



1. Land and Environmental Law Division
2. Civil Appeal.
  - a) Subordinate court case Hccc3384/01
  - b) Land original LR. No.70/01 Plot No.14
  - c) Plaintiff alleges sale agreement of land between himself and Muchuna Wakori (now deceased) for consideration of Ksh.50,000/-.
  - d) Deceased dies, widow claims property
  - e) Plaintiff files suit for permanent injunction and declaration that land is his.

#### Judgement

- a) Trial magistrate held no valid sale agreement. Suit dismissed.

#### Appeal

- a) Arguments by plaintiff/appellant
  - i) Valid sale agreement
  - ii) Plaintiffs appellant in occupation
  - iii) Notification of sale agreement was to be made by the deceased and not appellant
  - iv) Prayer to substitute judgement with award to plaintiff/appellant.

3. Held: a) No valid argument in law
  - b) Trial magistrates judgment/finding upheld

4. Case law

5. Advocates:

M. Munyu of Iseme Kamau & Co. Advocates for the plaintiff- present

J. Ochiro of Gitau Sighu & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent – absent

Kariuki Muchuna in person 3<sup>rd</sup> respondent - absent

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

**CIVIL CASE NO. 1069 OF 2004**

**JOSPHAT NJAU RERAI ..... PLAINTIFF**

**VERSUS**

**KAMUTHI FARMERS CO-OPERATIVE SOCIETY ...1<sup>ST</sup> RESPONDENT**

**HANNA MUTHONI MUCHUNA ..... 2<sup>ND</sup> RESPONDENT**

**KARIUKI MUCHUNA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

I: Background of Appeal

1) The appellant/original plaintiff, Josphat J Njau Rerai alleged that he bought from his relative one Muchua Wakori (now deceased) a portion of land within the original land LR 70/01. He said that he paid Ksh.50,000/- for this.

2. When Muchua Wakori passed away almost ten years later his widow Hannah Muthoni Muchuna threatened to evict him from the land. He then filed a land case in the subordinate courts at Milimani Commercial Courts seeking

**“A permanent injunction against the said Hannah Muthoni Muchuna together with the initial original owners of the land being M/s Kamuthi Farmers Cooperative Society Limited , restraining them from disposing, selling or alienating Plot 14, portion of Title, of Title No. LR No.70/10 to the detriment of the plaintiffs “a declaration that plaintiffs is entitled to plot No.14 – a portion of title LR No.70/10.”**

**“an order of transfer of Plot No.14 a portion of title LR70/10 to the plaintiffs**

3. The defence denied the allegations. The widow to the deceased (2<sup>nd</sup> defendant) alleged that the plaintiffs wife was granted permission by her husband to cultivate the land free of charge. When her late husband passed away in the year 2001 who took out letters of grant intestate and perused the assets owned by the deceased. These assets included the disputed portion of plot.

4. The third defendant was named a beneficiary to the said land. The first defendant was a land buying company under the Co-operative Society Act. It awarded the deceased its member 1 acres of land. There after excess portion of land of 50 by 50 was given to the deceased. There was not dispute over the 1 acres land and it is not part of these proceeding. The first defendant informed the lower court through its chairman that out of the excess plot being number 13 and No.14 the deceased sold plot No.13 to one Kariuki, Mwangi John. This was duly recorded in the association’s books and notification of such sale was made to them.

5. When the deceased died, his widow visited their officers where the 1<sup>st</sup> defendant confirmed that plot No.14 and the one acre plot was available to the widow being the deceased entitlement. They however stated that Plot 14 was left to Kariuki Muchuna, the son of the deceased as a beneficiary and or nominee entitled to the said property. It is this plot No.14 that was in dispute.

6. The plaintiff applicant alleged he bought the land produced a sale agreement (undated) and

notification letter dated 7 November 1992 to the 1<sup>st</sup> defendant of the sale. The 1<sup>st</sup> defendant said that they were not aware of the said sale nor letter of notification. Their books were never amended or adjusted to reflect his sale.

7. The defendant took exception that not only was the agreement undated but it was not known to them.

8. The plaintiff claims it was a genuine agreement. That the issue of a Land Control Board did not come into play as the plaintiff was buying shares and not title.

9. The trial magistrate determined the matter by dismissing the plaintiffs claim as confounded. The plaintiffs appealed. The following were his grounds of appeal.

**A: The learned magistrate erred in:-**

- a) **Law and fact in dismissing the appellants claim.**
- b) **In disregarding the appellants occupation of the suit property whilst determining the question of transfer of the suit property to the plaintiffs.**
- c) **As the suit was proved in a balance of probabilities.**
- d) **Dissolving/disregarding the evidence that the Plot were unallocated at the date of the sale in her finding in favour of the respondents**
- e) **Vesting the obligation to notify the 1<sup>st</sup> defendant of the sale agreement on the plaintiffs not with standing the clear provisions of the admitted sale agreement.**

**B: Opinion**

10. The facts of this appeal case has been constant. The plaintiff's relative was given Plot 14 portion of LR70/10 to cultivate. This she did peacefully. Her son alleges to have been given the said plot by way of sale. The issue before the subordinate courts in one of a sale agreement was there a lawful sale agreement in existence?

11. The law of contract section 3(3) requires that all agreements between parties entered must be in writing. The appellant was able to produce a sale agreement in writing. The question arises as to the content of the agreement. The parcel of land to be sold had not been mentioned nor described in the agreement. The deceased had three pieces of land which of these three was the selling to the appellant? This is the question the trial magistrate was not able to establish. If he states it is the one that his relative/mother was cultivating with permission from the deceased, then their presence on the land was that of a licensee.

12. Where the said land so occupied is described as plot 14, the 1<sup>st</sup> defendant was the head lessor. Any sales and or transfer would have to be notified by the vendor to so sell. Indeed the societies by laws at clause 43 states:-

**“No member shall without first obtaining the written consent of the committee, sell or otherwise dispose of any of his produce of a kind scheduled as following within this section by the General Meeting to any . . . society or person other than the society.”**

13. The appellant alleges that it was the deceased who ought to have obtained permission from the society to sell his portion and not him. The fault of not doing so should not be visited upon the appellant.

14. The appellant may be correct that the deceased ought to have notified the society of the sale, but

he too should have ensured and confirmed that the same had been registered.

15. The agreement is undated. It is unclear when it was entered into. The notification allegedly to the 1<sup>st</sup> defendant is dated the 7 November 1992. From the records of the 1<sup>st</sup> defendant only Plot No.13 was sold. Plot 14 was never sold. The agreement never said which plot was sold.

16. Under the law of contract there must be a written agreement that is dated signed, sealed and delivered. This agreement was signed but was never delivered to the 1<sup>st</sup> defendant.

17. I hereby would uphold the trial magistrate finding that there was no valid agreement in law.

18. The issue relied on by the trial magistrate was that there was no transfer after the sale. The appellant wished that the issue of occupation be considered. Occupation according to 2<sup>nd</sup> defendant, widow to deceased was given to the appellant's relative/mother. It was never the appellant possession only comes into play where adverse possession is sought. In this matter the time limit of 12 years had not expired. The possession is still in the deceased estate. I would dismiss this argument by the appellant.

19. I dismiss this appeal in its entirety with costs to respondent 1 and 2 only. Respondent 3 not having participated no costs will be awarded to him.

Dated this 19<sup>th</sup> day of February 2008 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Munyu of Iseme Kamau & Co. Advocates for the plaintiff- present

J. Ochiro of Gitau Sighu & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent – absent

Kariuki Muchuna in person 3<sup>rd</sup> respondent - absent