



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 256 OF 1996**

**KAMWELI MWANGANGI KITUKU :::::::::::::::::::: PLAINTIFF**

**VERSUS**

**NZISA MULI :::::::::::::::::::: 1 ST DEFENDANT**

**SAMMY MULI :::::::::::::::::::: 2 ND DEFENDANT**

**MWANIA MULI :::::::::::::::::::: 3 RD DEFENDANT**

**Coram: J. W. Mwera J.**

**P. Mulwa Advocate for Plaintiff**

**Osoro Advocate for Defendant**

**C.C. Muli**

**J U D G E M E N T**

By his plaint filed here on 18.10.96, the plaintiff pleaded that all the material time he was entitled to and was the owner of all that land known as Parcel No. MAKUENI/UNOA/67 in Makueni District. But that from August 1993 the 20 defendants wrongfully entered this land and they have since ignored, failed or refused to give it up to the plaintiff. So he prayed for an injunction to restrain the defendants from continuing to occupy the subject land and that they should also be ordered to be evicted from it.

The initial defence filed on 15.11.96 was amended on 2.2.99. It was also accompanied with a counterclaim. The defence denied that the plaintiff was entitled to the subject land. That the defendants had always occupied this land and that the plaintiff infact entered a secret deal with the husband of the 1st defendant (father of the 2nd and 3rd defendants) to sell this land depriving the defendant of their inheritance. That the land is agricultural and no land control board consent was obtained prior to that sale. Further that the plaintiff ought to have joined the seller as a party (defendant). That the sale was fraudulent because the defendants were not placed before the land control board to concur in the consent to sell. This was a rather 10 doubtful pleading in the light of the law. No law requires that families consent to sell of land they are probably not registered over. Another ground of fraud was alleged to be absence of a witnessed sale agreement.

There was a counterclaim that the defendants had been on the subject land for more than 12 years and so this court should declare their ownership thereof by virtue of adverse possession. To claim adverse possession, one must proceed by originating summons under O. 36 Civil Procedure Rules. The defendants did not seem to consider and proceed accordingly.

The plaintiff denied the claims in the counterclaim, and also replied to the amended defence on

8.2.99.

The plaintiff (P.W.1) told the court that he bought the land in issue from its owner Muli Mbuna (P.W.2) in 1973. They did so by an agreement (Exh.P1) and a due land control board consent was given (Exh.P2). Then P.W.1 got the registration (Exh.P3). but that Mbuna told P.W.1 to wait awhile so that he could move his family including the defendants to some alternative land. He built on that land but apparently the defendants declined to move there. They could not permit the plaintiff to work his land either and so he sued them and desires the reliefs sought. The court heard that one Bahati once bought this land at an auction when Mbuna failed to repay a certain loan. But on arrangement, P.W.1 paid off Bahati, and as it were, bought the land from Mbuna. He got the title that way.

Muli Mbuna (P.W.2) told the court that he took a loan from National Bank of 10 Kenya Limited some of which he used to educate the 2nd Defendant. The land was the security. He defaulted and the bank sold the land to Bahati. And with the arrangement alluded to earlier P.W.1 bought it from him. That had Sammy – the 2nd defendant found money, the family would have refunded Bahati his money and gotten the land back. But then the 2nd defendant did not have the money – hence the arrangement with the plaintiff for Sh.40,000/= [Exh. P2a shows Sh.300,000/= consideration]. That P.W.2 took his family, the defendants, to the present land he lives on but they stuck on the plaintiff's land. P.W.2 agreed that the defendants be evicted from the plaintiff's land.

The 1st defendant, Nzisa, wife of Muli (D.W.1) told the court that she has always lived on the subject land since she married P.W.2 as a young girl. She was not told that the land had been sold but that her husband (P.W.2) has simply moved elsewhere to live with his other wife. That he has not given D.W.1 alternative land to settle on. The land in issue was however initially registered in the name of P.W.2. She did not know of the loan from the bank. That D.W.1 had nowhere to live save to remain on this land. That one of her sons lives with P.W.2 on his other land at a place called Kathonzweni. That once P.W.2, her husband demolished the defendant's houses on parcel No.67 informing them that the plaintiff would be coming to build there.

Sammy Muli (2nd defendant – D.W.2) knew that this land was due for auction when his father (P.W.2) defaulted on the bank loan referred to earlier. D.W.2 began to repay that loan with his father but the arrangement fell through. That P.W.2 sold the land to the plaintiff but did not show the 2nd defendant alternative land to settle on – not even at Kathonzweni. He could be prepared to vacate land No.67 if an equally valuable land is shown to him by his father. That P.W.2 sold the land behind the defendant's back but that his brother, Mwanzia now lives on the land their father lives on. That as at the time of the trial the subject land was in the name of the plaintiff, but D.W.2 vowed not to move out of it. Somewhere in his testimony D.W.2 appeared to say that he has bought his own land, though. Both sides submitted.

The plaintiff's side maintained that the sale between Muli Mbuna (P.W.2) and the plaintiff was valid and lawful. He got the title to the land and he is entitled to the reliefs sought.

On the defendant's side denied that the sale was regular and discounted the evidence in support of the claim herein. That conspiracy and fraud vitiated the sale to the plaintiff and that it should be presumed that the 1st defendant living on parcel 67 has right to remain there.

Having considered all evidence here in the light of the pleadings and the law, the plaintiff has proved his case. Muli Mbuna (P.W.2) sold the land to him validly. P.W.2 was the registered owner. The defendants were not. The defendants are thus ordered to vacate the land within the next 90 days. It was said that P.W.2 has another land at Kathonzweni where Mwanzia, 1st Defendant's son already resides. It looks like the defendants prefer parcel No.67 but that does not and should not militate and prejudice P.W.1's right and title to it.

In sum the claim is proved and orders issue to the plaintiff with costs. The counter-claim is dismissed because it was not brought under O.36 Civil Procedure Rules and it was not proved. It is dismissed with costs.

**Judgement accordingly.**

**Delivered on 18th July 2001.**

**J. W. MWERA**

**JUDGE**