



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HC CIVIL CASE NO.176 OF 2010**

**ROBERT MBUI.....PLAINTIFF**

**VERSUS**

**KENNEDY MWANZIA MUSEMBI.....DEFENDANT**

**RULING**

(1) This is an application brought by way of a Notice of Motion dated the 2<sup>nd</sup> November, 2010 under Order XXXV rule (1) (1)(b) of the Civil Procedure Rules whereby Robert Mbui (the Plaintiff) prays that judgment be entered against Kennedy Mwanzia Musembi (the Defendant) requiring the Defendant forthwith to vacate and deliver up possession of Land Parcels known as Title Nos. Mavoko Town Block 3/7084 and 7085 (the suit property) owned by the Plaintiff. The application is based on the grounds that the Plaintiff purchased the suit property from the Defendant's father Timothy Musembi Kinama (the vendor) and is now the registered proprietor thereof; that the Defendant has persisted in illegal occupation thereof even after completion of the sale and notwithstanding his having been afforded adequate notice to vacate; that there are no triable issues raised in the Defence; and that the Plaintiff's right of quiet use and enjoyment of the suit premises have been infringed by the Defendant's continued illegal possession.

(2) The Plaintiff swore a supporting affidavit on the 2<sup>nd</sup> November, 2010. He repeats the averments made in his plaint dated the 26<sup>th</sup> August, 2010 and filed on the 2<sup>nd</sup> September, 2010. He says that on the 20<sup>th</sup> May, 2010, he entered into an agreement for sale of the suit property with the vendor and obtained the consent of the Land Control Board to the sale as is by law required. He admits that he was well aware of the Defendant's possession of the suit property as the same are adjacent to a school owned and managed by the Plaintiff. Upon completion of the sale, the Plaintiff gave the Defendant reasonable Notice to vacate nor that the suit property had changed ownership but the Defendant refused to vacate. It is for these reasons that the Plaintiff seeks the intervention of the court to compel the Defendant to deliver vacant possession.

(3) In his Defence filed "in protest" on the 24<sup>th</sup> September, 2010, the Defendant denies all and several allegations of fact contained in the Plaint. He denies that he has been living in the suit property as a licensee and asserts that the Plaintiff's acquisition thereof is tainted with fraud and illegality. The Defendant also filed a replying affidavit dated the 8<sup>th</sup> February, 2011 in opposition to the application. In paragraphs 3, 4, 5, 6 and 7 thereof he says:

**"3. That the Plaintiff/Applicant is my immediate neighbor and as at the time he entered into an agreement with Timothy Musembi Kinama he was aware that I was lawfully living in Mavoko Town Block 3/7084 and Mavoko Town Block 3/7085 where I had established my home there.**

**4. That the consent obtained by the plaintiff was fraudulent as he did not establish on what basis I was living there and the interest of my mother in the land was not taken into account.**

**5. That the plaintiff colluded with my father to dispute me from the property which my father to displace me from the property which my father and mother had allocated to me and allowed me to settle there pending transfer to myself.**

**6. That when my mother learned about the plot to have the land disposed she objected to against it and even instructed advocates to write to the Plaintiff and other parties warning them about dealings with the land. Annexed and marked KM1 is a copy of the letter dated 10.8.2007.**

**7. That further when my mother learned about the proceedings of the Land Control Board which were taking place on 8.7.1020 she instructed me with my brother Julius Mutua to go and voice our concern and although we did so, the Chairman of the Board proceeded to grant the consent.**

(4) The Defendant goes on to say that he has been living on the suit property since 1991 and has made developments thereon including connecting mains electricity and water thereto. As his mother and deceased father had established their matrimonial home on the suit property, the Defendant states that his mother has instituted legal proceedings in Machakos High Court Civil Suit No.161 of 2010(O.S) seeking declaration under the Married Women's Property Act, 1882 that the suit property amongst several others are matrimonial property and should be shared accordingly.

(5) I have considered the application in light of the supporting and replying affidavits and have come to the conclusion that it must fail for a number of reasons.

In paragraphs 5 and 6 of his affidavit, the Plaintiff states as follows:

**“5. That further prior to the purchase of the said parcel, I was aware of the Defendant’s possession of the said parcels as my school is adjacent to the said parcels.**

**6. That I got assurance from the Vendor, Timothy Musembi Kinama that the occupant of the said parcels, who is his son and the Defendant herein, would vacate the said parcels immediately upon conclusion of the sale of the parcels.”**

Clearly, the Plaintiff was aware of the Defendant’s possession of the suit property the Defendant and his siblings through their Advocates, Mbaluka and Company, wrote to the Plaintiff on the 10<sup>th</sup> August, 2007 (KM1) – long before he entered into the agreement for sale dated the 20<sup>th</sup> May, 2010 – warning him not to deal with the suit property without their consent as it was matrimonial family land. The Plaintiff has not denied this letter. Indeed, the Plaintiff has not taken issue with any of the averments made in the replying affidavit.

(6) The Defendant in paragraph 4 and 5 of the Defence dated the 23<sup>rd</sup> September, 2010 contends as follows:-

**“4. The Defendant denies the contents of paragraph 4 of the plaint and avers that he has been living in Movoko Town Block 3/7084 and 7085 initially known as Mavoko Town Block 3/1388 not as a licensee but as a son of the deceased with a right to the land which is matrimonial property.**

**5. The Defendant avers that he is a stranger to contents of paragraph 5 of the plaint and states that any sale that could have taken place then amounts to fraud against him and the other members of the family and the sale is tainted with illegality.”**

#### **PARTICULARS OF FRAUD AGAINST THE PLAINTIFF**

**(a) Colluding with the Defendant’s father to have the land sold to plaintiff when the plaintiff knew the defendant was living there.**

**(b) Obtaining consent for the transaction without involving the defendant.**

**(c) Deliberately lying to the Land Control Board to obtain consent.**

(7) From the evidence before me, and for the purposes of this application under Order XXXV rule 1 (1) (b) of the Civil Procedure Rules, the nature of the Defendant's defence on the basis of which he resists the Plaintiff's claim does not appear on the face of it to be a sham. There are triable issues which must be investigated fully at the trial of this suit.

(8) In the result, the Plaintiff's application in the Notice of Motion dated the 2<sup>nd</sup> November, 2010 cannot succeed and is hereby dismissed with costs.

Orders accordingly.

Dated and delivered at Machakos this 28<sup>th</sup> day of July, 2011

**P. Kihara Kariuki**  
**Judge**