW1 confirmed knowing Sylvanus Muli and stated that they have a pending case in court between them. Further, that he has seen the gazette notice but is yet to be compensated for the suit land because of the Court Order and a Caution registered against it. He averred that a portion of the suit land has been acquired by the Rift Valley Railways and that there are a group of people claiming ownership over it, but the Plaintiffs are not one of them. He said the Plaintiffs are not in actual possession of the suit land and that the amount received from them was Kshs. 90,000 which they are able to refund if the Court orders them to do so as they do not have any other vacant land to give them.

During cross-examination, DW1 confirmed he was 7 years old in 1990 and did not witness any transaction nor take part in them. He confirmed his father is forgetful and does not remember everything and could have forgotten part of the transaction. He insisted it was fourty five (45) acres of land sold to the Plaintiffs and that the agreement for the same was valid and paid for. He claimed the original land in question is no longer in the hands of the owner and he cannot give the Plaintiffs' fourty five (45) acres as he does not owe them land. He further stated that he does not know the cost of an acre of land. He confirmed the original parcel number was KAJIADO / KAPUTIEI – CENTRAL/ 839, which was subdivided to KAJIADO / KAPUTIEI – CENTRAL/ 2345; KAJIADO / KAPUTIEI – CENTRAL/ 2347; and KAJIADO / KAPUTIEI – CENTRAL/ 2348, and are all his land, while KAJIADO / KAPUTIEI – CENTRAL /2346 belongs to the 4th Defendant. He said the subdivisions were done around January 2012 and by that time, he was aware the father had sold fourty five (45) acres of land to the Plaintiffs. He explained that the original acreage of KAJIADO / KAPUTIEI – CENTRAL/ 839 was 79.29 hectares while the acreage for the subdivisions were as follows: KAJIADO / KAPUTIEI – CENTRAL /2345 is 31.54 hectares; KAJIADO / KAPUTIEI – CENTRAL / 2346 is 12.14 hectares; KAJIADO / KAPUTIEI – CENTRAL/2347 is 31.54 hectares and KAJIADO / KAPUTIEI – CENTRAL 2348 is 4.05 hectares respectively. He insisted he held the land in trust for his siblings and that the father gave the 4th Defendant a title to the land he purchased. He claimed the Plaintiffs' had disappeared hence they were unable to obtain title for them. He confirmed that the Plaintiffs sent a demand letter in 2010.

During reexamination he denied the transfer of the land was with an intention to defraud other people including the Plaintiffs and that he learnt of the demand letter of 2010 through the Plaintiffs' pleadings. He reiterated that the Plaintiffs could not own his portion of land because he was not available between 1991 to 2012 and that the Kshs. 90,000 included the house but this was never completed. He stated that he was 8 years old when the house was completed by his uncles. Further, that the payment by the Plaintiffs were not complete as per the Sale Agreement. He confirmed coming across other Sale Agreements with other people and insisted the Plaintiffs expressed an interest to buy hundred (100) acres of land but this did not materialize.

The Defendants thereafter closed their case.

The Plaintiffs and the 1st, 2nd as well as 3rd Defendants filed their respective written submissions that I have considered.

Analysis and determination

Upon perusal of the pleadings filed herein including the documents presented and testimony of PW1 as well as DW1, I find that the following are the issues for determination:

- Whether there were valid Sale Agreements between the Plaintiffs' and the 1st Defendant.
- Whether the Plaintiffs' paid the full purchase price in compliance with the Sale Agreements.
- Whether the Plaintiffs are entitled to an order of specific performance as against the 1st, 2nd and 3rd Defendants respectively.
- Who should bear the costs of the suit?

On the first issue as to the validity of various Sale Agreements between the Plaintiffs' and 1st Defendant. PW1 confirmed that they entered into various sale agreements with the 1st Defendant for the purchase of hundred (100) acres of land which was to be excised from land title number KAJIADO / KAPUTIEI – CENTRAL / 839 that was formerly part of ILMANEN Ranching Scheme. PW1 contended it was an express term of the agreement that the 1st Defendant would cause the said parcel of land to be surveyed within a reasonable time and once he received his title deed, he would effect a transfer of their portion to them. It was PW1's testimony that the suit land KAJIADO /KAPUTIEI – CENTRAL / 839 was registered in in the 1st Defendant's name, which he later subdivided into KAJIADO / KAPUTIEI – CENTRAL / 2345; KAJIADO / KAPUTIEI – CENTRAL / 2346; KAJIADO /KAPUTIEI – CENTRAL / 2347 as well as KAJIADO / KAPUTIEI – CENTRAL / 2348 and fraudulently and to the exclusion of the Plaintiffs transferred the same to the 2nd Defendant. DW1 confirmed that land

parcel number KAJIADO/ KAPUTIEI – CENTRAL / 839 initially belonged to his father but he subdivided it into KAJIADO / KAPUTIEI – CENTRAL/ 2345; KAJIADO / KAPUTIEI – CENTRAL / 2346; KAJIADO / KAPUTIEI – CENTRAL /2347; plus KAJIADO / KAPUTIEI – CENTRAL / 2348 respectively and transferred 2345; 2347; as well as 2348 to him to hold in trust for his siblings. While 2346 was sold and transferred to the 4th Defendant. DW1 insisted that the Plaintiffs disappeared and they were hence not able to transfer the land, they had purchased to them. He confirmed that the father only entered into an agreement with the Plaintiffs' to sell fourty five (45) acres vide the Sale Agreement dated the 17th November, 1990 and not hundred (100) acres as claimed. DW1 averred that the Plaintiffs only paid Kshs. 90,000, which included building a house. He insisted the Plaintiffs' only expressed an interest to purchase hundred (100) acres of land but the transaction was not completed. It was DW1's testimony that the father is forgetful and he only came across one agreement between the father and the Plaintiffs' for the Sale of fourty five (45) acres which he did not dispute. DW1 admitted that the father entered into the agreements with the Plaintiffs when he was 8 years old but he never witnessed the transaction nor was he a party to it. I note as per the Plaintiffs' list of documents, they produced an agreement dated the 6th January, 1990 and one dated 12th December, 1989 acknowledging payment of Kshs. 5000 towards the purchase of the fifteen (15) acres of land. I note that DW1 produced the Sale Agreement dated the 17th November, 1990 where the Plaintiffs' were purchasing fourty five (45) acres. I note from the pleadings in Machakos High Court Civil Case No. 299 of 2012, vide an affidavit dated the 13th September, 2012 at paragraph 13, the 1st Defendant admitted having sold KAJIADO/ KAPUTIEI – CENTRAL /839 to the Plaintiffs' in 1990 and that the Plaintiffs constructed for him a small house as part payment of the purchase price. It was DW1's evidence that the Plaintiffs' never completed the construction of the house and the same was only finalized by his uncles. PW1 however failed to produce some of the Sale Agreements he was relying on, in court.

Section 3(3) of the **Law of Contract** provides as follows: **'(3) 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; and**
>
> **(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:'**

In relying on these legal provisions and based on the facts above including the uncontroverted evidence of PW1 and DW1 I find that there was indeed a valid contract of sale of land between the Plaintiffs' and the 1st Defendant.

As to whether the Plaintiffs are entitled to an order of specific performance as against the 1st, 2nd and 3rd Defendants respectively, I note they want the 1st, 2nd and 3rd Defendants compelled to transfer the suit land to them failure of which the Land Registrar can sign the transfer forms. DW1 however contended that they do not have land to transfer to the Plaintiffs but they are ready to refund the Kshs. 90,000, which the Plaintiffs paid as purchase price. I note part of the suit land was compulsorily acquired by Rift Valley Railways, which fact was admitted by PW1 and DW1, with DW1 confirming that they were supposed to be paid compensation but the same had been withheld due to a caution registered against the suit land including a court order. I note the 1st Defendant admitted that the Plaintiffs purchased the suit land from him. Further, as per clause 4 of the Sale Agreement dated the 6th January, 1990 it stated that; **' that the contractual completion date shall be a date of 1990** while in the Sale Agreement dated the 17th December, 1990 at clause 5 it indicated that**: ' the contractual completion date shall be 31st December, 1990.'** Vide the Machakos Misc No. 320 of 2012, it is evident the Plaintiffs were granted an extension for 30 days from the 30th May, 2012 to apply for the consent of the Land Control Board, but they failed to do so.

Section 6 (1) (a) of the Land Control Act provides that: **'(1) Each of the following transactions that is to say—**

> **(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
>
> **is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.'**

In the **Civil Appeal No. 351 of 2002, Tunoi, Githinji and Onyango – Otieno JJA** held as follows:

> **' By Section 8 of the Land Control Act, the application for consent of the Land Control Board was required to be made within six (6) months of the making of the agreement subject to the jurisdiction of the High Court to extend the period. Upon failure by the deceased and the respondent to make an application for consent of the Land Control Board within six (6) months, the agreement for sale of the land became void for all purposes by virtue of section 6 (1) of the Land Control Act.'**

Based on these legal provisions, and in relying on the facts above, I find that the agreement for the sale of a portion of 100 acres from the suit land is void as no consent of the land control board was obtained within six (6) months from the date of the various agreements. I further find that the contract completion date was December 1990, which is almost 28 years ago. In the circumstances, the Plaintiffs' claim for specific performance must hence fail.

Despite the contract being void, I find that the Plaintiffs' are not estopped from demanding a refund of the purchase price they had paid to the 1st Defendant who failed to adhere to the terms of the Sale Agreements and subdivided the suit land which he transferred to the 2nd Defendant and 4th Defendant respectively to fraudulently defeat their claim. I however note that the Plaintiffs' did not demand for the refund

of the purchase price in their pleadings but DW1 in his testimony confirmed he was able to refund them, although he did not demonstrate how he would accomplish it. In the case of **MOSES MARANGU & ANOTHER Vs ESTHER NTHIRA & OTHERS Civil Appeal No. 95 of 2009 at Nyeri**, the Court ordered for the refund of the consideration paid even if the same was not pleaded. As per the two Sale Agreements produced in Court, dated 6th January 1990 and 17th November, 1990, I find that the acreage bought only amounts to sixty (60) and not hundred (100) as claimed. In the circumstances, and in relying on the judicial authority cited above, I find that the Plaintiffs' are indeed entitled to a refund of the purchase price for the sixty (60) acres, at a cost Kshs. 2,000 per acre which amounts to Kshs. 120,000.

As relates to the Plaintiffs claim for a share of the Compensation from the Rift Valley Railways, It is my finding that since the transactions were void, for want of the consent of the Land Control Board as well as past the completion date, they do not have a right over the same.

As regards the Plaintiffs' claim against the 4th Defendant, I note the Court already exonerated him as he was buyer for value without notice and already acquired a title to his parcel.

On the issue of mandatory injunction, I have already made a finding above that the Plaintiffs' only have a right to receive a refund of their purchase price and hence will decline to grant the order as sought. I will further proceed to vacate the interim injunction orders that were earlier granted pending the outcome of this suit.

On the issue of costs, I find that since the Plaintiffs' have been inconvenienced, they are indeed entitled to costs and will award the same to them.

In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and proceed to make the following order:

a) The 1st, 2nd and 3rd Defendants do refund to the Plaintiff Kshs. 120,000 inclusive of interest from 1990, within the next ninety (90) days from the date hereof;

b) The amounts stated in (a) above to attract interest from 1990 to date, at court rates

c) The costs of the suit are awarded to the Plaintiffs

Dated signed and delivered in open court at Kajiado this 16th day of April, 2018.

CHRISTINE OCHIENG

JUDGE