



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 66 OF 2011**

**NICODEMUS MOKAYA ORIKU.....PLAINTIFF**

**VERSUS**

**MONICA MWIKALI MWANZIA.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 14<sup>th</sup> March, 2011, the Plaintiff averred that he entered into an Agreement of Sale with the Defendant in respect of parcel of land known as Donyo Sabuk/Komarock Block 1/244 at Kshs. 292, 500; that he paid to the Defendant the full purchase price and that the Defendant has refused to attend the Land Control Board to facilitate the transfer of the partitioned land. The Plaintiff is seeking for an order of specific performance compelling the Defendant to transfer to him the suit land.
2. In his Statement of Defence, the Defendant averred that he never entered into a Sale Agreement with the Plaintiff as alleged and that the Plaintiff's suit is fatally defective and should be struck out in limine.
3. Although the Defendant was served with a hearing notice, he did not attend court when the matter came up for hearing on 7<sup>th</sup> February, 2018.
4. The Plaintiff, PW1, informed the court that parcel of land known as Donyo Sabuk/Komarock Block 1/244 was registered in the name of Makosi Itwilo Ndui; that the said Makosi granted to the Defendant a Power of Attorney and authority to deal with the Donor's affairs and that through a formal Agreement dated 22<sup>nd</sup> October, 2005, the Defendant sold to him a portion of the suit land measuring 3 acres at a consideration of Kshs. 65,050 per acre.
5. It was the evidence of PW1 that he made a down payment to the Defendant of Kshs. 80,000 at the time of signing the Agreement and that he thereafter made full payment of the purchase price. It was the evidence of PW1 that the Defendant agreed to sell to him a further 2 acres for Kshs. 130,000 which he also paid; that he took possession of the said 5 acres and built two permanent houses and that he has since sub-divided the suit land into two portions.
6. PW1 stated that the resultant Mutation of Donyo Sabuk/Komarock Block 1/19611 is still registered in the name of the Defendant and that the Defendant has refused to effect the title in his favour.
7. In his submissions, the Plaintiff's advocate submitted that the Defendant have executed a General Power of Attorney as the Donee; that the said General Power of Attorney was never revoked between the Donor and Donee and that after entering into an Agreement of Sale, the Defendant and the Plaintiff appeared before the Board where the Board gave its consent for the sub-division of the land.
8. The Plaintiff's advocate finally submitted that the Plaintiff complied with all the conditions of the Sale Agreement that he entered into with the Defendant and that an order of specific performance should issue.
9. The evidence of PW1 was that parcel number Donyo Sabuk/Komarock Block 1/244 is registered in the name of Makosi Itwilo Ndui who donated to the Defendant a General Power of Attorney in respect of the said land. According to the Plaintiff, it is on the basis of the said General Power of Attorney that the Defendant sold to him a portion of the suit land measuring 5 acres. The Plaintiff produced the General Power of Attorney dated 9<sup>th</sup> May, 1994.
10. The Plaintiff also produced in evidence the Agreement of Sale that he entered into with the Defendant on 22<sup>nd</sup> October, 2005 for the purchase of 3 acres of an unspecified parcel of land. In addition to the said Agreement, the Plaintiff also produced in evidence copies of Mutation forms for parcel number 244. The said copies of the Mutation forms show that parcel number 244 was sub-divided into four portions, with a sketch map dated 12<sup>th</sup> October, 1994 attached. The Mutation forms show the registered owner of the land as Makosi Itwilo.
11. As I have indicated above, the Agreement that the Plaintiff entered into with the Defendant does not state the land reference number of

the land that the Plaintiff was purchasing. Other than stating that the Plaintiff was purchasing five (5) acres, it does not state that the 5 acres are in respect to parcel number Donyo Sabuk/Komarock Block 1/244. It is therefore not possible for this court to state with certainty that the land that the Plaintiff purchased is a portion of parcel number 244 and not any other parcel of land.

12. Although the Plaintiff stated that parcel number Donyo Sabuk/Komarock Block 1/244 is registered in the name of one Makosi Itwilo, he never produced a copy of the official search or the Title Deed to enable the court to ascertain that the Plaintiff was dealing with land belonging to a Mr. Makosi. In any event, the General Power of Attorney that the Defendant purported to rely upon in selling the suit land to the Plaintiff was never registered.

13. Considering that the suit land is registered under the Registered Land Act (*repealed*), the General Power of Attorney ought to have been registered in accordance with Section 116 of the Registered Land Act (*repealed*). Having not registered the said General Power of Attorney, the same cannot validly form the basis of the sale of the suit land by the Defendant. The purported sale of the suit land by the Defendant on the basis of the said General Power of Attorney is therefore a nullity.

14. The Plaintiff informed the court that the Land Control Board gave its consent to sub-divide parcel of land number 244 and that the said land was sub-divided into parcel numbers 19611 and 19612. However, there is no evidence before me to show that indeed the Board gave its consent for the sub-division of the suit land, or that the said sub-division took place. The Mutation forms that the Plaintiff produced were neither dated nor signed. The said Mutation forms are also not registered.

15. In the absence of the consent of the Board for the sub-division of the suit land or evidence to show that the Mutation forms which gave rise to the parcel numbers 19611 and 19612 were ever signed by the owner of the land and registered, I find that the claim by the Plaintiff that parcel number 244 was sub-divided to be unsubstantiated.

16. The totality of the evidence before me shows that the Plaintiff did not prove his case on a balance of probabilities. The Plaintiff's suit is therefore dismissed but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**