



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIRBI**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CASE NO. 518 OF 2013**

**KUNGU KAMAU.....PLAINTIFF**

**-VERSUS-**

**KAMAU KIONGO.....1<sup>ST</sup> DEFENDANT**

**VINCENT KUNGU NDEKEI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This is a straightforward suit for completion of an alleged sale of property known as Title No. Chania/Ngorongo/1927. The Plaintiff claims that the 1<sup>st</sup> Defendant sold the property to him but then secretly transferred the same to the 2<sup>nd</sup> Defendant.

**Pleadings and Litigation History**

2. The suit herein was filed on 2<sup>nd</sup> May, 2013. A List of documents was then filed besides the Plaintiff alongside a list of witnesses and the Plaintiff's witness statement. A Defence Statement was filed on 15<sup>th</sup> May, 2013 by the 2<sup>nd</sup> Defendant and on 23<sup>rd</sup> May, 2013 the 1<sup>st</sup> Defendant also filed his Defence Statement. The Defendants filed no bundle of documents. Following closure of pleadings the pretrial conference was conducted and the case fixed for trial. The trial took place on 27<sup>th</sup> November, 2014.

**The trial and evidence**

3. The Plaintiff testified as did the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant did not testify but had filed a witness statement. The 2<sup>nd</sup> Defendant did not however present himself for cross examination.
4. The Plaintiff testified that the 1<sup>st</sup> Defendant had agreed to sell to him in 1995 a half acre of land for Kshs. 65,000/=. There was a Sale Agreement. He paid the full purchase price in installments. The 1<sup>st</sup> Defendant then distributed the land to others and relocated to Naivasha where he was arrested in 2009. The 1<sup>st</sup> Defendant was charged with obtaining by false pretense and jailed for six (6) months. The Plaintiff was the complainant. The Plaintiff sought the land he bought or an alternative parcel of land. The Plaintiff stated that he only paid the 1<sup>st</sup> Defendant Kshs. 51,000/=. The Plaintiff however denied in cross-examination that he was unable to complete the transaction.

5. The 1<sup>st</sup> Defendant's testimony on the other hand was that the plaintiff and the 1<sup>st</sup> Defendant entered into a Sale Agreement. Of the agreed Kshs. 65,000/-, the Plaintiff only paid by way of installments. He claimed that when the Plaintiff failed to pay the balance after he had subdivided the land, the 1<sup>st</sup> defendant took Kshs. 35,000/= to the advocate Mr. Waweru who appears for the 2<sup>nd</sup> Defendant in this matter. The 1<sup>st</sup> Defendant's instructions were clear that the amount be refunded to the Plaintiff. Shortly afterwards, the 1<sup>st</sup> Defendant states he was arrested, arraigned in court, tried and finally jailed for six months. The 1<sup>st</sup> Defendant was emphatic that he never absconded to the Rift Valley. He asked the court to dismiss the Plaintiff's claim and stated further that he would refund the Plaintiff the purchase price paid.
6. The 2<sup>nd</sup> Defendant did not call any witness. Neither did the 2<sup>nd</sup> defendant offer any testimony himself. Like the Plaintiff as well as the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant did not make any submissions.

### **Analysis & Determination**

7. I have reviewed the facts of this case in their entirety and the findings are pretty straightforward. The Plaintiff and the 1<sup>st</sup> Defendant entered into an agreement for the sale of the 1<sup>st</sup> Defendant's property. The sale price agreed upon was Kshs. 65,000/=. The Agreement was in writing. The 2<sup>nd</sup> Defendant defaulted. He simply bolted with the purchase money part of which he had been paid, to the Rift Valley. He was arrested and convicted at the prompting of the Plaintiff. He by then had sold and transferred the property to the 2<sup>nd</sup> Defendant who is the registered proprietor. The 1<sup>st</sup> Defendant says he was never at fault but two things stand out which show the contrary.
8. Firstly he was convicted on the basis of the same transaction. He was convicted on his own plea of guilt. He was fined 20,000/- or six months in jail, in the event he was unable to pay the fine. He was unable to and served the jail term. He does not deny these facts. Certainly, if he was not at fault how could he possibly have been convicted. The conviction and I have read the proceedings in the criminal trial, reveal that the 1<sup>st</sup> Defendant was at fault. He prompted or deliberately led to the collapse of the sale agreement between the 1<sup>st</sup> Defendant and the Plaintiff.
9. Secondly, from a more civil claim perspective, there is no evidence before the court that the 1<sup>st</sup> Defendant as the vendor who had received part of the purchase price ever issued a completion notice to the Plaintiff. If truly the 1<sup>st</sup> Defendant was ready able and willing to complete, nothing would have been easier than to put the Plaintiff on notice to complete the transaction. As the vendor he should have done so. By the time of his conviction in October, 2009, the 1<sup>st</sup> Defendant had long transferred the suit property to the 2<sup>nd</sup> Defendant. It is evident that the 2<sup>nd</sup> Defendant was at fault and deliberately so. He should not have transferred the property title No. Chania/Ngorongo/1927 to the 2<sup>nd</sup> Defendant in the face of the sale agreement dated 20<sup>th</sup> January, 1995. The defence that the Plaintiff was at fault cannot hold any water.
10. I notice though that this was a controlled transaction under the Land Control Act (Cap 302). The consent of the Land Control Board should have been obtained or at the very least applied for within six months of the 20<sup>th</sup> day of January, 1995. There is no evidence before me that such an application was lodged with the relevant board prior to the 20<sup>th</sup> day of July, 1995. Neither was there an application for extension of that period of time made to the High Court. Effectively the Sale agreement as between the Plaintiff and the 1<sup>st</sup> Defendant is void for want of compliance with the statutory provisions of the Land Control Act. It truly does not matter that neither party alluded to this fact or point of law, the court must always take judicial notice of such matters: see **Section 60(1) (a) of the Evidence Act (Cap 80)**. Secondly, there is uncontroverted evidence that it is the 2<sup>nd</sup> defendant who bought the suit property and is in possession. Perhaps, if the Plaintiff had been in possession then the Sale Agreement would have been saved pursuant to the Court of Appeals' holding in **Macharia Mwangi & 87 others –vs- Davidson Kagiri Mwangi [2014] eKLR** where

the court held that the mere lack of a consent will not of itself void an agreement especially if one party has taken possession.

11. The Plaintiff sought an order that the 2<sup>nd</sup> Defendant do transfer the suit property to the Plaintiff. I do not see such order as viable in the circumstances. The Plaintiff has not led any evidence to show that the 2<sup>nd</sup> Defendant knew or ought to have known of the Plaintiff's interest in the property. The Plaintiff has also not proven any element of fraud, misrepresentation, illegality or corruption on the part of the 2<sup>nd</sup> Defendant in the process of acquiring title to the suit property from the 1<sup>st</sup> Defendant. In the circumstances, under Section 26 of the Land Registration Act, 2012, the 2<sup>nd</sup> Defendant's title cannot be impeached. Likewise as there was no agreement for the transfer of the suit property between the Plaintiff and the 2<sup>nd</sup> Defendant, this court cannot force the 2<sup>nd</sup> Defendant to effect such a transfer.

12. Finally, I also hold the view that the Plaintiff claim would be barred by statute under Section 7 of the Law of Limitations Act Cap (22) Laws of Kenya. The Agreement should have been completed in 1995. That is over 15 years ago.

13. There is however no doubt that the Plaintiff would be entitled to a refund of the amount paid to the 1<sup>st</sup> Defendant. There has been a failure of consideration. I see no reason why the amount paid to the 1<sup>st</sup> defendant as purchase price should not be refunded. Statutorily, this amount would be recoverable under section 7 of the Land Control Act. Judiciously too, equity would demand that the 1<sup>st</sup> defendant is not allowed to unjustly enrich himself. The 1<sup>st</sup> Defendant has also exhibited the will to refund the purchase price paid to him by the Plaintiff. I would in the circumstance order that the amount of Kshs. 51,000/= be refunded to the Plaintiff by the 2<sup>nd</sup> defendant together with interest at court rates from the day of filing suit till full payment. A decree is to issue to that effect and also to the effect that the Plaintiff's suit is dismissed but with no orders as to costs.

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of February, 2015**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff

..... for the Defendants