



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.177 OF 2017

JOHN MUISYO KYULU.....PLAINTIFF

-VERSUS-

STEPHEN MUSEMBI NDONYE.....DEFENDANT

JUDGEMENT

The Plaintiff herein *John Muisyo Kyulu* filed this claim on *23rd February 2017*, against the Defendant, *Stephen Musembi Ndonge* and sought for the following orders:-

a) The Defendant to transfer I (one) acre out of his land title reference No.Kakuzi/Gituamba Block II/554 in default the Executive Officer of this Honourable Court be authorized to sign all the necessary documents to effect transfer and sub-division on behalf of the Defendant hereof.

b) Cost of the suit.

In his Complaint, he has alleged that on or about *29th January 1989*, the Plaintiff and the Defendant entered into an agreement for the sale of 1 (one) acre out of *LR.No.Kakuzi/Gituamba Block II/193*, registered in the name of the Defendant. He alleged that the agreed purchase price was *Kshs.10,000/=*, which the Plaintiff paid in full and he took possession of the one acre with the knowledge of the Defendant. He further alleged that the Plaintiff has been using the one acre and his nephew *Joseph Ndunda*

Kyulu was buried therein. However, the Defendant has failed to transfer the said one acre to the Plaintiff despite several demands.

It was his further averments that he even lodged a caution over the said title *LR.No.Kakuzi/Gituamba Block II/193*, on *1st August 2013*, claiming purchaser's interest. However, the said consent was removed without his consent. It was his allegation that on *6th February 2017*, when he did a search at the Lands office, he realized that the said land was subdivided and given new numbers being *LR.No.Kakuzi/Gituamba Block 2/553* and *LR.No.Kakuzi/Gituamba Block II/554*. Further the Defendant transferred *LR.No.Kakuzi/Gituamba/Block II/553* to another person and left *LR.No.Kakuzi/Gituamba Block II/554*, registered in his name. The Plaintiff therefore claims against the Defendant is for orders that he transfer one acre out of *LR.No.Kakuzi/Gituamba Block II/554*, and in the alternative, the Court authorize the Executive Officer of this court to sign all the necessary transfer documents.

Though the Defendant was served with the Summons, he failed to enter appearance nor file his Defence. The matter proceeded for hearing *ex parte*.

The Plaintiff, **John Muisyo Kyulu**, gave evidence for himself and called one witness, **Francis Kyulu Ndunda**. In his evidence, the Plaintiff alleged that he is a retired Kenya Defence Force(KDF) officer, and that he

bought one acre of land from Defendant out of his land parcel **LR.No.Kakuzi/Gituamba Block 2/193**. He paid the full purchase price and they signed a **Sale Agreement, Exhibit No.1**. The Defendant further gave him a copy of his **Identity Card No.108592 exhibit No.2**. It was his testimony that his brother, **Joseph Kyulu Ndunda** has been utilizing the land and has developed the same and even installed piped water. He further testified that one of his nephew died and was buried on the suit land as is evident from the **Burial Permit Exhibit No.4**. He also testified that the Defendant has refused to transfer the one acre to him and in **February 2017**, he carried a search and found that the suit land was subdivided into two portions being **LR.No.Kakuzi/Gituamba Block II/553** and **554**. Further that **LR.No.Kakuzi/Gituamba Block II/553** was transferred to someone else but **LR.No.Kakuzi/Gituamba Block II/554**, is still owned by the Defendant. He produced the **Search Certificate** as **exhibit No.5**. He urged the Court to compel the Defendant to transfer the said one acre to him. That his brother used the land and the Defendant has never sued him for eviction.

PW2, Francis Kyulu Ndunda stated that the Plaintiff herein is his **Uncle** who bought the suit land for his **father (PW2)**. That **PW2** lives on the said land since **1989**. However, the Defendant has never transferred the said one acre to the Plaintiff. They later realized that the Defendant did

subdivide the initial title into two portions but **PW2** still uses the portion that he had been utilizing todate. Wherein he has developed the same and even buried his child on the said land. That he has fenced the portion of land that he uses.

The Plaintiff filed **written submissions** on **4th August 2017**, and urged this court to allow his claim.

This Court has now carefully considered the available evidence and the exhibits produced in court. The Court has also considered the written submissions and finds as follows:-

Though the Defendant did not enter appearance, it is trite that he who alleges must prove. The Plaintiff has made a claim against the Defendant herein, and therefore he has a duty to prove the said claim or allegations. This duty is anchored under Section 107 of the Evidence Act which provides as follows:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The Plaintiff testified that he entered into a **Sale Agreement** with the Defendant in the **year 1989**, for purchase of one acre out of the Defendant's parcel of land **LR.No.Kakuzi/Gituamba Block II/193**. The

Plaintiff produced the said sale agreement. The said agreement was not challenged by the Defendant because he did not enter appearance. It is therefore evident that the sale agreement is in writing and it has met the provision of Section 3(3) of the Law of Contract before the amendment in the year 2003, which states as follows:-

"No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.... provided such suit shall not be presented by reason only of the absence of writing...."

i)

ii) **Being already in possession, continues in possession in part reference of the contract**

and has done some other act in furtherance of the contract”

It is evident that the sale agreement herein is in writing and therefore it has met the provisions of Section 3(3) of the Law of Contract Act prior to **1st June 2003**.

The Plaintiff also alleged that the purchase price was **Kshs.10,000/=** which he paid in full to the Defendant. The purchase price was the consideration and if the Plaintiff did pay the full purchase price, then he met his part of the bargain. The Plaintiff's evidence was not controverted and this Court has no reason to doubt that indeed the Plaintiff paid the full purchase price to the Defendant.

It was also the Plaintiff's evidence that after paying the full purchase price, he took possession of the same and allowed his brother's son, **Francis Ndunda Kyulu-PW2**, to utilize the one acre purchased from **LR.No.Kakuzi/Gituamba Block II/193**. **PW2** testified that he has developed the said one acre and has planted various fruit trees, installed piped water and fenced the said piece of land. He further testified that he even buried his son on the piece of land that he utilizes as is evident from the **burial permit Exhibit No.4**.

Therefore, it is evident that in full realization of the sale agreement entered by the Plaintiff and the Defendant herein, **PW2** with the permission of **PW1** took possession of the one acre which was allegedly bought from the Defendant and has continued to be in possession and has fully utilized it. By fencing the said parcel of land, it meant that he was claiming **absolute** and **exclusive possession** of the same. That evidence has also not been controverted by the Defendant.

It was also the Plaintiff's evidence that though he had placed caution on the suit property on **1st August 2013**, claiming purchaser's interest, the Defendant later removed the said caution and subdivided the initial land parcel into two parcels being **LR.No.Kakuzi/Gituamba Block II/553**, and **554**. The Plaintiff's evidence was also to the effect that though the Defendant sold **LR.No.Kakuzi/Gituamba Block II/553**, to someone else, **LR.No.Kakuzi/Gituamba Block II/554**, was left in the name of the Defendant and that is where the Plaintiff's portion of one acre falls. Therefore the Defendant is the registered owner of **LR.No.Kakuzi/ Gituamba Block II/554**, and he had sold one acre to the Plaintiff who has been utilizing the said land **since 1989** and has even carried massive development on it through **PW2**. Therefore, there is sufficient evidence to confirm that the Defendant has acknowledged that the Plaintiff's one acre falls on his portion of land that is why he did not sell **LR.No.Kakuzi/ Gituamba Block II/554**, but retained the same under his name.

The Plaintiff has claimed that the Defendant has refused and failed to transfer the one acre that he purchased to his name. The Court has seen the **Demand Letter** dated **16th November 2016**, in which the Plaintiff was demanding from the Defendant an immediate transfer of one acre to himself from **LR.No.Kakuzi/Gituamba Block II/554**. The Court has not seen any response from the Defendant and it is evident from the **Certificate of official search** dated **6th February 2017**, that as at **6th February 2017**, the said parcel of land **LR.No.Kakuzi/Gituamba Block II/554** was in the name of the Defendant. It is therefore evident that he had not transferred the one acre to the Plaintiff as per the demand letter dated **16th November 2016**.

Further, it is evident from the letter dated **9th May 2013**, from the District Officer to the Land Registrar, Thika that the Provincial

Administration had tried to intervene to have the said dispute of transfer of one acre to the Plaintiff by the Defendant resolved but to no avail. Instead the said letter culminated in the placing of caution in favour of the Plaintiff over the initial parcel of land **LR.No.Kakuzi/Gituamba Block II/193**, in which he claimed purchaser's interest.

However, it is evident that the said caution might have been removed probably without the consent of the Plaintiff and the said parcel of land **LR.No.Kakuzi/Gituamba Block II/193** was subdivided into two portions being **LR.No.Kakuzi/Gituamba Block II/553** and **554**. As has been stated earlier,

LR.No.Kakuzi/Gituamba Block II/553, was sold to a third party but **LR.No.Kakuzi/Gituamba Block II/554**, is in the name of the Defendant. That evidence is not controverted and the Court has no reason to doubt it.

The Plaintiff has therefore established that he purchased the one acre from the Defendant but the Defendant has **failed, refused** and **neglected** to **transfer** the purchased one acre to the Plaintiff despite demand and threat of filing a legal claim. Therefore the Court finds that the Plaintiff is entitled to the orders sought. The Plaintiff has successfully discharged his onerous task of proving what he has alleged as provided by Section 107 and 109 of the Evidence Act.

For the above reasons, the **Court finds and holds that the Plaintiff has proved his case against the Defendant herein on a balance of probabilities**. Consequently, the **Court enters Judgement for the Plaintiff against the Defendant as prayed in the Plaint in terms of prayer no.(a) with costs to the Plaintiff herein to be borne by the Defendant**.

It is so ordered.

Dated, Signed and Delivered at Thika this **8th** day of **December 2017**.

L. GACHERU

JUDGE

In the presence of

In person for Plaintiff (present)

No appearance for Defendant

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the Plaintiff in person and absence of the defendant.

L. GACHERU

JUDGE

8/12/2017