



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 164 OF 2009**

**PETER MUTUKU SILA .....1<sup>ST</sup> PLAINTIFF**

**MACKENZIE MUTISO SILA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMINICO LTD .....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Amended Plaintiff dated 25<sup>th</sup> May, 2011, the Plaintiffs averred that at all material times, they were the owners of land known as Matungulu/Sengani/1311; that by a written agreement of 27<sup>th</sup> May, 2008, the Defendant purchased a portion of the suit land measuring twenty (20) acres for Kshs. 8,000,000 and that the Defendant was to pay the purchase price once the consent of the Land Control Board was granted.
2. The Plaintiffs averred that in breach of the contract, the Defendant has declined to pay the balance of the purchase price despite the land having been registered in favour of the Defendant and that the transfer of the suit land in favour of the Defendant should be nullified.
3. In its Defence, the Defendant averred that it purchased the suit land from the Plaintiffs vide the agreement dated 30<sup>th</sup> August, 2007; that the transfer was effected in its name after it paid to the Plaintiffs a deposit of Kshs. 1,000,000 and that it has so far paid to the Plaintiffs Kshs. 2,500,000 as part payment of the purchase price.
4. According to the Defendant, it is ready to pay the balance of Kshs. 5,500,000 at reasonable terms and that the suit land has already been sub-divided into more than 180 plots measuring 40 x 100 whereby 50% of the said plots have already been sold out.

**The Plaintiffs' case:**

5. PW1 informed the court that the suit property is a portion of land which initially measured 66 acres and that it belonged to his late grandfather, Sila Ndilio. According to PW1, the said land measuring 66 acres was sub-divided into three portions amongst the sons of Sila Ndilio. It was the evidence of PW1 that the entire land measuring 66 acres had been registered in the name of the 1<sup>st</sup> Plaintiff who was to hold it on his own behalf and on behalf of his two brothers.
6. It was the evidence of PW1 that his father's portion of land measuring 22 acres was never registered in his name; that they sold 20 acres to the Defendant while 2 acres was sold to Samuel Dominic Muathe, the Defendant's director.
7. PW1 stated that he was a witness to the agreement of 27<sup>th</sup> March, 2008 between the Plaintiffs and the Defendant; that the Defendant was not supposed to transfer the suit property to third parties until the purchase price had been paid and that it is Mr. Muathe who signed the agreement on behalf of the Defendant.
8. According to PW1, the Defendant has only paid them Kshs. 1,200,000 out of the agreed amount of Kshs. 8,000,000 and that the agreement of sale should be nullified. It was the evidence of PW1 that he is the administrator of the Estate of his late father and that he is in possession of the copy of the Title Deed for land known as Matungulu/ Sengani/3470 (*the suit land*).
9. In cross-examination, PW1 stated that his father was alive when the agreement with the Defendant was signed. According to PW1, it is the 2<sup>nd</sup> Plaintiff who received Kshs. 1,200,000; that his mother has never received any money towards the purchase price from the Defendant and that some portions of the suit land have been transferred to third parties. PW1 stated that he was not aware how the other 2 acres were registered in the name of the Defendant's director.

10. The 2<sup>nd</sup> Plaintiff, PW2, stated that the Defendant's director, Dominic Muathe, was his friend of many years; that he agreed to sale the suit land to the Defendant and that he sold to him 20 acres for Kshs. 8,000,000. PW2 stated that after Mr. Muathe paid him Kshs. 1,200,000, he declined to pay him the balance of the purchase price; that he gave Mr. Muathe the original Title Deed and that the Title Deed was in the name of the 1<sup>st</sup> Plaintiff who is his uncle and who held it in trust for his father.

11. It was the evidence of PW2 that the Title Deed should be cancelled because neither the Defendant nor Mr. Muathe has paid the balance of the purchase price.

12. The 2<sup>nd</sup> Plaintiff's brother, PW3, stated that their father mandated PW2 to sell the suit land to the Defendant; that he was aware of the agreement that was signed between the Defendant and the Plaintiffs and that the Defendant only paid Kshs. 1,200,000 towards the purchase price.

#### **The Defence case:**

13. One of the directors of the Defendant, DW1, informed the court that the Defendant purchased a portion of parcel of land known as Matungulu/Sengani/1311 for Kshs. 8,000,000; that 20 acres were exercised from the said land and was registered in the Defendant's name as parcel number 3470 while parcel number 3473 measuring approximately 0.77Ha (*approximately 2 acres*) was registered in the name of Samuel Muathe, the Defendant's director.

14. According to DW1, the Defendant paid Kshs. 2,500,000 for the land and had the Title Deed registered in its name on 20<sup>th</sup> May, 2008; that the land has already been sub-divided into 160 plots and that most of those plots have been sold off to third parties.

15. It was the evidence of DW1 that the Defendant was to sell the plots to third parties before settling the balance of the purchase price and that the 1<sup>st</sup> Plaintiff having withdrawn his claim, the 2<sup>nd</sup> Plaintiff does not have the *locus standi* to prosecute the suit.

16. It was the evidence of DW1 that the suit land was in the name of the 1<sup>st</sup> Plaintiff who allowed them to pay to the 2<sup>nd</sup> Plaintiff Kshs. 1,000,000 as deposit.

17. According to DW1, the parcel of land known as 1311 was initially 66 acres and it was sub-divided into five parcels; that the Defendant received its title after the sub-division of the land and that the purchase price for the 22 acres (*the two parcels*) was Kshs. 8,000,000; that they paid a total of Kshs. 3,900,000 and that the Plaintiffs' family started raising issues thereafter.

18. DW1 informed the court that as at the time of filing this suit, the balance of the purchase price was Kshs. 5,500,000 and that the Defendant paid some more money to the Plaintiffs' family members.

#### **Submissions:**

19. The Plaintiffs' advocate's submissions are not record. The Defendant's advocate submitted that the 2<sup>nd</sup> Plaintiff does not have letters of administration to sue on behalf of the Estate of his late father, Michael Mutiso Sila; that it is PW1 and PW3 who should have filed the suit and that there is no suit before the court.

#### **Analysis and findings:**

20. The evidence by PW1, PW2 and DW1 was that by way of a written agreement dated 30<sup>th</sup> March, 2008, the Defendant purchased land measuring approximately 20 acres from Michael Mutiso Sila and Peter Mutuku Sila. The said land was excised from a parcel of land known as Matungulu/Sengani/1311 measuring 66 acres.

21. Plot number 1311 was inherited by Michael Mutiso Sila (*the 2<sup>nd</sup> Plaintiffs' father*), Peter Mutuku Sila (*the 1<sup>st</sup> Plaintiff*) and Kitheka Sila from their father. Each of the three (3) sons of Mr. Sila had 22 acres.

22. The 2<sup>nd</sup> Plaintiff's father's portion of land was sub-divided into two portions, being plot number 3470 measuring 20 acres and 3473 measuring 2 acres. Plot number 3470 that was supposedly sold to the Defendant is the subject of this suit.

23. From the adduced evidence, plot number 1311 was registered in the name of the 1<sup>st</sup> Plaintiff, on behalf of himself and his two brothers. After plot number 1311 was sub-divided into three portions, the 1<sup>st</sup> Plaintiff transferred plot number 3470 directly to the Defendant after the signing of the agreement of 30<sup>th</sup> August, 2007.

24. The sons of Michael Mutiso PW1 and PW2, who was the *defacto* owner of the suit land, informed the court that their father authorized them to sell the suit land to the Defendant. On that account, the 2<sup>nd</sup> Plaintiff together with his uncle, the 1<sup>st</sup> Plaintiff, signed the agreement of 30<sup>th</sup> August, 2008 [*27<sup>th</sup> March, 2008*].

25. The agreement shows that the sellers of the suit land were Michael Mutiso Sila (*deceased*) and other family members of the late Sila Nthambe. The consideration for the land was indicated as Kshs. 8,000,000. The agreement provided that the down payment was to be negotiated and the balance was to be paid in total "*once consent by Land Control Board to register Mutation and transfer is granted*".

26. The Sale Agreement between the Plaintiffs and the Defendant further provided that upon signing of the Sale Agreement, the buyer was to

start the development process, but the transfer of the Title Deed was not to be done before the total and final payment was made and acknowledged.

27. DW1 informed the court that as at the time the Plaintiffs filed this suit, the Defendant owed the Plaintiffs' family Kshs. 5,500,000. According to DW1, they were still raising the balance of the purchase by selling the over 160 sub-plots that had been carved from the suit land.

28. Having entered into an agreement of sale with the Plaintiffs, the Defendant cannot now claim that the 2<sup>nd</sup> Plaintiff does not have the *locus standi* to file the current suit. Indeed, if the *locus standi* of the 2<sup>nd</sup> Plaintiff is being challenged by the Defendant on the ground that he does not have the letters of administration in respect to his father's Estate, then it follows that the 2<sup>nd</sup> Plaintiff did not also have the *locus standi* to sign the Agreement of 27<sup>th</sup> March, 2008 because he was not registered as the proprietor of the suit land.

29. Having signed the Agreement of 27<sup>th</sup> March, 2008 on behalf of the family members of Michael Mutiso Sila, it is only the Plaintiffs who can ask for the nullification of the agreement and no one else. In the circumstances, the objection by the Defendant that the 2<sup>nd</sup> Plaintiff does not have the *locus standi* to file and prosecute this suit has no basis.

30. The Agreement between the Plaintiffs and the Defendant was that the balance of the purchase price was to be paid upon obtaining the consent of the Land Control Board. Although neither party produced the consent of the Board, it follows that the suit land could not have been registered in favour of the Defendant without the consent of the Board. Indeed, other than having the suit land registered in its favour, the Defendant's directors have sub-divided the land and sold to third parties more than 100 sub-plots. Again, the sub-division of the land and selling to the third parties could not have been actualized without the consents of the Board.

31. In the circumstances, I find that the Defendant is in breach of the Sale Agreement of 27<sup>th</sup> March, 2008. The Defendant ought to have paid the balance of the purchase price before transferring the land in its name and selling it to third parties.

32. For those reasons, I allow the Plaintiffs' Amended Plaint dated 25<sup>th</sup> May, 2011 in the following terms:

***a. An order be and is hereby issued nullifying the Sale Agreement dated 27<sup>th</sup> March, 2008 and the Transfer registered by the Registrar of Lands on 20<sup>th</sup> May, 2008 in respect of land known as Matungulu/Sengani/3470 in favour of the Defendant.***

***b. The register in respect of land known as Matungulu/Sengani/3470 and any other subsequent sub-divisions to be rectified by deleting the Defendant's name and all the subsequent registered owners of the sub-divisions and instead Michael Mutiso Sila (deceased) to be registered as the proprietor of the land known as Matungulu/ Sengani/3470.***

***c. The Land Registrar to issue a Title Deed for parcel of land known as Matungulu/Sengani/3470 in the name of Michael Mutiso Sila (deceased).***

***d. The Defendant to pay the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**