



**REPUBLIC OF KENYA**

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

**ELC. CASE NO.103 OF 2016**

**PETRONILLA MWENI MANTHI.....1<sup>ST</sup> PLAINTIFF**

**ANDREW WILLY THIACA MANTHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**STEPHEN MBITHI *t/a***

**NORTHFIELDS ESTATE.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 7<sup>th</sup> September, 2016, the Plaintiffs averred that by an Agreement dated 31<sup>st</sup> January, 2016, the Defendant agreed to sell to the 1<sup>st</sup> Plaintiff six (6) acres of land for Kshs. 2,400,000; that in breach of the Agreement, the Defendant failed to furnish to the Plaintiffs the completion documents and that an order of specific performance compelling the Defendant to transfer six (6) acres of the suit land should issue. In the alternative, the Plaintiff is seeking for refund of Kshs. 1,000,000 plus interest at the rate of 18%.
2. In his Statement of Defence, the Defendant averred that it is the Plaintiffs who breached the Sale Agreement by not facilitating the process of sub-division and transfer of the six (6) acres; that no completion period was provided for in the Agreement and that the Plaintiffs should abide by the Agreement.
3. The 2<sup>nd</sup> Plaintiff, PW1, informed the court that the 1<sup>st</sup> Plaintiff nominated him as her agent in the purchase of the suit land; that the Defendant agreed to sell to the 1<sup>st</sup> Plaintiff six (6) acres of land for Kshs. 2.4 million and that the Defendant was to facilitate the sub-division of the suit land.
4. According to PW1, after paying the Defendant Kshs. 1,000,000, he could not trace the Defendant and the sub-division of the land was never done. PW1 produced in evidence the Sale Agreement of 31<sup>st</sup> January, 2016 and three (3) letters. The bank slips were also produced in evidence.
5. In cross-examination, PW1 stated that it is the buyer who was required to facilitate for the sub-division of the suit land and that they never paid for the sub-division.
6. On his part, the Defendant, DW1, stated that he signed the Agreement of 31<sup>st</sup> January, 2016; that it is the buyer who was to retain a Surveyor to sub-divide the suit land and that the Sale Agreement did not have a completion date. According to DW1, it is the Plaintiffs who breached the Agreement of 31<sup>st</sup> January, 2016.
7. The Plaintiffs' advocate deponed that the Agreement provided that the Defendant was to facilitate the sub-division process; that the deposit of Kshs. 1,000,000 that was paid to the Defendant was to be used for sub-division of the land and that the Defendant has nothing to show for the Kshs. 1,000,000 that was paid to him.
8. The Agreement of Sale of 31<sup>st</sup> January, 2016 shows that the Defendant agreed to sell to the Plaintiffs six (6) acres of land to be excised from the land that the Defendant had bought from a third party.
9. Although the Defendant agreed to facilitate the process of sub-division and subsequent transfer of the suit land, the Agreement provided that *"the cost of sub-division and transfer will be borne by the buyer."* The Sale Agreement did not provide for the completion period, or how the balance of the purchase price was to be paid.
10. There is no evidence before me to show that the Defendant facilitated the process for sub-division, or that he retained a Surveyor for the purpose of sub-dividing the land. In fact, the Defendant did not procure the consent of the Land Control Board to have the suit land sub-

divided, neither did he call for a specific amount for the process of sub-dividing the land. Consequently, it is the Defendant who is in breach of the Agreement of 31<sup>st</sup> January, 2016.

11. However, as I have stated above, the Agreement of Sale did not have a completion period. It would also appear that the period of six (6) months from the date of the Agreement within which the consent of the Land Control Board was to be obtained has lapsed. Consequently, the Plaintiffs' only recourse is to have the deposit paid refunded.

12. For those reasons, I allow the Plaintiffs' Plaint dated 7<sup>th</sup> September 2016 as follows:

- a. The Defendant to refund the Plaintiffs Kshs. 1,000,000.*
- b. Interest on the above amount to be paid by the Defendant at court rates from the date of filing this suit until payment in full.*
- c. The Defendant to pay the costs of the suit.*

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

**O.A. ANGOTE**

**JUDGE**