



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC. NO. 17 OF 2014**

**HORYAL ENTERPRISES LIMITED.....PLAINTIFF**

**- V E R S U S -**

**KEA NDAO .....1ST DEFENDANT**

**MUNYOKI MBOGA .....2ND DEFENDANT**

**HABEL MWAWIRA NDAO .....3RD DEFENDANT**

**JUDGEMENT**

1. The plaintiff sued the three defendants asking the court to issue the following orders against the defendant.

*"a) a declaration that the plaintiff is the registered owner of L.R. No. 29212 Mariakani measuring one decimal nine two five (1.925) Ha.*

*b) an eviction order directing the defendants to vacate the suit premises.*

*c) a mandatory injunction compelling the defendants by themselves, their agents, children, servants to demolish the permanent and semi-permanent structures erected on the above mentioned plot and to hand over vacant possession.*

*d) a permanent injunction restraining the defendants by themselves, their children, servants and agents from trespassing, or entering upon, constructing, farming and or in any other manner dealing with plot no. L.R. No. 29212 Mariakani measuring one decimal nine two five (1.925) ha.*

*e) Any other order the court may deem just and expedient in the circumstance to grant.*

*f) Costs of and incidentals of this suit."*

2. The suit is defended and the defendants filed a joint statement of defence denying the claim. The defendants set out the particulars of why they denied the claim in paragraph 5 of the defence. They asked the court to dismiss this suit with costs.

3. The parties thereafter proceeded to adduce oral evidence. One of the plaintiff's directors a Mr. ALI MOHAMED YUSUF testified as PW1. He told the court that he is an investor and does investments through his company. He produced the certificate of incorporation of the company as Pexh1. He was told by a broker about a property in Mariakani which he went and viewed. He was also shown letters from the Chief, D.O. and County Council regarding this land which letters indicated that the land was owned by the family of Paul Wambua Nzana. There were also correspondence requesting the county council to set apart 1.9394 ha.

4. The witness continued that when he viewed the land it had a small house with children in it. The children took him to the 1st defendant. PW1 stated that he asked the 1st defendant for the documents for the land three times but he did not have or show him any. He also inquired from the neighbourhood and was told the land belongs to Paul Nzana, so he decided to buy it. They agreed at a price of Kshs. 12 million and a sale agreement was drawn. He produced the agreement as Pexh 2. It is his case that the land had been surveyed by the family and the family allowed him to process title in his name which title he did get comprised in grant no. CR. no 61466 and L.R no 29212. He produced a copy of the title as Pexh 3. Once he had the title in his name, he asked the 1st defendant to move out. He continued that he had two R.I.M. maps one showing the house is wholly on the land and the 2<sup>nd</sup> showing the house is partly on his land. PW1 said that before filing this case, he asked the defendants to move out but instead they refused and at one point assaulted him. He also produced a power of attorney authorizing him to testify as Pexh 4.

5. Mr. Omwenga put questions to the witness and he answered that the agreement was signed on 17th May 2011. At the time of signing the agreement, the property did not have a number and it had a house on it. The witness conceded that there is no clause in the agreement which authorized him to process the title document directly to his name. He has not been given possession of the land. He also did not inspect if there were any beacons on the ground. Neither did he have the surveyor's report explaining the extent of the encroachment by the defendants. PW1 is aware of the adjudication process ongoing in the area. He said he intended to use the land for a business which the company has not decided. PW1 admitted being aware of the existing dispute between PW2 and the 1<sup>st</sup> defendant but was unaware of the 1966 case. He was told that PW2 was selling this land on behalf of her family. In re-examination, he said he bought this land because of the assurance he got from the neighbours and the District Officer.

6. **WAYUA PAUL NZANA PW2** said her husband was called Paul Wambua Nzana who disappeared in 1990. She was the youngest of the three (3) wives of Paul. They lived in Mariakani on a plot bought by her husband measuring 5 acres situated along Mombasa- Nairobi highway. The plot was already bought at the time of her marriage. It was bought from a person known as Ndao Mwawiro who lived on a plot on the other side of the road. Ndao retained a portion of this plot to himself measuring an acre which later the 1<sup>st</sup> and 3<sup>rd</sup> defendants crossed over to live on when their land was acquired for the construction of the army barracks. They lived peacefully until 1989 when the defendants started threatening them after the disappearance of her husband.

7. PW2 reported the 1st defendant to the local administration to stop him from building on their land but he did not stop. She had letters written to the 1<sup>st</sup> defendant which she produced as a bundle as Pexh5. A clan committee was also appointed to resolve the dispute and she produced their findings as Pexh. 6. She later engaged a private and subsequently government surveyor to survey the plot after she got approval from the Town Council of Kilifi. She paid Kshs. 5000 for the application and got the approval on 3<sup>rd</sup> December 2010. The receipt was produced as Pexh. 7 and approval minutes Pexh. 8. PW2 continued that she sold the land to the plaintiff as her property but it belonged to her husband. She has not been paid the purchase price in full because the purchaser is yet to get possession. She had agreed to have the purchaser process title directly in to his name. Further that the 1966 case concerned the whole of Mariakani area not the suit plot in particular. She wants the 1<sup>st</sup> defendant ordered to remove his house from this land.

8. In cross-examination, PW2 admitted having no documents to prove that Paul bought this land from Ndao. She said that they moved out of this land in 1989 and the defendants stay on a portion of this land. That before 5th November 2010 she had not made any application to the Council. Ndao Mwawiro

belongs to the defendants' family as he was their father. She confirmed that 2 acres of land belonged to the defendants. She also confirmed that the adjudication process is still on going with the last visit made this year (2014).

9. PW2 is aware about registration of an objection by the defendants but said her plot was not included in the list. She had placed beacons before selling the land. She agreed with the advocate that the person to verify trespass is the surveyor who measured this land. Adjudication officers were from Kilifi and that is where the title should come from. She did not know why PW1 got the title for the land from Nairobi. The defendants did not build any houses on the suit land after 2011 and their houses have been on the land for over 20 years. In re-examination, she said the approval was done on 3<sup>rd</sup> December 2010. The Plaintiff then closed his case.

10. The 3<sup>rd</sup> defendant testified as DW1. He lives in Mariakani sub- location. Kea Ndao the 1<sup>st</sup> defendant is aged 76 years is his brother. DW1 is 64 years old and the 2<sup>nd</sup> defendant is a son to his uncle. He denied that his father sold any land to Paul as there is no document to show this. He denied that they chased away the family of Paul Wambua. He stated further that they re- located to their current home when their initial land was acquired. DW1 produced the proceedings in case No. 23 of 1966 as Dexh. 1. In these proceedings he said a Mr. Mwadzaya represented them. They have also authorized their cousin Kifili to do a letter on their behalf which letter he produced as Dexh. 2. DW1 continued that the land in question had not been surveyed but it is being surveyed now. DW1 denied they are entitled to only 2 acres out of the entire land as Paul Nzana had never owned 5 acres. There have been sittings before the Chief regarding the dispute. The Chief said the land belongs to Paul but the family of Paul has never sued them for eviction orders.

11. The 1<sup>st</sup> defendant said he has lived on this land only for 64 years and on the land where the barracks were built. It is their defence case that the plaintiff's title is fraudulent because titles for the area should come from Kilifi and not Nairobi. Further that they registered an objection on 3<sup>rd</sup> August 2014 and paid Kshs. 40,000/- for the 80 plots. He had a copy of the letter of objection which he produced as Dexh 3. DW1 continued that his two nephews charged with a criminal case of creating disturbance were acquitted because the court acknowledged that a dispute existed over this land.

12. DW1 avers that the plaintiff has failed to establish that where they live is the same land as the one comprised in the title. He has also not seen the surveyor's report. Further that the plaintiff purchased their land without their consent. He urged the court to dismiss this suit and the plaintiff be refunded his money by whoever received it. In cross-examination, DW1 stated that case no. 23 of 1996 concerned the whole area and not their plot specifically. He admitted that before the barracks were built, none of them lived on the suit land. They re-located when their father was still alive. He knew Paul had three (3) wives and lived on this land for about six years. Paul came to live on this land when their father was still alive. He never heard that his father attempted to evict Paul. The house on the land belongs to the 1<sup>st</sup> defendant and was built when their father was still alive.

13. DW1 said they are claiming the whole land which is measuring approximately 7 acres. In the hearings before the Chief, District Officer and District Commissioner, they had an opportunity of being heard. DW1 said Paul Nzana did not have a title to any land in Mariakani. The District Land Adjudication & Settlement Officer said they were not touching land with a title, hence they did not survey the two (2) acres. The objection notice does not include the plaintiff's title number. The map and the court proceedings show the land belongs to them. The 1<sup>st</sup> defendant's house is built on the part which is two (2) acres. DW1 maintained the land is theirs. In re-examination, DW1 said the Wambua families have not lived on this land for the past 10 years. Besides the District Land Adjudication & Settlement Officer the defence case is that no one has measured this land. Lastly they say the Wambua family had no land to sell. At this point, the defence closed their case.

14. The parties then agreed to put in written submissions. I have read the submissions and taken note of the issues raised therein. The plaintiff in his submissions raised 5 questions which they gave answers to based on the evidence on record. The defendants also besides giving a summary of the evidence raised

five issues in their submissions. In answering some of the issues, the defendants cited several case laws which I have also taken time to peruse and consider their applicability to the instant case. I will pick out some of the issues raised in those submissions which are similar and which I find as forming the questions for determination;

*a] Whether Wayua Paul Nzana had any land to sell to the plaintiff.*

*b] Do the defendants have any rights over this land and/or have they trespassed on the plaintiff's land.*

*c] Can all the prayers sought in the plaint against the defendants be granted?*

15. In answer to the 1<sup>st</sup> question, it comes out in the evidence that at one point in time Paul Wambua Nzana lived on the plot in dispute with his family. PW2 said that she lived with her husband on this plot and only moved away after her husband disappeared in 1990. It is her evidence that land they lived on was measuring five (5) acres sold to her husband by Ndao Mwawiro. DW1 said in evidence in chief that they had sittings before the area Chief concerning the dispute over this land and the Chief held that the land belonged to Paul. In cross-examination the DW1 admitted he knew Paul Wambua but could not remember the year he came to live on this land and that Paul came to live on the land when the defendant's father was still alive.

16. The plaintiff's witness also produced in evidence a bundle of letters most of which were written in 2010. Amongst the letters is one addressed to the District Officer Mariakani division by the local chief dated 11.8.2010 in which the chief wrote that he heard been hearing the land dispute and she confirmed that the land belonged to Paul Wambua Nzana's family. PW2 is also produced the minutes of clan elders meeting vide their letter dated 7.2.2002 addressed to the Town Clerk Mariakani. In this minutes, the elders confirmed that the land belonged to Paul Wambua Nzana. The land in this area of Mariakani sub-location is still under going adjudication process therefore they do not have title deeds. Ownership can only be verified by following the sequence of facts established. Although the defendants denied their father did not sell this land, they had no explanation why they allowed PW2's family to live on this plot. They also have not contested the findings of the clan elders and the local administration that were all in favour of PW2. In this instant, I am satisfied that indeed PW2 owned the disputed land. Consequently I find that she had land to sell to the plaintiff.

17. Before selling this land to the plaintiff, PW2 produced documents showing she applied to the Town Council of Mariakani for the parcel of land to be set apart vide her letter dated 2nd December 2010 under the Trust Land Act. The application received approval as contained in the letter dated 3.12.2010 from the council. The defendant pointed out that the approval refereed to a meeting dated 5.11.2010 before the application was made. PW2 could not explain the anomaly but in my view the error or mistake is not fatal to make the entire process null and void. Once she had all these documents in her possession, PW2 decided to sell the land to the plaintiff and the plaintiff accepted to buy. An agreement was drawn (PEX 2 )

18. The plaintiff subsequently processed and obtained the title for the sold land which he exhibited a copy as Pexh 3. The defendants wondered why the plaintiff purchased their land without their consent. They further averred that the plaintiff did not prove that the title deed is in respect to the same parcel of land where they live. Lastly they doubted the title because it was obtained in Nairobi and not Kilifi district registry or how the plaintiff got a title in the area where adjudication process was not complete. The defendants submitted that the plaintiff failed to show a copy of official search done to prove that indeed the title deed is genuine. The provision of the law under Section 26 of the Land Registration Act no 3 of 2012 gives grounds for any person not satisfied with the authenticity of a title to question it. The defence filed did not question the title in the manner provided neither did they file a counter-claim to seek orders to cancel the plaintiff's title. The defence evidence other than for the difference in date did not identify which process was irregular. Once the land was set apart whether adjudication process was not complete, the plaintiff was at liberty for process title for the specific land.

19. Do the defendants have any rights over this land or have they trespassed. PW2 gave evidence that Ndao (the defendants' father) sold five (5) acres and retained one (1) acre for himself. It is the one (1) acre where the 1st defendant built on. PW2's claim was only in respect of the approximate five (acres) land. I have already found that PW2 was entitled to this land which she later sold to the plaintiff. The defendants are entitled only to the remainder after five (5) acres was taken out of the parcel since the entire land was more than five acres. It did not come out both from the plaintiff's case and the defendants' evidence what interest the 2<sup>nd</sup> defendant has on this land. I therefore safely conclude he is not entitled to any portion of the land in dispute.

20. As to whether they trespassed on to the plaintiff's land, I am in doubt if this fact was proved. PW1 said that he had two maps one showing the small house is wholly on his land with the other map showing it is partly on the land. He has not inspected the beacons on this land. PW2 stated that it is the 1st and 3rd defendants who built on this land. She lived with them until 1989 and the defendants had a boundary dispute with her husband. DW1 said it is the 1<sup>st</sup> defendant who is living on the land. PW1 said he found small house on the land when he went to view it the first time. It did not come out clearly in evidence whether besides the small house pre-existing before the title some houses have been built. Secondly no survey report was produced to clarify whether the 1<sup>st</sup> defendant's house is exactly located on the suit land. The plaintiff did not lead any evidence that established the actions constituting trespass committed particularly by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

21. In the case of *Salim & Ano vs Mohamed KLR (E & L)1* cited by the defendants, Waki J at Paragraph 35 said that "*if there was encroachment then it had to be decided whether it amounted to trespass. His answer was negative because the house existed long before plot no. 1288 came into existence.*" The similar scenario applies that the 1st defendant's house existed before the title was obtained. In fact the house existed before the plaintiff purchased this land. The other cases cited by the defendants do not apply as they all related to grant of injunctions. We are not dealing with an interlocutory application where temporary orders of injunction are sought but situation where final orders are sought. I do find that the 1<sup>st</sup> defendant is not a trespasser as there is no evidence he built another house separate/different from the one he lived in when PW2 was still on this land. Similarly, there is no mention on exactly what the 1<sup>st</sup> and 3<sup>rd</sup> defendants have done on the land.

22. Lastly can the plaintiff get all the orders sought against the defendants? My answer is partly yes and partly no. The negative bit is that the plaintiff is not entitled to obtain the orders as contained in prayers (b) & (c) in the amended plaint in so far as they relate to the 1<sup>st</sup> and 3<sup>rd</sup> defendants for the reasons given in the body of this judgement. I do grant prayer (a) as pleaded, prayer (d) as against the 2<sup>nd</sup> defendant. I direct further that if there are any structures put by the 2<sup>nd</sup> defendant on the suit land, this court gives the Plaintiff liberty to remove them as there was no evidence led to establish how he is entitled to claim any portion of this land. I also allow prayer (e) of the amended plaint to the extent that it does not apply to the portion where the small house existing before the filing of this suit is located and so that the plaintiff does not use it to evict the 1<sup>st</sup> and 3<sup>rd</sup> Defendants but the permanent injunction is intended to stop the defendants jointly and severally from further extending into the plaintiff's land if at all and or interfering with the plaintiff's user and occupation of the portions not in their physical possession as set out in paragraph 19 and 20 above. Since this suit succeeds in part, I order each party to bear their costs.

**Dated and delivered in open court at Mombasa this 26th of Feb. 2015.**

**A. OMOLLO**

**JUDGE**

**26.2.2015**

