



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU Civil Case 240 of 1992**

Ø     **Contract: Defence of non est factum**  
**STEPHEN IKIAO ..... PLAINTIFF**

**VERSUS**

**M'ITARU M'THANKARI M'IKIAMBA ..... DEFENDANT**

**CONSOLIDATED WITH MERU CMCC CASE NO. 483 OF 1992**

**M'ITARU M'THANKARI M'IKIAMBA ..... PLAINTIFF**

**VERSUS**

**STEPHEN K.M. IKIAO ..... DEFENDANT**

**JUDGMENT**

The suit HCC No. 240 of 1992 was consolidated with CMCC Meru No. 483 of 1992 on 28<sup>th</sup> April 2005. In that matter before the Chief Magistrate's Court, M'Itaru M'Nthakari (M'Itaru) sued Stephen Ikiao (Stephen). M'Itaru pleaded that he was the registered owner of parcel number *Mikinduri/Anthwana/724* (suit property) measuring 2 acres. He pleaded in the suit that Stephen had taken possession of the suit property when they agreed that M'Itaru would transfer that suit property to him in exchange of the property of Stephen being parcel *Antwambui Adjudication Section* measuring 3 acres. He therefore prayed for eviction of Stephen from the suit property and for a permanent injunction to restrain the said Stephen from trespassing on that land. M'Itaru also prayed for mesnes profit for Kshs. 500/= per acre per year. He also prayed Kshs. 3,000/= for damage caused by Stephen to his bananas, yams and other crops. Stephen in that action filed a defence where he pleaded that he agreed to buy 2.80 acres of M'Itaru's parcel number *Mikinduri/Anthwana/117* for Kshs. 7,500/=. He said that he had paid that consideration in full. That later parcel number 117 was subdivided by the order of the court in another court action. He therefore prayed that the suit property would be registered in his name. He denied that he had agreed to exchange land with M'Itaru. In HCC No. 240 of 1992, this time it was Stephen who sued M'Itaru. He claimed in this action as he did in his defence in the Chief Magistrate's Court action that there be an order of declaration that he is entitled to 2.80 acres of the suit property. M'Itaru filed a defence in HCC No. 240 of 1992 claiming that the agreement between him and Stephen was one of the exchange of lands. This case was first heard by Sitati J. on 19<sup>th</sup> July 2006. The said Judge recorded evidence of Stephen and his witness Gichunge M'Anampiu. The case was

adjourned part heard. At the resumed hearing on 23<sup>rd</sup> May 2007, before Ouko J. it was ordered that the case do start *de novo*. Stephen stated in evidence that he was a retired teacher. He met M'Itaru in 1984. M'Itaru agreed to sell to him his land. They entered into a written agreement for sale of 2.80 acres of parcel number 117 for Kshs. 7,500/=. He produced plaintiff exhibit number 1 dated 2<sup>nd</sup> March 1984. It is entitled, "Agreement and sale of piece of land P/NO 117 Athwana Sub Location Mikinduri Location." That exhibit set out the agreement of Stephen to buy 2.80 acres of parcel number 117 belonging to M'Itaru. The exhibit also showed that the price was Kshs. 7,500/=. The same exhibit acknowledged that Stephen had paid M'Itaru Kshs. 1,600/=. Stephen produced another agreement dated 2<sup>nd</sup> April 1984. This also witnessed a further payment by Stephen to M'Itaru of Kshs. 2,500/=. He produced another exhibit dated 26<sup>th</sup> May 1984 which witnessed his payment of Kshs. 2,400/=. A consent of the Land Control Board was also produced by Stephen showing a consent to that transaction was granted on 31<sup>st</sup> May 1984. It should however be noted that the consent to transfer indicated that Stephen was getting the whole parcel number 117 measuring 4.7 acres. In evidence, Stephen stated that the land over and above the 2.80 acres that he paid for, which was 1.95 acres, was to be in exchange with his land which was 3 acres at Tigania, that is Antwamburi. To this end, Stephen said that he wrote a letter to Tigania Land Adjudication Officer which letter was undated. In that letter, he requested the Land Adjudication Officer to transfer his 3 acres over F/NO 1779 to M'Itaru. The letter was exhibited before court. On that letter, there is a hand written note at the bottom in red as follows:-

***"Transfer of 3.00acres to Itaaruru Thakari Kimba is allowed provided there is no dispute. 3/7/84."***

Stephen stated that M'Itaru had failed to honour their agreement. That he had failed to transfer the suit property to Stephen and had failed to take the 3 acres given to him by Stephen. Stephen confirmed that he took possession of parcel number 117 in 1984 and he is on that land todate. On that land, he had planted crops. On being cross examined, Stephen confirmed that M'Itaru was not literate but added that M'Itaru had a witness during the transaction of sale. That witness was literate but is now deceased. Stephen further stated that his land at Antuamburi did not have a title. He was referred to plaintiff's exhibit number 5 the letter of consent by the Land Control Board. He was asked why that letter indicated that the purchase price was Kshs. 15,000/= and not Kshs. 7,500/=. This is how he responded:-

***"This is not what I paid to the defendant (M'Itaru). I paid Kshs. 7,500/=. We valued my 3 acres at Kshs. 2,500/= per acre total Kshs. 7,500/= making a total of Kshs. 15,000/=. We agreed verbally."***

Stephen, on further being cross examined, he denied that there was a dispute over his land at Antuamburi. He denied M'Itaru was chased away when he went to that property. PW2 was Victor Gichunge. He is the brother-in-law of Stephen. He said that he was a retired civil servant and previously worked as a land officer. He knew M'Itaru from childhood. He was also related to M'Itaru through marriage. Both he and M'Itaru were married from the same family. In February 1984, M'Itaru approached him telling him he wanted to sell his land. Since PW2 did not have money, he

introduced him to Stephen. He said that he witnessed plaintiff exhibit number 1 and 3 being signed by Stephen and M'Itaru. He confirmed that Stephen occupies the suit property to date. Stephen occupation of the suit property was also confirmed by PW3 who formerly worked for Stephen. The evidence of M'Itaru in his defence was recorded by me. M'Itaru in evidence said of this transaction:-

**“We were to exchange with Kiao (Stephen). Plaintiff (Stephen) came to my place, he said to me that he wanted us to exchange my 2 acres with his 3 acres. My land had a title but his had no title. He started to cheat on the agreement. I did not transfer to him.”**

That quote captures M'Itaru's defence. He further stated that Stephen at one time took him to show him the land he was exchanging with him. However, when they arrived, it turned out that that land belonged to Geoffrey Gichuru, (DW2). Gichuru chased them away. M'Itaru further stated:-

**“Plaintiff (Stephen) declined to give his land but he is in my land. .... Agreement was for exchange not for sale. I want court order for plaintiff to vacate from my shamba since he refused with his 3 acres.”**

DW2 Geoffrey Gichuru said that Stephen was giving his land folio number 226 gathering number 399 to M'Itaru on the material date. On that day, Stephen came to his land with M'Itaru to till the land with a tractor. That was 9.30pm. He further said:-

**“I had instructed my children not to allow anyone in the land. My sons chased them away.”**

Gichuru said that there had existed a dispute over the land between him and Stephen. That in Stephen bringing M'Itaru on the land which had that dispute he was provoking him into killing M'Itaru since Stephen knew that he owned a gun. Stephen's claims that M'Itaru sold to him 2.80 acres for Kshs. 7,500/=. He said that later they agreed that he would get a further 1.9 acres from M'Itaru in exchange for his 3 acres at Atuamburi Adjudication Section. The defence of M'Itaru is that plaintiff's exhibit number 1, 2 and 3 were not his deed. He was essentially is raising a defence of *non est factum*. That literally means, “It is not my deed.” *Non est factum* is a doctrine of contract that allows a person who could not read and who executed a deed after it had been incorrectly read over to him to plead that he was not bound by it. The learned author *Treitel*, in the book “*The Law of Contract*” on that doctrine stated:-

**“In Gallie V. Lee Lord Reid said that the doctrine permanently or temporarily unable through no fault of their own to have without explanation any real understanding that be from defective education, illness or innate who have been tricked into signing the document. or illiterate but also to persons who are senile, of in which the document is expressed. But it will not may apply to “those who are of the purport of a particular document, whether incapacity,” and to these must be added persons The doctrine may thus apply not only to the blind very low intelligence or ignorant of the language normally protect literate persons of full capacity.”**

Also, in an article by *Purchas L.J.* where he discussed the case stated by *Treitel* as quoted above, had this to say:-

**“.....In Gallie V. Lee .....they expressed the opinion that.....’to support plea of non est factum it must be in a particular which goes to the substance of the whole consideration or to the root of the matter.....The plea of non est factum requires clear and positive evidence before it can be established. As Donovan L.J. said,**

*delivering the judgment of the Court of Appeal in QB 904, 912: "The plea of non est factum is a plea which within narrow limits."*

*Muskham Finance Ltd Vs. Howard [1963] 1 must necessarily be kept*

Stephen and his witness DW2 both confirmed that M'Itaru was illiterate. After confirming that he was illiterate, they both stated that he had a witness who was literate. PW2 further stated in evidence:-

***"We read over the agreement to the defendant (M'Itaru) in Kimeru and he accepted to sign."***

M'Itaru however said that the agreement he entered into with Stephen was for exchange of their land which Stephen failed to honour. He denied he entered into the agreement with Stephen now seeks to enforce by this action. M'Itaru, in my view, successfully raised the defence of *non est factum*. Having raised that defence, the burden of proof lay on Stephen to prove it was his deed. Stephen called PW2 who allegedly witnessed the agreement. Both the evidence of Stephen and PW2 was in my view discredited by very vital contradiction. In respect of plaintiff exhibit number 1 which is the basis of Stephen's claim, Stephen said that it was he who drafted that agreement. PW2 also said that it was he who drafted the same agreement. When the case was heard before Sitati J., PW2 in evidence said in regard to plaintiff's exhibit number 1:-

***"I drafted an agreement for them."***

Stephen, in respect of the same exhibit, when giving evidence before Ouko J. said:-

***"I drew it myself. On the same day of execution, I paid Kshs. 1,600/=."***

Giving evidence before Ouko J. PW2 in respect of the very same exhibit said:-

***"I drafted the agreement plaintiff exhibit number 1."***

PW2 later before Ouko J. repeated that it was he who drafted that exhibit. He said:-

***"It is in my own hand writing."***

What does one make of such contradiction? Stephen is a retired teacher. PW2 is a retired civil servant a former land officer. The contradiction they displayed in their evidence, I think exposes the case of Stephen for what it is. That is, it is not based on truth. How else can one explain how two people who are learned can so contradict each other on who wrote the agreement the basis of this action? It would be expected that each one on seeing plaintiff's exhibit number 1 would recognize whether or not it was in their writing. Stephen additionally failed to prove the interpretation that was given to M'Itaru of that document. There is a thumb print on plaintiff's exhibit number 1, 2 and 3. The thumb print is indicated to belong to M'Itaru. The other evidence that exposes the weakness of Stephen's case is the letter of consent from the Land Control Board dated 31<sup>st</sup> May 1984. That document reflects the consideration for the transaction to be Kshs. 15,000/=. When Stephen was examined in chief by his counsel, he did not explain that discrepancy. It should be remembered that plaintiff's exhibit number 1 showed the consideration to be Kshs. 7,500/=. It is only on being cross

examined that Stephen stated that his land which he was to exchange with M'Itaru for the extra 1.95 acres from parcel 117 was valued at Kshs. 2,500/= per acre. The total acreage of his land was 3 acres making it valued at Kshs. 7,500/=. This, he said, added to the amount reflected in plaintiff exhibit number 1 brought the total to be Kshs. 15,000/=. In my view, that explanation having only surfaced at cross examination shows that it was an afterthought and the court cannot rely on it. It only goes to show that Stephen did not prove his case. He did not prove that he paid M'Itaru Kshs. 7,500/=. I unfortunately did not hear the evidence of Stephen and his witness because the same was recorded by Sitati J. and Ouko J. I however had opportunity of hearing and seeing M'Itaru. He gave a picture of an old, illiterate, rural man who had been thoroughly frustrated and cheated out of his land which is still registered in his name. Stephen, who I saw as the case proceeded was to the contrary a picture of a younger well groomed and educated person. In my view, there is every likelihood that Stephen took advantage of ignorance and illiteracy of M'Itaru. The evidence of M'Itaru's witness DW2 well captures the character of Stephen. He said:-

***“Plaintiff (Stephen) always boasts he has enough money and he will take me wherever. But I always say the law protects me.”***

DW2 said this in respect of a dispute he too had with Stephen over the very same land Stephen was exchanging with M'Itaru. DW2 went further and said:-

***“Plaintiff (Stephen) true to his words, as he told me he has money. He went to the land office, he went to police and corrupted them..... 1971, I jailed for 3 months.”***

DW2 was not cross examined on that evidence and therefore one can assume that Stephen accepted the same to be correct a portrayal of his character. Even if one was to accept Stephen's evidence that he gave M'Itaru his 3 acres at Antumburi Adjudication Section he did not prove that the transaction was unconditionally accepted by the adjudication officer. The adjudication officer stated that the exchange was subject to there being no dispute. As we now know, there did exist a dispute over that land between Stephen and DW2. I find that Stephen failed to prove his case on a balance of probability but M'Itaru succeeded to prove his case that he had a defence of the doctrine of *non est factum* and he was therefore entitled to the eviction of Stephen from the suit property. Stephen has been in occupation of that suit property since 1984. That occupation in my view has been illegal. I grant the following judgment:-

- 1. HCC number 240 of 1992 is dismissed with costs to M'Itaru M'Nthakairi M'Ikiamba.***
- 2. An order is hereby given that Stephen Ikiao do give vacant possession of parcel number Mikinduri/Anthwana/724 within 30 days from this date hereof.***
- 3. In default of Stephen Ikiao giving vacant possession as stated in number 2 above, an order is hereby issued for eviction of Stephen Ikiao within 30 days after the date of this judgment.***
- 4. Stephen Ikiao's counterclaim in CMCC Meru No. 483 of 1992 is dismissed with costs to M'Itaru M'Nthakairi M'Ikiamba.***
- 5. Costs of CMCC Meru 483 of 1982 and HCC No. 240 of 1992 are awarded to M'Itaru M'Nthakairi M'Ikiamba.***

Dated and delivered at Meru this 2<sup>nd</sup> day of July 2010.

**MARY KASANGO**  
**JUDGE**