



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NYERI**  
**ELC NO. 79 OF 2014**  
**(Formerly THIKA CMCCC No. 219 OF 2012)**

**FREDRICK MAHIHU MUIGAI .....PLAINTIFF**

**-VERSUS-**

**JOSEPH KAMIRI .....1<sup>ST</sup> DEFENDANT**

**JOHN K. MATIVO .....2<sup>ND</sup> DEFENDANT**

**DUNCAN N. WANJIGI .....3<sup>RD</sup> DEFENDANT**

**SIMON KABOCHO ..... 4<sup>TH</sup> DEFENDANT**

**JOSHUA GITONGA .....5<sup>TH</sup> DEFENDANT**

**CHRISTIAN CHURCH INTERNATIONAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Pleadings**

1. Fredrick Mahihu Muigai, the plaintiff herein, brought this suit seeking judgment against the defendants for:

**(a) An order of eviction;**

**(b) Permanent injunction to restrain the defendants, from trespassing upon parcel No. LR No.4148/226 situate in North East of Ruiru Township within Thika District (suit property), obstructing or in any manner whatsoever interfering with his operations, use, peaceful occupation, possession and/or enjoyment or from doing any acts adversely affecting his interest in the suit property;**

**(c) General damages for the tort of trespass to the suit property;**

**(d) Mesne profits;**

**(e) Costs of the suit;**

**(f) Interest on (c), (d), and (e) at court rates;**

**(g) Any other or further relief this honourable court may deem fit and just to grant.**

2. The plaintiff's case is that sometime in March 2008, the defendants sought to purchase the suit property at a consideration of Kshs. 300,000/=, made a deposit of Kshs.150, 000/- pending execution of a formal sale agreement between them.

3. Arguing that the execution of a formal sale agreement, transfer of land forms and land control board application forms was to be done after the defendant paid the balance of the purchase price either to his advocate or to himself, the plaintiff contends that the defendants failed to pay the balance of the purchase price and as a result, no sale agreement was executed between him and the defendants.

4. The plaintiff further contends that without his consent and/or knowledge, the defendants took possession of the suit property and without any justifiable reason have continued to occupy the suit property.

5. It is the plaintiff's case that he instructed his advocates to refund the money received toward purchase of the suit property to the defendants and required them to vacate the suit property.

6. According to the plaintiff he rescinded the agreement to sell the suit property to the defendants and demanded that they hand over vacant possession of the suit property to him which demand the defendants refused to heed.

7. It is the foregoing state of affairs that prompted the plaintiff to file the suit herein seeking the orders listed herein above.

8. Vide their statement of defence filed on 12 April, 2012; the defendants contend that they are the beneficial owners of the suit property.

9. It is the defendant's case that they paid the whole purchase price and obtained consent to transfer the suit property to them. They paid the purchase price partly through the plaintiff's advocate and partly through the plaintiff's agent.

10. Contrary to the plaintiff's contention that they took possession without his consent and/or knowledge the defendants contend that they were put into possession of the suit property with the knowledge and authority of the plaintiff.

11. According to the defendants, they took possession of the suit property in 2007 upon paying the 1<sup>st</sup> installment. Since that time, their possession of the suit property has been continuous and uninterrupted.

12. Terming the plaintiff's suit an afterthought, the defendants deny having received any refund of the purchase price and contend that there was inordinate delay in bringing the claim. The claim is also said to be fatally defective.

## **EVIDENCE**

### **The plaintiff's case**

13. When the matter came up for hearing, the plaintiff relied on his statement filed on 22<sup>nd</sup> March, 2012. He informed the court that he never intended to sell the land. Nevertheless, he admitted that his advocate was given Kshs.150, 000/= whose purpose he did not know. He further stated that he had not instructed his lawyer to take the money on his behalf. He complained that despite this court having issued an order restraining the defendants from continuing with the developments they had began on the suit property, in disobedience of the order of the court, the defendants continued with the construction.

14. In re-examination, the plaintiff stated that the defendants approached his advocates with the intention of purchasing the suit property and maintained that he did not approach the defendants. He also maintained that the amount deposited with his lawyer was returned to the defendants. He produced the documents filed on 22<sup>nd</sup> March, 2012 as **Pexbt 1 to 9** and the original title deed as **Pexbt 2** (read 10).

### **The Defence Case**

15. D.W.1, Joseph Kamiri, the Bishop of Christian International (the 6<sup>th</sup> defendant) and one of the trustees of the 6<sup>th</sup> defendant, informed the court that they bought the suit property from Ndarugu Githobokoni Development Company Limited (hereinafter referred to as the Company).

16. According to D.W.1, they dealt with Festus Odede Ogaya, a director of the company.

17. Although they were not shown any title deed or authority to sell, they believed the person they dealt with because he showed them receipts issued to many other buyers.

18. They made all their payments through the company. The money was to be handed over to the plaintiff's advocate.

19. He produced the documents contained in the defendants' list of documents filed on 5<sup>th</sup> October, 2015 as **Dexbt 1 to 8**.

20. Concerning **Dexbt 1**, (draft sale agreement), he admitted that it does not contain the name of the seller. He also admitted that **Dexbt 3**, (application for consent of the land control board), was not signed by both the buyer and the seller. He further admitted that Festus Odede Ogaya confessed vide **Dexbt 8** that he received the money for his own use.

21. D.W.1 further informed the court that after they finished paying for the suit property, Nginya, a co-director of Festus Odede Ogaya came to their office and claimed that they had not finished paying for the suit property. In the company of Nginya, they went and saw the owner.

22. While admitting that they never dealt with the plaintiff and that they had not met him before they entered the suit property, D.W.1 maintained that they dealt with the plaintiff's agents. In that regard he made reference to a letter dated 6<sup>th</sup> January, 2010 from the plaintiff's advocate which talks about Kshs.150,000/- which the plaintiff wanted to refund. According to the defendants, that letter is a confirmation that the owner received money from them.

23. Although he did not personally attend the land control board meeting in which consent for transfer of the suit property was issued, D.W.1 is aware that the directors of the company attended the meeting as the plaintiff's agent.

24. D.W.2, Justine Gitari, a pastor with the 6<sup>th</sup> defendant, confirmed D-1's statement to the effect that they dealt with the company herein as opposed to the plaintiff. The Company was represented by Festus Odede Ogaya.

25. D.W.2 admitted that while entering into the transaction for the sale of the suit property, they did not conduct any due diligence to find out who the owner of the suit property was.

26. He informed the court that none of the payments in respect of the suit property were made directly to the plaintiff's advocate.

27. Like D.W.1, he admitted that at the time they took possession of the suit property, they had not met the plaintiff.

28. He explained that the application for consent to transfer the suit property was made by the plaintiff's

agent and the surveyor. He, however, did not attend the land control meeting in which consent for transfer of the suit property was issued in their favour.

29. Like D.W.1, he stated that the letter from the plaintiff's advocate dated 6<sup>th</sup> October, 2016 is a clear indication that the advocate had received the money referred to in that letter on behalf of the plaintiff.

### **Submissions**

30. At the close of hearing, parties to this suit filed submissions, which I have read and considered.

31. From the pleadings and the submissions, in my view the issues for determination are as follows:

- (i) Whether there existed a contractual relationship between the plaintiff and the defendants?
- (ii) Whether the plaintiffs gave express or implied authority to the company to act as his agent?
- (iii) Whether the plaintiff is entitled to the reliefs sought?
- (iv) Whether the defendants became the beneficial owners of the suit property after they paid the agreed purchase price.

32. With regard to the 1<sup>st</sup> question, on behalf of the plaintiff, it is submitted that the evidence of the plaintiff and that of the defendants' witnesses (D.W.1 and D.W.2) shows that there were negotiations between the parties with a view of selling the suit property to the defendants but the negotiations did not culminate into a contract as the defendants did not meet the conditions demanded by the plaintiff.

33. Arguing that the agreement between the plaintiff and defendants did not meet the legal threshold for an agreement of sale of land, counsel for the plaintiff contends that the document relied on by the defendants to wit a copy of the sale agreement dated 31<sup>st</sup> October, 2007 between the 6<sup>th</sup> defendant and the purported agent of the plaintiff does not bind the plaintiff because he was not party to it.

34. On behalf of the defendants, reference is made to the pleadings filed by the plaintiff and in particular an averment contained in an affidavit sworn by the plaintiff and a letter from the plaintiff's advocate dated 22<sup>nd</sup> March, 2012 and 6<sup>th</sup> October, 2010 respectively and submitted that the plaintiff having acknowledged receipt of what is described in the affidavit as deposit towards purchase of the suit property, is estopped from alleging that there was no contract for sale of the suit property executed between him and the defendants.

35. With regard to this issue, upon reading and considering the pleadings filed in this matter and in particular paragraphs 4, 5, 7, 8, 9 of the plaint, I find and hold that the question of existence of a contract of sale of the suit property between the defendants and the plaintiff is not in dispute. In that regard see the said paragraphs whose contents are as follows:

**“4. Sometime in March, 2008, the defendant(s) sought to purchase from the plaintiff the aforementioned suit land for a consideration of Three Hundred Thousand Kenya Shillings (Kshs.300,000/=), and made a deposit of One Hundred and Fifty Thousand Kenya Shillings (Kshs.150,000/=) pending the execution of a formal Sale Agreement between the parties, transfer of Land forms and Land control board application forms upon the defendant paying the balance of the purchase price to the plaintiff and/or their advocates, Messrs. Waruhiu, K'owade & Ng'ang'a advocates.**

**5. The defendants did not pay to the plaintiff the balance of the purchase price of Kshs.150,000/- and consequently no sale agreement was executed as between the parties.**

**7. The defendants without any justifiable reason, legal and or otherwise have refused to honor**

**their end of the bargain towards fulfillment of the sale transaction. To this end, they have refused to pay the balance of the purchase price to the plaintiff and or his advocates and are trespassing onto the plaintiff's property and continue doing so without any color nor right.**

**8. The plaintiff avers that he instructed his advocates to refund the balance of the purchase price to the defendants and demand the defendants to vacate and cease trespassing into the suit property but they have neglected refused and failed to cease trespassing.**

**9. The plaintiff further avers that his advocates' demand for the balance of the purchase price from the defendants has borne no fruits as the defendants are adamant not to pay the same and or fulfill their obligations under the sale agreement and have refused to hand over vacant possession despite the plaintiff rescinding the contract."**

36. It is clear from the above quoted portion of the plaintiff's pleadings, that there existed a contract of sale of the suit property to the defendants whose terms are as specified in paragraph 4 of the plaint.

37. Contrary to the plaintiff testimony to the effect that he was not party to the sale of the suit property or authorized anybody to sell the suit property on his behalf, the above quoted portion of his pleadings negates such a finding. The only conclusion that can be drawn from the quoted portion of the plaintiff's own pleading that, he had either authorised the sale of the suit property to the defendants or if he had not, he ratified what arrangement was entered into between the defendants and the persons who represented him in the agreement for sale of the suit property.

38. A plain reading of the quoted section of the plaintiff's pleadings leaves one without doubt that the only problem the plaintiff had with the arrangement is that the defendants failed to fulfill their part of the bargain, that is to say, the defendants failed to pay the balance of the purchase price causing him to rescind the contract.

39. One wonders what the plaintiff was rescinding if there was no sale agreement between him and the defendants.

40. In his testimony before court, the plaintiff departed from his pleadings by trying to prove that he had no dealings with the defendants.

41. Whilst the defendants admitted that they had no direct dealings with the plaintiff over the suit property, given the fact that the plaintiff had in his pleading expressly admitted having dealt with the defendants, I find and hold that the plaintiff is estopped from departing from his pleadings. In this regard see **Order 2 Rule 6** of the Civil Procedure Rules which provides as follows:

**"No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit."**

42. In view of the foregoing, I return a positive verdict on the first issue.

43. With regard to the 2<sup>nd</sup> issue, I reiterate my finding above that the only reasonable conclusion that can be drawn from the quoted portion of the plaintiff's own pleadings is that he had either authorised the sale of the suit property to the defendants or if he had not, he ratified whatever arrangement there was between the defendants and the persons who represented him in the agreement for sale of the suit property.

44. The plaintiff's assertion that he neither authorised his advocates and/or the company to sell the suit property is similarly a departure from his pleadings which is to the effect that the defendants sought to purchase from him the suit property for a consideration of Kshs.300,000/= and made a deposit of Kshs.150,000/= pending execution of a formal sale agreement.

45. Reference to a formal sale agreement can in the circumstances of this case mean only one thing, that there was an informal agreement entered into between the parties.

46. In the absence of any other informal agreement between the plaintiff and the defendants and given the parity between the averments contained in paragraph 4 of the plaintiff's own pleadings (plaint), one can be forgiven for concluding that the informal agreement referenced in that section of the plaint is the handwritten agreement produced by the defendants as **Dexbt 1**.

47. Whilst the plaintiff counsel blamed the defendant for failing to bring the directors of the company to confirm whether or not they had been authorised by the plaintiff to sell the suit property, noting that it is the plaintiff who wants the court to find that he had not authorised the company to sell the suit property on his behalf, I find and hold that the burden rested with him to prove that he had not authorised the company to sell the suit property.

48. On the strength of the evidence produced in this case, showing that part of the purchase price received by the directors of the company was ultimately received by the plaintiff's advocate and acknowledged as having been received as part payment of the suit property, I find and hold that the company acted as an agent of the plaintiff in the sale of the suit property, lack of express authority to do so, notwithstanding.

49. On whether the plaintiff is entitled to the reliefs sought, my view of the matter is that for the plaintiff to be entitled to the reliefs sought, he must demonstrate that the defendants' entry, possession and occupation of the suit property is illegal or unlawful.

50. From the evidence adduced in this matter, I entertain no doubt that the defendants entered into the suit property pursuant to the informal contract entered between them and the plaintiff. A reading of paragraph 4 of the plaint shows that the parties had not agreed on the completion time and/or what would happen in the event one of the parties failed to comply with their part of the bargain. That being the case, I am of the considered view that the plaintiff cannot rely on the alleged non-fulfillment of the defendants' obligation to defeat the defendants' interest in the suit property. To be able to defeat the defendants' interest in the suit property, the plaintiff needed to prove that the defendants' possession and occupation of the suit property has no basis in law, which fact on account of the agreement entered into between him and the defendants, he failed to prove.

51. On whether the agreement entered into between the plaintiff and the defendants met the legal threshold of an agreement for sale of land under **Section 3(3)** of the Law of Contract Act, from the pleadings filed in this matter and the documents exchanged between the parties to the suit and in particular the letter from the plaintiff's advocate dated 6<sup>th</sup> January, 2010, I have no doubt that the agreement entered into between the plaintiff and the defendants met the spirit espoused by the said section of the law, which was to enable the court to determine whether the parties had entered into the agreement in question and what the terms of the agreement were.

52. As pointed out above, from paragraph 4 of the plaintiff's own pleadings (plaint), it is clear what the parties' obligation to each other was under the agreement. The defendant was to pay to the plaintiff either directly or through his advocate the agreed purchase price of Kshs.300, 000/- after which the plaintiff would execute the relevant documents to facilitate transfer of the suit property to the defendants. The letter from the plaintiff's advocate under reference confirms as much. In this regard see the letter which in the relevant part provides as follows:

**“RE: SALE OF L.R. NO.4148/226**

**MARY W. MUIGAI TO CHRISTIAN CHURCH INTERNATIONAL**

**You expressed an intention in the purchase of the above mentioned property from our client. You had to pay the entire purchase price upon which our client would transfer the property to yourselves. Despite several requests for you to complete the transaction, you are unable to do so.**

**In the circumstances we have been instructed to refund to you the sum of Shs.150, 000/- which you had deposited with us...”**

53. It is clear from the foregoing that there was an offer to buy the suit property which offer was accepted by the seller. The acceptance of the offer was communicated to the defendants who paid the requisite consideration in respect thereof. In this regard, see the receipts issued by the company and the affidavit by the company's director, Festus Odede Ogaya sworn on 7<sup>th</sup> April, 2010 which at relevant parts provides as follows:

**“2. That I am one of the Directors of M/S Ndarugu Githomboki Company Limited.**

**3. That I received Kshs.150, 000/- from Christian International being part of the purchase price for Plot No. L.R 4148/226.**

**4. That however when I received the said Kshs.150,000/- I did not forward it to M/S Ndarugu Githobokoni Development Company Ltd neither did I inform my co-director Mr. John Paul Nginya.**

**5. That I am personally responsible for the said money and I will personally repay the money in instalments as may be discussed and mutually agreed with the owner of the said sub-plot.”**

54. It is clear from the above affidavit and the evidence on record that the defendants paid the consideration agreed between them and the plaintiff agent, the company herein but one of the directors of the company dishonestly applied for his own use.

55. Can the defendants be blamed for the dishonesty of the plaintiff's agent? My answer is that- they cannot.

56. Noting that the plaintiff has not alleged any wrong doing on the part of the defendants by paying the purchase price to his own said agent, I find and hold that the defendants cannot be faulted for having paid the agreed purchase price through the said agent. The fact that part of the purchase price received through the company amplifies my finding that the company acted as the plaintiff's agent.

57. Whereas the defendants have urged the court to determine that they are the beneficial owners of the suit property, cognisant of the fact that they did not raise a counter-claim requiring to be declared as such and cognisant of the fact courts don't grant reliefs not sought for, I decline to make any orders in favour of the defendants. Nevertheless, being of the view that the plaintiff has not made up a case for being granted the orders sought, I find his case to be lacking in merits and dismiss it with costs to the defendants.

58. Orders accordingly.

**Dated, signed and delivered at Nyeri this 20<sup>th</sup> day of December, 2017.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. King'ori h/b for mr. Thega for the plaintiff

N/A for the defendants

Court assistant - Esther