



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**

**ELC NO. 70 OF 2021**

**{Formerly at Environment and Land Court at Kisii Case No. 870 of 2016}**

**DONALD ONSONGO MAGEKA.....PLAINTIFF**

**=VRS=**

**JAPHET SIOCHA.....DEFENDANT**

**JUDGMENT**

It is the Plaintiff's case that he is the registered owner of parcel number EAST KITUTU/MWAMANGERA/1471 situate within Keroka Urban Council in Nyamira that on 3/11/2011 and that while he was on a visit to his parcel of land the Plaintiff found that the Defendant had constructed a building thereon without his knowledge, permission, consent or information. Something that has inconvenienced the Plaintiff as a result of which he seeks the following orders: -

- a) An order do issue compelling the Defendant, his agents, employees, servants, representatives and/or assigns to vacate suit parcel NO. EAST KITUTU/MWAMANGERA/1471, by removing all buildings, structures erected thereon within 30 days of the court's order.**
- b) A permanent injunction do issue restraining the Defendant, his agents, employees, servants, representatives and/or assigns or whosoever from LR. NO. EAST KITUTU/MWAMANGERA/1471.**
- c) An order for compensation for trespass.**
- d) Costs of the suit and interest thereon at court rates from the date of filing suit till payment in full.**
- e) Any other relief the Honourable Court may deem fit to grant to meet the ends of justice.**

He recorded an undated statement which was filed in court on 18/6/2012 and which he relied on in court as his evidence in chief.

On his part, the Defendant filed a Defence dated 20/9/2012 and amended it on 7/3/2016 to include a counter-claim. In his Statement of Defence, the Defendant averred that the Plaintiff was registered the owner of the suit land to hold the same exclusively in trust for his (Plaintiff's) brother Joseph Mokaya who had purchased it from the initial owner. Upon purchase of the suit land, the Plaintiff and his aforesaid brother put the Defendant in actual possession of the land which the Defendant occupies to date. He embarked on developing the suit land with the full knowledge, permission, consent and information of the plaintiff. In form of a counter claim the Defendant seeks a Declaration that the Plaintiff holds Title to L.R. NO. EAST KITUTU/MWAMANGERA/1471 in trust for the Defendant exclusively.

At the Hearing, the Plaintiff testified that since he lives in Nairobi and rarely visits his rural home, he allowed his brother Joseph Mokaya to cultivate the suit property after fencing it all around.

In 2004, there was some robbery at his rural home in Nyansiongo and his house was broken into. As a result, he lost his Title Deed to the suit property among other documents. The Plaintiff then caused the issue to be gazetted in the *Kenya Gazette*, Gazette Notice No. 15130 on 02/12/2011. He produced a copy of the duplicate Title which was issued on 21/2/2012. He also produced a copy of the Police Abstract and a Green Card showing the History of the suit land. On 3/11/2011, he discovered that somebody had put up some building on the suit property and it turned out to be the Defendant to whom he had never sold the suit property. In Keroka SRM Civil Suit No. 157 of 2011 the Plaintiff's brother Joseph Mokaya Migiro, according to the documents produced in court, sought for a Declaration against the Plaintiff to the effect that the latter held L.R. NO. EAST KISTUTU/ MWAMANGERA/1471 in trust for him and One Melzedack Anyona. This was by way of counterclaim. The Plaintiff is not exhibited. He suspected that it was his elder brother Joseph who must have stolen the Title Deed and who had also attempted to sell the same to Melzedack Anyona. The two were charged in Keroka Criminal Case No. 691 of 2013. Both were acquitted under Section 210 of the Criminal Procedure Code on 29/04/2015. The agreement of sale was witnessed by the Plaintiff's brother and the latter's wife as well as the Agent. The Plaintiff claims not to have authorized his brother Joseph Mokaya to sell the suit land. He went on to

say that the Defendant has developed the suit property and even put up a shop and backrooms on the plot where he collects rent.

On cross-examination the Plaintiff said he was not certain as to when his Title Deed got misplaced and that he had bought the suit property in 1979 but could not trace the Sale Agreement and that he was issued with the Title Deed in 1983. When he discovered that his brother was a person involved in fraud he decided to visit the suit land only to discover that there were structures thereon. He admitted that when the Sale Agreement between him and the Defendant was tendered at Keroka Court, his brother was acquitted.

DW1, Japheth Siocha adopted his statement dated 7/9/2012 as his evidence in chief. He says that he bought a plot from Donald Onsongo Mageka in 2006 known as EAST KITUTU/MWAMANGERA/1471. He signed his part on the Sale Agreement, and the same was sent to the Plaintiff by the latter's brother who then signed a copy and sent it back to him. He further stated that all along the Plaintiff was aware that he was developing the suit property and in April 2012 the Plaintiff had some problems with his brother, Joseph Mokaya over a portion of land elsewhere belonging to Joseph and adjoining the Plaintiff's. As a result, the Plaintiff swore to teach his brother a lesson which lesson turned out to be this case. He claimed that he bought the property at Kshs. 130,000/=. The same measures 100 X 25 feet. He has never got the Title Deed since the Vendor has refused to process the same. He further stated that the Plaintiff had him charged in Keroka PMCR NO. 691 of 2013 but the Defendant was acquitted and the appeal in Nyamira High Court Criminal Appeal No. 11 of 2016 was equally dismissed on 22/11/2018. On cross-examination the Defendant said that he was introduced to the Plaintiff and his late uncle, Melkizedeck Anyona and that when he was buying it, Joseph had the Title Deed which is and was registered in the name of the Plaintiff.

On re-examination, the Defendant agreed that the document examiner made a report to the effect that the 2 signatures in the Sale Agreement were authored by the same person and that the first time he met the Plaintiff was in 2013 yet he had constructed houses thereon in 2008. The original Title Deed was in the custody of Joseph at the time of the sale. He further said that during the criminal trial, the Plaintiff admitted to have received the purchase price and that the Plaintiff used to pass near the suit property when the Defendant was constructing.

DW2 – JOSEPH MOKAYA MIGIRO admitted that he sold the suit land measuring 100 by 25 feet to the Defendant on 14/1/2006 at the request and with the authority of his brother, the Plaintiff. He then banked the money in the latter's Bank Account and the Defendant took immediate possession of the land. He testified that the current suit was filed due to his disagreement with his brother over another parcel of land. He further said that he was acquitted in a Criminal Case against him in Keroka PMCC No. 691 of 2013 over the issue here and the appeal to the High Court, Nyamira was equally dismissed.

On cross-examination by Mr. Ochwangi, Mr. Migiro agreed that the Plaintiff never gave him any written authority and that the document examiner opined that the signature appearing in the Sale Agreement was not the Plaintiff's. On re-examination by Mr. Oyugi the Defendant claimed to have received verbal instructions from the Plaintiff to sell his land and that this was not the first time he was doing so. The last witness, Jackson Osoro Momba Migiro adduced evidence by adopting his written statement dated 8/4/2017. However, he was unable to give any personal knowledge on the sale of the suit land. He is a brother to the Plaintiff as well as DW2. All he could confirm is that the Defendant has been on the suit property for about 20 years now and has immensely developed the same.

What beats my mind here is that it is the Plaintiff's case that he was quite clear in his mind that his own brother Joseph Mokaya Migiro was fully involved in whatever led to the transfer of the parcel of land known as EAST KITUTU/ MWAMANGERA/1471 to the Defendant. He was fully convinced that his brother stole the Title Deed in respect to the suit property to the Defendant. He had used him as an Agent to sell 2 other properties belonging to him with the desired results realized. His own relatives were also involved in the sale contract and the necessary papers executed on the Plaintiff's part and the Sale Agreement is said to have been sent to him after the Defendant executed his part. The Defendant was then given a Title Deed by the same Mokaya. The Defendant has demonstrated to the Court that he paid to the Plaintiff's brother and Agent the sum of Kshs. 130,000/= in full purchase price. The recipient of the said money does not deny that he did receive the money on behalf of the Plaintiff. All that notwithstanding, the Plaintiff did not deem it necessary to join his brother as a Defendant in the case.

It is also quite unbelievable and unimaginable that the Defendant could have bought the suit plot, put up some commercial properties in 2006 and for all this time until 3/11/2011 the Plaintiff did not notice the development on the suit property, yet he used to regularly visit his rural home where the suit property is situate. DW2 has testified that he used to have several transactions with the Plaintiff, his younger brother and that in December 2005 he had already deposited in the latter's Account the sum of Kshs. 100,000/= on 23/8/2005 which the Plaintiff needed. He remitted the balance after the sale but offset the Kshs. 100,000/= from the money he had lent his brother. Some misunderstanding between him and the Plaintiff developed and the Plaintiff threatened to teach his elder brother a lesson. Unfortunately, it is the Defendant who bore the blunt of the lesson. This misunderstanding was occasioned by another transaction between the two over a property in Nyansiongo. Coming to the Criminal Case Number 691 of 2013 at the Principal Magistrate's Court at Keroka, the Defendant herein and the Plaintiffs' brother, Joseph Mokaya Migiro were charged with the offence of making a false document contrary to Section 347 (d) (i) of the Penal Code. The document being the Sale Agreement in respect to EAST KITUTU/MWAMANG'ERA/1471 in the name of the Plaintiff herein purporting it to be a genuine Sale Agreement authorized by the Plaintiff on 14/01/2006 and the second charge was forcible detainer of being in possession of land parcel number EAST KITUTU/MWAMANG'RA/1471 belonging to the Plaintiff. In this case, the Plaintiff, who was the complainant, admitted that his brother was his "General Agent" and that he had left the suit property in his custody. He also admitted that his brother used to sell his properties on his behalf. The Plaintiff testified in the Criminal Case that he never gave his brother, the 1<sup>st</sup> accused any power of Attorney but that he had permission to sell his properties. When then did this permission come to an end? In the instant case the Plaintiff says that he had not given his brother power of Attorney. Isn't this applying double standards since in the earlier transactions he did not also give his brother power of Attorney. The Court in Criminal Case Number 691 of 2013 observed:

***“.....I do not see how the said agreement can be deemed to be false document yet the 1<sup>st</sup> accused (the Plaintiff's elder brother) disclosed that the land he was selling was in his brother's name. PW1 (the Plaintiff) also stated that he would use his brother, 1<sup>st</sup> accused, to buy land and other transactions for him. He acknowledged receiving money in 2006 but denied it having been sale proceeds from the plot in dispute.....”***

In other words, the complainant herein agrees that he bought the plot in dispute through his brother, the 1<sup>st</sup> accused meaning that at the time of buying, his brother acted as his agent and must have signed the Sale Agreement in 1978 on his behalf. But now when it comes to the sale

to another person, accused No. 2, PW2 changes tact and goes against his brother who was his agent and denies having given him consent to sell the property on his behalf. He admits having received money from his brother but claims it was sale proceeds for another property. I do not see why he would now deny having given consent to the 1<sup>st</sup> accused to sell other properties and yet he had religiously received money through bank deposits from the 1<sup>st</sup> accused. He had allowed the 1<sup>st</sup> accused to act as his agent in the sale of some of his properties as well as in acquiring them. I now wonder what had made him change tact when it comes to the sale of the plot in dispute.

The court concluded the Ruling that the accused had no case to answer in the following words:

***“He was a buyer who bought the land through the right channel and having done so had acquired a right to hold the said piece of land as his own. By virtue of being a buyer he had acquired rights to enter into the said piece of land.”***

This is the verdict of the Court in Criminal Case Number 691 Of 2013.

What is the effect of such a Decision? Under the Evidence Act, CAP 80 Laws of Kenya, Section 43 of the Act provides:

The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, may be proved when the question is whether such court ought to take cognizance of such suit or to hold such trial.

Section 44 of the Evidence Act, on Judgments in rem

(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

A ***Judgment in rem*** determines the status of property on a basis which binds the whole world. In Latin: “with respect to the thing”, which concerns proprietary legal rights. This is in contrast to a judgment in personam.

Since the issue of fraud had been determined in the criminal trial and the High Court on appeal, with the lower court, a competent court, conclusively pronouncing itself to the effect that there was no forgery of the sale agreement, that judgment must be respected by this Court. And since the Plaintiff is clinging on the said agreement claiming that it was a forgery and that he was not party to the agreement in order to defeat the sale, this Court can do no more than disregard his claim. Based on the evidence adduced in court, it is my conclusion that there must have been some disagreement between the Plaintiff and his brother, Joseph Mokaya Migiro over other matters or the remittance of the purchase price which made the Plaintiff decide to avenge by not transferring the suit land to the Defendant. The court cannot allow this. The Defendant cannot be made to be sacrificed at the brothers’ alter.

The Plaintiff’s suit is therefore dismissed with costs.

On the counterclaim, the Defendant has proved on a balance of probabilities that he bought the suit land from the Plaintiff, through the latter’s brother and the lower court concluded that the Sale agreement passing property rights from the Plaintiff to the Defendant was valid and not a forgery. The Defendant then succeeds in his prayers in the counterclaim.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF APRIL 2022.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Plaintiff: Mr. Ochwangi.**

**Defendant: Mr. Ouru for Mr. Nyatundo.**