



REPUBLIC OF KENYA



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**Chome & another v Thoya & another (Land Case 120 of 2017)  
[2024] KEELC 1546 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1546 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 120 OF 2017  
MAO ODENY, J  
MARCH 22, 2024**

**BETWEEN**

**CHARO CHOME ..... 1<sup>ST</sup> PLAINTIFF**

**KENGA KOMBE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BENDERA CHARO THOYA ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LANDS REGISTRAR – KILIFI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 2<sup>nd</sup> June 2017 the Plaintiffs herein sued the Defendants seeking the following orders:
  - a. A permanent injunction order against the Defendant her agents and or servants and anyone deriving interest from the Defendant restraining them from trespassing encroaching and selling the parcel of land Plot Number Roka/Uyombo/154.
  - b. Specific performance for the contract between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff.
  - c. The 2<sup>nd</sup> Defendant be ordered to rectify the register and insert an entry cancelling the 1<sup>st</sup> Defendant's name and inserting the name of the 1<sup>st</sup> Plaintiff in her place together with costs and interest.
2. The 1<sup>st</sup> Defendant filed a defence but the 2<sup>nd</sup> Defendant although served never filed a defence within the stipulated period.



### **Plaintiff's Case**

3. PW1 stated that he bought the suit parcel of land from the 2<sup>nd</sup> Plaintiff vide an agreement dated 13<sup>th</sup> February 2010 at a consideration of Kshs 180,000/- He further stated that the 2<sup>nd</sup> Plaintiff had bought the suit land from the 1<sup>st</sup> Defendant which agreement was witnessed by the Area Chief.
4. PW1 further stated that the 2<sup>nd</sup> Plaintiff took possession and was in such occupation for 9 years and sold to the 1<sup>st</sup> Plaintiff who took possession upto the time when the dispute arose. PW1 urged the court to find that he is the rightful owner of the suit land.
5. On cross-examination by Mr. Shujaa, PW1 stated that the suit land was about 10 acres and that the 2<sup>nd</sup> Plaintiff showed him the Sale Agreement with the 1<sup>st</sup> Defendant. Further that the Plaintiff was to transfer the suit land to him. He further stated that the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant did not obtain a Land Control Board Consent.
6. PW2 Chome Ponda Mjomba, stated that the 1<sup>st</sup> Plaintiff is his son who bought the suit land from the 2<sup>nd</sup> Plaintiff and that it had no title deed when he bought it. It was his evidence that he has been cultivating the land. On cross examination by Mr. Shujaa, PW2 told the court that he had been tilling the land but stopped 3 years ago and that he did not know the 1<sup>st</sup> Defendant.
7. PW3 William Jenso Lenga stated that the 2<sup>nd</sup> Plaintiff gave him a Power of Attorney dated 15<sup>th</sup> July 2020 and registered on 17<sup>th</sup> July 2020 to represent him in these proceedings. He testified that the 2<sup>nd</sup> Plaintiff bought the land from Bendera Thoya in 2011 and urged the court to grant the prayers in the plaint.
8. On cross-examination by Mr. Shujaa, PW3 stated that he was not a witness to the agreement between the 2<sup>nd</sup> Plaintiff and Bendera and that he does not know the acreage. He also stated that it is the 1<sup>st</sup> plaintiff who is in occupation.

### **Defendant's Case**

9. DW1 adopted her Witness Statement dated 25<sup>th</sup> July 2017 and testified that she is the registered owner of the suit property but entered into an agreement for sale with the 2<sup>nd</sup> Plaintiff at a consideration of Ksh.30,000/-. She further stated that later her family objected to the agreement and refused to give consent to the transaction as required by the Land Control Board.
10. DW1 further stated that she informed the 2<sup>nd</sup> Plaintiff to get a refund of his money but the 2<sup>nd</sup> Plaintiff refused and failed to appear at the Chief's office to receive his money.
11. On cross -examination by Ms Achieng, she confirmed that she sold the land to Kenga Charo and did not tell him whether the suit land had a title or not. She also stated that the Plaintiff paid the full purchase price and she moved out of the suit land. DW1 also stated that she has alternative land where she stays and that nobody is on the suit land.

### **Plaintiffs' submissions**

12. Counsel for the Plaintiff submitted that the 1<sup>st</sup> Defendant does not dispute the fact that she sold the land to the Plaintiff and identified the land being sold by describing the same as bordering Mr. Dhaalani, to the South, Mr. Mwalimu Bao and Mr. Kea Kagongolo to the North Mr. Matoi to the East, and Mr. Elijah to the west. That the said description clearly depicts unsurveyed land being sold and identified the 1<sup>st</sup> Defendant Bendera Charo Thoya ID Card Number 2127979.



13. Counsel further submitted that the Defendant admitted to selling the land and receiving the full purchase price of Kshs. 180,000/ which was reduced into writing vide an agreement dated 13<sup>th</sup> February 2010.
14. Counsel relied on Section 6 of the *Land Control Act* and submitted that the suit land being sold was unsurveyed and only parcels with titles issued to parties are subject to this Act.
15. Counsel further submitted that by the time the 1<sup>st</sup> Defendant was selling the land to the 2<sup>nd</sup> Plaintiff, she apparently already had a title which she had obtained 12 years ago and that her actions of concealing this fact was fraudulent.
16. It was counsel's submission that there was no basis for the refund of the purchase price, which the Plaintiff never accepted. Counsel urged the court to find that the Plaintiff has proved his case against the Defendant as prayed in the plaint.

### **1<sup>st</sup> Defendant's Submission**

17. Counsel identified the following issues for determination;
  - a. Whether there was a valid agreement for sale of the suit land between the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant.
  - b. Whether the Plaintiffs are entitled to specific performance of the agreement for sale made between the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant.
  - c. Whether the sale of the suit land to the 2<sup>nd</sup> plaintiff by the 1<sup>st</sup> Defendant was fraudulent.
  - d. Whether the Plaintiffs are entitled to rectification of the register relating to the suit property as prayed for in the Plaint.
18. Counsel submitted that there was no valid agreement for sale as the suit property was registered in the name of the 1<sup>st</sup> Defendant on 20<sup>th</sup> March 1989 and that the agreement for sale between the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant was made on 23<sup>rd</sup> November 2001.
19. Counsel further submitted that there was consent of the Land Control Board as the family had objected to the sale of the suit property hence the same was null and void.
20. Counsel relied on Section 6 of the *Land Control Act* and submitted that if any money or other valuable consideration has been given in the course of a controlled transaction that becomes void under the Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid.
21. Mr. Shujaa cited the case of David Sironka Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR and submitted that Section 6 of the *Land Control Act* is a mandatory provision of the law and where no consent has been obtained within 6 months of the transaction, the agreement becomes null and void for all purposes.
22. Mr. Shujaa further submitted that where a contract is declared illegal by statute the Courts will not enforce the contract or provide any other remedies arising out of the contract and relied on the case of Mistry Amor Singh—Vs- Kulubya [1963] E.A.408 for the proposition that ' No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.' It was counsel's submission that the only recourse for the 2<sup>nd</sup> Plaintiff is to recover a refund of the purchase price from the 1<sup>st</sup> Defendant as provided in the Act.



23. On the issue of fraud, counsel submitted that it is trite law that fraud must be strictly proved by cogent evidence and that the Plaintiff did not prove fraud. On the prayer for rectification of the register relating to the suit land, counsel relied on Section 80(1) & (2) of the [Land Registration Act](#) which empowers the court to grant such an order when it is satisfied that there was fraud, misrepresentation, error or mistake.
24. Mr. Shujaa stated the Court can only order for rectification of the register by cancelling the registration of the 1<sup>st</sup> Defendant and replace it with that of either Plaintiff when it is proved that the registration in the name of the 1<sup>st</sup> Defendant was made by mistake or obtained through fraud or misrepresentation or was acquired through a corrupt scheme and in this case the conditions have not been met.
25. Counsel urged the court to dismiss the plaintiffs' suit with costs.

### **Analysis And Determination**

26. The issues for determination are whether there was a valid sale agreement between the Plaintiffs and the 1<sup>st</sup> Defendant, who is the rightful owner of the suit land, whether the Plaintiff is entitled to the reliefs sought.
27. The 1<sup>st</sup> Plaintiff bought the suit land from the 2<sup>nd</sup> Plaintiff at a consideration of Kshs. 180,000/ which was paid in full who had purchased it from the 1<sup>st</sup> Defendant at a consideration of Kshs 30,000/ vide an agreement dated 23<sup>rd</sup> November 2011. The agreements were in writing and the Plaintiff took possession of the suit land. The 1<sup>st</sup> Defendant admitted that she moved out upon sale and receipt of the purchase price in full to her alternative parcel of land.
28. It is on record that the 1<sup>st</sup> Defendant attempted to refund the purchase price through the Chief but the Plaintiff neither went to the Chief's office nor accepted the refund as contemplated by the 1<sup>st</sup> Defendant
29. The 1<sup>st</sup> Defendant claimed that the family objected to the sale and that is why she wanted to refund the money to the Plaintiff. If that was the case, then why did she give vacant possession to the Plaintiff who took occupation and started cultivating the suit land without any objection for a period of 7 years.
30. The 1<sup>st</sup> Defendant sold the land and identified the parcel that she was selling by delineating the boundaries. From the evidence on record, the 1<sup>st</sup> Defendant became greedy and wanted to sell the land at a higher price that is why she attempted to refund the money to the Plaintiff. It follows that the agreement was never rescinded hence it was still valid and enforceable.
31. The moment the 1<sup>st</sup> Defendant entered into the Sale Agreement, she was bound by the terms and conditions of the agreement. One of the conditions was to ensure that a transfer was effected in the name of the purchaser, which she never did. It should be noted that the 1<sup>st</sup> Defendant was cunning as she did not disclose that by the time she was selling the suit land she already had a title to the suit property. This amounts to misrepresentation. Section 26 is applicable in this respect.
32. On the issue whether the Plaintiff is entitled to an order of specific performance, in the case of *Reliable Electrical Engineers Ltd -vs- Mantrac Kenya Limited (2006) eKLR* the court held that: -

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.



Even when damages are inadequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

33. It is not disputed that the Plaintiff entered into a valid Sale Agreement for the purchase of the suit land. The said agreement was in writing, the Plaintiff paid the full purchase price and the same does not suffer from any illegality. The Plaintiff took possession immediately after purchase, the 1<sup>st</sup> Defendant confirmed that she gave vacant possession and moved to her alternative plot.
34. The Plaintiff has met the conditions for grant of specific performance as there is no illegality in the agreement and the 1<sup>st</sup> Defendant will suffer no hardship if the order is granted.
35. Section 80 of the *Land Registration Act* provides that
  - “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
36. Having found that the 1<sup>st</sup> Defendant entered into an agreement without disclosing that she had a title to the suit land amounted to misrepresentation. The Defendant cannot be allowed to keep the money and the land after having sold the same for valuable consideration, which she acknowledged. The 1<sup>st</sup> Defendant has to honor her obligation to transfer the land to the 1<sup>st</sup> Plaintiff. I therefore make the following specific orders
  - d. A permanent injunction is hereby issued against the Defendant her agents and or servants and anyone deriving interest from the Defendant restraining them from trespassing encroaching and selling parcel of land known as Plot Number Roka/Uyombo/154.
  - e. Specific performance for the contract between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff.
  - f. The 2<sup>nd</sup> Defendant is hereby ordered to rectify the register and insert an entry cancelling the 1<sup>st</sup> Defendant’s name and inserting the 1<sup>st</sup> Plaintiff’s name in her place.
  - g. Costs to be paid by the 1<sup>st</sup> defendant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF MARCH 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

