



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**LAND AND ENVIRONMENT DIVISIONS**  
**ENVIRONMENT AND LAND CASE NO. 48 OF 2013 (O.S)**  
**JOYCE MUKAMI.....PLAINTIFF**  
**VERSUS**  
**CYPRIANO KIMATHI MWONGO.....DEFENDANT**

**J U D G M E N T**

1. This application is dated 8th February, 2013. On its face the Originating Summons states that it is filed Under Section 8 of the Land Control Act Cap. 302 Laws of Kenya, Under Order 37 rule 3 of the Civil Procedure Rules and under Section 68 of the Land Registration Act, 2012.

2. The application seeks the following orders:-

- 1. THAT this Honourable Court be pleased to certify this application as urgent.**
- 2. THAT this Honourable Court be pleased to extend time for the applicant to apply for Consent of Land Control Board for sub-division and transfer of 0.20 Ha or ½ acre from L.R NO NKUENE/LOWER-MIKUMBUNE/622.**
- 3. THAT this Honourable Court be pleased to issue an order of inhibition to be registered to inhibit any transactions on L.R NO. NKUENE/LOWER-MIKUMBUNE/622 until this matter is heard and determined or until further orders of the Court.**
- 4. THAT costs of this application be provided for.**

3. The application is supported by the affidavit of JOYCE MUKAMI and has the following grounds:-

- a. THAT the Plaintiff/Applicant entered into a land Sale Agreement with the Defendant to buy 0.20 hac or ½ acre to be excised from Land Reference No. NKUENE/LOWER-MIKUMBUNE/622 at a total consideration Kshs. 590,000/=.**
- b. THAT full payment was made except a sum of Kshs. 85,000/= (eighty five thousand only) awaiting transfer of the land.**
- c. THAT a dispute arose between the Defendant and another buyer and the whole land was cautioned pending hearing and determination of MERU CMCC NO. 949 of 2003 and MERU**

**H.C.C.C NO. 5 of 2007.**

- d. THAT the Defendant/Respondent agreed to transfer to the Plaintiff 0.20 hac or (½) an acre immediately the case was over.**
- e. THAT the case has been decided but the Plaintiff has refused to honour his part of the deal.**
- f. THAT the Plaintiff could not apply for consent of the Land Control Board before the said cases were determined and impediments removed.**
- g. THAT the Defendant should not be allowed to use provisions of the Law to defraud the Plaintiff.**

4. The Plaintiff's supporting Affidavit states as follows:-

- 1. THAT I am the Plaintiff/Applicant herein and therefore competent to make and swear this affidavit.**
- 2. THAT I and the Defendant entered into a land Sale Agreement in which the Defendant agreed to sell to me 0.20 Hac or (½ ) acres from L.R NO. NKUENE/LOWER-MIKUMBUNE/622 which was sub-divided and later became NKUENE/LOWER-MIKUMBUNE/ 1156 at an agreed consideration of Kshs. 590,000/= (Five hundred and ninety thousand only). (Annexed are copies of the said Sale Agreements marked "JM 1" and "JM 2").**
- 3. THAT the Defendant took money from me in instalments and there is a balance of only Kshs. 85,465/= (eighty five thousand, four hundred and sixty five). (Annexed is a bundle of acknowledgment receipts marked ("JM 3).**
- 4. THAT the sub-division of Land Reference No. NKUENE/LOWER/ MIKUMBUNE/622 which was marked in the mutation as No. 1156 could not be registered due to cases filed against the Defendant and the Land remained intact. (Annexed is a copy of the register marked ("JM4").**
- 5. THAT we did not apply for Consent of the Land Control Board as the Defendant advised me that he had been advised by his Advocate to wait as the Lands had been cautioned.**
- 6. THAT we all waited until the Appeal was decided on 19th December, 2012.(Annexed is the copy of the judgment marked "JM 5).**
- 7. THAT after the Appeal was decided the Defendant has been avoiding me and giving me false promises.**
- 8. THAT I now wish to apply for Consent of the Land Control Board but could not do so due to the matters aforesaid.**
- 9. THAT L.R. NO. NKUENE/LOWER-MIKUMBUNE/622 is now in danger of being sold to another person as prices have gone up and it is free after the Court case.**
- 10. THAT I pray this Honourable Court to extend time to allow me apply for consent of the Land Control Board to enable me proceed with the terms of the agreement.**
- 11. THAT the contents of this affidavit are true to the best of my knowledge, information and belief.**

5. The Respondent has opposed the application through a Replying Affidavit sworn on 04/04/2013 and filed on the same day. The Replying Affidavit states as follows:-

*“ I Cypriano Kimathi Mwongo of P.O Box 74 Nkubu, do make oath and state as follows:-*

- 1. THAT I am the respondent herein and thus competent to swear this affidavit,*
- 2. That I have read and understood the affidavit of the Applicant and it is the same that I make the following affidavit.*
- 3. That it is true that in the year 2004 I sold ½ acre of my land to the Applicant.*
- 4. That the applicant breached the said agreement by refusing to pay the purchase price and to date she is still indebted to me to the tune of Kshs, 170,000/=.*
- 5. That I am no longer willing to sell my land to her and I am ready to refund her money.*
- 6. That I am advised by my lawyer that since the Sale Agreement became void for failure of setting land Control Board Consent the current application is unmeritorious and cannot be granted.*
- 7. That, I have never discussed the issue of obtaining consent with the applicant as we have always been in dispute over her failure to pay my money.*
- 8. That I pray that this application be dismissed for being an abuse of the due process of the Court.*
- 9. That all what is deponed to herein is true to the best of my knowledge, believe and understanding.*

6. The parties canvassed this suit through Written Submissions.

7. The Plaintiff claims that she entered into a Sale Agreement with the Defendant for the Sale of Land Reference NO. NKUENE/LOWER-MIKUMBUNE/622 at a total consideration of Kshs. 590,000. A dispute arose between the Defendant and another buyer and the whole land was cautioned pending hearing and determination of Meru CMCC NO. 949 of 2003 and Meru HCCC NO. 5 of 2007. The Plaintiff claims that the Defendant had agreed to transfer the ½ acre which was the subject of the Sale Agreement to the Plaintiff once the cases affecting the suit land were heard and determined. The Plaintiff claims that after the cases were decided, the Defendant refused to honour his part of the deal to transfer the ½ acre of land to the Plaintiff.

8. The Plaintiff submits that because of the Court cases she could not apply for the requisite Land Control Board Consent and hence her prayer No.2 in this application.

9. The Plaintiff submits that the Defendant is invoking the absence of Land Control Board Consent in this matter not because he wants to be faithful to the intended purpose of the Land Control Act but to deprive the Plaintiff the benefit of her contract with the Defendant. She submits that an amendment to the Land Control Act which came to effect on 24 th December, 1980 (Act No. 13 of 1980) addresses the Mischief which had hitherto been created by the earlier version of the Act. The Plaintiff quoted the provision to Section 8(1) of the Act as stating:-

***“ Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions if any, as it may think fit”***

The Plaintiff submits that this amendment empowered the High Court to extend that period even where the application period of six months has expired. She further points out that the amendment also repealed the provision that consent would be deemed to have been refused if no determination of the application was made within 3 months.

10. The Plaintiff submits that the doctrine of equitable estoppel is relevant in this matter. She refers the Court to the case of Macharia Mwangi and 87 Others Versus Davidson Mwangi Kagiri [2014] e KLR where the Court quoted the holding in Steadman Versus Steadman [1976] AC 536-540 as opining:-

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

11. The Plaintiff also refers the Court to the case of Thorner Versus. Major [2009] 1 WLR 776 WHERE Lord Walker pointed out that the Modern law on proprietary estoppels was based on 3 main elements as follows:-

***a. A representation or assurance made to the Claimant.***

***b. Reliance on its by the Claimant***

***d. Detriment to the Claimant in consequence of his (reasonable) reliance.***

The Plaintiff opined that this case had backing in Kenya from the case of Doge Versus Kenya Conners Ltd [1988] KLR where the Court held”..... that equitable doctrines apply generally unless excluded by statute..... it is a principle of justice and equity that when a man by his words or conduct has led another to believe that he makes an act safely in faith of them....., he would not be allowed to go back when it would be just and inequitable to do so”.

12. The Plaintiff has referred to the case of Giella Versus Cassman Brown & Co. Ltd [1973] EA 358 in which Spry V.P at Page 360 elaborated upon the conditions necessary for the grant of an interlocutory injunction. I do not find this Submission relevant to this matter.

13. The Plaintiff has referred the Court to the case of Stima Peak Farmers Ltd Versus Onesmus Weru and 4 other- Civil Appeal No. 18 of 2010 (Court of Appeal at Nyeri ) and says that the Court of Appeal has demonstrated to what extent Courts should go to see to that a party does not benefit from his own wrongs. The Plaintiff submits that since the Defendant wants that since the Defendant wants to benefit from his own wrongs because land prices have gone up, he should not be allowed to do so.

14. The Plaintiff has proffered the following authorities:-

***a. EMILY CHONGE WANYAMA VERSUS PATRICK MANG'ENI YUSTO, LAND AND ENVIRONMENT CASE NO. 32 OF 2012 (HIGH COURT, BUNGOMA).***

***b. SATIMA PEAK FARMERS VERSUS ONESMUS WERU AND 4 OTHERS, CIVIL APPEAL NO. 18 OF 2010-COURT OF APPEAL AT NYERI.***

***c. SECTION 8 OF THE LAND CONTROL ACT.***

15. The defendant opposes the Plaintiff's case and says that the agreement between the parties was made on 7th December, 2004, Consent should have been obtained within 6 months of that date. He says that there has been an inordinate delay of 10 years . He opines that the Plaintiff cannot wake up one morning after such a long delay and come to Court to seek a relief which by law was supposed to be sought within 6 months.

16. The Defendant says that the applicant breached the apposite Sale Agreement by failing to pay the intended full consideration. He attributed this failure to pay the full consideration by the Defendant as the reason why Land Control Board Consent was not applied for.

17. I have carefully considered the pleadings and the Submissions filed by the respective parties. I have also perused the authorities filed by the Plaintiff.

18. The apposite Sale agreement was made on 7/12/2004. The agreement made it clear that part of the money to be paid to the Defendant would be paid once a caution filed by one CYPRIANO M'RARAMA MIKUA had been removed and once an inhibition placed by the Court in Meru CMCC No. 949 OF 2003 was removed. It is clear that the full effect of the agreement would take effect after Meru CMCC NO. 949 of 2003 was heard and determined and if appeals ensued, after hearing and determination of such appeals.

19. In his Replying Affidavit, the Defendant says that the Plaintiff refused to pay a sum of Kshs. 170,000/= . However, the acknowledgements of money received shows that what remained to be paid to the defendant was Kshs. 85,465/= . It is noted that the defendant offers to refund the money he received from the Plaintiff. But he does not seek to take account of the fact that the balance owed to him was only to be paid after removal of a caution and an inhibition and after determination of a Court Case mentioned in the agreement. The appeal arising from Meru CMCC NO. 949 OF 2003 was decided on 19th December, 2012.

20. This suit was filed on 11th February, 2013 less than two months from the time the appeal arising from Meru CMCC NO. 949 of 2003 was decided. This is the reference point from which the time the payment of the balance of the purchase price to the Defendant should be calculated. It is therefore untrue, as the defendant has claimed, that the Plaintiff delayed the payment of the balance for 10 years. I find that the Plaintiff did not breach the parties' Sale Agreement dated 07/12/2004. Instead, I find that it is the defendant who is trying to avoid the contract.

21. One cannot eat his cake and still have it. The apposite agreement is clear evidence, in writing, that the Defendant had made the Plaintiff to believe that he would transfer the disputed land her to her once cases affecting the land were finalized . He has led the Plaintiff to believe that he would honour the agreement between them and as held in Macharia Mwangi and 87 others versus Davidson Mwangi Kagiri, “ he will then not be allowed to turn around and assert that the agreement is unenforceable”.

22. In the Circumstances, I find that there is a veritably sufficient reason for this Court to extend the time for the applicant to apply for Consent of the Land Control Board for Subdivision and transfer of 20 Hectares or ½ acre from L.R. No NKUENE/LOWER-MIKUMBUNE/ 622.

23. The following orders are granted: -

***1. Time is extended for the Applicant to apply for Consent of the Land Control Board for Sub-division and transfer to the Plaintiff, JOYCE MUKAMI, of 0.20 Hectares or ½ acre from L.R. No. NKUENE/LOWER-MIKUMBUNE/622.***

***2. That the balance of the purchase price being the sum of Kshs. 85,465/= be paid to the Defendant through the firm of L.Kimathi Kiara &Co. his Advocates.***

***3. Upon satisfying himself that the balance of the purchase price has been paid to the Defendant as ordered in ( 2) above, this Court's Executive Officer to execute all relevant documents to facilitate implementation of Order (1) above, including transfer to the Plaintiff of the apposite parcel of land.***

***4. The order for Inhibition already registered against L.R. NO. NKUENE/LOWER-MIKUMBUNE/622 not to be removed unless for the purposes of implementing the orders issued by this Court herein.***

***5. Costs are awarded to the Plaintiff.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF MAY, 2016 IN THE PRESENCE OF:-**

CC: Daniel /Lilian

Rimita for the Plaintiff/Applicant

Mutura for Defendant/Respondent

.....

**P. M. NJOROGÉ**

**JUDGE**