



**REPUBLIC OF KENYA**

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

**ELC CASE NO 553 OF 2015**

**PETER KARANJA KAMAU-CHAIRMAN OF MURACIA**

**UMWE UTATIRA SELF HELP GROUP .....1<sup>ST</sup> PLAINTIFF**

**SAMUEL NJOGU GAICHARE- VICE CHAIRMAN OF MURACIA**

**UMWE UTATIRA SELF HELP GROUP .....2<sup>ND</sup> PLAINTIFF**

**SAMSON NDUNGU-SECRETARY OF MURACIA**

**UMWE UTATIRA SELF HELP GROUP .....3<sup>RD</sup> PLAINTIFF**

**JAMES MAGONDU NDUATI-VICE SECRETARY OF MURACIA**

**UMWE UTATIRA SELF HELP GROUP .....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MUTINDA MUTISYA KYULE..... DEFENDANT**

**JUDGEMENT**

The Plaintiffs brought this suit by way of a Complaint dated 19<sup>th</sup> June 2015. The plaintiffs averred that by a sale agreement dated 1<sup>st</sup> November 2013, the defendant had agreed to sell to them at a consideration of Kshs.1,300,000/= a portion of land measuring 2 acres which was to be excised from LR No. DonyoSabuk/Komarock Block 1/18374(herein after “Plot No. 18374”). The Plaintiffs averred that pursuant to the said agreement, they paid to the defendant a sum of Kshs. 1,025,000/= leaving a balance of Kshs. 275,000/= to be paid upon the sub-division of Plot No. 18374 and receipt of a consent of the Land Control Board to transfer the sold portion thereof measuring 2 acres to the plaintiffs. The plaintiffs averred that Plot No. 18374 was subsequently subdivided and one of the resultant parcels,LR No. DonyoSabuk/Komarock Block 1/47826(herein after referred to as “the suit property”) registered in the name of the defendant. The plaintiffs averred that in breach of the said agreement for sale, the defendant refused and/or neglected to transfer to the plaintiffs the 2 acres which he had sold to them. The plaintiffs sought the following reliefs against the defendant:-

- a) Specific performance of the agreement for sale by transferring 2 acres out of LR No. DonyoSabuk/Komarock Block 1/47826(“the suit property”) to the plaintiffs.
- b) Alternatively, the refund of Kshs 1,025,000/- together with interest at court rates from 1<sup>st</sup> November 2013 until payment in full.

c) Costs of the suit.

d) Any other and/or further relief as to.

Summons to enter appearance were issued on 23<sup>rd</sup> June 2015 and served upon the defendant on 20<sup>th</sup> August 2015. The defendant did not enter appearance and/or file a statement of defence. On 15<sup>th</sup> October 2015, the Plaintiffs requested for interlocutory judgment against the defendant which was entered by the Deputy Registrar on 26<sup>th</sup> October 2015.

The suit was thereafter set down for formal proof on 2<sup>nd</sup> June 2016 when the 1<sup>st</sup> plaintiff gave evidence in support of the plaintiffs' claim against the defendant. The 1<sup>st</sup> plaintiff stated that he was the chairman of MuraciaUmweUtatira Self Help Group (hereinafter referred to as "the group") and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were the other officials of the group. He stated that, as officials of the group, they entered into an agreement with the defendant for the purchase of land on 1<sup>st</sup> November 2013 at a consideration of Kshs. 1,300,000/-. The group paid Kshs 205,000/- upon the execution of the agreement for sale and made subsequent payments bringing the total amount paid to Kshs. 1,205,000/- as at 3<sup>rd</sup> February 2014.

He stated that the defendant was to subdivide the land a portion of which was sold to them. He stated that the original parcel of land a portion of which was sold to the group was known as LR No. DonyoSabuk/Komarock Block 1/18374 (Plot No. 18374) and that the same was registered in the name of the defendant's mother, Agatha Nthenya. He stated that Plot No. 18374 was subdivided and a portion thereof known as LR No. DonyoSabuk/Komarock Block 1/47826 ("the suit property") registered in the name of the defendant. Upon registration of the suit property in the name of the defendant, the defendant refused to transfer to the group a portion thereof measuring 2 acres which he had sold to it.

The 1<sup>st</sup> plaintiff stated that the plaintiffs registered a caution against the title of the suit property on 4<sup>th</sup> February 2015 and thereafter instructed their advocates on record to write a demand letter to the defendant. He stated that the Land Control Board had not issued consent for the transfer of a portion of the suit property to the group. He stated further that the balance of the purchase price in the sum of Kshs 275,000/- which was payable to the defendant upon transfer of the suit property to the group remained outstanding and that the group was ready and willing to pay the same. The 1<sup>st</sup> plaintiff produced in evidence as exhibits among others, copies of; the Agreement for Sale dated 1<sup>st</sup> November 2013, acknowledgment of payment dated 3<sup>rd</sup> February 2014, certificate of official search on the register of the suit property dated 11<sup>th</sup> May 2015 and a demand letter dated 24<sup>th</sup> March 2015.

I have considered the pleadings and the evidence on record. The only issue that arises for determination in this suit is whether the Plaintiffs are entitled to specific performance of the Agreement for Sale which they entered into with the defendant or in the alternative, a refund of the purchase price. I am satisfied on the evidence before me that the Plaintiffs entered into an Agreement for Sale dated 1<sup>st</sup> November 2013 with the defendant pursuant to which the defendant agreed to sell to the group a portion of land measuring 2 acres which was to be excised from Plot No. 18374. I am also satisfied that pursuant to the said agreement, the plaintiffs paid to the defendant a sum of Kshs. 1,025,000/= as part of the purchase price leaving a balance of Kshs. 275,000/= to be paid on completion. I am also satisfied that the defendant breached the said agreement for sale by failing and/or refusing to transfer the said parcel of land to the plaintiffs.

**Chitty on Contract, 30<sup>th</sup> edition, volume 1** at paragraph 27-003 states as follows on the remedy of specific performance:

*"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable."*

Section 6(1) (a) of the Land Control Act, Cap. 302 Laws of Kenya (“the Act”) provides that any transaction for sale of land within a land control area in respect of which no Land Control Board consent has been obtained is void for all purposes. The 1<sup>st</sup> plaintiff in his testimony admitted that there was no Land Control Board consent for the sale transaction herein. Section 8 (1) of the Act requires that the consent be obtained within 6 months of the making of the agreement by any of the parties. There is no evidence that an application for consent was made within the statutory period. In the absence of consent of the Land Control Board, the sale transaction between the plaintiffs and the defendant became null and void for all intents and purposes under Section 6 (1) of the Act. This court cannot enforce a void contract and consequently an order for specific performance sought by the plaintiffs cannot issue.

In the case of David Sironga Ole Tukai vs. Francis Arap Muge & 2 others Nairobi CA No. 76 of 2014 the Court of Appeal stated as follows in respect to sections 6,7,8 and 22 of the Act:-

*“...The learned authors of THE LAW OF CONTRACT, Butterworths Common Law Series (General Editor, Prof Michael Furmston), 3rd ed. 2007, p. 1000 state as follows regarding express statutory prohibitions, like those of the Land Control Act:*

*“Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the very simple reason that the legislative intent is evident from the express language of the statute itself. In other words, while the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of Parliament in so far as that particular statute (or material provision thereof) is concerned.”*

Having disposed of the issue as to whether or not a remedy of specific performance is available to the plaintiffs, I now turn to the alternative prayer. Section 7 of the Act provides a remedy to a purchaser who cannot enforce a transaction which has become void for want of consent under Section 6(1) of the Act. That section provides as follows:-

*“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.”*

It is clear from the foregoing that where a transaction becomes void for lack of consent of the Land Control Board, any money or consideration paid by a purchaser under such transaction is recoverable as a debt. It is my finding therefore that the Plaintiffs are entitled to a refund of Kshs. 1,025,000/- being the sum of money which they paid to the defendant pursuant to the Agreement for Sale dated 1<sup>st</sup> November 2013.

In conclusion, the plaintiffs’ suit succeeds on the alternative prayer. I therefore enter judgement for the plaintiffs against the defendant in the sum of Kshs. 1,025,000/= together with interest at court rates from 3<sup>rd</sup> February 2014 until payment in full. The plaintiffs shall have the costs of the suit.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of January, 2017.**

**S.OKONG’O**

**JUDGE**

**In the presence of**

**Mr. Mumo for the Plaintiffs**

**N/A**      **for the Defendant**

**Kajuju**      **Court Assistant**