



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.142 OF 2017

MBURU MUHINDI.....PLAINTIFF/APPLICANT

-VERSUS-

NYINGI KAHINGA.....DEFENDANT/RESPONDENT

JUDGEMENT

By a *Plaint* dated **16th February 2017**, the Plaintiff herein **Mburu Muhindi** has sought for Judgement against the Defendant on the following terms:-

- a) An order for Specific Performance.**
- b) In the alternative and without prejudice to (a) above, compensation for the land and development thereon at the current market price.**
- c) Costs of suit.**
- d) Any other and/or further relied as the Honourable Court may deem fair and just.**

He alleged in his statement of claim that the Defendant is the registered proprietor of all that piece of land known as **Muranga/Ithanga Phase II/296**. Further that in the **year 2005**, the Defendant agreed to sell to the Plaintiff a portion of the parcel of land measuring **2 acres** from this **Muranga/Ithanga Phase II/296** for **Kshs.40,000/=** and a **Sale Agreement** was drawn. He also alleged that both parties engaged the services of **Mutta Services Surveyor**, who excised the **2 acres** portion from the Defendant's land and the Plaintiff was put into occupation. Thereafter the Plaintiff embarked on improving and developing the land for the last **12 years** in uninterrupted possession. However, in **2014**, the Defendant made a false report to the **CID, Thika** and Plaintiff was arrested and charged with an offence of **Forcible Detainer** in **Criminal Case No.2458 of 2014** before the **Chief Magistrate's Court Thika**. However, the Plaintiff was later acquitted and the court found that indeed he had purchased the land he was in possession of from the Defendant. It was the Plaintiff's further allegation that he caused a Valuation of the **2 acres** together with the improvement and development and the same was valued at **Kshs.870,000/=**. The Plaintiff urged the Court to allow his claim.

The Defendant was served with **Summons to Enter Appearance** on **7th March 2017**, as is evident from the **Affidavit of Service of David Njoroge Mburu**, a **Process Server** dated **27th April 2017**. However, he failed to Enter Appearance and/or file his Defence.

Consequently, the Plaintiff applied for **interlocutory Judgement** on **24th April 2017** and matter was thereafter set down for formal proof.

Plaintiff's Case

PW1 – Mburu Muhindi, gave evidence for himself and called no witness. He adopted fully his witness statement which was recorded on **16th February 2017**. He reiterated the contents of the **Plaint** but averred that so far, he has paid **Kshs.39,000/=** to the Defendant and that he is more than willing to clear the balance as soon as the subdivision is through. He further stated that he took possession of the land and cleared the bush and therefore, the court should allow his claim. He further stated that the Defendant did not obtain **Consent** of the **Land Control Board** as he had not obtained the title deed by the time of the transaction.

After *viva voce* evidence, the Plaintiff filed **written submissions** on **19th April 2018**, and urged the Court to allow his claim. The Plaintiff relied on various decided cases among them the case of **Lucy Njeri Njoroge...Vs...Kaiyaha Njoroge (2015) eKLR**, wherein the Court allowed a prayer for Specific Performance.

Further, the Plaintiff relied on the case of Rose Wambui Wahito...

Vs...John Ian Maingey, ELC No.165 of 2013 (Nairobi), where the Court ordered a refund of the money paid to the Defendant as purchase price and declined to allow an Order of Specific Performance on the ground that:-

“The property to be bought is 3 acres of the Vendor’s 18 acres share of all that parcel of land known as LR.No.1338/4/R and the said 3 acres were not ascertained or identified for purpose of enforcement of the contract”.

The Court has now carefully considered the available evidence and the exhibits produced thereon. The Defendant did not file his defence and so the Plaintiff’s evidence remain unchallenged. However, the Plaintiff is the one who has alleged and he had a duty to call sufficient evidence to prove his case on the required standard of balance of probabilities. Section 107 of the Evidence Act places such a duty on he who alleges must prove. It states as follows:-

(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Court has seen an Agreement dated **20th January 2014**, between the Plaintiff and the Defendant. In the said Agreement, the Defendant has acknowledged receipt of **Kshs.39,000/=** from the Plaintiff being purchase price for land measuring **2 acres**. It is also evident that Defendant herein has been summoned severally by the **Assistant County Commissioner, Kakuzi Division** over the land dispute with the Plaintiff herein.

There is also no doubt that the Plaintiff was indeed charged in **Criminal Case No.2458 of 2014** with an offence of **Forcible Detainer**. The Complainant therein was **Nyingi Kahinya** and the parcel of land that he was accused of having possessed or detained was the suit property **Muranga/Ithanga Phase II/296**. However the trial court acquitted the Plaintiff herein and further held that the Plaintiff had indeed purchased the suit property from the Defendant. There is no doubt therefore that the Plaintiff did purchase the suit property from the Defendant. However, the Defendant had not obtained any **Consent** from the **Land Control Board**. Failure to obtain the **Land Control Board Consent** as provided by **Section 6** of **Land Control Act** rendered the contract *null and void*. The Plaintiff is only entitled to refund of the purchase price as provided by **Section 7** of

the said Act.

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

This was the findings in the case of Mbuthia Charagu...Vs...Kiarie Kaguru, Civil Appeal No.87 of 1986, the Court held that:-

“Unless there is a Consent of Land Control Board all the transactions relating to the transfer are null and void.”

The Plaintiff has alleged that he took possession of the suit property in the **year 2005** and has developed and improved the same. He attached a **Valuation Report** which gave the value of the suit property as at the time of filing the suit as **Kshs.870,000/=**. The Plaintiff is seeking for the said amount from the Defendant. The Defendant has not filed any defence nor challenged the Plaintiff’s claim.

Therefore, the Court finds that the Plaintiff’s claim is unchallenged and there is sufficient evidence from the **Valuation Report** that the **value** of the suit property stands at **Kshs.870,000/=**. This Court has no reasons to doubt the same.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case on a balance of probabilities in respect of the **alternative prayer No.(b)**. However, the Plaintiff is not entitled to an Order of Specific Performance as there was **no Consent** from the **Land Control Board** and the portion of **2 acres** from the land parcel **No.Muranga/Ithanga Phase II/296** had not been identified and ascertained.

Consequently, the **Court enters Judgement for the Plaintiff against the Defendant in terms of prayer No.(b)** of the **Plaint** dated **16th February 2017**.

Further, the compensation of the land and development thereon is as stated in the **Valuation Report** dated **22nd May 2015**, in the tune of **Kshs.870,000/=**. The Plaintiff is also entitled to costs of the suit and interest thereon.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of July 2018.

L. GACHERU

JUDGE

In the presence of

M/S Njoki holding brief for M/S Waithera Mwangi for Plaintiff

No appearance for Defendant

Lucy – Court clerk

L. GACHERU

JUDGE

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

L. GACHERU

JUDGE

6/7/2018