



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

**Civil Case 121 of 1999**

**MICHAEL WASWA CHENGWALI**

.....

**PLAINTIFF**

~VRS~

**MICHAEL WASWA CHENGWALI**

.....

**DEFENDANT**

**JUDGMENT**

The Plaintiff Michael Waswa Chengwali sues the Defendant Anzelimo Wanyama Chemiati for a declaratory order that the Defendant's registration as proprietor of land parcel No.KIMILILI/KIMILILI/1026 was erroneous and ought to be cancelled and the said land transferred to the Plaintiff as the administrator of the estate of the deceased. In his amended plaint dated 4<sup>th</sup> February, 2000 the Plaintiff states that his deceased father Chengwali Walukha Nguti bought the land jointly with the Defendant from one Pilisi Mumalasi in 1964. The Defendant later relinquished his ownership rights and was compensated by the deceased to buy another parcel which he did namely L. R. Number KIMILILI/KAMUKUYWA/1028. It was in 1994 after the death of deceased that the Defendant acted in cohorts with the Provincial Administration and caused the land to be transferred into his name.

The Defendant in his amended statement of defence dated 25<sup>th</sup> April 2000 denies the claim. He avers that he bought the land from one Pilisi Mumalasi alone and later the seller transferred the land to him. He denies the allegation that he ever bought the land jointly with the deceased.

The Plaintiff testified that he is the administrator of the estate of his deceased father Chengwali Walukha Nguti who died in 1992. He

produced the grant issued to him by Bungoma High Court Succession Cause No.80 of 1998 together with death certificate. In that capacity, the Plaintiff told the court that his deceased father Chengwali bought land Kimilili/Kamukuywa/1026 jointly with the Defendant from one Pilisi Mumalasi, now deceased. The parties entered into an agreement dated 26/05/1964. Later on, the deceased Mr. Chengwali and the Defendant agreed that the Defendant be refunded his part of the purchase price to enable him buy another adjacent parcel no.1028. The refund was done and the Defendant bought the said land. Parcel No.1026 became the property of the deceased exclusively. The deceased occupied the land and was buried there in 1992 when he died. In 1994 the Defendant was assisted by the Provincial Administration to transfer the land to himself.

PW2 Peter Nguti Namiti testified that he is a brother to the deceased and an uncle to the Plaintiff. He testified that his late brother lived on land parcel no.1026 for over 30 years before he died. When he died, the deceased was buried on the land. PW2 said he knew that the deceased had bought the land from Pilisi Mumalasi. The deceased died before the land was registered in his name.

The Defendant testified that he bought the land single-handedly L.R. KIMILILI/KAMUKUYWA/1026 from Pilisi Mumalasi on 05/07/1964. He thereafter allowed the deceased to stay there because his sons were harassing him. When he died, the deceased was buried on the land. The Defendant states that the Plaintiff has unsuccessfully sued him in Kimilili Land Disputes Tribunal and lost the case. The Plaintiff's appeal was dismissed by the Provincial Appeals Board.

DW2 Andrea Nakhosi told the court that the Defendant bought land from Pilisi Mumalasi in 1964. The witness was present when the agreement was made together with others.

The issues for determination herein are as follows:

- a) **Whether the subject matter of the suit was bought by the deceased Changwali and the Defendant jointly or whether the Defendant bought it alone;**
- b) **If I find that the land was bought by the deceased and the Defendant jointly, did the Defendant relinquish his right of ownership;**
- c) **Whether the transfer to the Defendant and his subsequent registration as the proprietor was lawful;**
- d) **Whether the Plaintiff is entitled to the land in his capacity as the administrator of the estate.**

The Plaintiff and the Defendant produced land sale agreements made in 1967 for sale of three and half (3 ½) acres of land at the price of six heads of cattle. Land demarcation had not been done and the number of the parcel is not indicated. The Plaintiff claims his deceased father and the Defendant bought the land which is now L.R. NO.KIMILILI/KAMUKUYWA/1026 jointly. The Defendant claims he bought it alone. Both parties agree that the deceased resided on the land for many years before he died and that he was buried on the land.

The parties were before the land tribunal on the same subject matter in 1997. The Plaintiff had sued the Defendant but he lost the case. The defence raised the issue of *res judicata* in this case. This issue was heard and determined by my brother Justice Mbiti before the hearing of this case commenced. He ruled that the tribunal had no jurisdiction to adjudicate matters of registered land in regard to ownership. That issue was therefore settled.

It is not easy to tell which one of the two agreements is genuine by looking at them. The seller of the land Pilisi Mumalasi

testified before the tribunal in 1997. At the time this case was heard, Mr. Mumalasi was deceased. The proceedings of the tribunal were produced by the Plaintiff in this court. Mr. Mumalasi said that he sold his land to Anzelimo Wanyama and Chengwali Walukha in 1964. This evidence supports the Plaintiff's case that the agreement where the deceased Changwali and the Defendant Wanyama bought the land jointly is the genuine one.

The Defendant caused himself to be registered as the sole proprietor of the land on 15/4/1994 after the death of the deceased. The seller said at the tribunal that he was coerced by the Provincial Administration to execute the transfer in favour of the Defendant. The Plaintiff told the court that when he came to know that the Defendant was the registered owner, he lodged a caution. A copy of the register shows that the caution was lodged by Michael Waswa Chengwali on 18/6/1996. It was soon after this that the Plaintiff filed the case before the tribunal.

The Defendant did not explain why he waited until the death of the deceased in 1992 to start chasing the transfer into his name. His explanation that he allowed the deceased to stay on his land for about 28 years because the deceased was being harassed by his sons not convincing. The wife of the deceased Chengwali Walukha testified before the tribunal. Her evidence was in support of the Plaintiff's case on how the land was acquired. She further said that the deceased stayed on the land with his younger wife and that he told his family he wanted to be buried on that parcel of land. The Defendant did not tell the court why he allowed the deceased to be buried on his land if only the deceased was only a licensee.

The land sale agreements made in 1964 and to which the relevant land board consent was not obtained became invalid within six (6) months from the date of execution. Section 6 of the Act requires that consent be obtained within six (6) months. In effect, this means that the agreements produced by the parties in this case had no legal force. There is evidence on record and supported by the Defendant himself that the deceased occupied the land and stayed there with his family for more than 20 years.

The Defendant relied on the said void agreement to coerce the owner of the land to transfer the land to him about thirty (30) years after the agreement was made. It is not in dispute that the Defendant never took occupation of the said land. Legally he had no right to take the land from the family of the deceased who were already in adverse possession.

The Plaintiff referred this court to two decided cases. In the case of **ONYANGO & ANOTHER -VRS- LUWAYI CIVIL APPEAL NO.93 OF 1985, KISUMU** it was held by Justices of Appeal Kneller, Hancox and Nyarangi, in a case with similar facts, that the land sale agreement was void for all purposes for failure to obtain consent of the relevant land board.

The case of **SHAMALLA -VRS- CHIBEN CIVIL APPEAL NO.169 OF 1986, KISUMU** that under section 6 of the Land Control Act, the land sale agreement was null and void where the consent of the relevant land board was not obtained within the stipulated period.

The authorities are relevant in the case before me. The purchasers in those decisions had not occupied the land after the execution of the agreement and had failed to obtain the relevant consent. The Defendant in this case did not obtain the consent of the relevant Land Control Board. The contract of sale was void for all intents and purposes. Any transfer executed by the parties based on the void agreement is of no legal consequence. The owner of the land testified before the tribunal that he was coerced to execute the transfer to the Defendant. The said registration in the Defendant's name was therefore riddled with two major problems namely a void contract and coercion.

I find that the Plaintiff has proved on the balance of probabilities that the registration of land parcel no.KIMILILI/KAMUKUYWA/1026 in the name of Anzelimo Wanyama Chemiat was fraudulent, a misinterpretation and void. Judgment is hereby entered for the Plaintiff against the Defendant as prayed in the plaint. I order cancellation of the register and order that the land reverts to the family of the deceased and be registered in the name of the Plaintiff as the administrator of the estate. The Defendant shall meet the costs of the suit.

**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on the 9<sup>th</sup> day of June, 2010 in the presence of Mr. Makali for the Plaintiff and Mr. Situma for Kakoi for the Defendant.

**F. N. MUCHEMI**  
**JUDGE**