REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 28 OF 1994

SABINA WANJIRU MUCHOKI …….…. PLAINTIFF

VERSUS

JOSEPH NJARAMBA MWANGI ……..…… DEFENDANT

JUDGMENT

A. **The Background**

The plaintiff acting by herself filed suit on 9th January, 1997. She pleaded that the defendant, while knowing that her husband was mentally unstable, used tricks to get him to transfer family land to him (the defendant). She was praying that –

> **"the defendant and his agents be restrained from using or dealing with L.R No. LOC.7/ICHAGAKI/823…"**
>
> The plaintiff was also praying for costs of the suit.

The defendant, in his statement of defence dated 27th March, 1997 and filed on 1st April, 1997 pleaded that the plaint was bad in law and did not disclose any reasonable cause of action and should be struck out.

The defendant pleaded that there had been an agreement in writing, dated 22nd November, 1995 later up-dated by another agreement dated 4th January, 1996 by which the plaintiff's husband agreed to sell and the defendant agreed to buy 0.8 acres of land to be partitioned from the vendor's land parcel number LOC.7/ICHAGAKI/823 for Kshs. 80,000/= - the whole of which sum was paid by the defendant to the vendor, *Peter Muchoki Gachina* . It is pleaded that following the delivery of payment as aforesaid, the said *Peter Muchoki Gachina* put the defendant into possession of the 0.8 acres purchased, and the defendant has now fully developed the same, at great expense.

On the occasion of hearing, on 27th April, 2004 learned counsel, ***Mr. Mureithi*** appeared for the defendant while the plaintiff appeared in person. Although ***Mr. Mureith***i did have a preliminary objection which had been notified long ago, in the content of the pleadings, he indicated his readiness to allow the trial to run its full course, in view of the fact that the plaintiff was conducting her own case in person.

B. **The Plaintiff's Case**

Proceedings began with the swearing of the plaintiff, *Sabina Wanjiru Muchoki* who gave her evidence in the Kikuyu language and this was translated. She said she came before the Court in search of assistance to enable her to recover her land. She testified that she lives on the suit land, as she has done since 1971. She

has lived on this land, in Maragwa District, from the very beginning when she had married her husband, *Peter Muchoki Gachina*. All her 10 children were born on the suit land, which comprises six acres. The land was bequeathed to the plaintiff's family by her widowed grandmother, who died in 1996. The deceased had been using the whole area of the suit land, and she had passed the same to the plaintiff's family, with her husband acquiring the title deed. The plaintiff's family has used the suit land for farming maize, beans and coffee.

The plaintiff testified that, while walking through the suit land sometime in 1995, she found the defendant and his wife cultivating on part of it. When she sought an explanation, the defendant answered that the land had been leased to him by the plaintiff's husband. The plaintiff proceeded to her husband, and had the defendant and his wife summoned; and the plaintiff then sought to know whether the defendant was a lessee or a hired worker. Whereas the defendant was clear that the land had been leased to him, the plaintiff's husband remained mute. The plaintiff took further action by visiting the office of the District Officer (D.O), on 1st November, 1995 with the object of raising a complaint about the defendant's activities on the suit land. The D.O. had requested the plaintiff to appear before him with her children. Before doing so, she visited the local Chief's office, and found out that the Chief was supporting the defendant's cause. When she saw the D.O., he gave her a letter to take to the Chief, keeping a copy (plaintiff's exhibit No. 1) for herself. In this letter dated 1st December, 1995, the D.O. for Maragwa Division communicated to the Chief for Ichagaki Location that the plaintiff's husband was attempting to sell the suit land without the approval of his family. When the Chief received the letter, he summoned the plaintiff and the defendant, and read to them the letter, with interpretation provided. But on 23rd February, 1996 surveyors came to the suit land and marked out a portion comprising 0.6 acres, for the defendant. The plaintiff averred that she had no knowledge about a sale transaction which had taken place between her husband and the defendant. Following the visit by the surveyors, the plaintiff made a complaint to the D.O. merely again; but the D.O. stated he had not authorized the said sub-division of the suit land. On 17th March, 1996 the plaintiff took the complaint further, to the DC's office. This initiative may have led to a hearing of the complaint before the local elders meeting, where the plaintiff's husband was asked to refund to the defendant any such monies as may have been paid towards the purchase of the suit land. The plaintiff testified that the said agreement to refund purchase money to the defendant was a formal one (plaintiff's exhibit No.2) and was duly witnessed. But on 29th June, 1999 the defendant brought in other surveyors, and after they made their demarcations, the suit land was sub-divided.

So what was the plaintiff seeking? In her words:

> **"I would like to inform the Court that my children and I were not involved in the transaction in favour of [the defendant] … I pray that the Court gives me back my land which [the defendant] has taken. I do not know how to provide for my children if the [suit] land is taken away [from us]."**

At the hearing of 29th June, 2004 the plaintiff was cross-examined by counsel for the defendant. She testified that she had not bee present when her husband sold the suit land. In her words:

> **"The defendant used to invite my husband for drinks, and he used such occasions to cheat my husband. I was never present at any of those drinking meetings. The defendant and my husband used my own jerrican to carry the *changaa* drink from Nairobi".**

The plaintiff testified that the title to the suit land, L.R NO. LOC 7/ICHAGAKI/823 was not in her name, but in the name of her husband . She further averred that the local elders before whom the dispute had been placed on 20th July, 1996 had ruled that her husband should pay back to the defendant the sum of Kshs.120,000/=, before the suit land was restored to the plaintiff's family. However, the plaintiff's husband did not make the refund. Later the plaintiff brought her complaint to the Land Tribunal, in Land Disputes Tribunal Case No. 53 of 1998. The plaintiff was aware that the defendant had sued her husband in respect of the suit land, at the Muranga Resident Magistrate's Court, though she said she did not know the outcome of that case. She insisted that the Resident Magistrate's Court could not possibly have ordered a transfer of 0.8 acres (the suit land) to the defendant, because : "*The land belongs to us as a family. My husband only held title*". She said she was unaware that the said 0.8 acres have since been sub-

divided and transferred to the defendant, leaving the remainder, being 5.2 acres, registered in her husband's name. She said she had lodged a caution against interference with the entire six acres of the land parcel. She said she had noticed from the Lands Office record that her caution had been removed in 1999 but she knows not how this came to be, as nobody had brought it to her attention. She said she did not believe there had been a sub-division, since this case has been still pending in Court

. C. The Defendant's Case

The defendant was sworn and gave his evidence. He said he was a businessman at Kangemi market. He said he knew the plaintiff, as well as her husband, *Muchoki* . He testified that *Muchoki* had offered to sell 0.5 acres of land to him as he needed money for medical treatment for his sick child, and for paying fees for his daughter at a training institution. *Muchoki* requested Kshs.50,000/=, which the defendant could not raise at the time; he was able to raise Kshs.10,000/= on the 4th September, 1995; on 21st September, 1995 he paid *Muchok*i Kshs. 20,000/=; and on 17th October he paid a further Kshs.20,000/=. The defendant testified that on 22nd November, 1995 he and Muchoki came before a Muranga Advocate, *Mr. Wambaa* for a formal agreement to be drawn up covering the several payments. Thereafter *Muchoki* kept seeing him for further payments; and on 27th December, 1995 a further payment of Kshs.10,000/= was made; followed by another Kshs.10,000/= on 4th February, 1996; and then Kshs.10,000/= again paid at Maragua. The defendant said he paid more than the originally agreed Kshs.50,000/= because *Muchoki* kept asking for more; and in the end the total amount paid was Kshs.80,000/=; and it was then agreed that an additional 0.3 acres of Muchoki's land would be sold to the defendant. An agreement was made on 22nd November, 1995 and it provided that if *Muchoki* should change his mind regarding the land sale transaction, then he would make a refund to the defendant. The agreement stated that if Muchoki should fail to effect transfer, then he would repay twice the sums of money he had received from the defendant. The agreement was executed before *M/s Ben Wambaa Advocates* (defendant's exhibit No.1). There were amendments (defendant's exhibits 2 and 3) to the original agreement, and these recorded additions to the originally – agreed land size to be transferred.

The defendant said he was aware that the plaintiff did register a caution against the said land transaction; but he also, on 15th January,1 996 registered a caution, claiming purchaser's interest. The plaintiff's caution was the later one, being registered in January, 1997. The defendant averred that the vendor, *Muchoki* , at one stage changed his mind over the sale transaction, and it became necessary for the matter to be brought before the local elders on 27th July, 1996. The elders ruled that *Muchoki* was to refund the sum of Kshs.120,000/= to the defendant if he was not going to transfer the suit land to the defendant. This repayment was to be effected by the deadline of 30th November, 1996, failing which a suit would be lodged against the vendor (defendant's exhibit No. 4). The refund was not, in the event, made and the defendant filed suit. The Court remitted the matter to the Land Disputes Tribunal, whose decision the Court later adopted : 0.8 acres of *Muchoki*'s land was to be transferred to the defendant. This order was made by the Resident Magistrate on 11th May, 1999 at Muranga, in Joseph Njaramba Mwangi v. Peter Muchoki Gachina , Land Dispute Tribunal Case No. 53 of 1998. The following are the words of the learned Resident Magistrate, *Mr. A.M Kimgoo:*

> **"THIS SUIT upon being referred to the District Land Dispute Tribunal on 21.8.98 for arbitration by this Honourable Court on the main civil suit No. 52 of 1998 and upon such an award being read to the parties on 13.11.98 in open court and in the presence of both parties, judgment is hereby entered as per the award filed thus –**
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> > **'That the defendant do and is hereby ordered to transfer to the plaintiff 0.8 acres out of land parcel No. LOC.7/ICHAGAKI/823'".**

The defendant testified that the Court order above-mentioned led to the subdivision of *Muchoki*'s land. The mother title (823) was closed for sub-division and the creation of two new titles : LOC.7/ICHAGAKI/3188 and LOC.7/ICHAGAKI/3189. This change is shown in the abstract of title for L.R No. LOC. 7/ICHAGAKI/823 (defendant's exhibit number 6). Abstracts of title for the two new land reference numbers are provided as defendant's exhibits numbers 7 and 8. The defendant testified that he had already collected his title document from the Land Office, though he was not aware that ***Muchoki***

(the vendor) had surrendered the original title. The defendant prayed that the plaintiff's suit be dismissed with costs, and that the plaintiff do see her only recourse as filing suit against her own husband.

On cross-examination by the plaintiff in person, the defendant testified that he had not, at the time of entering into the sale agreement with *Muchoki ,* met with the plaintiff or indeed any of her children. He was also not aware of *Muchoki's* family needs which led him to offer to sell the suit land to the defendant. He averred further that, had *Muchoki* repaid him the sum of Kshs. 120,000/= as ordered by the local elders, he would not have filed suit against the vendor. He averred that notwithstanding the earlier agreement that Muchoki would pay double the amount of money he had received, if he failed to transfer the land to the defendant, the local tribunal had been lenient and had allowed repayment only one-and-a-half times, hence the Kshs.120,000/= required to be repaid; ad he, the defendant was in agreement. To the question as to the real owner of the property which *Muchoki* had sold, the defendant said:

> **"As far as I know, Muchoki is the owner of the property. No document that I have tendered was signed by the plaintiff or any of her children. I have never been with [the plaintiff] during the processing of [these] land matters, apart from the time when we appeared before the Chief. If Muchoki were not there, [then the plaintiff] would be following up on this matter. But so long as he is alive, the property is his property. I have not heard of any complaint from Mr. Muchoki" .**

The defendant denied the plaintiff's accusation that he was gaining ownership of the suit land through the dishonest method of inebriating *Muchoki* with alcohol and then winning consents in his own favour.

The defence concluded its case with the evidence of *Lucas Njoroge Muchoki ,* who was sworn and led through the examination-in-chief on 7th October 2004. He said he was a peasant farmer, and was well aware of the facts relating to the instant case. He said the plaintiff's husband had sold land to the defendant. This land was originally half an acre in size, but it was later enlarged to 0.8 of an acre. The witness said he was present at the time of the first agreement between vendor and purchaser. The land was being sold at the price of Kshs.10,000/= for every 0.1 of an acre. After the transaction was virtually complete, the vendor had wanted to make a refund of the purchase money, and this matter had been considered at a meeting of the clan elders. The elders advised that the purchase monies be refunded, and cautioned that if refund was not made, then litigation would be inevitable and the Court would then authorize sub-division of the land. The witness said he had been present at the meeting of clan elders. In the event, the refund was not made and the defendant filed suit, which culminated in orders by the Murang'a Resident Magistrate that the land be sub-divided and 0.8 acres transferred to the defendant. The land was duly sub-divided and transferred; and the defendant has taken possession.

On cross-examination by the plaintiff in person, the witness said his role in the land transaction has only been that of a witness; he had not addressed his mind to issues relating to *Muchoki's* family interest, because this was purely a *market process of the buyer and the seller*. He said the question how the 10 children of the Muchoki family could be raised, if the family land was sub-divided and sold off, had not been his primary concern. He said : *"I could not have challenged the buyer -seller contract. I did not know all the details of the conversation between the plaintiff's husband and [the defendant]. Between Muchoki and [the defendant] I used to be a witness, as I was there much of the time. The D.O. and the Land Board approved the transaction. I did not decide the matter*".

On re-examination, the witness said he did know the children of the plaintiff, and most of them were over 18 years of age. Only three of the ten children live at home; the rest live and work in Nairobi.

D. Submissions

The plaintiff concluded with one prayer: the sum of Kshs.80,000/= should be ordered to be refunded to the defendant, who should return the land which had been transferred to him.

Learned counsel, Mr. Mureithi submitted that the title prayed for in the plaint no longer existed. The

said title, L.R No. LOC.7/ICHAGAKI/823 had been closed on 16th July 1999 and was thereafter replaced with new titles – one in the name of the plaintiff's husband and the other in the name of the defendant.

Counsel remarked the plaintiff's admission, that her husband had been ordered by the local elders to refund Kshs.120,000/= to the defendant; but he never did, and consequently the Magistrate's Court properly authorized transfer of the suit land to the defendant.

Counsel submitted that the *plaintiff had no locus standi to sue in respect of a property that belonged to her husband alone* , and which her husband had taken the decision to sell off and had indeed transferred. In the words of counsel, "*The property was never in her name, and is not in her name*". Counsel submitted that the defendant was a purchaser for value and, the property having been properly transferred into his name, the plaintiff's suit was overtaken by events, and her case should be dismissed with costs.

The plaintiff made a final response. Her words may be set out here:

> **"Since it was Muchoki who was selling the land, and we were in the dark, I do not believe that the land cannot be returned to us. I brought [the defendant] before the Court so I would come to know how much he had paid my husband. I could not have asked questions at the tribunal, as I knew nothing. The Court should determine how much money we are to repay to the defendant. That is all".**

E Final Analysis and Orders

The essence of the plaintiff's case is unambiguous. There is a parcel of land which she has always known to be *family lan*d . And there is the *family* , with its 12 members who are *Peter Muchoki Gachina* (her husband, and the vendor), *Sabina Wanjiru Muchoki* (herself, the plaintiff) and10 children most of who are adults and live and work in Nairobi. The family land comprises about six acres, and the plaintiff is inveterately committed to seeing to it that this land shall remain always the *family's* economic safetynet. The plaintiff obviously perceives herself as the *family's* custodian of economic security, and she views the said family land as the precious asset in this scheme of economic security.

However, such a social and moral perception of the *family's* economic interests, and of the family land , is not exactly reflected in the state's *instruments of legal ownership* . This may be demonstrated as follows:

> (i) The original title for the said family land was Title No. LOC.7/ICHAGAKI/823 dated 1st April, 1976. It was registered solely in the name of *Peter Muchoki Gachina* , the plaintiff's husband. He is there described as *"the absolute proprietor of the land comprised in the above - mentioned title"*.
>
> (ii) On 16th July, 1999 the said title was closed, upon sub-division into two new numbers – LOC.7/ICHAGAKI/3188 and LOC.7/ICHAGAKI/3189.
>
> (iii) On the same date 16th July, 1999 new titles were issued – one in the name of Peter Muchoki Gachina , and the other in the name of *Joseph Njaramba Mwangi* (the defendant).

The terms of proprietorship as shown on the document of title include the *right of aliena tion, a*nd it is not specified that the lawful title holder is under any obligation, during his or her lifetime, to pay regard to any broader *family* preferences before exercising such a right. This has the effect of conferring upon property titles the m*arketable quality* which guarantees that third parties acting in good faith and giving value in return, can lawfully acquire land title from its original owner. In theory therefore, *Peter Muchoki Gachina's* land title, or part of it, could lawfully pass on to the defendant through an exclusive two-party transaction involving *vendor and purchaser*, without the intervention of broader family i*nterests* such as those represented by the plaintiff in this case. This being possible, it follows that the defendant if he acted in good faith and gave value for the suit land, and lawfully got himself registered as the new owner, would become the lawful proprietor of the same for all purposes, and his title could not then be defeated

by claims founded on the moral claims of the family.

The definitive legal point set out above is apparently contradicted by the plaintiff when she pleads:

> **"Since it was Muchoki who was selling the land, and we were in the dark, I do not believe that the land cannot be returned to us….. The Court should determine how much money we are to repay to the defendant."**

By her references to we and us, it is quite clear to my mind, the plaintiff is pleading the ostensibly morally superior interests of the *family* , as compared to the "*unilateral"* acts of *Muchok*i and the defendant as purchaser. Clearly, she supposes that such family interests have God on their side; and therefore the Court must nullify the pretentious acts of *Muchoki* and the defendant, cancel the two new land title numbers (LOC. 7/ICHAGAKI/3188 and LOC. 7/ICHAGAKI/3189) and restore the original title number (LOC. 7/ICHAGAKI/823) and its ownership in the *family of Muchok*i .

By contrast, the evidence of the defendant's witness, *Lucas Njoroge Muchoki* is remarkable. He says:

> **"I could not have challenged the buyer-seller contract. I did not know all the details of the conversation between the plaintiff's husband and [the defendant]. Between Muchoki and [the defendant] I used to be a witness, as I was there much of the time".**

Quite consistent with that evidence, learned counsel, *Mr. Mureithi* submitted that the plaintiff had no locus standi to sue in respect of a property that belonged exclusively to her husband. This is a trite legal point which, of course, elicited no response from the plaintiff's side. So long as the plaintiff's husband, *Peter Muchoki Gachina i*s alive and is the *registered proprietor* of a parcel of land, his autonomy in alienating that land stands in every sense unqualified, and his wife, the plaintiff, can in no way limit that freedom, as a matter of law, by relying on broad *family interests.* The only times the plaintiff can assert her rights in relation to such property are, firstly, during *succession*, when the registered proprietor is no longer alive; and secondly, when issues of *matrimonial property* come up and it becomes necessary to make provisions for the plaintiff herself. Apart from these two instances, there may well be further situations in which applicable principles of equity dictate that special arrangements be made touching on the property in question.

Similar questions came before me in a recent case in which the plaintiff also conducted her own case – ***Beatrice Wanja Mburu & 4 others v. Samuel Mburu & George Mburu Kimani ,*** Civil Case No. 2750 of 1996. I would like to reproduce my remarks in that case:

> **"Where does this leave the plaintiff and her claims that rest on moral foundations and on customary tradition? There is absolutely no question that the laws of this country ought to be properly moored in ethical considerations. But for the plaintiff, the immediate expression of the governing moral principles ought to have been the assumption of responsibility by her……. husband …… Even as [the husband] exercised his rights to dispose of the suit land during his own lifetime, he should have made appropriate economic-support arrangements for his family – and that did not necessarily have to be founded on the suit land."**

The foregoing passage applies with equal force to the position of the plaintiff in the present case. Accordingly, I must find in favour of the defendant and against the plaintiff, and specifically make the following orders:

> **1. The plaintiff's prayer that the defendant and his agents be restrained from dealing with or using the suit land is refused.**
>
> **2. The plaintiff shall bear the defendant's costs in this suit.**

DATED and **DELIVERED** at **NAIROBI** this 21st day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the defendant : Mr. Mureithi, instructed by M/s P.K

Mureithi Advocates

The plaintiff in person