



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 58 OF 2011**

**ZACHARIAH NJENGA KAMITL.....1ST PLAINTIFF**

**RICHARD MAINA KARUIRU.....2ND PLAINTIFF**

**VERSUS**

**DEVELOPMENT INVESTMENTS LIMITED.....1ST DEFENDANT**

**TERAKATE PROPERTIES LIMITED.....2ND DEFENDANT**

**KASARANI HILLS LIMITED.....3RD DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup> Defendant was the registered owner of the L.R. No. 11329 situated at Kasarani, Nairobi. By an agreement dated 5/8/2005 the 1<sup>st</sup> Defendant agreed to sell this parcel of land to the 2<sup>nd</sup> Defendant. Upon payment of the agreed deposit of the purchase price, the 1<sup>st</sup> Defendant allowed the 2<sup>nd</sup> Defendant to take possession of the suit land and subdivide it into several portions for sale to third parties. Consequently, the 2<sup>nd</sup> Defendant sold plots number 251 and 324 to the Plaintiffs which were to be created from the subdivision of L.R. No. 11329. The Plaintiffs paid the full purchase price to the 2<sup>nd</sup> Defendant and they were allowed to take possession of plots numbers 251 and 324 and construct commercial premises on the plots.
2. The 2<sup>nd</sup> Defendant failed to transfer the two plots to the Plaintiffs. The 1<sup>st</sup> Defendant started constructing a perimeter wall around L.R. No. 11329 which prompted the Plaintiffs to file this suit for fear that they would be denied access to their plots by the 1<sup>st</sup> Defendant's actions. They seek a permanent injunction to restrain the Defendants or their agents from evicting them from plot numbers 251 and 324 created out of L.R. No. 11329 and to stop the Defendants from selling, alienating, allocating, fencing, building or in any way dealing with the two plots of land. They seek specific performance of the sale agreements dated 21/2/2006 and 7/9/2007 together with the costs of the suit.
3. The 1<sup>st</sup> Defendant filed a Defence and Counterclaim on 21/3/2011 in which it admitted offering its property for sale to the 2<sup>nd</sup> Defendant vide the sale agreement dated 5/8/2005. It urged that the sale agreement was rescinded following the 2<sup>nd</sup> Defendant's failure to pay the agreed purchase price. The 1<sup>st</sup> Defendant contended that the Plaintiffs were not privy to the contract between it and the 2<sup>nd</sup> Defendant which was rescinded.
4. It categorically stated L.R. No. 11329 has never been subdivided and that the sale of plots including 251 and 324 was done without its authority or consent and therefore was incapable of conferring any legal interest to any person including the Plaintiffs since the 1<sup>st</sup> Defendant is the exclusive registered owner and holds the title over L.R. No. 11329. It maintained that it had vacant possession of this land and that there were no developments on it as the Plaintiffs claim. The 1<sup>st</sup> Defendant counterclaimed an order for permanent injunction to restrain the Plaintiffs from encroaching onto his land or dealing with his land.
5. The 2<sup>nd</sup> Defendant in its Statement of Defence claimed that it has been willing to transfer the suit plots to the Plaintiffs but has been frustrated by the 1<sup>st</sup> Defendant who refused to transfer the land to the 2<sup>nd</sup> Defendant to enable it subdivide and transfer the relevant plots to the Plaintiffs.
6. The 2<sup>nd</sup> Plaintiff gave evidence. He produced a copy of the sale agreement and confirmed that the 1<sup>st</sup> Defendant allowed the 2<sup>nd</sup> Defendant possession of L.R. No. 11329 and that it acquiesced to the 2<sup>nd</sup> Defendant's possession, occupation and subdivision of L.R. No. 11329. He claimed that the 2<sup>nd</sup> Defendant allowed him to take possession of plot number 324 with the authority and knowledge of the 1<sup>st</sup> Defendant.

Despite fulfilling his obligations under the agreement, the 2<sup>nd</sup> Defendant had failed to transfer the Suit Property to him.

7. The agreement dated 21/2/2006 between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Plaintiff stated that the 2<sup>nd</sup> Defendant was in the process of purchasing L.R. No. 11329 off Thika Road having entered into an agreement with the 1<sup>st</sup> Defendant, the registered owner. The land was sold subject to the proposed subdivision scheme. Under the agreement, the Plaintiffs were to take possession upon payment of the full purchase price and erect commercial premises on the plot.

8. The 2<sup>nd</sup> Plaintiff produced copies of receipts issued by the 2<sup>nd</sup> Defendant for the sums of Kshs. 250,000/= paid on 14/2/2006 as a deposit of the purchase price and Kshs. 350,000/= paid on 23/1/2007 being the balance of the purchase price. Certificates of completion for payment for the plots were issued by the 2<sup>nd</sup> Defendant to the Plaintiffs.

9. The 1<sup>st</sup> Plaintiff stated that he had constructed a dwelling house on the plot he purchased from the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Plaintiff gave evidence which was similar to that of the 1<sup>st</sup> Plaintiff. Both Plaintiffs knew and believed that the 1<sup>st</sup> Defendant had allowed the 2<sup>nd</sup> Defendant to subdivide the land it was buying from it to create plots to be sold to interested parties. That was the basis upon which the Plaintiffs purchased the plots from the 2<sup>nd</sup> Defendant.

10. The 2<sup>nd</sup> Defendant called Samuel Kamunya Gichigi, an Advocate of the High Court of Kenya, to give evidence on its behalf. He confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a sale agreement in which the 1<sup>st</sup> Defendant was selling the land known as L.R. No. 11329 to the 2<sup>nd</sup> Defendant. The land measured approximately 41 acres and was to be subdivided to create plots for sale. The witness claimed that the 1<sup>st</sup> Defendant allowed the 2<sup>nd</sup> Defendant to sell the subdivided portions and remit the sale proceeds to the 1<sup>st</sup> Defendant as part of the purchase price for the whole parcel of land being L.R. No. 11329.

11. He made reference to **Originating Summons Numbers 211, 212 and 649 of 2001** which were claims made by people who were squatters on L.R. No. 11329. He stated that the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants took cognizance of the presence of the squatters on the subject land. He averred that many persons bought plots and paid the purchase price to the 2<sup>nd</sup> Defendant after advertisements were placed in a daily newspaper inviting potential buyers to purchase the subdivided portions of L.R. No. 11329. He confirmed that the 2<sup>nd</sup> Defendant engaged a surveyor who subdivided the suit land into plots.

12. It was his evidence that the subdivision and other activities undertaken by the 2<sup>nd</sup> Defendant were carried out under the watch and support of the caretaker of the 1<sup>st</sup> Defendant. He confirmed that the Plaintiffs met their obligations under the agreement and that their money was with the 1<sup>st</sup> Defendant. He also confirmed that the 2<sup>nd</sup> Defendant gave the Plaintiffs completion certificates as well as possession of the plots which measure approximately 1/8 of an acre. He stated that the 2<sup>nd</sup> Defendant had been hindered by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants from issuing titles to the Plaintiffs. The 1<sup>st</sup> Defendant transferred L.R. No. 11329 to the 3<sup>rd</sup> Defendant.

13. A director of the 2<sup>nd</sup> Defendant gave evidence. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not participate in these proceedings. The Plaintiffs and 2<sup>nd</sup> Defendant filed submissions which the court has considered.

14. The court has looked at copies of Originating Summons Numbers 211, 212 and 649 all of 2001. The Plaintiffs were not parties to these suits. They bought the suit plots after these cases had been filed in court.

15. The sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 5/8/2005 in relation to L.R. No. 11329 indicates that L.R. No. 11329 was sold to the 2<sup>nd</sup> Defendant for Kshs. 45 Million. A deposit of Kshs. 4.5 Million was to be paid on execution of the agreement, which was to be held by the vendor's advocates as stakeholder pending completion of the sale. The balance was to be given to the vendor's advocate against an undertaking to release the money upon registration of the transfer in favour of the purchaser and handing over of possession subject to occupation by the squatters. The agreement restricted assignment of the agreement by the purchaser without the written consent of the vendor. The agreement listed the completion documents that were to be delivered to the purchaser's advocate and provided the completion date was 120 days from the date of the agreement.

16. Special condition no. 14.3 of the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated that prior to the successful completion of the transaction, the purchaser or its agents would not directly or indirectly interfere with the property or enter the land except to deal with the squatters which would be done by prior arrangement and with the vendor's written approval.

17. Special condition no. 14.4 stipulated that if the purchaser entered into any agreements for sale of parcels of land after subdivision before completion then this would be on condition that the written consent of the vendor was given and the funds deposited in a joint account in the names of advocates for both parties. The funds would be released upon successful completion and payment of the full purchase price.

18. The 2<sup>nd</sup> Defendant's director produced some of the correspondence exchanged between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant's advocates letter of 17/2/2006 stated that the total paid to the 1<sup>st</sup> Defendant towards the purchase price as at that date was Kshs. 8,185,000/=. The letters dated 8<sup>th</sup> and 9<sup>th</sup> March 2006 forwarded further payments to the 1<sup>st</sup> Defendant's advocates. The letter dated 24/12/2008 forwarded payment of Kshs. 500,000/=.

19. No evidence was adduced to confirm that that the entire purchase price of Kshs. 45 Million was paid to the 1<sup>st</sup> Defendant or that the 2<sup>nd</sup> Defendant performed its obligations under the agreement dated 5/8/2005 between it and the 1<sup>st</sup> Defendant. The transfer between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant was registered on 3/6/2011.

20. It is not clear why the 2<sup>nd</sup> Defendant did not sue the 1<sup>st</sup> Defendant for specific performance of the agreement dated 5/8/2005 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

21. There was no contract between the Plaintiffs and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant ought to have pursued completion of the sale agreement between it and the 1<sup>st</sup> Defendant. Only after this was concluded and the land subdivided could the 2<sup>nd</sup> Defendant have transferred plots to the Plaintiffs. The court finds merit in the 1<sup>st</sup> Defendant's defence that there was no privity of contract between it and the Plaintiffs. The Plaintiffs' claim lies against the 2<sup>nd</sup> Defendant whom they entered into agreements with and paid the purchase price to.

22. The court declines to grant the orders sought in the plaint. The Plaintiffs are awarded the costs of the suit to be borne by the 2<sup>nd</sup> Defendant.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of October 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Githinji for the Plaintiffs

Mr. Majau for the 2<sup>nd</sup> Defendant

Mr. J. Okumu- Court Assistant

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants