



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 116 OF 2015**

**FRANCISCA WAYA KYULE.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**DAVID GONA NGUMA.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Application before me is the one dated 16<sup>th</sup> July, 2015 in which the Plaintiff is seeking for the following reliefs:-

**(a) THAT Defendant/Respondent by himself, agents, representatives, assignees, employees, servants or any person acting on his behalf be restrained from selling, attempting to sell, interfering, trespassing, dealing with, meddling in or in any other manner whatsoever dealing with all that parcel of land more particularly known as subdivisions number 10719/257, 10719/264, 10719/265 Malindi within Kilifi county, pending the hearing and determination of this suit.**

**(b) THAT the cost of this Application be in the cause.**

**The Plaintiff's/Applicant's case:**

2. The Plaintiff has deponed that he agreed to purchase the suit properties from the Defendant at a cost of Kshs.320,000 for each plot and that he took up occupation of the first plot having paid for it as agreed and that while he made efforts to pay up for the remainder of the plots, the Defendant reneged on the express terms of the agreement and revised the same upwards from Kshs.320,000 to Kshs.350, 000 and subsequently to Kshs.650,000.
3. It is the Plaintiff's case that the Defendant's machinations are an after thought because he has already constructed permanent buildings on the suit properties; that he has laboured under incessant threats and harassment from the Defendant and that this court ought to enforce the express terms of a contract.

**The Defendant's/Respondent's case:**

4. In his Replying Affidavit, the Defendant denied that he sold to the Plaintiff the suit properties as alleged; that he only entered into an agreement dated 10<sup>th</sup> April 2003 in which he agreed to sell portion number 10719/264; that there was no agreement for sale of portion numbers 10719/255 and 10719/257 Malindi and that if there was any such agreement, the same was rendered null and

- void by the agreement of 30<sup>th</sup> January, 2009.
5. According to the Defendant, he entered into an oral agreement for portion numbers 10719/256 and 10719/257 Malindi in December 2003 for Kshs.350,000 and that the Applicant paid a deposit of Kshs.300,000 leaving a balance of Kshs.400,000 which was to be paid within a month.
  6. It is the Defendant's case that the Plaintiff never paid the balance of Kshs.400,000.

**Analysis and findings:**

7. The Plaintiff is seeking for order of injunction restraining the Defendant from selling and dealing with subdivision numbers 10719/257, 10719/264 and 10719/265 Malindi.
8. In the Plaint, the Plaintiff is seeking for an equitable relief of specific performance.
9. The Plaintiff has annexed an Indenture dated 10<sup>th</sup> November 2003 and registered on 11<sup>th</sup> November 2003.
10. According to the Indenture, the Plaintiff purchased plot number 10719/264 from the Defendant for Kshs.320,000. The Defendant has not disputed this fact.
11. Other than the Indenture of 10<sup>th</sup> November 2003 in respect to portion number 10719/264, the Plaintiff has not exhibited any other agreement in respect of plot numbers 10719/257 and 10719/265.
12. Section 3(3) of the Law of Contract Act provides that no suit shall be brought upon a contract for the disposition of the interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties thereto and the signatures of each party signing has been attested by a witness.
13. In the absence of a written contract in respect to plot numbers 10719/257 and 10719/265, an order of specific performance cannot issue due to the clear provisions of Section 3(3) of the Law of Contract Act.
14. It is trite law that specific performance grants a party what he actually bargained for in the contract. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved.
15. Other than the absence of a contract in writing in respect to portion numbers 257 and 265, there is no evidence placed before me to show that the Plaintiff performed within the requisite period his obligations viz-a-viz the purchase of portion numbers 10719/257 and 265, including the payment of the balance of the purchase price.
16. In the circumstances, I find and hold that the Plaintiff has not established a prima facie case with chances of success, save for plot number 10719/264.
17. For those reasons, I shall, which I hereby do, allow the Application for injunctive order only in respect to plot number 10719/264 in the following terms.

**(a) The Defendant either by himself, agents, representatives, assigns, employees servants or any person acting for or on his behalf be restrained from selling, interfering, trespassing, dealing with, meddling in or in any other manner whatsoever dealing with all that parcel of land more particularly known as subdivision numbers 10719/264 pending the hearing and determination of this suit.**

**(b) Each party to bear his own costs.**

**Dated and delivered in Malindi this 1<sup>st</sup> day of April, 2016.**

**O. A. Angote**

**Judge**