



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. CASE NO. 74 OF 2017 (O.S)

FIDEL OKARI MOGANDA.....	1 ST PLAINTIFF
PENINA NJOKI MWANGI.....	2 ND PLAINTIFF
JAMES KAMAU MUTURI.....	3 RD PLAINTIFF
MARY MUTHONI NDUNGU.....	4 TH PLAINTIFF
SUSAN WANGUI ESETE.....	5 TH PLAINTIFF
GEOFFREY MBUGUA KARIUKI.....	6 TH PLAINTIFF
HANNAH WAMBUI GATEERE.....	7 TH PLAINTIFF
JOSEPH KAHARA MUCHIRI.....	8 TH PLAINTIFF
GEOFFREY MWANGI MUCHIRI.....	9 TH PLAINTIFF
SAMSON KARANJA KIMANI.....	10 TH PLAINTIFF
ALICE NG'ENDO KANYIRI.....	11 TH PLAINTIFF
JAMES MWAI MWAURA.....	12 TH PLAINTIFF
LUCAS MWANIKI KARIUKI.....	13 TH PLAINTIFF
STEPHEN KARIUKI KAMAU.....	14 TH PLAINTIFF
MAINA KARIUKI.....	15 TH PLAINTIFF
STEPHEN GATHOGO NJUGUNA.....	16 TH PLAINTIFF
JOHN MWAURA MURIUKI	17 TH PLAINTIFF
LILIAN WANJIRU GIKONYO.....	18 TH PLAINTIFF
MARY NJAMBI MWANGI.....	19 TH PLAINTIFF
ALEXANDER NZIOKA MAINGI.....	20 TH PLAINTIFF
JOHN MAINA MURIUKI.....	21 ST PLAINTIFF
SAMMY GITHINJI GITAU.....	22 ND PLAINTIFF

BENSON JAMES KAMAU.....23RD PLAINTIFF
BERNARD WACHIRA MACHARIA.....24TH PLAINTIFF
JOHN MACHARIA KARANJA.....25TH PLAINTIFF
JAMES NGANGA HIKA.....26TH PLAINTIFF
CHARLES NGIGI KINUTHIA.....27TH PLAINTIFF

AND

SAWA SAWA HOUSING ESTATES CO. LTD.....DEFENDANT
JEDIDAH NGIMA MUNENE.....INTERESTED PARTY/APPLICANT

JUDGMENT

1. The suit was commenced by way of an Originating Summons dated 14th August, 2017. In the Originating Summons, the Plaintiffs are seeking for the following orders:

a That directors of Sawa Sawa Housing Estates Company Limited be ordered to complete sale of land transactions entered into with the Plaintiffs by availing completion documents and executing all necessary documents for the transfer of sub-divisions of land parcel known as Donyo Sabuk/Koma Rock Block 1/189 (Donyo Sabuk/Koma Rock Block 1/9036-9139) lawfully purchased by the Plaintiffs within such time frame as the court will be pleased to grant.

b. That in the absence of compliance by the Defendant with court orders issued pursuant to paragraph 1 hereinabove, this Honourable Court be pleased to appoint and authorize the Deputy Registrar of the High Court to execute such documents as shall be necessary to transfer the sub-divisions of Donyo Sabuk/Koma Rock Block 1/189 (Donyo Sabuk/Koma Rock Block 1/9036-9139) lawfully purchased by the Plaintiffs.

2. The Originating Summons is premised on the grounds that the Plaintiffs purchased sub-divisions of land known as Donyo Sabuk/Koma Rock Block 1/189 from the Defendant; that the Plaintiffs fully settled the agreed purchase price and were issued with share certificates and that although the suit land has been sub-divided into parcel numbers 9036-9139 and green cards issued, the Defendant has failed to take steps to have the suit properties transferred to them.

3. According to the Plaintiffs' Affidavit, due to the inordinate delay in processing the Title Deeds, they came together as the affected parties and registered a group known as Sawa Sawa Welfare Self Help Group to champion the interests of the members.

4. The Plaintiffs deponed that the court should compel the Defendant to transfer the suit property to them.

5. In response, one of the Directors of the Defendant deponed that at the time of incorporation, the company had two shareholders, himself and one Richard Munene; that he held one share in the company and that his co-director is now deceased.

6. It was the deposition of the Defendant's director that the owners of the sub-plots were required to pay Kshs. 30,000 per plot for the processing of the Title Deeds and that other than Grace Njeri Mwaura and Benson James Kamau, the rest of the plot owners have not paid the said amount.

7. The Defendant's director further deponed that the process of transferring the suit properties to the Plaintiffs was delayed due to the demise of his co-director and that the legal administrator of the Estate of the deceased Director has not been appointed.

8. In his submissions, the Plaintiffs' advocate submitted that under Order 37 Rule 3 of the Civil Procedure Rules, the court is empowered to intervene in the circumstances where a party is unable or unwilling to conclude a transaction; that the Deputy Registrar can be mandated by this court to jointly execute the transfer documents with the Director who is alive and that the Originating Summons should be allowed.

9. The Defendant's advocate submitted that the Defendant's Articles and Memorandum of Association provides that the quorum of the company is at least two members and that it is only Grace Njeri Mwaura and the 24th Plaintiff who have paid up fees for their title documents.

10. The Originating Summons has been filed pursuant to the provisions of Order 37 Rule 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act.

11. Section 98 of the Civil Procedure Act provides that where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, the court may order that the conveyance, contract or other document shall be executed by such person as the court may nominate for that person.

12. Order 37 Rule 3 of the Civil Procedure Rules on the other hand provides that a purchaser may file an Originating Summons for the determination of any question which may arise in respect of any requisition or objections, or any claim of compensation; or any other question arising out of the contract of sale (*not being a question affecting the existence or validity of the contract*).

13. The surviving director of the Defendant has stated that the Defendant has been unable to transfer the sold plots to the Defendant because, firstly his co-director died in the year 2013 and secondly, the Plaintiffs have declined to pay up the Kshs. 30,000 for the processing of the title documents. According to the Defendant, some of the Plaintiffs are not on the list of the people who paid up for the plots.

14. The Plaintiffs in this matter are seeking for orders of specific performance. It is trite that for one to succeed in a claim for specific performance, which is an order of the court requiring a party to perform a specific act, and in accordance with the contract, the party has to show that he has complied with the contract.

15. Although the Plaintiffs have exhibited the certificates of ownership that were issued to them by the Defendant in respect to the plots that they purchased, they have not annexed the copies of the agreements that they entered into with the Defendant to enable the court know the Defendant's obligations in the transaction.

16. Indeed, a transaction in land is only valid if and when the same is reduced into writing, and where all the parties have signed it, and their signatures attested by a witness. (*See Section 3(3) of the Law of Contract Act*).

17. In the absence of the Sale Agreements that the Plaintiffs entered into with the Defendant, this court is unable to compel the Defendant to transfer the suit properties to the Plaintiffs. Indeed, the agreements by the parties in this matter would have enabled this court to know if they were required to pay Kshs. 30,000 per person as alleged by the Defendant or not.

18. Even if the Sale Agreements in respect to the suit land were produced, the failure by the Plaintiffs to move the Succession Court to appoint a legal administrator of the deceased director would still be a legal impediment to the enforcement of such agreements. Indeed, pursuant to the provisions of Clause 11 and 13 of the Defendant's Memorandum and Articles of Association, the Defendant can only transact business when it has at least two directors.

19. Consequently, until the court appoints the legal representative of the deceased director, the Defendant cannot legally transfer the suit properties to the Defendant.

20. In any event, and as I have already pointed out above, the Plaintiffs can only succeed for an order of specific performance by filing an ordinary suit and producing the Sale Agreements during trial. Neither Section 98 of the Civil Procedure Act nor Order 37 Rule 3 of the Civil Procedure Rules is applicable in this case.

21. For those reasons, I dismiss the Originating Summons dated 14th August, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE