



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE NO. 127 OF 1992**

**SOLOMON MEME MUTHAMIA
..... PLAINTIFF**

VERSUS

**1. NTAARI
KABUTURA..... 1ST
DEFENDANT**

**2. LAND ADJUDICATION OFFICER MERU
2ND DEFENDANT**

JUDGEMENT

SOLOMON MEME MUTHAMIA (the Plaintiff) instituted this suit through a plaint filed by Mr. Kioga Advocate against NTAARI KABUTURA (the first defendant) who is represented by Mr. Nyaga Kamundi Advocate and LAND ADJUDICATION OFFICER MERU (the second Defendant) who is represented by the Attorney General. The plaintiff is claiming ownership of land Reference KIBIRICHIA/NTUMBURI/327 (the suit property) measuring 29.40 acres. This claim is based on a Sale agreement dated the 29th July, 1974 and in the alternative, on the doctrines of adverse possession and constructive trust.

The plaintiff has given oral evidence and called two witnesses to verify his pleadings. In his evidence the plaintiff has testified that on the 29th July 1974 he entered into a Sale Agreement with the first defendant for the sale to him of the suit property for Shs.1,000/= consideration. He said that the sale agreement was drawn and executed in the offices of Mr. Ayub Mbaya Advocate (PW 1) and was witnessed by Mr. Daniel Gitonga (PW 3). He tendered into evidence the original sale agreement as exhibit No.1. Daniel Gitonga (PW 3) testified that the plaintiff is his brother whom he introduced to the first defendant when the latter was looking for a buyer of the suit property. He testified that the plaintiff and the first defendant duly executed a sale agreement in Mr. Ayub Mbaya's office on the 29th July, 1974, which execution he witnessed, and that thereafter the plaintiff took possession of the suit property. PW 3 further informed the court that the first defendant did not have a family. He said that the first defendant divorced his wife early in the 1970s before he had any children with her.

Mr. Ayub Mbaya (PW 1) told the court that in 1974 he was practising law in Meru in the law firm of M/s A. MBAYA AND RIMITA Advocates. He recalled on 29th July 1974 he was approached by both the plaintiff and first defendant who wanted to have a sale agreement executed. The first defendant was selling the suit property to the plaintiff for KShs.1,000. Mr. Mbaya said he drew up the sale agreement (which he identified as exhibit 1) which was explained to the first defendant in Kimeru Language. Mr. Mbaya said that the plaintiff signed the sale agreement while the first defendant thumb-printed it and he countersigned. He said the plaintiff paid the first defendant the purchase price in full, namely KShs.1,000. Mr. Mbaya finally testified that in the month of July, 1974 when this sale transaction was entered into, the process of land adjudication was going on in Meru. In order to effect the transfer of the suit property to

the plaintiff, all that was required of the first defendant was to inform the land adjudication officer that he had sold the suit property to the plaintiff, so that the first defendant's names would be deleted from the adjudication register and the names of the plaintiff inserted instead.

In his written statement of defence filed on the 19.5.1992 the first defendant pleaded that in or about 1974 the plaintiff approached him for a lease of the suit property for an indefinite period; that he agreed to lease the suit property to the plaintiff at an annual rental of Shs.1,000; that the plaintiff cunningly tricked him into executing various documents purported that he had sold and transferred the suit property to the plaintiff; and that after receiving the sum of KShs.1000 from the plaintiff, which he sincerely believed to be in respect of the first year's rental for the suit property, he gave the plaintiff vacant possession, and the plaintiff occupied the suit property, not as a purchaser but as a lessee. In his oral evidence before me the first defendant adopted his written statement of defence in its entirety.

In his submissions, Mr. Kamundi pointed out that there is a doubt as to the existence of a valid agreement of Sale between the plaintiff and the first defendant because the latter has disowned it. I have given this evidence and submissions due consideration. I have no reason to doubt Mr. Ayub Mbaya's evidence. I have also perused the sale agreement and I find that it was duly executed by the parties in the presence of Mr. Ayub Mbaya. The purchase price of Shs.1000 appears to be minimal. There is evidence before me from Mr. Mbaya that the suit property was stony and dry and that the price of Shs.1,000 was reasonable. Besides, this sale took place nearly twenty-seven years ago when the value of the Kenya shilling was high. For these reasons I hold that the plaintiff and the first defendant executed a valid sale agreement (No.1)

The next point for my determination is whether the first defendant effected the transfer of the suit property to the plaintiff. It is the evidence of Mr. Ayub Mbaya (PW 1) that, after execution of the sale agreement, the first defendant was required to write and inform the land adjudication officer (second Defendant) that he had sold the suit land to the plaintiff. The second defendant, on receiving that information, was then required to cancel or delete the names of the first defendant from the adjudication register and to insert the plaintiff's names in their place. Once this was done, the plaintiff's interest in the suit property became registrable.

The plaintiff supported Mr. Mbaya's evidence by telling the court that the first defendant actually wrote a letter and informed the second defendant that he had sold the suit property to the plaintiff. A copy of that letter dated 29th July, 1974 was tendered into evidence as Exhibit 2. This letter reads:

"29th July, 1974

The Land Adjudication Officer

Meru.

TRANSFER OF LAND KIBIRICHIA NTUMBURI NO.329

I have sold the above piece of land to Solomon Meme Muthamia. I therefore apply to you for my name to be struck off from your register and instead insert the name of the buyer SOLOMON MEME MUTHAMIA. I now remain hoping my said letter will meet with kind consideration.

Yours faithfully,

NTAARI s/o KABUTURA

Copy to: SOLOMON MEME MUTHAMIA

P. O. Box 119

MERU.

WITNESS: DANIEL GITONGA

NTUGI, MERU”

There is an endorsement on this letter purportedly made by the Land Adjudication Officer, which reads:

***“Transfer accepted provided
the objector i.e. Mr. Ntari
signs a transfer form. 29.7.74”***

The plaintiff gave evidence and told the court that indeed the first defendant signed the transfer form, which he tendered into evidence as his exhibit 3, which reads:

“The Asst. Land Adjudication Officer I/c

Land Adjudication Department,

Meru.

ADJUDICATION SECTION: K/NTUMBURI

FOLIO NO.

FRAGMENT NO.329.

I Ntaari Kabutura t he registered owner of the above land hereby renounce my title to the said land and request you to re -register the land in the name of Solomon Meme Muthamia.

(Thumb -print) (Signed)

NTAARI KABUTURA Solomon Meme muthamia

(Transferee) (Transferor)”

It is now Mr. Kioga’s submission that, from the time exhibit 3 was signed by the plaintiff and first defendant, the suit property became the property of the plaintiff, for it was through this exhibit 3 that the suit property was transferred to the plaintiff. He submitted further that the second defendant, upon receipt of both Exhibit 3, was under a duty to delete the names of the first defendant from the adjudication Register and to insert the names of the plaintiff. This, the second defendant did not do.

In his oral evidence, the first defendant said that he did not write Exhibit 2. He said he thumb-printed exhibit 3 but he did not know its contents.

In his submissions Mr. Kamundi said that exhibit 2 and exhibit 3 do not support the plaintiff’s allegation that the suit land was transferred to him and that amendments were made in the adjudication register in his favour. Even granting that exhibit 2 is a genuine document, which was disowned by the first defendant, the entry at the bottom reads that the transfer was accepted on condition that the objector signed the transfer form. Mr. Kamundi submitted that exhibit 3 was not a transfer form. That it is not signed or filed by the land adjudication officer as required and therefore the first defendant’s land was not transferred to the plaintiff and the plaintiff’s name was not entered into the land adjudication register as a

proprietor. He submitted that this is confirmed by Exhibit 4.

The plaintiff gave evidence about exhibit 4. He told the court that in 1982 he received information that the second defendant was visiting the adjudication section where the suit property was situated. He went to inquire from the second defendant what the problem was. The second defendant told him that one of the forms had not been filled by the first defendant in 1974 and that the suit property was still being reflected in the names of the first defendant. The plaintiff said that the second defendant advised him to write another letter, requesting him (second defendant) to delete the names of the first defendant from that form. The plaintiff told the court that he wrote a letter on 26th October, 1982 which he produced as his exhibit 4. That letter reads:

“26TH October, 1982

The Land Adjudication Officer ,

Meru.

Dear Sir,

Re: TRANSFER OF LAND KIBIRICHIA/NTUMBURI/329

I bought the above land from Ntaari s/o Kabutura during the year 1974. He moved out of the land and we did all transaction to your office for the transfer of the same, but his name still appears in some of the forms although his name was by then struck off the register by support of transfer form . I am therefore applying for his names to be struck off the forms as well. I am enclosing herewith please find the agreement form for the same. The transfer form is held by you. Hoping you will do the needful.

Yours faithfully,

SOLOMON Meme Muthamia”

A critical analysis of Exhibit 4 reveals that it does not support the first defendant. The plaintiff is confirming that transfer forms were duly executed by him and the first defendant and all the necessary forms were submitted to the second defendant, who acted upon them and struck off the first defendant's names from the adjudication register. He only wrote exhibit 4 on the advice of the second defendant.

I do pause here and observe that this court would have benefited tremendously from the second defendant's explanation about Exhibit 2, 3, and 4 if he had come and given evidence in this court but he did not come.

There is an endorsement recorded at the reverse side of exhibit 4 which reads: -

“This was an oversight as the L.A.O had directed that parties to sign the transfer form. This was done and the final register altered but the A.R. was not. A.R. to be altered and the name of SOLOMON MEME MUTHAMIA to be entered.

Signed

22.12.82 ”

If the adjudication register had not been altered at all, there is no doubt at all that the land adjudication officer directed it to be so altered through this endorsement on 22.12.1982. The court was told by the plaintiff that that endorsement was written by the second defendant. This can be implied from his testimony. As I have stated hereinabove the second defendant did not give evidence. The identity of the person who signed that endorsement was not established. Mr. Mutuku, State Counsel, informed the

court that the second defendant would be relying on all the documents which the plaintiff had presented to court. This, of course, included Exhibit 4 and the endorsement on its reverse side. I am aware that the second defendant had pleaded in his written statement of defence that he would seek the court to declare that the note of the Land Adjudication Officer at the back of the plaintiff's letter dated 22.12.1982 was overtaken by events and therefore null and void, but no evidence was adduced to verify it.

The position therefore is this. The endorsement at the reverse of exhibit 4 was made by the second defendant and it was a directive that the plaintiff's names be entered into the adjudication register as the proprietor of the suit property.

Accepting that position to be correct, the plaintiff's names are deemed to have been entered into the final adjudication register by the second defendant on 22nd December, 1982. The second defendant was therefore under a duty, imposed upon him under the LAND ADJUDICATION ACT, to forward the plaintiff's names to the Director of Land Adjudication and eventually to the Chief Land Registrar for registration of the suit property in the plaintiff's names. The plaintiff told the court, however, that in the month of May, 1983 he was summoned by the second defendant but that he did not go immediately. He went on 11th August, 1983. Upon his arrival, the Second Defendant informed him that an objection to transfer the suit property to him had been filed by members of the family of the first defendant, who wanted a share as well of the suit property. The Plaintiff said he refused to give a share of the suit property to the objectors who were, to him, strangers.

The plaintiff said he was given a copy of that objection which was a letter written by one MARTIN BUNDI which he presented to court at Exhibit 5. This letter reads:

“NTARI KABUTURA FAMILY

NTIRIMITI MARKET

P. O. BOX 79

TIMAU

The Land Board

P. O. MERU

KENYA

REF: SALE OF LAND NO.329 AT NTUMBURI

According to the above reference of land we family of NTARI KABUTURA the Seller or Owner would regret that sale as our father sold it when we were so young that we could not know what was going on. We remain the family: Haruni Kinoti

Christopher Kabutura

Martin Bundi

Samuel Mugambi

Julia Mwambura.

Yours,

MARTIN BUNDI ”

I wish to state at the outset that none of these people were called to give evidence in this case.

The second defendant treated Exhibit 5 as a valid objection under the Land Adjudication Act. This is clear from his pleadings in the written statement of defence clause 3 which reads:-

“3. The Second defendant admits that one Martin Bundi lodged an objection No.345 which was heard on 11.8.19 83 and this revealed the decision in an earlier objection No.97 filed by the plaintiff. It was decided that the land reverted to Ntaari Kabutura who is the 1st Defendant herein”.

The second defendant did not however adduce evidence to verify his pleadings. There is however an endorsement on exhibit 5 which is said to be the decision of the second defendant after hearing the alleged objection. That endorsement reads:

“Since there was a sale and the fact that the seller seems reluctant, it is my feeling that the transaction should only be fairly done through the Land Control Board after registration. So the transfer form together with the application thereof should be stood for now.

Signed 14.8.83”

Before I deal with the issue whether proper objection proceedings were conducted as required under the Land Adjudication Act, I wish to mention that the first defendant, at paragraph 5, 6 and 7 of his a statement of defence had pleaded that one MARTIN BUNDI was his son who, in conjunction with several other children and his wife, lodged an objection with the second defendant against the purported sale/transfer of the suit property to the plaintiff, that the second defendant upheld that objection and thereafter the suit property reverted to him and was registered in his names under the Registered Land Act.

Going by the pleadings of the first defendant, Bundi and the other objectors, are members of his family being his sons and wife. The first defendant's evidence before me was, however, to the contrary. He testified that MARTIN BUNDI is not his son. He is his sister's son. MARTIN BUNDI is therefore the first defendant's nephew. The first defendant then denied knowing Harun Kinoti and Christopher Kabutura. He said he knew Samuel Mugambi but gave no more details. He did not mention Julia Mwambura at all in his evidence.

Therefore oral evidence given by the first defendant is materially at variance with his pleadings. Therefore MARTINBUNDI and the other objectors have not been shown to have any beneficial interest on the suit property. The plaintiff's evidence that the first defendant had divorced his wife and had no children has not been displaced by any credible evidence.

Then on the issue of objection proceedings. No proceedings have been presented to court to show exactly what went on after the alleged objection had been received by the second defendant. However, there is some evidence to show that neither the plaintiff nor the first defendant were allowed to talk. This is clearly brought out in the cross-examination of first defendant by the Attorney General through Mr. Mutuku. The first defendant had this to say:-

“When my objection was heard I was present. The plaintiff was present. He did not allow us to talk.

He did not read to us his findings. He only told the committee to sit down and decide.”

Mr. Kioga has submitted that the second defendant has contravened the provisions of Section 26 of the Land Adjudication. He submitted that no proper objection proceedings were conducted and the endorsement on the reverse of exhibit No.5 cannot be taken to be the objection proceedings. That being the position, it is Mr. Kioga's submission that the second defendant had no option but to enter the

plaintiff's name into the adjudication register and to forward the same to the Director of Land Adjudication.

In his submissions, Mr. Kamundi has stated that the second defendant was within his powers to entertain the objection raised by MARTIN BUNDI in exhibit 4. The second defendant acted within Section 26 of the Land Adjudication Act, which, he submitted, did not provide for a method of procedure in dealing with objections. He submitted that the second defendant was only mandated to make further consultations and inquiries as he deemed fit, that he discharged this duty satisfactorily by inviting the parties to appear before him, and thereafter he made his decision not to register the plaintiff as the owner of the suit property, that if the plaintiff felt aggrieved with that decision, the remedy available to him was to appeal to the minister under Section 29 of the Land Adjudication Act, which he did not do. He submitted that the plaintiff cannot now be heard to complain.

It is important to look at the provisions of Section 26 of the Land Adjudication Act, which provides:-

“26(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit, he shall determine the objection”.

This court was not informed the date upon which a notice of completion of adjudication register was published, if at all. The second defendant did not come to court to say if any notice of completion of adjudication register was ever published and when this was done. I am unable, in absence of such evidence, to say the second defendant complied with the provisions of S.26(1) of the Land adjudication Act.

As to the procedure of determining any objection raised, I agree with Mr. Kamundi's submission that the second defendant was mandated to carry out further consultation and to make such inquiries as he deemed fit. This is precisely why the second defendant summoned the plaintiff and the first defendant to his office. The first defendant has however informed the court, through cross-examination of Mr. Mutuku, that though both the plaintiff and him were present and turned up in answer to the summons, the second defendant did not allow them to talk and did not read his findings to them. In my view, by denying the plaintiff and the first defendant the opportunity to be heard, the second defendant violated the rules of natural justice and condemned the plaintiff unheard. In my view the second defendant further contravened the provision of Section 26(2) of the Land adjudication Act.

The result of this was that the second defendant forwarded the adjudication Register to the Director of Land Adjudication and the Chief Registrar reflecting that the registrable owner of the suit property was the first defendant. Thereafter the Chief Land Registrar caused the registration of the suit property in accordance with the adjudication register and pursuant to the provision of Section 28 of the Land Adjudication Act.

Indeed the Plaintiff has testified that when he checked the position of the suit property with the Land's office Meru he found that the first defendant had been registered the proprietor of the suit property under the Registered Land Act on 30th July 1991 and a Title deed issued (exhibit 6). He however registered a caution on 12th April, 1992 and got a court prohibition order which he registered on 16th April 1992 pending the determination of this suit. The final issue for determination is whether the plaintiff has established a trust or ownership of the suit property through the doctrine of adverse possession.

Mr. Kioga has submitted that, in view of the errors committed by the second defendant, which I

have pointed out above in this judgement, that the first defendant can only hold the suit property in trust for plaintiff. He relied on the case of FRANCIS MUNENE PAUL MUTHUITA V. MILKA WANUEL s/s PAUL MUTHUITA & OTHERS (1982-1988) I KAR 42 to support his submission that a court can declare a trust where it is clear that a defendant holds land under circumstances which show that he was not its owner. He also relies on the unreported case of SARAH WANJIKU MUTISO V. GIDEON M. MUTISO Court of Appeal Nos. 109 and 112 1986 to support his submission that, if a registered owner of land is tricked to transfer his land to another, the latter holds that land in trust for the original owner. Mr. Kioga did not unfortunately hand to court the decision of the court of Appeal in Civil Appeal Nos. 109 and 112 of 1986. My efforts to get it from the relevant registry did not bear any fruit.

In my view the express provisions of Section 143(1) of the Registered Land Act need no further interpretation and the intention of parliament is expressed in ordinary plain words, namely, a first registration of title cannot be cancelled or amended at all. This section provides:-

“S.143 (1) subject to Subsection (2), the court may order rectification of the register by directing that a ny registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or obtained by fraud or mistake”.

There is a submission by Mr. Kioga that this first registration was facilitated, not by fraud or mistake, but by the wrongful actions of the second defendant. I think Mr. Kioga’s submission lacks merit.

It is true no fraud has been established on the part of the first defendant to cause this registration to be effected in his favour. But it certainly has been done through mistake, which came about through the wrongful actions of the second defendant. A mistake can come about through a deliberate omission to perform a public duty or through a wrongful performance of such public duty. In this case, it was committed through the latter.

I therefore hold that the second defendant is the defaulting party in this case for not conducting the process of land adjudication properly as laid down in the Land Adjudication Act cap 284 and thereby facilitating the first registration of the suit properly as laid down in the Land Adjudication Act Cap 284 in the names of the first defendant under the provisions of the Registered Land Act Cap.300. The first defendant cannot therefore hold the suit property in trust for the plaintiff because of the mandatory statutory provisions of Section 143 of the Registered Land Act.

As for the doctrine of adverse possession, the period of twelve years started to run on 30th July, 1991 when the suit property was registered in the names of the first defendant, and expires on 30th July, 2003.

Therefore the plaintiff’s claim against the first defendant must fail and it is hereby dismissed.

The Plaintiff’s claim against the second defendant is that the second defendant conducted himself in a manner that violated the provisions of the Land Adjudication Act by not conducting a lawful process of land adjudication and thereby he has suffered the loss of his 29.4 acres and should be compensated. The plaintiff has not specifically pleaded for compensation from the second defendant, though his advocate made this an issue in his submissions. I think I have the inherent duty to award a litigant a relief which has not been pleaded if I am satisfied that it should be done in the interests of justice. This is specifically provided for in Order VII Rule 6 of the Civil Procedure Rules which is

: “6. Every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court thinks just, whether or not it could have been asked for or could have been granted when the suit was filed and this rule shall apply also to a defence”.

It is my holding that, as the plaintiff has suffered the loss of his 29.4 acres, the second defendant,

and through him, the Ministry of Lands and Settlement, is entitled to compensate the plaintiff for that loss. The plaintiff bought these 29.4 acres on 29th July, 1974. He is entitled to compensation at the current market price for the reason that he will be required to get another parcel of land at the current price. For this purpose I direct that a valuation Report of the suit property be filed within thirty days from today. There be a mention before me on 2nd April, 2001.

A.G.A. ETYANG'

JUDGE

2.03.2001

Delivered this 2nd March, 2001 in the presence of Mr. Mureithi for Mr. Kioga for plaintiff, N/A by Mr. Omurera state Counsel Meru for Second defendant, in attendance M/s Mutonyi court clerk.

A.G.A. ETYANG'

JUDGE

2.03.2001

2.4.2001

Coram: Etyang' – Judge

Mr. Mureithi holding brief for Mr. Kioga for plaintiff

No appearance for defendants.

M/s Violet Mutonyi – court clerk

Mr. Mureithi

Valuation Report compiled by M/s Gitonga Aritho Associates dated 30/3/2001 was filed today by the plaintiff. The land measuring 29.4. acres have been valued at the current market price of KSh.3,237,000. I pray for judgement to be entered against the second defendant in this sum.

A.G.A. ETYANG'

JUDGE

2.4.2001

Court: Both State Counsel Mr. Omurera and Second defendant are absent. I shall proceed with this matter.

A.G.A. ETYANG'

JUDGE

2.4.2001

RULING

By the judgement of this court entered on 2nd March, 2001 this court held that the second defendant is entitled to compensate the plaintiff for the loss of the suit property measuring 29.4 acres. The

court called for a valuation Report on the suit property to be filed within thirty days. A valuation Report has now been filed and it shows the market price of the suit property (29.4 acres) is Shs.3,237,000.

The second defendant has not made an appearance today through a State Counsel. However, from my perusal of the report it is clear that there has been intensive development of this property since 1974. The property is now located in a settlement scheme where new institutions have come up such as Ntumburi Methodist and catholic churches, Ntumburi primary school, curio shopping centre and Lewa Wildlife conservation Area. The area is experiencing intensive development, which has made demand for land in the area acquire an upward demand, hence high land values. On the basis of this Mr. Gitonga Aritho valued it at KShs.3,237,000.

The second defendant has not shown any particular interest in this case. He declined to attend court throughout the trial, did not give evidence or call witness. When this report was tabled today, he has not seen it fit to attend court. I have no alternative but, at the request of the plaintiff's Counsel, to enter judgement for the plaintiff in terms of this valuation report.

Judgement for the plaintiff is now entered against the second defendant in the sum of KShs.3,237,000. As the second defendant is a government employee in the Ministry of Lands and Settlement, this judgment is entered against the Ministry of Lands and Settlement. I order that the second defendant, being the default party, pays the costs of this suit both of the plaintiff and the first defendant.

It is so ordered.

Dated and delivered at Nairobi this 2nd April, 2001 in the presence of Mr. Mureithi for plaintiff, and Mrs. Violet Mutonyi, court clerk. No appearance for and by first and second defendant.

A.G.A. ETYANG'

JUDGE

2.4.2001