



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 2 OF 2018**

**LOISE NDUMBA M/MURUNGI.....PLAINTIFF**

**VERSUS**

**JOSEPH MURUGU KIRAITHA.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

The plaintiff instituted this suit in Meru High Court in February 1991 or thereabouts as HCCC NO. 76 of 1991, before the establishment of the Environment and Land Court Act of 2012. In her plaint dated 20<sup>th</sup> February, 1991, the plaintiff averred that in or about 5<sup>th</sup> April, 1990 she entered into a written agreement with the defendant whereby the defendant agreed to sell him four (4) acres from land parcel No. Ntumburi/382 at a consideration of Kshs.26,000/=

The plaintiff paid a down payment of Kshs.13,000/= The plaintiff also stated that it was a term of the alleged agreement that the plaintiff was to be given quiet possession of ½ of the share until the finalization of the purchase price. It is further alleged that despite express written agreement, the defendant has always been chasing the plaintiff from the suit premises. In a brief statement of defence filed on 22/3/1991 the defendant denied the plaintiff's claim and puts her to strict proof thereof.

**PLAINTIFF'S CASE**

The plaintiff testified on oath and stated that she entered into a sale agreement whereby the defendant agreed to sell him four (4) acres of land parcel No. NTUMBURI/382 at a purchase price of Ksh.26,000/= He paid a down payment of Kshs.13,000/= and the defendant agreed that the plaintiff would use a portion of land measuring 2 acres out of the suit land until the final transfer of the 4 acres is done. The plaintiff also averred that they entered into the said agreement when the suit property was in an adjudication process.

The plaintiff also stated that the defendant wrote a letter to the District Land Adjudication Officer requesting him to sub-divide the suit property and to excise 4 acres to be registered in favour of the plaintiff. The plaintiff took possession of the two (2) acres until he was evicted by the defendant.

**DEFENDANT'S CASE**

The defendant admits that there existed a transaction between the plaintiff and his late father for one (1) acre in land Parcel No. NTUMBURI/ABOTHUGUCHI/382. The sale transaction was made in 1990 and in 1991, the title deed was issued. The defendant contends that since the land transaction was done during the Adjudication process and being a transaction concerning agricultural land, the Divisional Land Control Board had to be sought and obtained. There being no such consent, the defendant averred that the transaction became void for all purposes under Section 6 (1) of the Land Control Act Cap. 302 Laws of Kenya.

**PLAINTIFF'S SUBMISSIONS**

The plaintiff through the firm of Gichunge Muturi & Co. Advocates submitted that parties are bound by the terms of the contract entered into. The learned counsel also submitted that the suit property was bought when it was undergoing the Adjudication process thus the Land Control Board Act was not applicable.

In conclusion Mr. Gichunge Muturi & Co. Advocates submitted that the plaintiff has proved his claim against the defendant on a balance of probabilities and that she is entitled to acquire 2 acres of the suit property.

**DEFENDANT'S CASE**

The defendant through the firm of Muia Mwanzia & Co. Advocates admitted the existence of a transaction between the plaintiff and his client for the sale of one (1) acre in respect of Land Parcel No. NTUMBURI/ABUTHUGUCHI/382 in 1990. In 1991, a title was issued. However, the parties did not seek and obtain a consent from the Land Control Board as required under the Land Control Act Cap. 302 Laws of Kenya.

The learned counsel submitted that Section 6 of the Land Control Act states that a transaction in land is void for lack of consent. Counsel cited the following cases;

**1. Rose Wakanyi Karanja & 3 Others –Vs- Geoffrey Chege Kirundi & Another [2016] eKLR.**

**2. Onyango & Another –Vs- Luwayi [1986] KLR 513.**

### **DECISION**

The plaintiff and the defendant entered into a written agreement for the sale of land measuring four (4) acres in Land Parcel No. NTUMBURI/382. The agreed purchase price was Kshs.26,000/= and the Plaintiff/purchaser paid a deposit of Kshs. 13,000/= it was a term of the said agreement that the purchaser was to use two (2) acres until the balance was paid and transfer done.

The plaintiff took possession of the two acres from 1990 until 1991 when she was evicted. Being aggrieved by the defendant's action she moved to court and filed this case.

A transfer of interest in land requires that certain terms and conditions are met. First, a contract for the sale of land must be in writing. Section 3 (3) of the Contract Act (Chapter 23) Laws of Kenya provides as follows:

**“3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless;**

**i. The contract upon which it is founded is in writing.**

**ii. is signed by all parties thereto; and**

**(b) The signature of each party signing has been affected by a witness who is present when the contract was signed by such party.....”**

The agreement which has been produced as P. Exhibit No. 1 has not been attested by a witness who was present when the contract for sale was being signed. The other requirement for the transfer of interest in land is the consent from the Land Control Board where the land in question is Agricultural land. Section 6 of the Land Control Act states that a transaction in land is void for lack of consent. The courts have also expressed itself on that. In the case of **HIRANI NGAITHE GITHIRE –VS- WANJIKU MUNGE [1979] KLR 50** Chesoni J. stated as follows:-

**“Section 6 of the Land Control Act is an express provision of statute:**

**It is a mandatory provision and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a controlled area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”**

I also note from the sale agreement that after the signing of the purported sale agreement, the parties did not apply for consent from the Land Control Board within three months. As observed by Chesoni J. the courts do not legislate but interpret the law. As such, this court cannot accede to the request to have the Executive Officer of this Honourable Court be authorized to sign consent forms and any other documents intended to be signed by the transacting parties. Agreements are entered into by parties voluntarily and courts do not compel either of them to honour their obligations unless it is shown that one of the parties is obstructing the course of justice.

In the instant case the plaintiff has not even paid the full purchase price to warrant the defendant to transfer the agreed acreage of four (4) acres. The plaintiff has not also demonstrated that he has sent application for consent from the Land Control Board and that the defendant refused to sign the same. In the upshot, I find that the plaintiff has not proved his case on a balance of probabilities. The same is hereby dismissed with each party to bear his own costs.

**DATED AND SIGNED IN THIS 18<sup>TH</sup> DAY OF OCTOBER, 2018.**

**E. C. CHERONO**

**ELC JUDGE - KERUGOYA**

**DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018**

**LUCY N. MBUGUA**

**ELC JUDGE - MERU**

**In the presence of:**

C/A: Janet/Galgalo

CP Mbaabu holding brief for Mwanzia

Plaintiff