



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 85 OF 2016**

ISAAC MUCIRI GITHINJI.....PLAINTIFF

VERSUS

DAVID WAINAINA GACHOKA.....DEFENDANT

**JUDGMENT**

The plaintiff **ISAAC MUCIRI GITHINJI** filed this suit against the defendant **DAVID WAINAINA GACHOKA** seeking judgment in the following terms:-

***(a) Refund of the purchase price being Ksh. 255,270.00 plus interest at the rate of 50% from the date of an agreement and/or in the alternative the defendant do transfer one acre of land out of rice holding No. 280 B TEBERE SECTION UNIT 19.***

***b) Costs of the suit and interest.***

The claim was based upon pleadings that on 12th June 2013, the parties entered into an agreement by which the defendant was to sell to the plaintiff one acre out of rice holding No. 280 B TEBERE SECTION UNIT 16 (the rice holding) at a consideration of Ksh. 360,000 of which the plaintiff has since paid Ksh. 255,270.00. The balance was to be paid once the tenant card and licence were issued in favour of the plaintiff who was to take occupation by 1st August 2014. However, the defendant has blatantly refused to transfer the same or give vacant possession despite notice to sue hence this suit.

Having been served with the plaint and summons to enter appearance, the defendant only entered appearance but filed no defence. Subsequently on 26th June 2016, a judgment was entered against him. The plaintiff's advocate thereafter took a date for formal proof.

When the case came up for formal proof on 29th November 2016, **Mr. MWANGI** advocate holding brief for **Ms MUTHIKE** advocate for the plaintiff drew the Court's attention to the fact that the claim was liquidated and so there was no need for formal proof. The Court agreed with **Mr. MWANGI** but directed that since the plaintiff was already in Court and there was also an alternative claim which was not liquidated, no prejudice would be caused in hearing him.

The plaintiff then testified and asked the Court to adopt his statement filed in Court together with the plaint and the documents.

Plaintiff's brief case as per his statement dated 13th June 2016 is that on or about 12th June 2013, he and the defendant entered into an agreement by which he was to purchase the rice holding at a consideration of Ksh. 360,000. He paid Ksh. 223,000.00 on 12th June 2013 and thereafter, between 9th January 2016 and 26th April 2016 a further sum of Ksh. 33,270 which actually adds upto Ksh. 256,270 and not the Ksh.

255,270 claimed in the plaint. The defendant however refused to give him vacant possession or transfer the rice holding to him. He produced the sale agreement dated 12th June 2013 and the demand letter dated 16th March 2016 as exhibits 1 and 2 respectively.

I have considered the plaintiff's un-controverted evidence together with the exhibits which include an agreement between him and the defendant over the purchase of the rice holding. According to that agreement (Exhibit 1), the defendant was to sell to the plaintiff one acre out of the rice holding of which Ksh. 223,000.00 was acknowledged by the defendant on 12th June 2013 when the agreement was signed. According to the plaintiff's statement, he made a further payment of Ksh. 33,270 through M-pesa and Cash. Paragraph five (5) of the said agreement provided as follows:-

***“In case of breach of this agreement by the vendor, he shall refund the amount paid with an interest of 50% p.a. calculated from the date of this agreement”***

Plaintiff was to take possession by 1st August 2014. He says the defendant has not let him into possession nor transferred the rice holding to him and therefore he seeks the refund of part of the purchase price of Ksh. 223,000.00. In light of the plaintiff's un-controverted evidence, there is no doubt in my mind that the plaintiff is entitled to the refund of that sum. In his evidence in chief, he asked for whatever remedy the Court would grant him between the refund and performance of the agreement. I find it more prudent to order a refund of the money which, by my calculations, is Ksh. 256,270 and not the Ksh. 255,270 indicated on the plaint. I say so because I am satisfied that there was an error by counsel for the plaintiff in adding up the amount actually paid by the plaintiff to the defendant.

What has concerned me most is whether the plaintiff is entitled to the interest of 50% p.a. from the date of the agreement. That was part of the agreement between the parties herein. A Court of law does not re-write a contract between the parties. Its duty is just to enforce it. In **NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER (2002) E.A 503**, the Court of Appeal held that:-

***“A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.***

Therefore, in a case such as this one where the parties have reduced their agreement in writing, the duty of the Court is to look at the agreement itself and give appropriate remedy. The plaintiff says the defendant breached the agreement and this Court must believe his un-controverted evidence. The agreement does not refer to any consent being sought from the Land Control Board. It is clear therefore that this transaction did not relate to agricultural land as defined under ***Section 2 of the Land Control Act***. I notice that the agreement was drawn by a lawyer and clearly therefore, if it was subject to the provisions of the ***Land Control Act***, there would have been a mention to that effect. In any case, land within an Irrigation Scheme vests in the ***National Irrigation Board*** as established under ***Section 3 of the Irrigation Act*** and it is clear from ***Legal Notice No. 67 of 1977*** that the Mwea/Tebera Irrigation area of Kirinyaga is a designated Irrigation Scheme. It is obvious to me therefore that what the parties intended was to allow the plaintiff to occupy and utilize part of the rice holding. ***Paragraph 8 of the Irrigation Regulations*** makes it possible for a licensee with the permission in writing of the Scheme Manager, to ***“allow any other person to occupy his holding or to cultivate it on his behalf”***. That, in essence, must be circumstances under which the parties' agreement must be viewed. Therefore, as the parties had agreed on a default clause, this Court must give effect to their agreement. I therefore find that the plaintiff is entitled to interest of 50% p.a. on the paid sum of Ksh. 256,270.00 calculated from 12th June 2013 as per clause five (5) of their agreement.

There will be judgment for the plaintiff against the defendant in the following terms:-

- 1. Refund of Ksh. 256,270.00 plus interest at the rate of 50% from the date of the agreement.***
- 2. Costs of this suit.***

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**

Judgment dated, delivered and signed in open Court this 9<sup>th</sup> day of December, 2016

Mr. Gori for Ms Muthike for Plaintiff present

Ms Kiragu for Mr. Kiama for Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**