



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT
ELC.NO.854 OF 2014

BENARD MULONGO MWANJA..... PLAINTIFFS
(SUING ON HIS BEHALF AND ON BEHALF OF 19 OTHERS)

=VERSUS=

CHARLES MBUGUA NGUGI.....DEFENDANT

JUDGEMENT

The Plaintiff herein ***Benard Mulongo Mwanja*** suing on his behalf and on behalf of **17** others brought this claim against the Defendant through a Plaint dated ***8th August 2012*** which was amended on ***5th April 2016***. The Plaintiffs have sought for following orders against the defendant;-

- 1. An order of specific performance of the Sale Agreements entered into between the Plaintiffs and the Defendant.***
- 2. Costs of the suit and interest.***

The Plaintiffs have alleged in their Plaint that they are the owners and beneficiaries entitled to ***L.R.NO.26693 in Kikuyu*** comprising of ***4.48 acres*** as per ***Certificate of Title No.IR 104873*** and that they independently approached the defendant herein who individually entered into various Sale Agreements with the defendant in respect of various Plots they preferred and chose to buy. The Plaintiffs averred that they paid their purchase price of their respective plots as agreed with the defendant and have all along pursued the defendant for the Title Deeds to their individual Plots from the defendant and the same has not been forthcoming. The Plaintiffs further argued that the defendant has breached the said Sale Agreements, prejudiced them as they have assumed possession and even constructed thereon.

The defendant herein filed his Defence on ***29th of October 2012*** and admitted the contents of paragraph ***1, 2, 3 of the Plaint*** and denied the contents of paragraph ***4*** of the Plaint and averred that the remedy of Specific Performance is not available to the Plaintiffs since the Plaintiffs claim if any against the Defendant is Statute barred. The Defendant denied the plaintiffs allegation that he agreed to sell various Plots and puts the Plaintiffs to strict proof thereof. The defendant denied the contents of paragraph ***6*** of the Plaint and further argued that he was not in Sound Mind that he could enter into a legally binding contract since at the time the Contracts were allegedly entered into he suffered from a rare medical condition described as ***ATTENTION DEFICIENCY HYPERRACTIVE DISORDER(A.D.H.D)*** and that a Psychiatrist Expert account shall be rendered at the appropriate time to proof this fact and therefore lacked capacity to enter into a legally binding Contract. The defendant argued that the 1st Plaintiff who is

a qualified Medical Practitioner took unfair advantage of the defendant's condition. The defendant denied contents of **paragraph 7, 8 and 9** and particulars of alleged breach. The defendant denied prejudicing the Plaintiffs in anyway and accused the Plaintiffs of being trespassers on his property since the plaintiffs have never paid Sufficient Consideration for the alleged purchase. The defendant also denied any knowledge of the Demand and Intention to sue and averred that the suit is premature and ill conceived.

The plaintiffs gave evidence for themselves in court and produced various exhibits among them the sale agreements and acknowledgement receipts showing payment of the purchase price for their respective parcels of land. They also produced various transfer forms which were executed but not filed at the respective Registry. In total fourteen plaintiffs gave their evidence in court and these are; Benard Mulongo Mwanja, Francis Muturi Njoroge, Harun Kariuki Muchemi, Samuel Kibara Ndengiriri, Duncan Njoroge Ngugi, Joshua Njuguna Ngigi, Joseph Mwangi Kingori, Nelson Mwangi Ngarachu, David Maina Waweru, Jinaro Munyi Mwangi, Paul Muthuma Mwacha, Francis Hinga and Moses Kinyanjui Ngethe. Though the defendant filed his Defence, he did not attend any of the court sessions though served with Hearing Notices. The plaintiffs evidence was therefore not challenged and the Defendant did not give evidence to support his defence.

This Court has now carefully considered the Amended Plaint dated **5th April 2016** and the prayers sought therein. The main prayer is for Specific Performance of the Sale Agreements entered between the Plaintiffs and the Defendants herein. There are twenty plaintiffs herein and they have produced various Sale Agreements entered on various dates with the defendant herein. The Court has also considered the available evidence and the exhibits produced in court. The Court has further considered written submissions and the cited authorities and the Court will render itself as follows;-

The plaintiffs have sought for an order of Specific Performance which is an equitable remedy which means that the Court has to satisfy itself that on facts presented to it, it is equitable and in the interest of both parties to grant the reliefs sought. See the case of **Amina Abdul Kadir Hawa versus Rabinder Nath Anand & another [2012] Nairobi Hccc no.2059.**

Further in the above stated case, the court held that;

“the party entitled to earn the relief has to demonstrate that he/she alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.....”

From the court record it is evident that the parties herein filed their separate Statement of Issues for determination. The plaintiffs filed their Statement of Issues on **28th November 2012** and the defendant filed his Statement of Issues on **10th July 2013**.

Having considered the two sets of Statements of Issues, the court finds that the issues for determination are;

- 1. Whether the defendant is the registered owner of Land parcel known as LR.NO.26693 Kikuyu.***
- 2. Whether the defendant entered into various Sale Agreements with the plaintiffs to sell various portions of land to them?***
- 3. Whether the alleged Sale Agreements were valid and met the essential of a valid Contract?***
- 4. Did the defendant breach the terms of the said Sale Agreements and if so are the alleged Sale Agreements enforceable against the defendant?***
- 5. Are the plaintiffs entitled to an order of Specific Performance as prayed in the Plaint?***
- 6. Did the defendant have capacity to enter into a legally binding Contract?***

7. Who is liable to pay costs?

I will now endeavor to answer the issues set out for determination based on the available evidence and exhibits produced in court.

The first issue is whether the defendant herein is the registered owner of the suit property **LR.No.26693 Kikuyu**. The plaintiffs in their Plaint alleged that the defendant herein **Charles Mbugua Ngugi** is the registered owner of **LR.No .26693 Kikuyu** and on various dates between the year **2007 and 2008** he willingly entered into various sale agreements with the plaintiffs with intention of selling those various portions of land to the plaintiffs. The defendant in his Defence filed in court on **29th October 2012** and dated **25th October 2012** admitted the contents of paragraph **3** of the Plaint which contents was to the fact that the defendant was the owner of **LR.No. 26693 Kikuyu** measuring **4.48 acres** as evident by **Certificate of Title L.R.No. 26693**.The said **Certificate of Title IR 104873** in the name of **Charles Mbugua Ngugi** was produced as exhibit in court by the plaintiffs. There is therefore no doubt that the defendant herein is the registered owner of **LR. No.26693 Kikuyu**.

The second issue is whether the defendant entered into various Sale Agreements with the plaintiffs herein. There are 20 (twenty) plaintiffs herein and in the Bundle of Documents produced in court, there are different Sale agreements between the plaintiffs and the defendant entered on various dates. The defendant in his Defence denied that he ever agreed to sell various portions of lands to the plaintiffs and he did put them to strict proof. He further alleged that he was not of Sound Mind and could not enter into a legally binding Contract as he suffered from a condition known as **“ATTENTION DEFICIENCY HYPERACTIVE DISORDER (A.D.H.D)** and therefore lacked capacity to enter into a legally binding Contract. However the defendant did not attend court to avail evidence of his suffering from the said disorder and further controvert the plaintiffs’ evidence that he willingly signed the various Sale agreements. From the Bundle of Documents the court has seen the signed Sale agreements by various persons who are named as plaintiffs herein and **Charles Mbugua Ngugi** who is the defendant. The Sale agreements are as follows;

- 1. Ndungu Muchai Gichuru** dated **15th September 2005** and purchase price was **Kshs.200,000/=**
- 2. Tilus Ngugi Warigi** dated **17th July 2008** and the purchase price was **Kshs.350,000/=**
- 3. Francis Muturi Njoroge** dated **10th December 2004** and the purchase price was **Kshs.300,000/=**
- 4. David Maina Waweru** dated **29th November 2004** and the purchase price was **Kshs. 250,000/=**
- 5. Benard Mulongo Mwanja and Consolata Wanjiku Ndege** dated **29th November 2004** and purchase price was **Kshs.500,000/=**
- 6. Jenaro Munyi Mwangi** dated **14th December 2004** and the purchase price was **Kshs.250,000/=**
- 7. Dancan Njoroge Ngugi** dated **25th September 2006** and purchase price was **Kshs.500,000/=**
- 8. Harun Kariuki Muchendu** dated **15th September 2005** and purchase price was **Kshs.480000/=**
- 9. Stephen Thairu Njoroge** dated **2nd February 2007** and the purchase price was **Kshs.240,000/=**
- 10. Samuel Kibara Ndirigi** dated **29th November 2004** and purchase price was **Kshs.250,000/=**
- 11. Charles Kamau** dated **25th February 2004** and purchase price was **Kshs.250,000/=**
- 12. Joshua Njuguna Ngigi** dated **1st September 2006** and the purchase price was **Kshs.570000/=**

13. **Charles Maina** dated **8th May 2007** and the purchase price was **Kshs. 250,000/=** and another one dated **25th May 2005** and purchase price was **Kshs.350,000/=**

14. **Paul Muthuma Mwacha** dated **20th September 2004** and purchase price was **Kshs.500000/=**

15. **Nelson Mwangi Ngarachu** dated **22nd June 2006** and the purchase price was **Kshs.500,000/=**

16. **Francis Hinga** **LR.No.26693/20** under transfer produced as exhibit **13A**

17. **Moses Kinyanjui Ngethi** under a transfer for **LR.No 26693/19**

The above stated persons had entered into various Sale agreements with the defendant herein **Charles Mbugua Ngugi** From the amended Plaintiff dated **5th April 2016**, the suit land is **LR.No.26693 IR NO.104873**.The court has now to confirm that indeed the various plaintiffs herein entered into various Sale agreements with the defendant for Sale of various portions of land from **LR.No.26693 IR NO.104873**.

The court has scrutinized the Sale Agreements and has noted that the Sale agreements are in respect of different land References. Some of the Sale agreements refer to **LR.20064/7 IR NO.88995/1** measuring **6.071**.The Sale agreement in respect of **LR.NO20064/7** measuring **6.071** hectares (**IRNO.889951**) are the ones signed by;

1. **Ndungu Muchai Gichuru and John Mwangi Wanjohi**

2. **Dancun Njoroge Ngugi**

3. **Harun Kariuki Muchendu**

4. **Stephen Thairu Njoroge**

5. **Joshua Njuguna Ngigi**

6. **Charles Thoithi though refers to LR.NO 20064/15**

The other Sale agreements are in respect of **LR.NO 2005/7** measuring **6.071 Hectares** and the persons who signed sale agreements in respect of **LR.NO. 2005/7 IR 8899/1** are **Francis Muturi Njoroge,David Maina Waweru,Charles Kamau,Jenaro Munyi Mwango,Benard Mulongo Mwanja and Consolata Wanjiku Ndege,Samuel Kibara Ndigirigi**

The only Sale agreement in respect of **LR NO.26693** is the one dated **17th July 2008** between the defendant herein and **Tilus Ngugi Warigi** and is on the Sale of a portion of Land **Ref No.26693/14** situated at South West of Kikuyu and also transfer to **Francis Hinga** in reference to **LR.No.26693/30** .All the other Sale agreements refer to different parcels of land from **LRNo.26693**.However the transfer forms and consents to transfer refers to **LR. NO. 26693**

From the available evidence, the defendant herein entered into various Sale agreements with the plaintiffs herein for purchase of portions of land from him but from different land references, These land reference are **LR.NO 20064/7** measuring **6.071 hectares**, **LR NO. 2005/7** measuring **6.071**hectares and **LR.No. 26693/14**which according to the Plaintiff measures **4.48** acres.

From the above analysis of the available Sale agreement the defendant was selling portions of his land to the plaintiffs but from three different land parcels. However for **Paul Muthuma Mwacha**, the land reference is indicated as **LR.NO.20065/7** measuring **6.071** hectares **IR NO.8899/1** which has a similarity with **LR.NO 20064/7** in terms of the size of the land and IR number though for **LR 20065/7**, the **IR NO is 8899/1** whereas for **LR.NO.20064/7** the **LR.NO is 88995/1**. In **LR.NO.20065/7** the **No. 5** is omitted

and the Certificate of Title produced in court is for **LR NO 26693/14 IR NO 104873**. The Plaintiff herein is in reference to **26693** measuring **4.48** acres but not the other land references stated in the produced Sale agreements –**LR NO 20064/7 IR NO 88995/1, LR NO 2005/7, IR NO 8899/1 and LR NO 20065/7 IR NO 8899/1**. The Court therefore finds and holds that the defendant herein did enter into various Sale agreements with the plaintiffs but the said Sale agreements referred to different land parcels, from the one stated in the Plaintiff apart from plaintiffs **Tilus Ngugi Warigi, Francis Hinga and Moses Kinyanjui Ngethe**,

However the Deed Plans and the Consents to transfer are in respect of **LR NO 26693**. The Court will therefore infer that even though the Sale agreements refer to different parcels of land, the intention was to Sale **LR.NO.26693** as stated in the Plaintiff. The reference to different parcels of land in the attached Sale Agreements could have been deliberate on the part of the defendant and it is unfortunate that the plaintiffs herein did not notice the omissions at the time of signing the Sale Agreements.

The 3rd issue for determination is whether the Sale agreements were as valid and met the essentials of valid contracts? The court has scrutinized the sale agreements produced in court. They have been signed by the parties herein. The Sale agreements are also in writing. Though the defendant said he was not in good state of mind when he signed the said Agreements, he did not turn up in court to give evidence on the said allegation. That assertion therefore remains as an allegation and the court will find and hold that the Sale Agreements entered were valid and met the essentials for a valid Contract.

The fourth issue is whether the defendant breached the terms of the said Sale Agreements. The Sale agreements as drawn stated the purchase price for each portion of land purchased by each plaintiff. There is evidence that the plaintiffs paid purchase price in full and the defendant acknowledged receipt of the same. There is evidence that the defendant applied for and obtained letters of consent from the Land Control Board Kikuyu between the **years 2006 and 2008** for the transfer of portions of land to the different plaintiffs herein. The plaintiffs did perform their part of the Contract as stipulated in the Sale agreements. However the defendant has failed to transfer the portions of land to the plaintiffs as stated in the Sale agreement. He is therefore in breach of the Contract entered between himself and the plaintiffs herein.

The fifth issue is whether the plaintiffs are entitled to an order of Specific Performance?

An Order of Specific Performance is an equitable one and the Court had to be satisfied that on the facts presented to it, it is equitable in the interest of both parties to grant the relief sought and that damages would not be adequate compensation. It was the evidence of the plaintiffs that they have all paid the purchase price as stated in the various Sale agreements. Further it was their testimonies that they have taken possession of the various portion of land as per the Sale agreements and have put up their residential homes and even buried their relatives on these parcels of land. The plaintiffs have performed their part of contract and have been living on the suit property. The Court finds that damages herein would not be adequate to compensate them and if orders sought are not granted, the Plaintiffs might suffer hardships and irreparable damage which may not be compensated by an award of damages (see the case of **Macharia Mwangi & 87 others versus Davidson Mwangi Kagiri(2014) eKLR**) where the Court quoted with approval the case of **Steadman versus Steadman (1976)AC 536** and held that;

“if one party to an agreement stands by and lets the other incur expenses or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable”

Further in the same case of **Macharia Mwangi Maina and 87 others (supra)** the Court held that,

“the appellants were in possession of the suit properties as bonafide purchasers; they were put in possession by the respondents and the doctrine of proprietary Estopples applied in the case and estopped the respondents from reneging on the agreements”

In Cheshire and Burns, Modern Law Property by E.H Burn 16th Edition at page 130 it is stated as

follows;

“if a contract for sale is capable of specific performance an immediate equitable interest passes to the purchaser and order for specific performance can be decided on that basis”

The defendant herein is the one who put the plaintiffs into possession and he cannot now renege on the Sale agreements after having received the purchase price in full and even executed the transfers and obtained the consents to transfer portions of **LR.NO 26693**.

The Court finds that the plaintiffs have been able to prove that they have performed their part of Contract and are in possession of their respective portions of land from the suit property. Damages would therefore not be adequate compensation and the plaintiffs are therefore entitled to an order of Specific Performance as prayed in the plaint.

The sixth issue is whether the defendant had capacity to enter into a legally binding Contract. The plaintiffs alleged that they voluntarily entered into the Sale agreements with the defendant. Though the defendant alleged that he was suffering from Attention Deficiency Hyperactive Disorder (A.D.H.N) he did not attend court to avail evidence to support and prove that allegation. That allegation has not been substantiated and therefore remains an allegation. The court therefore finds that the defendant had capacity to enter into a legally binding Contracts.

The last issue is who is liable to pay Costs. Ordinarily, costs follow event. The plaintiffs herein are the successful litigants. The defendant's failure to transfer the respective portions of the suit property to the plaintiffs led to the plaintiffs filing of this suit therefore the defendant is liable to pay Costs.

Having now carefully, analyzed the available evidence and the exhibits therein, the Court finds that the plaintiffs have proved their case on a balance of probability and accordingly Judgment is entered for the plaintiffs against the defendants as prayed in terms of prayers No. **I and II** of the Amended Plaint dated **5th April 2016**.

It is so ordered.

Dated Signed and Delivered at **Nairobi** this **3rd** day of **March 2017**

L.GACHERU

JUDGE

In the presence of;

M/s Kithinji holding brief for Mr Musyoki for the Plaintiffs

None attendance for the Defendant

Kevin: Court Clerk

L.GACHERU

JUDGE