



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**ENVIRONMENT ND LAND CASE NO. 19 OF 2013**

**JOSEPH MUCHOE WANYAMA** (Suing for and on behalf of members  
of Yuya Farmers Co-operative Society Ltd ..... **PLAINTIFF**

**VERSUS**

**MERCIA MULIRO** (Sued as personal representative of  
**MASINDE MULIRO** ..... **DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The Plaintiff Joseph Muchoe Wanyama brought this suit against the defendant on behalf of members of Yuya Farmers Co-operative Society Limited pursuant to leave of court granted on 9/4/2008.
2. The defendant is sued in her capacity as the administratrix of the estate of the late Masinde Muliro whom I shall hereinafter refer to as “Muliro” who died in 1992.
3. The history of this case can be traced to a sale agreement signed on 24/1/1980 between Muliro and Yuya Farmers Co-operative Society (the society) in respect of sale of 700 acres comprised in title No. LR 9008 situated in Cherangani area East of Kitale Municipality.
4. The Plaintiffs are claiming the following reliefs;-

(a) A declaration that the plaintiffs are entitled to 201.7 acres to be excised from LR NO. 11209 Sibanga farm or its monetary equivalent.

(b) Alternatively, Kshs.490,000/= together with interest thereon or interest at commercial rates from 24/1/1980 until payment in full.

(c) Costs and interest

(d) Any other or further relief that the Honorable court may deem fit and just to grant.

**PLAINTIFFS CASE**

5. The Plaintiffs representative Joseph Muchoe testified that in 1980 they heard that Muliro was

- selling some 700 acres of his land comprised in LR NO.9008. On 21/4/1980 the society officials entered into a sale agreement in which Muliro agreed to sell his land to the society at a consideration of Kshs.1,700,000/=.
6. The society paid a down payment of Kshs.480,000/= on execution of the agreement to Messers Kapten & Co. Advocates. A further Kshs.10,000/= was given to Muliro on 4/2/1980. Muliro did acknowledge receipt of the Kshs.10,000/= on a piece of paper produced as exhibit 2.
  7. According to the sale agreement (exhibit 1) the balance of the purchase price of Kshs.1,220,000/= was to be paid to Messers Kapten & Co. Advocates who was to hold it until consent of the land control board was obtained.
  8. Before the sale could go through, the property which the plaintiffs were buying was advertised for sale. The plaintiffs took part in the public auction and managed to get the property at Kshs.650,000/=. The property passed on to the plaintiffs through a vesting order (exhibit 3).
  9. The plaintiffs then approached Muliro for refund of the Kshs.490,000/= already paid to him. Muliro allegedly verbally told the plaintiffs that he was going to give them part of his farm LR 11209 commonly known as Sibanga farm which was neighbouring LR NO. 9008 which Muliro was in the process of selling to them.
  10. Muliro died before he could either refund the plaintiffs their money or give them land Sibanga at Farm. It is on this basis that they brought this suit against Muliro's widow Mercia who is the administratrix of his estate.

### **DEFENDANT'S CASE**

11. Mercia Muliro the administratrix of the estate of Muliro while admitting that Muliro wanted to sell LR NO 9008 to the plaintiffs denied knowledge of Muliro receiving Kshs.490,000/= from the plaintiffs. She stated that she is aware that Kshs.480,000/= was paid to Messers Kapten & Co. Advocate, but that she did not know if the money was paid to Muliro.
12. The defendant stated that the plaintiffs invaded her Sibanga farm but were later removed. She testified that she is aware that Muliro had obtained an eviction order in respect of LR. 9008 in civil case No.533 of 1981. She produced the eviction order as defence exhibit 3. The defendant contends that she has no land to give the plaintiffs.
13. The defendant called her son Mukasa Mwambu Muliro who contended that there was no evidence that his father received the money which was deposited with Messers Kapten & Co. Advocates. He also contended that the transaction did not receive the consent of the land control board. He urged that the plaintiffs case be dismissed.

### **ANALYSIS OF EVIDENCE**

14. There is no dispute that Muliro wanted to sell 700 acres of his land comprised in LR NO. 9008 to the plaintiffs. The sale agreement signed on 24/1/1980 is clear.
15. The Plaintiffs contend in their amended plaint that Muliro did not disclose to the plaintiffs that the land he was selling to them was charged to the bank. The plaintiffs are wrong in this because the sale agreement is clear that the property had been charged to Standard Chartered bank. It is apparent that the advocate who drafted the pleadings did not have enough instructions on the true position of the transaction.
16. The Plaintiffs representative testified that they bought the property after it had been advertised by Standard Chartered bank. This is not the position. The truth of the matter is that the property that is LR 9008 was sold pursuant to a decree in Nairobi High Court Civil Case No. 1238 of 1983 between Dickson Ochieng and Masinde Muliro.
17. The Standard Chartered bank who had a charge over the property were requested by the High Court to discharge the property so as to facilitate its sale on the understanding that they were going to be paid money from the proceeds of the sale to offset the loan which Muliro owed the bank. This is how the bank prepared a partial discharge produced as exhibit 4.
18. The property which Muliro wanted to sell to the plaintiffs was sold in a public auction on 26/1/1982. The property was bought by the plaintiffs at Shs.650,000/=. The property vested in the plaintiffs as per a vesting order dated 27/10/1983.
19. The defendant contends that there is no evidence to show that Muliro received Kshs.490,000/=

and that therefore the plaintiffs are not entitled to a refund of the same. The defendant further contends that the plaintiffs are not entitled to be given alternative land.

### **ISSUES FOR DETERMINATION**

20. The issues which emerge for determination are as follows;-

- (a) Did Muliro receive Kshs.490,000/= from the plaintiff?
- (b) Are the plaintiffs entitled to alternative land of 201.7 acres from the defendant?
- (c) Are the plaintiffs entitled to any other alternative form of compensation?
- (d) Is the claim herein statute barred?

21. There is evidence which is not disputed that the plaintiffs entered into a sale agreement with Muliro. Clause 5 of the sale agreement stated that the plaintiffs were to pay Kshs.480,000/= which was to be paid to the vendor (Muliro). There is evidence that on the day of execution, the plaintiffs paid Kshs.480,000/= in cash to Messers Kaptan & Co. Advocates who issued them with a receipt. There is also evidence that on 4/2/1989 Muliro received Kshs.10,000/= and he acknowledged receipt on a piece of paper. A copy of the receipt and acknowledgement were produced as exhibit 2.

22. Messers Kaptan & Co. Advocates were acting for Muliro who had agreed that the money was to pass through the firm for onward transmission to him in the manner he wanted. I therefore find that Muliro received a total of Kshs.490,000/= from the plaintiffs.

23. The plaintiffs claim of 201.7 acres is based on the fact that Muliro wanted to sell to them 700 acres at Kshs.1,700,000/= since they paid him Kshs.490,000/=. They are therefore entitled to 201.7 acres. This is on the basis that each acre was selling at about Shs.2,428/=. I do not think that the plaintiffs are entitled to alternative land or any form of compensation.

24. The transaction between the plaintiff and Muliro involved agricultural land. Under the provisions of the land control Act, consent of the land control board was necessary. This had to be given within 6 months of the agreement. It is clear that no consent of the land control board was obtained. The transaction therefore became void for all purposes at the expiry of 6 months.

25. The Plaintiffs could therefore only claim refund of the amount paid as per section 7 of the Land Control Act Cap 302. It has been held by the court of Appeal that no compensation is recoverable based on a transaction which has become void see the *case of Kariuki -Vs- Kariuki [1983] KLR 225*. It therefore follows that the plaintiffs claim for alternative land or compensation in monetary terms is not maintainable.

26. The Plaintiffs claim was long caught up by limitation. The Plaintiffs however moved to court vide Miscellaneous application No. 705 of 2007 at Eldoret and obtained leave to file the suit against the defendant out of time. The plaintiffs counsel submitted in his submissions that leave to extend time within which to file the suit was not challenged. I do not agree with the submissions of counsel for the plaintiffs. The defendant pleaded limitation in her defence. In his evidence DW2 Mukasa Mwambu Muliro contested the claim which he said was brought after 33 years. This was a challenge to the leave which had been granted and it falls on me to decide whether the same was properly granted or not.

27. The provisions of Limitation of Actions Act Cap 22 are clear that in matters relating to contract there can be no extension of time. Ordinarily it was expected that the application granting extension should have been filed with the pleadings in this case so that when ex-parte grant of extension is challenged in the proceedings, the court can consider it. This was not done and I am therefore unable to know the grounds upon which the extension of time was given. However this notwithstanding, the extension of time was wrong. In the *case of Divecon Limited (otherwise known as Diving Contractors and Shirinkhanu Sadrudin Samani Nairobi Civil Appeal No. 142 of 1977)*, the respondent had been granted extension of time in a matter touching on a contract. The grant of extension of time was challenged in the pleadings and in the proceedings but the judge well aware that no extension can be granted in matters of contract went ahead to

hold that he had discretion to extend time in needy cases. The appellant moved to th court of appeal which overturned the judgement holding that there can be no extension of time in matters touching on contract. I therefore find that the plaintiffs claim herein was time barred and no extension of time should have been granted.

### **DECISION**

28. For the reasons given hereinabove, I find that the plaintiffs suit can not stand. The same is hereby dismissed with costs to the defendant.

**Dated, signed and delivered at Kitale on this 20th day of February, 2014.**

**E. OBAGA,**

**JUDGE**

**Mr Nyamu for Mr Ingosi for Plaintiff and M/S Nasike for the defendant. Court Clerk – Kassachoon.**

**E. OBAGA,**

**JUDGE**

**20/2/2014**