



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

**AT NAIROBI**

**CIVIL CASE NO.46 of 1990**

**MWAURA BAGITE..... PLAINTIFF**

**VERSUS**

**TONGEI OLE PUNYA ..... DEFENDANT**

**RULING**

This suit was initiated by plaint dated 05.01.90. The plaint filed through Kibunja & Mwiti Advocates bears no court stamp showing its date of filing. However, there is a carbon copy of court fee receipt whose date is not very clear but it also looks like 05.01.90. Be that as it may, the plaint avers that on 19.03.76 the plaintiff and defendant entered into a sale agreement in which the defendant was to sell to the plaintiff 35 acres of land from L.R. No. Narok/Cis-Mara/Nairagie – Enkare/348 at a consideration of Kshs.43,000/= . The plaintiff says he paid the total purchase price; was subsequently registered as the sole proprietor; was issued with a title deed on 06.02.84 and went into occupation of the land and embarked upon cultivating it.

The plaintiff complains that sometime in 1988 the defendant together with his servants and/or agents unlawfully trespassed into the above-mentioned land without any justification, disrupted and denied the plaintiff peaceful enjoyment of his said land and that he (plaintiff) has suffered damage as a result of the defendant’s alleged trespass. Consequently, the plaintiff prays for judgment against the defendant for:-

- a) General damages for trespass.
- b) A permanent injunction restraining the defendant, his servants and/or agents from interfering with the plaintiff’s enjoyment of L.R. No. Narok/Cis- Mara/Nairagie-Enkare/417.
- c) Costs of this suit. d) Interest on (a) and (c) above at court rates.
- e) Any further or better relief as this honourable court finds just to grant.

It appears that concurrently with the filing of the plaint, i.e. on 05.01.90, the plaintiff filed a chamber summons seeking the injunction alluded to at prayer (b) of the plaint above. The chamber summons is supported by the plaintiff’s affidavit sworn on 05.01.90 to the same effect. In it the plaintiff adds that he completed payment of the total purchase price on 04.05.82 and annexes a photocopy of an undated typed letter in kiswahili purporting to relate to the sale by the defendant of part of the aforesaid land to the plaintiff. the letter bears a left thumb-print ascribed to the defendant and a signature said to be that of the plaintiff. the land in question is not specified, neither is the purchase price indicated.

After the typed text there is an endorsement by hand to the effect that payment of the balance of the purchase price amounting to Kshs.13,000/= was completed on 04.05.82. The endorsement is also in photocopy form. One Peter Mberi is indicated as a witness to the endorsement. The endorsement includes what looks like a thumb-print against the figure of Kshs13,000/= but it does not indicate whose thumb-print it is or whether it is of left or right hand. The name of the defendant appears at the bottom of the endorsement. The plaintiff's affidavit also depones that after going through all the process of subdivision, the plaintiff was issued with a title deed for his share of the land bearing the title Narok/Cis-Mara/Nairage – Enkare/417 on 06.02.84.

On the other hand the defendant filed through Otieno Opiacha Advocate a defence and counter-claim dated 20.03.90. However, the court stamp is not clear regarding the date of filing but it looks like 22.03.90. The defendant denies selling the plaintiff the 35 acres he claims or that he sold the land at Kshs.43000/= or that the plaintiff entered into occupation of the land in 1976 and embarked upon its cultivation. There is an alternative defence said to be without prejudice to the above defence, namely, that if there was an agreement for sale, the same was for only 4 acres from L.R. No. Narok/Cis-Mara/Nairage – Enkare/348 at a consideration of Kshs.29,000/= only. The defendant adds that in any case the purported sale is not valid in law as per section 3 of the Law of Contract Act (Cap.23) and that in any event the plaintiff never paid the agreed purchase price.

As regards the plaintiff's claim to have been registered as sole proprietor of parcel No. Narok/Cis-Mara/Nairage – Enkare/417, the defendant avers that the plaintiff's purported registration was fraudulent and null and void on grounds that consent to sub-divide any portion of original parcel No. Narok/Cis-Mara/Nairage – Enkare/348 was never sought or obtained, neither was consent to transfer the subject portion sought or obtained. The defendant avers that the plaintiff's registration must have been based on wrong and false information given by the plaintiff to the Land Registrar. The defendant proceeds to aver that by reason of the aforesaid matters, he has suffered loss and damage and prays:-

- a) For the plaintiff's claim to be dismissed with costs.
- b) For a declaration that the purported sale of Narok/Cis-Mara/Nairage – Enkare/417 between the plaintiff and defendant be declared null and void.
- c) For a declaration that the purported transfer of parcel L.R. Narok/Cis- Mara/Nairage – Enkare/417 into the name of the plaintiff was fraudulently obtained and therefore null and void.
- d) For rectification of the register and directing that L.R. Narok/Cis-Mara/Nairage-Enkare/417 still remains part of L.R. Narok/Cis-Mara/ Nairage – Enkare/348 in the name of the defendant.
- e) For damages. f) For costs of the counter-claim.
- g) For such further relief that this honourable court may deem just and convenient to order.

There is in the court file, inter alia, grounds of opposition drawn by Otieno Opiacha as Advocate for the defendant on 20.03.90 and filed on a date which is not clear from the court stamp but it looks like 22.03.90 opposing the plaintiff's chamber summons of 05.01.90. There is also a replying affidavit sworn by the defendant on 22.03.90 addressing and contradicting the issues subject matter of the plaintiff's chamber summons of 05.01.90. Among other interlocutory documents in the court file are two temporary injunctions:-

- a) An injunction given and issued on 23.02.90 restraining the defendant, his servants and/or his agents from interfering, disposing, alienating, trespassing or in any way dealing or doing anything on L.R. No. Narok/Cis-Mara/Nairage – Enkare/417 until 06.03.90 when the chamber summons application of 05.01.90 was to be heard inter-partes.
- b) A similar injunction to the one at (a) above said to have been given on 08.05.90 and issued on 15.05.90

and ordered to last until further order of the court or determination of the suit.

There is another chamber summons application of 16.07.96 by the plaintiff/applicant seeking orders for the defendant to show cause why he should not be committed to jail for disobeying the injunctive order said to have been given on 08.05.90 restraining the defendant and/or his agents from interfering with or disposing of the suitland and that the said land known as Narok/Cis-Mara/Nairagie – Enkare/417 be preserved until further orders of the court; that the court do direct entry and inspection of the suit premises to ascertain its status at the time; and that costs of that application be borne by the defendant in any event. The application was dismissed by Hayanga, J (as he then was) on 22.12.96 who found it incompetent as he could not find the order of 08.05.90 alleged by the plaintiff to have been disobeyed by the defendant. Hayanga, J noted that while he could find injunctive orders by Dugdale, J of 23.02.90 and then another by Pall, J, he could not find the order said to have been given on 08.05.90.

I note that this is an old case, the events subject matter thereof having allegedly started way back in 1976 and culminating in the filing of this case in 1990. There have also been various interlocutory applications handled by different Judges. I also note that different Advocates have acted for one or the other party at different times. All this provides recipe for confusion.

On 17.02.05 the case came up for hearing before me whereat the plaintiff was represented by learned counsel Mr. D. Konyango assisted by Mr. P. Kaluma. There was no appearance for the defendant. Mr. Kaluma for the plaintiff informed the court that the hearing date of 17.02.05 was taken by plaintiff's counsel ex-parte after the defendant was invited personally to attend at the Registry for purposes of taking a hearing date but he did not attend. So the plaintiff's counsel took the hearing date ex-parte and gave the hearing notice to an illiterate son of the defendant at the defendant's home in Narok and that two wives of the defendant were present during the occasion. Counsel then drew the court's attention to the fact that this is an old matter and he asked to be allowed to proceed with the hearing in the defendant's absence. The court noted that there was an affidavit of service by one R.F. Otieno, process server who said he served the notice on the defendant's illiterate son at the defendant's home in Narok and allowed the hearing to proceed ex-parte. Plaintiff's counsel then called the plaintiff to give evidence in support of his claim and closed the plaintiff's case, whereupon the court fixed judgment for 09.05.05.

I have now perused the court file and noted the history of the case. I note that initially the firm of Kibunja & Mwititi Advocates acted for the plaintiff while Otieno Opiacha Advocate acted for the defendant. This appears to have continued until 1996. After noting the ruling of Hayanga, J alluded to above, I have not been able to find a record of any other activity in this case until 15.09.04 when the firm of Lumumba, Mumma, & Kaluma Advocates wrote to Naikuni, Ngaah and Company Advocates inviting them to send their representative to the Central Registry of the High Court, Nairobi on 29.10.04 to fix a hearing date for this case. It is not clear to me when and how the firm of Naikuni, Ngaah and Company Advocates came on record as acting for the defendant. Apparently the latter firm did not send a representative to the Registry on 29.10.04 and the firm of Lumumba, Mumma & Kaluma Advocates took the hearing date of 17.02.05 ex-parte and served the hearing notice in the manner indicated hereinabove. It is also not clear from my reading of the file how the lawyers who were initially acting for the parties vacated the scene and the new lawyers for the plaintiff got involved in sending court process to the defendant's home in the manner reported above.

The issues raised in this case are of fundamental importance to our jurisprudence. I take cognizance of the fact that land is a highly emotive issue in this country. Indeed land ownership and management was a central issue in Kenya's independence struggle and a lot of human blood was shed in that struggle. Many human lives continue to be lost today over land disputes. Utmost care must, therefore, be taken in the adjudication of land disputes, like the present one, to give all concerned parties a fair chance of participating in the process of adjudication of such disputes.

Having now studied the case file, I am of the considered view that a better mode of service on the defendant should be undertaken and the defendant be accorded a chance of being heard in this defence before the court decides this case. Accordingly, I have reviewed my order of 17.02.05, allowing the plaintiff to proceed with his case ex-parte, and hereby set aside the proceedings that took place before me

on 17.02.05. The new plaintiff's advocates shall take a fresh hearing date and, if unable to confirm which lawyers are currently acting for the defendant and serve such lawyers, shall serve the defendant personally with the hearing notice. Costs shall be in the cause. Orders accordingly.

**Delivered at Nairobi this 9th day of May, 2005.**

**B.P. KUBO**

**JUDGE**