



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC 179 OF 2017

KARIUKI GAKURE.....PLAINTIFF

-VERSUS-

DAVID KARIUKI NGARI

T/A GAKUYO REAL ESTATEDEFENDANT

JUDGEMENT

The Plaintiff herein *Kariuki Gakure* vide a *Plaint* dated *14th February 2017*, sought for the following orders against the Defendant herein:-

- a) An order directing the Defendant to point out the plot sold to the Plaintiff on the ground and put the Plaintiff into possession and further furnish the Plaintiff with a title to the said plot.*
- b) In the alternative an order for the refund of the sum of Kshs.120,000/= paid by the Plaintiff to the Defendant to the purchase of the said plot.*
- c) General damages for breach of the contract for sale.*
- d) Costs of this suit.*
- e) Interest on (a) and (b) above.*

In the statement of claim, the Plaintiff averred that between *7th November 2008* and *14th November 2008*, the Defendant sold to him a plot known as *Thika Municipality/Block 12/1662/Kianjau B*, at an agreed price of *Kshs.120,000/=*, which sum the Plaintiff paid in full and the Plaintiff was

issued with receipts and Certificate of ownership of the said plot. He further averred that despite the full and final settlement of the purchase price, the Defendant has failed and/or neglected to point out the said plot to the Plaintiff and/or put him into possession and he also failed to furnish the Plaintiff with the title deed for the said plot.

It was his contention that in the *year 2015*, after various repeated requests from the Plaintiff, the Defendant furnished the Plaintiff with a copy of *letter of approval of subdivision scheme* from the *National Land Commission* dated *13th March 2014*, which related to plot *No.Thika Municipality/Block 18/1978*. Further, that even with that completely different plot, the Defendant has failed to point out the

said plot on the ground to the Plaintiff and/or put him into possession and/or furnish him with a title deed to the said plot. The Plaintiff therefore urged the Court to allow his claim.

Despite having been served with the summons to enter appearance, the Defendant failed to do so, nor file his Defence. There is an *Affidavit of Service* dated **15th March 2017**, sworn by **Samson Karau Mutiso**, a Court Process Server.

The matter proceeded *ex parte* and Plaintiff herein **Kariuki Gakure**, gave evidence for himself and called no witness. The Plaintiff adopted fully his witness statement as his evidence in Court. The said statement was signed and filed on **2nd February 2017**. Further the Plaintiff reiterated that he bought a plot from the Defendant for **Kshs.120,000/=** and the plot was supposed to be **Thika Municipality/Block 12/1662/Kianjau B**. That he paid the purchase price in **two instalments** of **Kshs.80,000/=** and **Kshs.40,000/=**, as is evident from the **two receipts, Exhibit 1** dated **7th November 2008** and **Exhibit 2** dated **14th November 2008**.

He also testified that he was issued with a certificate of ownership the same date on **14th November 2008** - **No.097**, and he produced it as **Exhibit No.3**. He also stated that he was shown the plot but later the beacons were removed from the said plot that he had been shown. Further that in the year **2014**, the Defendant gave him a letter from **National Land Commission** indicating a different plot. He was also shown the plot but again the beacons were removed. He produced the **letter** as **Exhibit No.4**.

That despite demand and notice of intention to sue, the Defendant has failed to make good the claim. He produced the **demand letter** as **Exhibit No.5**. He asked the Court to allow his claim plus costs and interest thereon.

The Plaintiff thereafter filed written submissions on **9th September 2017**, which this Court has carefully considered. The Court has also considered the evidence adduced by the Plaintiff and the exhibits produced therein. It is evident that on **7th November 2008**, the Plaintiff paid **Kshs.80,000/=** to **Gakuyo Real Estate** for **plot No.2, Thika Municipality Block 12/1662**. Again the Plaintiff also paid **Kshs.40,000/=** on **14th November 2008** to the said **Gakuyo Real Estate**, the Defendant herein being payment for **plot No.12/1662**. The Plaintiff is also in possession of certificate of ownership **No.097** issued by the Defendant and it is in respect of **Thika Municipality/Block 12/1662(Kianjau 'B')**. The Plaintiff alleged that the suit plot was valued at **Kshs.120,000/=** and he paid the full purchase price. Indeed from the two receipts the Plaintiff has shown that he paid **Kshs.120,000/=** to **Gakuyo Real Estate**. Further the Plaintiff alleged that the purchase price was paid in full. However, the alleged contract herein was for sale of land. The said contract ought to have been in writing as provided by Section 3(3) of the Law of Contract Act which provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

The Plaintiff did not produce the Sale Agreement which ought to have been in writing. Without the Sale Agreement, the Court cannot find and hold with certainty that indeed the Plaintiff paid the full purchase price as per the sale agreement between the parties. The Court cannot also find and hold with certainty that the Defendant breached the said sale agreement as it is

not clear which was the real description of the alleged property that the Plaintiff was to purchase. The

said description would have been given in the sale agreement which was not done.

Failure to produce the sale agreement herein, the Court cannot hold and find with certainty that the Defendant is in breach of Contract for Sale of land.

The Plaintiff is the one who alleged and so he had a duty to prove his allegations as provided by Section 107 of the Evidence Act. Though the Plaintiff failed to produce the Sale Agreement, there is evidence that he did pay **Kshs.120,000/=** to the Defendant. Since the Plaintiff has alleged that he was never shown the plot that he had allegedly purchased, then this Court finds that **he is entitled to refund of the purchase price as sought in his prayer No.b.**

However, without the availability of Sale Agreement, the Court cannot find that there was breach of the same and the **Plaintiff is not entitled to general damages for breach of contract.**

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case against the Defendant on a balance of probabilities in terms of prayer No.b of the instant Plaintiff. Consequently, the **Court enters Judgement for the Plaintiff against the Defendant herein in terms of prayer No.b.** The Plaintiff is also **entitled to costs of the suit and interests on prayer No.b from the date of filing of this suit till payment in full.**

It is so ordered.

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

L. GACHERU

JUDGE

In the presence of

Mr. Chule holding brief for Macharia for Plaintiff

No appearance for Defendant

Lucy - Court clerk.

L. GACHERU

JUDGE

8/12/2017