



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 17 OF 2017**

**ELIJAH MUTHOKA DANIEL.....PLAINTIFF**

**VERSUS**

**JUSTUS MUTUA MUSYIMI.....DEFENDANT**

**JUDGMENT**

1. Elijah Muthoka Daniel, (hereinafter referred to as the Plaintiff) commenced this suit by way of a plaint dated 13<sup>th</sup> November, 2015 and filed in court on even date. He prays for judgment against the defendant for:-

- a) **That the Court grants an order of injunction against the Defendant restraining him whether by himself, his agents and/or servants from interfering or otherwise dealing with the land title number Makueni/Unoa/3640 duly registered in the name of the Plaintiff.**
- b) **General damages for the loss of use of the suit land to be assessed by the Court.**
- c) **Special damages at Kshs.370,922/20.**
- d) **Costs of this suit.**
- e) **Interest at court rates.**

2. The Plaintiff's claim is denied by the Defendant in his defence and counter claim dated 23<sup>rd</sup> June, 2016 and filed in Court on the 24<sup>th</sup> June, 2016. In his counter claim, the Defendant prays for the Plaintiff's suit against him to be dismissed and judgement be entered against the Plaintiff for:-

- a) **A declaration that the sale and registration of LR No. Makueni/Unoa/3640 in favour of the Plaintiff is null and void ab initio.**
- b) **An order of cancellation of the title to LR No.Makueni/Unoa/3640, 2464, 2465, 2466, 2467 and 2468 and thus reverting the same to the title No.Makueni/Unoa/335.**
- c) **Costs of the suit.**

3. On the 28<sup>th</sup> September, 2016, the Plaintiff filed a reply to the defence and counterclaim, the same being dated 20<sup>th</sup> September, 2016.

4. Hearing of the Plaintiff's case commenced on the 27<sup>th</sup> July, 2017. The Plaintiff adopted his undated statement filed in Court on 13<sup>th</sup> November, 2015 as his evidence.

5. His case was that he bought land parcel number Makueni/Unoa/3640 from one David Dick Musyimi. He said that Musyimi excised the same from land parcel number Makueni/Unoa/2467. He went on to say that he and Musyimi entered into a land sale agreement over the suit land. That upon assuming possession of the suit property, he planted indigenous trees which he intended to use for commercial purposes as well as to secure the property. That the Defendant embarked on a mission to drive him out of his property. The Plaintiff pointed out that the Defendant destroyed the investments that he had made on the suit property and also blocked the only access road to the suit property. He said that upon learning of the destruction of the property, he made a complaint to the OCS Makueni which led to the arrest and subsequent arraignment of the Defendant in Makueni Law Courts for the offence of malicious damage to property in criminal case number 55 of 2014.

He went on to say that he also procured the services of an analyst from the Kenya Forest Service who assessed the destruction carried out.

6. The Plaintiff produced copies of title deeds for Makueni/Unoa/2467 and 3640, sale agreement dated 19<sup>th</sup> March, 2011, copy of deed plan, payment receipt issued by Geospatial, payment receipt issued by Makueni Lands Office, copy of the consent letter, copy of receipt issued by Makueni County Government, a copy of valuation report by Kenya Forest Service, a copy of mutation form dated 14<sup>th</sup> July, 2015, a copy of receipt from Kenya Forest Service and copies of receipts of fare incurred as P.Exhibit Nos. 1 to 12 respectively.

7. On the other hand, the Defendant's case was that land title number Makueni/Unoa/3640 is a sub-division of land title number Makueni/Unoa/2467 which was also a subdivision of Makueni/Unoa/335. He said that the latter parcel of land belonged to his deceased mother, Kanini Musyimi. That on 04<sup>th</sup> September, 1983, he was gifted with a portion of land in Kangundo by his grandmother. That one of his brothers, Stephen May Musyimi, sold the land in question without his consent. That after Stephen had sold the land gifted to him, the former started pushing for the sub-division of Makueni/Unoa/335 amongst himself, the Defendant and a third brother. He added that as brothers, they all had agreed that land equivalent in acreage to the one that the Defendant had been gifted in Kangundo would first be excised from Makueni/Unoa/335 and given to him upon which the brothers would proceed to share the remainder of the land equally between themselves.

8. The Defendant went on to say that Stephen wasn't happy with the proposal they had arrived at and he instead instigated for his arrest on allegations of having committed a crime of robbery. That he was charged in Makueni criminal case number 628 of 2010 where his two brothers, Stephen May Musyimi and David Dick Musyimi were the witnesses. After trial, the Defendant said that he was convinced and sentenced to serve 7 years imprisonment. He however appealed against the conviction and sentence in Machakos High Court Criminal Appeal number 63 of 2012 and was finally acquitted. That when he left Prison, he learnt that his mother had died on the 15<sup>th</sup> August, 2011 and had already been buried. He also learnt that land parcel Makueni/unoa/335 had already been subdivided to create Makueni/Unoa 2464, 2465, 2466, 2467 and 2468. He said that he also learnt that land Parcel Makueni/Unoa/2467 had been registered in the name of his brother David Dick Musyimi who then sold it to the Plaintiff pursuant to the agreement dated 19<sup>th</sup> March, 2011. The Defendant added that he has never been shown his land to date as a result of the subdivision. According to him, the subdivision of Makueni/Unoa/335 was illegal, null and void ab initio.

9. The Plaintiff's evidence in cross-examination was that he has pleaded for Kshs.370,922/20 in his plaint. He said that he conducted due diligence before he bought the suit land from one Dick. He admitted that the suit land was part of Makueni/Unoa/335 and could not tell by what means it was subdivided. He said that he was not aware of any objection to the subdivision of Makueni/Unoa/335 into five portions. He said that he did not see the Defendant destroy his property even though he found him cultivating on the suit land. He said that the receipts in the supplementary list of documents were obtained after he filed this suit. He said that he was the one who paid for the expenses indicated in the receipts even though some of them are not issued in his name.

10. The Plaintiff admitted that the Defendant's counterclaim relates to a succession cause.

11. The Plaintiff in his evidence in re-examination told the Court that he believed that it was the Defendant who destroyed his property as he had been informed about it by someone who saw the Defendant. He said that the seller gave him the mutation form while he was carrying out a search. It was also his evidence that he never saw any objection to the suit property.

12. Stephen Munyao Mwanza (PW 1) was called by the Plaintiff as his sole witness. The witness told the Court that he is a Forester in charge of Mbooni East and Nzau Sub-Counties. He said that he was sent by the officer in charge of the County to go and carry out the assessment of the Plaintiff's trees that were said to have been damaged. He went on to say that he prepared the report dated 25<sup>th</sup> September, 2014. He revealed that the report (PExhibit No.9) concerned Land parcel number Makueni/Unoa/2476 titled in the name of David Dick Musyimi whom he did not know. He said that the Plaintiff is said to have bought the land from the said David Dick.

13. Stephen (PW 1) told the Court that majority of the damaged trees were indigenous resulting in environmental degradation. He pointed out that he assessed value of the damage occasioned at Kshs.243,449/20 based on the royalty rate prepared by the government for the year 2014/2015. He added that the Plaintiff paid 5% of the total value of the assessment.

14. Stephen (PW 1) reiterated in his evidence in cross-examination that David Dick is the registered owner of the land in question. The witness went on to explain about the formular that is used to calculate the value of the trees. He said that he saw a house on the ground but could not be able to tell who the owner was. He was not re-examined.

15. The Defendant's evidence in cross-examination was that he did not have the agreement he had with his brothers concerning their family land. He said that the suit land was never registered in his name and added that the land in question is ancestral. He denied having ever damaged the Plaintiff's property. According to him, all what he did was to remove illegal property from the farm. He said that his prayer was to have all the title deeds issued from mother title deed number 335 cancelled.

16. By the time of writing this judgement, it is only the Plaintiff's Counsel who had filed his submissions.

17. On the 04<sup>th</sup> May, 2017 both the Plaintiff and the Defendant filed their separate lists of issues for determination. The former's list is dated 25<sup>th</sup> April, 2017 while the latter's list is dated 03<sup>rd</sup> May, 2017. I shall address the issues raised in the two lists collectively.

18. The submissions by the Plaintiff's Counsel were that the Plaintiff is a bonafide purchaser for value of the suit land and, therefore, he deserves protection of the law as provided in Sections 24, 26 and 53 of the Land Registration Act. He termed the Defendant's claim against the Plaintiff as devoid of any legal rationale. The Counsel relied on the case of **Nairobi Permanent Market Society and Others Vs. Salima Enterprises (1995-1998)**<sup>1</sup> EA 232, as cited in the case of **Kasarani Mall Ltd Vs. Daniel Otieno Muganga & 3 others (2017)** eKLR where the Court held that:-

***“Section 23(1) of the Registration of Titles Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title..... the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”***

19. The Counsel was of the view that the Plaintiff has satisfied this Court that he deserves the issues of the orders sought.

20. From the evidence on record, there is no doubt that the Plaintiff is the registered owner of land parcel number Makueni/Unoa/3640. The Plaintiff says that he bought the suit land from one David Dick Musyimi and that he carried out due diligence on the parcel of land before he purchased it. On the other hand, the Defendant has stated that the land was excised from Makueni/Unoa/2467 which had also been excised from Makueni/Unoa/335 which was owned by his late mother, one Kanini Musyimi. The Defendant says that he and his two brothers who include Stephen May Musyimi and David Dick Musyimi had agreed that the Defendant would get a parcel of land equivalent to the parcel of land that he owned in Kangundo and which land Stephen May Musyimi sold without his knowledge. He went on to say that this agreement was not honoured by his two brothers.

21. The Defendant further says that the subdivision of the land was carried out while he was serving sentence in Makueni criminal case number 628 of 2010. That when he was set free upon successful appeal in Machakos High Court Criminal Appeal No.62 of 2012, he found that his mother had already died and the family land had been subdivided. A look at copies of title deed numbers Makueni/Unoa/2467 and 3640 show that they were issued on the 23<sup>rd</sup> September, 2015 and 28<sup>th</sup> June, 2011 respectively.

22. The copy of the death certificate dated 7<sup>th</sup> December, 2015 and produced as D.Exhibit No.5 shows that Grace Kanini Musyimi died on the 15<sup>th</sup> August, 2011. A copy of the certificate produced as D.Exhibit No.3 shows that title deed number Makueni/Unoa 335 was closed on the 16<sup>th</sup> February, 2011 and numbers 2464, 2465, 2466, 2467 and 2468 issued. The proprietor(s) of the new title numbers have not been indicated in the certificate of search. One would have expected the Plaintiff to produce copies of consent of applications to transfer the new title numbers to their respective owners. To my mind, there is a lacuna as to how David Dick Musyimi came to own land parcel number Makueni/Unoa/2467. Suffice it to say, there is nothing to show that the same was transferred to him by Kanini Musyimi before she passed on. That would therefore put into question as to whether or not David Dick Musyimi had the capacity to enter into a land sale agreement with the Plaintiff and whether he could transfer a valid title to him.

23. In the case of **Munyu Maina Vs. Hiram Gathiha Maina (2013)eKLR**, the Court of Appeal stated,

***“When a registered proprietor root of title is under challenge, it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership..... in such circumstances, the registered proprietor must go beyond the instrument of title and prove legality of how he acquired the title”.***

24. In the matter before me, the Plaintiff who is the registered proprietor of Makueni/Unoa/2467 has failed to go beyond the instrument of title so as to prove the legality of how he acquired the title. Given the above circumstances, his claim against the Defendant must fail. I am satisfied that the Defendant has on a balance of probabilities satisfied this Court that he has a cause of action against the Plaintiff as pleaded in the counterclaim.

25. Title number Makueni/Unoa/3640 and 2467 as well as 2464, 2465, 2466 cannot stand and ought to be cancelled in light of the evidence before me.

26. From the foregoing, I dismiss the Plaintiff’s suit against the Defendant with costs. I also proceed to enter judgment for the Defendant and against the Plaintiff in terms of prayers (a), (b) and (c) of his counterclaim.

27. It is so ordered.

**Signed, dated and delivered at Makueni this 22<sup>nd</sup> day of November, 2018**

**MBOGO C. G.,**

**JUDGE**

**In the presence of:**

Mr. Kinyanjui for the Plaintiff

Ms. Kyalo for the Defendant

Mr. Kwemboi – Court Assistant

**MBOGO C. G.,JUDGE.**

**22/11/2018**