



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

**Civil Case 154 of 2000**

**MUSA KIMATHI ..... PLAINTIFF**

*Versus*

**JOSHUA MBAYA**

**JENNIFER KAROKI MBAYA ..... DEFENDANTS**

**JUDGMENT**

The plaintiff pleaded in his plaint that he was the owner of parcel No. 1036 Mwichwiri Farmers Company having purchased it from the first defendant by an agreement dated 8<sup>th</sup> January 1999. In his plaint the plaintiff sought an injunction to stop the defendant from interfering with that parcel of land. The defendant denied the plaintiff's claim. They also counter claimed by pleading that the plaintiff agreed to transfer parcel no. 1036 in exchange of plot no. 53D Maki commercial agencies Nanyuki. The defendants in that counter claim pleaded that by virtue of that agreement they were entitled to plot no. 1036 and sought that the plaintiff be ordered to transfer it to them. They also sought mesne profits from the date the plaintiff agreed to the exchange. When the case came for hearing the plaintiff in evidence stated that he entered into an agreement with the first defendant to purchase parcel no. 1036. The transaction was concluded and the title deed clearance certificate was issued to him by Mwichwiri Farmers Company. By virtue of that certificate the plaintiff stated that he was recognized by the company as the owner of parcel no. 1036. He stated that the defendant however began to trespass that parcel of land. That they even erected some structures and fenced the parcel of land. These were however demolished by the administration. In due course however because of the pressure that was brought upon him by the administration in particular the DO he agreed to exchange the plot for another. That agreement was reduced in writing which was later produced as defence exhibit no. 1. It is pertinent to note that the agreement provides that the plaintiff was exchanging plot no. 53 in exchange for the defendant's plot no. 1056 Maki Commercial Agencies. That agreement seemed to have been amended subsequent to the parties execution. The 2<sup>nd</sup> defendant in evidence stated that the error was noted by her counsel and she returned the letter to the DO who amended it to read that the plaintiff was exchanging plot no. 1056 at Mwichwiri to the first defendant and thereafter the first defendant was to transfer to the plaintiff plot no. 53 at Maki Commercial Agencies. Even with those subsequent amendments the agreement did not conform to the defendant's counter claim. The plaintiff in evidence stated that he had not been shown the plot that he was to get from the first defendant in exchange. The defence evidence was given by the second defendant. She stated that the plaintiff took advantage of the first defendant's mental problem when he purchased parcel no. 1036. It is important to note however that that allegation of mental state was not pleaded in the defence. It can only therefore be concluded that the second defendant said statement was only an afterthought. It however cannot be entertained by this court since parties are bound by their pleadings. The second defendant further said that the plaintiff agreed to exchange parcel no. 1036 with parcel no. 53. That evidence was however not supported by defence exhibit 1. The parcel numbers mentioned in that exhibit are different to the ones that the second defendant stated in evidence. The second defendant produced defence exhibit no. 2 which was a clearance certificate of Maki Commercial Agencies. That certificate according to her evidence related to the parcel of land that the plaintiff was supposed to get. Having scrutinized that clearance certificate I note that the same has cancellation which were not counter signed by the directors of Maki Commercial Agencies. The original plot number quoted in that clearance certificate was no. 494. That number was cancelled and an entry

made of number 53. Similarly the name of the owner of the certificate was originally not that of the first defendant. That name has been cancelled and the name of the first defendant written thereon. That cancellation too was not countersigned. I have considered the evidence presented before me and I find that the plaintiff has proved his case on a balance of probability. The defendants on the other hand have failed to prove their counter claim. As stated before the agreement relied upon by the defendant in support of the counter claim was defence exhibit no. 1. That agreement was cancelled and amended subsequently after the parties who were contracting had executed it. Any variation which was to be effected upon such an agreement had to be done with the consent of the contracting parties. The plaintiff was not a party to the variation by the DO and it is doubtful if the first defendant was a party of that variation. This is according to the second defendant's evidence. The DO was a mere witness to the execution of that agreement between the plaintiff and the first defendant. He therefore had no right to amend that agreement without their consent since he was not a party to the agreement. For that reason the defendant's counter claim fails. As stated the plaintiff's case succeeds on a balance of probability because the plaintiff has proved his ownership of plot no. 1036. That is sufficient to justify the granting of the prayers he seeks. The judgment of this court is as follows:-

- 1. An order is hereby issued for a permanent injunction to issue restraining the defendants, their servants or agents or any person claiming under them from trespassing or interfering with the plaintiff's land parcel no. 1036 Mwichwiri Farmers Company.***
- 2. An order is hereby issued for eviction of the defendants from parcel no. 1036 Mwichwiri Farmers Company within 21 days of the date of this judgment.***
- 3. The plaintiff is awarded costs of the suit and of the counter claim.***

**MARY KASANGO**

**JUDGE**

***Dated and delivered this 14<sup>th</sup> day of May 2009***

**M. S. A. MAKHANDIA**

**JUDGE**