



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO.108 OF 2012**

**WEKESA KINISU .....1ST PLAINTIFF**

**RICHARD KINUSU TOTOLALA ..... 2ND PLAINTIFF**

**V E R S U S**

**FRED SINJA.....DEFENDANT**

**JUDGMENT**

1. The two Plaintiffs are the sons of Kinisu Totolela – deceased. They have filed this suit as administrators of the estate of their father for their benefit and the benefit of their brothers. Their claim as contained in the plaint are prayers for an order of permanent injunction restraining the Defendant, his agents and anybody claiming under his command from developing the suit plot until determination of this suit and eviction order against the same be issued by this court. They prayed also for costs of the suit and any other relief the court deems just and fit to grant.

2. The suit is defended and the Defendant filed his statement of defence on 7<sup>th</sup> May 2012 through his previous counsels M. Kiveu & Co. Advocates. In the seven paragraph statement of defence, he denied the Plaintiffs claim. At paragraph 7, he pleaded that he would raise a preliminary objection to have this suit dismissed for being incompetent and an abuse of the court process. The matter proceeded to full hearing. The Plaintiffs called four witnesses to support their case. The Defendant also called 3 witnesses to fortify his case. The summary of the Plaintiffs case is as given hereunder. The 1<sup>st</sup> Plaintiff Wekesa Kinisu testified as PW1. It is his evidence that his father died in 1999 leaving behind 18 daughters and 10 sons. Two of the sons have died while the daughters are all married.

3. The deceased Totolela Kinisu owned a plot no. 16 located at Lukusi market jointly with Abraham Kanyanya-deceased. The plot was partly developed. Each of the sons of Totolela has settled in various areas and only their mother Rusalia remained to take care of the home. PW1 continued that he heard on 19<sup>th</sup> January 2009 that the Defendant was building on this plot yet he was neither their brother nor son to Abraham – deceased.

4. They took the complaint to the District Officer to stop him from building. His further evidence is that the Defendant had begun constructing a toilet. He produced the letter from the District Officer as pex. 1. The Defendant stopped temporarily but continued again on 21.4.2010. They complained a second time upon which the District Officer summoned them and asked that they sit at home and agree. He produced the District Officer's second letter as Pex. 2. He asked the court to stop him from building on the land.

5. On cross examination, he said this is a commercial plot which attracts rates from the county council.

He was unaware of demand notices for rates from Bungoma municipal council (when shown MFI.D1 – 3). He continued that Edward Kinisu was appointed by the family to take care of this plot but instead sold part of it. He concluded that Edward needed to have involved all the family members in the sale. He admitted the Defendant has developed on the suit plot a 6 roomed building which is occupied.

6. The 2<sup>nd</sup> Plaintiff testified as PW2. He lives in Naitiri and is a farmer. He also heard someone was building on their plot. He accompanied the 1<sup>st</sup> plaintiff to the District Officer's office. He corroborated PW1's evidence and asked this court to issue an order of permanent injunction against the Defendant. In cross examination he said he saw the Defendant building on the suit plot. That Edward should have involved all of them before selling the plot. Before today (20.3.2013) he had not obtained injunctive orders to stop the Defendant from building. He confirmed the Defendant has now developed the land.

7. PW3 Richard Sifuma Kanyanya lives in Lukusi location. He is a cousin to the Plaintiffs. He is the son of Abraham Kanyanya- deceased who jointly owned this plot with the Plaintiffs' father. In 2009, he found someone digging a pit latrine on this plot. He teamed up with the Plaintiffs in presenting a complaint to the District Officer. In spite of receipt of the District Officer's letter, the Defendant did not stop hence they filed this suit.

8. When cross-examined by Mrs Onyando, he said they went to the District Officer on 19.1.09 who issued a letter. He admitted the letter was not a court order. He denied giving the Defendant permission to utilize the plot no. 16. In the letter, he said if Kinisu's children have sold a portion of the plot then the remaining portion is his. He was unaware of the demand notices for rates shown to him.

9. PW4 is the mother to the Plaintiff. She told court that someone has built on her plot 16 at Lukusi market. She did not know who sold the plot to the Defendant and concluded by saying she wants the plot back so she can share it with her children. In cross-examination, she claims the plot by virtue that it belonged to her late husband. The plot was partly developed. She stated that her husband left the management of the plot to Edward Kinisu. She also did not know the county council wanted to repossess the plot. This marked the close of the Plaintiffs case.

10. The Defendant's case proceeded on 6<sup>th</sup> November 2013. The Defendant testified as the first witness. He told court that he is a farmer and businessman. He comes from Lukusi location. He bought half of the plot on 17<sup>th</sup> June 2008 for a consideration of Kshs. Seventy thousand (Kshs. 70,000/=) only from Edward Wekesa Kinisu. The agreement was witnessed by the area Chief amongst others. He produced the agreement as Dex. 4.

11. He bought the plot because Edward approached him that their plot would be sold for non- payment of municipal rates. He produced demand note for Kshs. 8,000/= dated 5<sup>th</sup> March 2004 as Dex. 1 and demand note for Kshs. 18,135/= dated 26<sup>th</sup> November 2007 as Dex. 2. He also produce final reminder notice dated 31<sup>st</sup> May 2008 demanding Kshs. 22,714/= as Dex. 3. He said he bought the plot in good faith.

12. He began developing the plot in 2009 and no one stopped him until when he was roofing and produced the District Officer's letter as Dex. 5. Before the District Officer they presented their case upon which the District Officer advised them to go home and agree. The District Officer asked him to stop building which he did. No agreement was reached at home as proposed by the D.O. Later before the chief, he said PW3 gave him the green light to continue building and therefore he completed the house. He urged the

court to dismiss this suit as if the plaintiffs' prayers are granted, he will be denied his rights.

13. He was cross examined by the 1<sup>st</sup> Plaintiff. He said he had known Edward Kinisu for a long time. He knew that Kinisu-deceased and Abraham-deceased in whose names the demand notices issued were both deceased. He also knows the widow (PW4) but did not inform her of the sale. He said he was never invited to the Plaintiff's family meeting after they left the D.O's office. He paid Edward Kshs.

70,000/= and from this Edward was to pay the council Kshs. 22,000/=.

14. On cross examination by the 2<sup>nd</sup> Plaintiff, he denied being served with any letter by the widow (PW4). He said he lived on the suit plot as tenant for 3 months before Edward approached him to buy part of it. In re-examination, he said he bought the plot to save it from being auctioned.

15. EDWARD WEKESA KINISU testified as DW2. He is a retired teacher and eldest son of Kinisu-deceased. The Defendant was his neighbour and tenant on suit plot no. 16 from 1972 –2008. That their deceased fathers were not paying rates which therefore accumulated. As a result of this accumulation, the Bungoma Municipal Council issued the first notice dated 31.5.08 to repossess the plot. On receipt of the notice he called his brothers but only the 2<sup>nd</sup> Plaintiff came. They agreed with the 2<sup>nd</sup> Plaintiff to each search for a buyer and therefore he came across the Defendant who was willing to buy the plot.

16. The Defendant paid him before the Chief, Lukusi location. He thereafter paid the debt owed to the council. He said he notified PW4 each time the demand notice came. That had he not sold part of the plot, the whole plot would have been auctioned. When they sat down as a family after the District Officer's letter, no one opposed the Defendant using the land. He personally has no objection to the Defendant using the land.

17. Under cross-examination by the 1<sup>st</sup> Plaintiff he said their father had 4 wives of whom 2 are alive. He stood firm that during the family no one opposed Defendant's use of the plot. The half he sold comprised half share of both Kinisu-deceased and Kanyanya-deceased. He collected initial rent from the premises but later it was their mother who received rents.

18. The Defendant's last witness Samuel Nayombe Chenonoi is the Chief of Lukusi location. He witnessed the agreement between the Defendant and Edward (Dex. 4). He was also shown the demand notices from the county council. He was told by Edward that he was selling part of the plot to secure the developed part from being auctioned. Later Edward and his brothers went to his office. PW3 was complaining he had not got a share from the sold portion. He advised them to go and reconcile at home.

19. In cross examination, he admitted the sons of Kinisu –deceased were not witnesses in the agreement. He also did not see any letter where the family agreed on mode of sharing. He did not know how many wives Richard had. He denied stealing the land. In re-examination he said when the land was sold, succession cause had not been filed. The Defendant closed his case.

20. Both parties then filed their written submissions. The Defendant summarized the evidence and cited case law of **Stanley Kirui vs. Westlands Pride Ltd [2013] eKLR** to fortify his submissions. I have read the submission as filed and need not reproduce them in this judgment.

21. Having considered the evidence adduced, the pleadings and the submissions tendered, the issues I find to be arising for determination are;

(a). Was the sale contract entered between Edward Wekesa Kinisu and Fred Sinja (Defendant) valid?

(b). If answer (a) is yes, are the Plaintiffs entitled to orders they are seeking as per their plaint?

(c). If the answer to (a) is negative what remedy would lie in favour of both the Plaintiffs and the Defendant?

(d). Who should bear the costs of this suit?

22. The Defendant's case is that he bought half of the suit plot from Edward Kinisu and paid the whole sum of Kshs. Seventy thousand only (Kshs. 70,000/=) that was agreed. He produced a sale

agreement as Dex. 4. The agreement is dated 17<sup>th</sup> June 2008 selling undeveloped part of plot 16 in Lukusi market and measuring 25ft by 100ft. A deposit of Kenya shillings sixteen thousand (16000/) only was paid on execution. The remaining balance was paid by installments. On the face of Dex. 4, when the deposit was made, the people present were the parties to the agreement (Edward and Fred) and Titus Mwinani as secretary.

23. When 2<sup>nd</sup> installment of Kenya shillings Twenty five thousand (25000/) only was made, the witness was Wanyonyi T. Sekapchanga. On 4<sup>th</sup> and last installment, there were three witnesses i.e. Wanyonyi T. Sekapchanga, Rose Siundu and Stephen Sinja. Below the names of the witnesses, the Chief (DW3) wrote on 28.8.2008 the following words, ***“The plot sold to offload rent accumulation. Company to transfer to buyer.”***

24. The agreement as drawn on the face of it meets the requirements of section 3 (3) of the Law of Contract Act cap 23 of the Laws of Kenya which provides that a sale of land agreement must be in writing, signed by both parties and the parties signatures witnessed. The only limitation that faces this agreement is whether Edward had capacity to sell the land. It is not in dispute that suit plot no. 16 was jointly owned by Kinisu Totolela – deceased and Abraham Kanyanya – deceased. When the agreement was drawn, both owners were dead.

25. From the evidence adduced, Edward was given authority to manage the property by virtue of being the eldest son in the Kinisu household. It did not come out that that authority extended to the share held by Abraham's household. Edward (DW2) told court that the half share he sold included Abraham's share in the plot. He did not disclose who gave him authority to sell Abraham's share. Secondly, he had not taken letters of administration of his father's estate nor that of the estate of Abraham. He did not therefore have capacity to transact any business on the property of the deceased to purport to pass title to a third party. For this reason, I find the agreement void for lack of capacity of the seller to pass title to the Defendant. The reason given for selling the plot cannot validate what is void ab initio.

26. This brings me to the second question whether the Plaintiffs are entitled to the orders sought. DW2 said he sold the half of the plot that was undeveloped to secure the developed part. He also relied on the demand notices issued by Bungoma municipal council (as it was then). The 1<sup>st</sup> demand note was issued on 5<sup>th</sup> March 2004 and produced as Dex. 1 while Dex. 2 was issued on 26<sup>th</sup> November 2007 some three years later. The final reminder, Dex. 3 issued on 31<sup>st</sup> May 2008 demanded Kshs. 14,214/= and auctioneer's charges of Kshs. 8500/=.

27. The notice said the property would be sold if this amount (Kshs 22714/-) was not paid within 7 days. The evidence show DW2 got the Defendant to purchase the plot two weeks later (17.6.2008). It becomes difficult to believe the seller that the sale was urgent that he could not involve his brothers as the variation of the dates on notices does not reflect any visible threat. Further, DW2 did not produce a receipt to show that he actually paid rates due within that month or anytime to corroborate the averment that the sale was to save the plot from being auctioned. Instead what is shown that the sale was to secure the plot is DW3's comment on the agreement (Dex.4) ***“The plot sold to offload rent accumulation? Company to transfer to buyer”*** made on 28<sup>th</sup> August 2008. This comment was added two months after the agreement was entered into and purchase price paid in full. In my view, the comment was an afterthought and not the initial intention of the seller (DW2). The comment by itself cannot be taken as evidence of payment of rates if any to the municipality.

28. DW2's further evidence is that he paid Kshs. 22,000/= as rates plus charges of auctioneer of Kshs. 8000/= (which then gives a total of Kshs 30000/). However Dex. 3 shows the rates outstanding was Kshs. 14,214/= plus charges of 8,500/= (giving total demanded as Kshs. 22,714/=). The witness seems to be dishonest even when his own document shows otherwise. He also did not say what he did with the balance of approximately Kshs. 47,000/=. He did not give his siblings or the widow yet he was entrusted to manage the property on behalf of the family. He abused that trust. He also did not say what happened to the rent monies he collected during the time he was receiving the rents. With this non accountable behavior, he should be personally liable to refund all monies he received from the defendant.

29. The Plaintiffs did not know about the sale until the Defendant began construction of a pit latrine on the suit portion. Other than DW2 saying he informed the plaintiffs about the pending auction but they did not come. He did not tell the court if he consulted them after sorting out the “emergency”. The Defendant did not also endeavour to process the title documents into his name before commencing development on the plot. Although DW1 said he had only been a tenant for three (3) months before buying the plot, DW2 said he was a neighbour and tenant from 1972 – 2008. Whichever is the truth, the defendant had knowledge that the owners of the plot were dead. He therefore ought to have acted with diligence and involved more than one family member before paying them money. He failed to do so, especially when he was paying the subsequent installments.

30. On the question of what remedy if any is available to the Defendant, I find none. It is not denied the Defendant has put up a 5 door/roomed building on this plot. The Defendant filed a defence to the plaintiffs claim but did not file a counter-claim to present any of his claims for the court’s consideration. In the defence, he asked the court to dismiss the Plaintiffs suit. The Defendant was represented by an advocate from the beginning of this suit. It beats logic how he could then fail to make a counter-claim to plead either for specific performance or refund. In the absence of the counter claim, this court has limited choice on any remedy to offer to the Defendant. The law as it is provides that parties are bound by their pleadings.

31. To aggravate the Defendant's misfortune, the Plaintiffs led evidence that immediately the Defendant began constructing a pit latrine, they took their complaint/dispute before the District Officer. The District Officer summoned both parties and he asked the Defendant to stop. The Defendant admitted he stopped briefly but continued in 2010. The Defendant alleged he was stopped when he was about to put roof to the building. His argument from his evidence is that he was never served with a court order that could have stopped him from building. The Defendant did not have any document to put his hand on to secure his right on the land other than the agreement. He became aware of the family feud over his user of the suit land. Even the District Officer advised him to stop building until they had agreed. No such agreement was reached yet he still felt confident in putting more of his money on a venture which in my view was very risky. It is like he was taking himself from the frying pan into the fire. It does not matter at what stage his building had reached but as a reasonable man with or without an injunction, he should have slowed down development until the dispute was resolved. It becomes difficult given the circumstances to penalize the Plaintiff for the defendant’s self-inflicted wounds.

32. The Plaintiffs have taken out limited grant of letters of administration in respect of the estate of Kinisu Totolela –deceased. The grant gives them authority to administer their father’s property. I therefore find they are entitled to the orders sought to the extent of the share held by their father in the suit plot no. 16. Consequently I find the Defendant's only remedy is to demand a refund of his money from Edward Wekesa Kinisu (DW2) and not the Plaintiffs. Given that I find the Plaintiffs have succeeded in the case and will have their land. I order that each party to bear its own costs of the suit. It is so ordered.

**DATED, SIGNED and DELIVERED** this 22<sup>nd</sup> day of May, 2014

**A. OMOLLO**

**JUDGE.**