



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 103 OF 2017

PAUL NSAVA.....1ST PLAINTIFF
SABETH MUTHUSI.....2ND PLAINTIFF
GEORGE KUNGU.....3RD PLAINTIFF
STEPHEN KATUA.....4TH PLAINTIFF
MARGARET NJAGI5TH PLAINTIFF
BERNARD OTIENO6TH PLAINTIFF
LISA WACHIRA7TH PLAINTIFF
CATHERINE MWANGI8TH PLAINTIFF
DOMINIC NGUNJIRI.....9TH PLAINTIFF
CHARLES INDZAI10TH PLAINTIFF
MARGARET NYAMBURA.....11TH PLAINTIFF
MONICAH KARANUH.....12TH PLAINTIFF
JOHN IKIARA.....13TH PLAINTIFF
CHRISPUS OJIAMBO.....14TH PLAINTIFF
PURITY WAKIBINE.....15TH PLAINTIFF

VERSUS

ARCHER DRAMOND MORGAN LIMITED.....1ST DEFENDANT
ARCHER DRAMOND MORGAN LIMITED.....2ND DEFENDANT
ARCHER DRAMOND MORGAN LIMITED.....3RD DEFENDANT
ARCHER DRAMOND MORGAN LIMITED.....4TH DEFENDANT
ARCHER DRAMOND MORGAN LIMITED.....5TH DEFENDANT

JUDGEMENT

1. In the Complaint dated 6th March, 2017, the Plaintiffs have averred that they entered into individual sale agreements for the purchase and sale of 110 different housing units (Hill Crest Park) erected on parcel of Land known as L.R.No.2713 Athi River; that they entered into individual, Agreement of Sale, Lease and management of 110 units with the 1st and 2nd Defendants and that the Defendants have breached the terms of the Agreement of Sale and Lease.

2. The Plaintiffs have particularized the breach of the contract to include: the 1st and 2nd Defendants issuing a consent to the 5th Defendant to convert the guard house to a shop; failure to furnish the houses within the project; failure to construct a play area, swimming pool and shopping mall; and failing to incorporate into the Management Company the homeowners who have fully purchased their units.

3. In their prayers, the Plaintiffs are seeking for the following orders;-

a. A declaration that the part used as a guard quarters be retained as such; construction of a common play ground, swimming pool and shopping mall as laid out in the plan; a declaration that the borehole tank on the suit land be retained as the property belonging to the Estate; a declaration that the paid up home owners be incorporated as shareholders in the 2nd Defendant's company, amongst other prayers.

4. Although the Defendants were served with the Summons to Enter Appearance and the Complaint, they neither entered appearance in the matter nor filed a Defence. The matter proceeded for hearing on 20th November, 2017 in their absence.

5. The 1st Plaintiff, Pw 1, informed the Court that he had the authority of the rest of the Plaintiffs to give evidence on their behalf. It was the evidence of Pw 1 that the Plaintiffs entered into individual agreements for sale and leases for house units on L.R No.27317 with the 1st and 2nd Defendants.

6. Pw 1 stated that according to the said agreements and Leases, the Defendants agreed to incorporate a company which was to be wholly owned by the unit holders, to furnish the houses within the project, to construct a play area, swimming pool and shopping mall.

7. Pw 1 informed the court that instead of building a shopping mall, the Defendants sold the land designated for a shopping mall to Mavuno Church; has failed to incorporate the homeowners in the Management Company; that the Defendants have failed to maintain the estate; failed to have provide the audited accounts and that they have refused to ensure that the bungalows are provided with the benefit of driveways as laid out in the plan.

8. Pw 1 finally testified that the 1st Defendant has modified the guard house to be a kiosk in favour of the 5th Defendant contrary to the plans of the Estate and that the said kiosk poses a security risk and also reduces the status of the estate. Pw 1 produced a bundle of documents in support of their case.

9. The Plaintiffs' advocate submitted that the plaintiffs fulfilled all their obligations in the sale agreements that they entered into with the Defendants; that the Defendants have failed or refused to abide by the terms of the agreements and that an order of specific performance should issue.

10. The evidence before me shows that the plaintiffs entered into individual lease agreements with the 1st Defendant and the 2nd Defendant. In all the Lease Agreements, the 1st Defendant and the 2nd Defendants were referred to as the "Company" and "Manager" respectively. Other than the Lease, the Plaintiffs also entered into Individual Sale Agreements with the 1st Defendants for the purchase of "units" on L.R.No.27317.

11. According to clause 7.3 of the Lease Agreement, upon receiving the reversionary interest in the land, the Management Company was to issue each unit holder with a share in the management company. That has not happened. Clause 10 of the Sale Agreement obligates the Defendants to employ day and night watchmen and radio alarm back-up services towards the provision of adequate security.

12. The Defendants have not denied the allegations from the Plaintiffs. Indeed, no Defence was filed to rebutt the Plaintiffs averments and evidence.

13. Although the Plaintiffs are entitled to an order of specific performance, they can only enforce the specific obligations that were bestowed on the Defendants under the Leases and the Sale Agreement they entered into, and nothing more. The only obligations which the Defendants were to meet, and which they have not met are those summarized in the Plaintiff's advocates submissions – that is, inclusion of all the Plaintiffs as shareholders in the Management Company; provision of security to the Estate and services stipulated in the Sale Agreement.

14. I have perused the Sale Agreement and the Lease that were produced by the Plaintiff. I have not seen any obligation that was placed on the Defendants to build a swimming pool or a shopping mall on the suit land. Indeed, Pw 1 did not point to the Court any clause that made reference to the construction of a shopping mall and swimming pool by the Defendants.

15. For those reasons, the Plaintiffs suit for an order of specific performance is only limited to those obligations that have been specifically stated in the Sale Agreement and the Lease.

16. Consequently I allow the Plaintiffs Complaint in terms of prayers numbers (a), (c), (d), (f) and (h) which are as follows;-

a. A declaration that the part used as a guard quarters be retained as the guard house and that the defendant's agent servant and or employee be stopped from letting the same forthwith.

b. A declaration that the borehole sunk within L.R.27317 paid up by the homeowners be retained as property belong to Hill Crest Estate.

c. That L.R. 27317 be excised so as to have individual title deed for the 110 house units.

d. A declaration that the paid up home owners be incorporated as shareholders in the second defendant company.

e. Costs of this suit plus interest thereon on court rates from the date of judgment until the above prayers have been implemented.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE