



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC CASE NO. 76 OF 2018**

JIMMY NATHAN SAMBO.....1<sup>ST</sup> PLAINTIFF

SYLVIA SAMBO ZIDHERI.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

EDMOND MWAKIO AUGOSTINE.....1<sup>ST</sup> DEFENDANT

LUCY MAYANKA MWAKIO.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

1. By a plaint dated 5/04/2018 the Plaintiffs prays for the following reliefs;

(a) A declaration that the purported Agreement of sale entered into on the 9<sup>th</sup> January, 2003, between the Defendant and one Frazer Sambo relating to a portion of land described as property within the Sale Agreement aforesaid in Sub division Number 11162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality was and is illegal, null and void.

(b) An order of injunction restraining the Defendant by himself, servant, employee, and/or any other person dealing under him from entering upon, developing, selling, leasing, wasting and/or dealing with the suit portion of land described as property within the Sale Agreement aforesaid in Sub division Number 11162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality in any manner whatsoever.

(c) Costs of the suit.

(d) Any other relief this Honourable court may deem fit to grant.

**PLEADINGS**

**The Plaintiff**

2. The Plaintiffs' claim is that sometimes in **March 2018**, the Defendant approached the plaintiffs and produced an alleged Sale Agreement dated **9<sup>th</sup> January, 2003**, between the defendant and one Frazer Sambo over an alleged portion on the **larger Plot No. 441 Section 1, Mainland North**. The plaintiffs averred that the purported agreement of **9<sup>th</sup> January, 2003**, was fraudulently entered into and the said entire transaction then was tainted and characterized by misrepresentation of facts. The Plaintiffs maintained that they are they rightful owners of the parcel of land and prayed for declaration that the alleged sale of the portion of land set out in the purported agreement dated **9<sup>th</sup> January, 2003** to the Defendant is illegal, null and void.

**The Defence and Counterclaim**

3. The Defendants filed their statement of defence and counterclaim on **11<sup>th</sup> May 2018** in opposition to the Plaintiff's claim. They claimed to be purchasers for value in that the 1<sup>ST</sup> defendant purchased the suit land in the year **2003** from **Frazer Juma Sambo** who was one of the

registered proprietors; that the 2<sup>nd</sup> plaintiff was not present at the time of the sale; that it was recognized that the defendants were indeed the owners of a sub-plot which was clearly marked and distinct on the larger portion of Plot No. 441 and after a 2009 subdivision the operational title was No. 11162 (Original 441/3) which left the Defendants' portion intact; that at the time of purchase, there was subdivision going on and it was agreed that each purchaser do contribute to the survey fees Kshs. 6000/= which the defendants contributed; that the defendants believed that after carving Frazer Sambo's land from the larger Plot No. 441, the new owner was to subdivide the new title into separate portions and issue a title to the purchasers.

4. It is pleaded that Plot No.441/3 existed in 2003 of which Frazer was one of the registered proprietors; all the other persons named in the title apart from Frazer Sambo are strangers to the defendants; the defendant avers that he learned that the 1<sup>st</sup> plaintiff and others were showing the suit property to other prospective buyers. When he confronted the 1<sup>st</sup> plaintiff and others they acknowledged that the plot which was clearly marked and distinct and which was a part of the large plot named 441.

5. At the time of sale, the defendant averred, subdivision was going on and each purchaser was asked to contribute Kshs.6,000/= for survey to enable him acquire title at the end of the process. There were many purchasers. The defendants waited for the title deed after purchase; they deny fraud; sale was completed and possession was given immediately; the defendant took possession, cut down trees and built a caretakers house and laid the foundation of a storage building, investing the sum of Kshs.1,500,000/= in the premises.

6. It is pleaded that the agreement had no limitations in as to time was not of essence and the balance of Kshs.100,000/= was to be paid in exchange for the new title in his name; it is also stated that at the time of the sale the apportioned plot was not a cemetery. The foundation they erected had not been disturbed the defendants intimate that the plaintiffs offered to refund him Kshs.200,000/= which he rejected.

### The Counterclaim

7. In the counterclaim the plaintiffs state that: Jimmy Nathan Sambo is not a beneficiary to Frazer Sambo, that Frazer and his sons appeared before the advocate and took the consideration; that he purchased the plot for Kshs.300,000/=; that a balance of Kshs.100,000/= was to be paid after the vendor secured the title deed in respect of the sold sub-plot; that the defendants extensively developed the suit land after obtaining full possession thereof; that when they learnt that there was possibility of the suit land being resold, the 1<sup>st</sup> defendant travelled to Mombasa and met the beneficiaries of the estate of Frazer Sambo. The 1<sup>st</sup> defendant blamed the plaintiffs had failed to process title in his name since 2003.

### Reply to Defence and Defence to Counterclaim

8. The plaintiffs in the main suit filed a reply to defence and defence to counterclaim on 21/6/2018. They aver that the general consensus and family tradition was that any dealing with the land was done through consultation and consensus of all the registered owners. They deny having engaged the defendants over the said plot as alleged in the defence. They state that a substantial part of the land is occupied by family members.

9. They accused the defendants of failing to conduct due diligence. They allege the defendant has admitted inordinate delay in payment of the balance of purchase price. They deny the developments on the said plot alleged by the defendants. The entire parcel is still intact and jointly owned in undivided shares by the registered proprietors.

### The Plaintiffs' Evidence

10. At the hearing, the Plaintiffs called three witnesses. PW1, the 1<sup>st</sup> Plaintiff herein testified that the suit land is a cemetery registered under Title No. 11162 Section 1 Mainland; that the suit land belongs to the family of David Samuel Sambo, his deceased grandfather; that suit land was inherited by the 2<sup>nd</sup> plaintiff and her other 10 siblings; that their names appear on the title deed; that the name of the 1<sup>st</sup> plaintiff's father, one Nathan Sambo appears as one of the registered owners; that Frazer the person alleged to have sold the land to the 1<sup>st</sup> defendant is his uncle and that they were not informed of the sale; that the said Frazer was not an administrator to David's Estate; that he had no right to sell the land; that they did not know of the sale until 10 years after Frazer's demise; that the whole family lives on the land and have set that portion apart as a family cemetery.

11. He stated that he had not taken out letters of administration to the estate of the late David Sambo or Nathan Sambo. He state that the portion bought by the defendants is part of the family cemetery land and they are not separated by any fence. He admitted that some other persons bought land from Frazer but insisted that they purchased with the consent of the family; that all named in the title document to the main parcel are deceased save for Emmy Muteti Nzai who has not been made a party to the instant suit. Upon re-examination he stated that in 2003 when the sale transaction occurred, title to the main parcel had not been issued and that it was issued in the year 2009.

12. PW2 was Gideon Nyasoro Sambo. He introduced himself as the son of the late Harry Sambo and grandson of David Samuel Sambo; he stated that he was not present when the 2003 agreement was executed; that he is not a son to Frazer; that the suit land had been allocated to a family cemetery and that other family members have been buried there. He stated that the burial of deceased persons began from one end of the plot. He admitted that Frazer sold part of that land to the 1<sup>st</sup> defendant. He also admitted that rubbish is dumped on the said land. He also admitted on cross examination that at one point the family was intent on refunding the 1<sup>st</sup> defendant the purchase price.

13. Saba Samuel Sambo testified as PW3. He identified himself as a cousin to the 1<sup>st</sup> plaintiff and son to Harry Sambo who, according to his evidence, died in 1992. Harry was also son to David Sambo. He stated that he was also the nephew to the 2<sup>nd</sup> defendant. He further averred that Frazer Sambo is his late uncle. He denied being present when the agreement of 2003 was executed. He maintained that the suit land in issue is a graveyard and objected to the sale. He admitted that Frazer's children are still alive and named 3, Owen who works in Ukunda, Rukia, who is living on the land, Amigo who works in Kampala and Tom who lives on the land. Anna, also reportedly Frazer's child, is said to be deceased.

14. The plaintiffs then closed their case.

### **Evidence for the Defence**

15. **DW1, Edmond Mwakio Agostine**, the 1<sup>st</sup> defendant testified on **10/9/2020**. He adopted his statement dated **10/5/2018** as his evidence-in-chief. He stated that he was introduced to Frazer Sambo in **2003** by his sister-in-law who told him that Frazer was selling land. He purchased the land and obtained possession and commenced construction soon thereafter. At the time the land was not being utilized as a cemetery. He produced the copy of the agreement dated **9/1/2003** as **D. Exhibit 1**. And the photographs of the construction works as **D. Exhibit 2(a)-(c)**. He also produced photographs showing garbage dumped on a section of the land. He stated that he had obtained an architectural plan for the construction. He stated that he called PW2 and PW3 after some prospective buyers were taken to the land. They referred him to Jimmy Sambo, the 1<sup>st</sup> plaintiff as their chairman in the matter. He called him on the phone. He learned from PW2 that the intention was to dispose of the land since they had thought the 1<sup>st</sup> defendant had died. According to him he paid some money and the balance was to be cleared after the title was availed to him, but the title has never been so availed. He produced minutes of his meeting with the family as **D. Exhibit 5**. However the issue was not resolved by the meeting. He identified PW 2 and PW3 as the persons who were involved in the sale transaction and who received the money that he paid for the land on behalf of Frazer. He also stated that they were present during the construction of the foundation on the land soon after the purchase. DW1 gave a graphic account of how rituals were conducted during the cutting down of **15** coconut trees to ward off bad luck and to facilitate the erection of the foundation. Upon cross examination he admitted that neither Frazer Sambo who was said to have been unwell and at home at the time nor himself signed the agreement in person; their respective agents did.

16. **DW2 and DW3** were **Jamila Wangeci** and **John Mwangi** who reiterated what **DW1** testimony in furtherance of the defence case. DW2 stated that the 1<sup>st</sup> defendant was his cousin; that she had learned from the 2<sup>nd</sup> plaintiff's brother, Harry Sambo that Frazer was intent on selling a plot; that she informed the 1<sup>st</sup> defendant of the intent; that the 1<sup>st</sup> defendant viewed the plot and subsequently sent **Kshs. 200,000/-** as part purchase price; that when she went to Frazer he sent her and PW2 and PW3 to their advocate's office; that PW2 and PW3 were to collect the money on behalf of Frazer; that one John Mwangi signed the agreement on behalf of the 1<sup>st</sup> defendant and PW2 and PW3 on behalf of Frazer; that she then paid the money in the presence of the advocate; that the 1<sup>st</sup> defendant then erected a structure on the plot. That no objection was voiced; that later when they heard that the plot was being sold, they came to the plaintiffs and the plaintiffs asked to refund the purchase price but no agreement was reached.

17. DW3 corroborated the evidence of DW2 that the money was paid at an advocate's office to PW2 and PW3 and that he executed the agreement on behalf of the buyer while PW2 and PW3 executed it on behalf of the seller. He only saw Frazer during the negotiations and Frazer never went to the advocate's office due to illness. He also corroborated DW1's evidence that PW1 did not complete the construction due to financial challenges, and that the plaintiff's family expressed the desire to refund the purchase price.

### **Submissions**

18. Submissions were filed on behalf of the plaintiff on **25/9/2020** and on behalf of the defendants on **12/10/2020**. I have considered the pleadings the evidence and the submissions.

### **DETERMINATION**

#### **Issues for Determination**

19. Having read the pleadings, the evidence on record and the submissions filed by the Plaintiff, I am of the view that the only issues for determination are;

- (a) *Whether the agreement between Frazer Sambo and the 1<sup>st</sup> Defendant should be declared illegal null and void.*
- (b) *Whether the plaintiffs have capacity to bring the action.*
- (c) *Whether the defendants should be restrained by way of a permanent injunction from interfering with the suit land.*
- (b) *What Orders should then issue?*

20. From the evidence on record and the submissions by both parties there is no doubt that subdivision **No. 11162 (Original No. 441/3) Section 1, Mainland North** is registered as family land. A portion of the suit land was sold to the 1<sup>st</sup> defendant though it is clear that the title document is yet to be issued in his name. The evidence on record is that the portion of the main plot owned by the family members was purchased by the 1<sup>st</sup> defendant from one Frazer Sambo. The Plaintiffs contend that the sale was irregular on the ground that other family members entitled to the land were not consulted.

21. In their submissions the plaintiffs cite **Section 3(3)** of the **Law of Contract Act** and **Section 38(1)** of the **Land Act** and posit that neither the vendor, Frazer nor the defendants who were purchasers were present at the signing of the agreement. It is stated that PW2 and PW3 denied having been involved in the execution of the agreement, contrary to the defendant's allegations and that their names and identity card numbers do not appear on the agreement. It is also urged that DW3 signed on behalf of the purchasers while he had no power of attorney from them. The plaintiffs relied on the case of **Leo Investments Ltd vs Estuarine Estate Ltd [2017] eKLR**. However that decision is in respect of an unsigned contract which the court held to be unenforceable and an affront to the unequivocal text of **Section 3(3)** of the **Law of Contract Act** while the instant agreement is said to have been signed by agents of both parties.

22. Further the plaintiffs cite **Section 3(4)** of the **Law of Contract Act** and urge that there was no evidence of authorization in writing allowing the signatories to act as agents in the execution of the agreement.
23. It is noteworthy that this was not specifically raised by the plaintiffs in their pleadings and may correctly be deemed an ambush of the defendants which practice is highly discouraged.
24. This court will nevertheless address the issue.
25. Regarding the consent from the seller, I must state that the title in the names of the present registered owners was registered in **2009** and the agreement was executed in the year **2003** and any requirement of the registered owner's consent as at the year **2003** has not been demonstrated. A history of the registration status of the main parcel is missing. This court can not be expected to fill in the gaps in the plaintiff's evidence. Therefore the particular of fraud couched as "*convincing one of the registered proprietors of the land to sell yet the land was registered in the names of several people*" can not stand. However concerning the submission that there was no written authorization on the part of DW3 to execute the agreement, that may be so, but in addition to the failure to specifically plead that claim, it must be observed that there is no dispute between DW1 and PW3 that the latter executed the agreement on behalf of the former. Whereas the lack of such written authorization could have mattered had the evidence of the two not concurred, it is now of no consequence in this suit.
26. **Section 45 of the Law of Succession Act** has been relied on by the plaintiffs. That section provides that no person shall deal with the property of a deceased person save as authorized by that Act otherwise he shall be deemed an intermeddler. The distribution of the estate of a deceased person shall be only after a confirmed grant under that Act.
27. The plaintiffs have alleged that the 1<sup>st</sup> defendant obtained the suit land fraudulently for the reason that at the time the suit land was sold to the 1<sup>st</sup> defendant, the plaintiffs had not filed any Succession Cause since the title to the suit land is in the names of the children of the deceased David Sambo while some of the children are long deceased.
28. At the submission stage the plaintiffs changed the theme into that of lack of a grant of letters of administration over the estate of the late David Samuel Sambo. This change of goalposts midway in the proceedings should be discouraged.
29. Nevertheless this court will address the issue.
30. First, the capacity of the plaintiffs to bring this suit is challenged by the defendants. The defendants, citing the cases of **Julian Adoyo Ongunga V Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015** and **Barnes Muema V Francis Masuni Kyangangu Nbi Appeal Case No. 87 of 2016** state that no letters of administration are demonstrated to have been obtained by the plaintiffs in respect of the registered owners whom they admit to be all deceased except one. I find that to be the correct position in the matter and the plaintiff's claim is liable to be dismissed on this ground alone.
31. Other than the plaintiffs' mere assertion that the land belonged to the estate of David Samuel Sambo, there is no other proof that that was so. The title document produced at the hearing does not show that at the registration stage the persons registered appear on the title as administrators of the estate of the late David Samuel Sambo, or that they were registered by way of transmission after distribution of the estate of David Samuel Sambo. In the premises, this court cannot therefore find that the sale by Frazer to the defendants was null and void for want of a grant of letters of administration to the estate of the late David Samuel Sambo.
32. However, it is evident that the plaintiffs have not established that the land was registered in the names of the children of the late David Sambo by the date **9/1/2003** when the 1<sup>st</sup> defendant bought the land from Frazer. The inclusion of Frazer as a registered owner after the sale shows that he had a disposable interest in the land even before the registration.
33. It is correct as the 1<sup>st</sup> defendant's evidence states that the plaintiffs have failed to demonstrate who the registered owner of the entire parcel was before it was registered in the names of the eleven children of the late David Sambo.
34. In this court's view it was necessary for the plaintiffs to demonstrate the ownership by the time of sale so as to establish that the late Frazer Sambo did not therefore have capacity to sell the suit land. As they failed to discharge that burden, it therefore follows that the sale of the disputed land to the 1<sup>st</sup> Defendant by Frazer Sambo can not be said to have been fraudulent as it preceded the registration of the current registered owners of the land. No evidence adduced to show that either Frazer Sambo or the defendants were party to any fraud or misrepresentation and the 1<sup>st</sup> defendant were innocent purchasers for value.
35. On the other hand, I find that the defendants have given a good account of how they obtained the land; they have demonstrated that they not only paid a substantive portion of the purchase price but also obtained possession from the late Frazer and developed the plot by commencing the erection of a building which was thwarted by the financial difficulties arising after they purchased the plot. The plaintiffs have not demonstrated that the portion purchased by the defendants has been or is in the possession of any other person. Consequently, the taking up of possession by the defendants is effective to date.
36. The plaintiff's own evidence shows that they had been aware of the sale of a portion of the land to the defendants even before the year 2018 when this dispute arose. It also showed that they were aware that other persons besides the defendants successfully purchased and settled upon portions of the same land from which the defendants' parcel was carved. PW2 stated specifically as follows:

***"Frazer has sold part of his land to other people."***

37. PW1 stated as follows:

***“I do not recall how many buyers bought from Frazer. Those others bought from Frazer with our consent. ”***

38. At the same time the capacity of the plaintiffs to challenge the sale comes under serious doubt when PW1 admits that they were not among the registered owners of the main parcel of land from which the defendants’ portion was carved.

39. The plaintiffs never demonstrated that they are pursuing the other persons who, besides the defendants, admittedly purchased portions of the same land from Frazer. In this court’s view there is no justification for singling out the defendants for recovery of land that was sold to him long before the title was issued in the names of the plaintiff’s kin.

40. The plaintiff’s evidence also shows that the area referred to was not a cemetery at the time it was sold to him. According to the photographic evidence produced by the defendants and which was not objected to or challenged as untrue by the plaintiffs, the land was vacant at the time of purchase and some neighbours used it as a garbage dump.

41. It is also apparent that the labelling of the portion purchased by the defendants as a cemetery was only geared at denying them the land they have purchased. PW1 stated in his evidence that:

***“The portion and the cemetery are one parcel. There is no fence between them.”***

42. PW2 stated as follows:

***“The portion he (Frazer) sold is part of the cemetery. Many deceased people were buried there. We began burying from one end.”***

43. In this court’s view there is recognition apparent in the evidence of the plaintiffs that some land was sold long ago and the owners may one day resurface just as they have.

44. The plaintiffs’ evidence did not effectively controvert the allegation that there was the taking of possession by the defendants and the construction of the foundation on the purchased land. The defendants’ photographic evidence of the progress of the construction works was not challenged by the plaintiffs.

45. Lastly is the issue of laches.

46. The plaintiffs relying on that doctrine, and citing **Section 7** of the **Limitation of Actions Act Cap 22** of the Laws of Kenya aver that the defendants’ counterclaim is time barred. A preliminary point ought to be raised at the earliest point in any litigation as doing so saves much judicial time right compared to raising such at the submissions stage. However this court will address that issue.

47. **Section 7** of the **Limitations of Actions Act** provides as follows:

***“An action may not be brought by any person to recover land after the end of 12 years from the date on which the cause of action accrued to him, or, if it first accrued to some other person through whom he claims, to that person.”***

48. The plaintiff’s claim that the counterclaim was brought 17 long years after the sale agreement was executed in **2003** and that this exceeds the statutory **12 years** provided for in **Section 7** of the **Limitation of Actions Act**. However, in this court’s view, the plaintiffs have not conclusively shown that the defendants lost possession of the plot to any person. The plaintiffs are the ones who sued first in these proceedings. The defendants’ evidence has shown that the plot they purchased is a distinct and identifiable portion of the main land parcel. Secondly, the plaintiffs have not given the date from which the period of laches ought to be computed to enable them adopt the issue of laches as an effective defence. If anything, the computation should not be deemed to be from the date of execution of the agreement, but it may be computable from the date of loss of possession or breach. Furthermore this is not an issue arising directly from the pleadings in respect of which the defendants were supposed to have answered by way of reciprocation or by evidence at the trial. Suffice it to state here that there is no conclusive evidence that possession by the defendants was ever lost. The defendants have indicated that all along that they took possession and they were only awaiting the issuance of title which never came.

49. I therefore find that the Plaintiffs herein have failed to prove their case on a balance of probabilities while the defendants have proved their counterclaim on a balance of probabilities and I do enter judgment for the defendants in the main suit and I issue final orders as follows:

**(a) The plaintiff’s suit in the main suit is hereby dismissed with costs.**

**(b) The defendants’ counterclaim is granted as prayed in prayers no (a), (b), (c) and (d) thereof.**

**(c) A declaration declaring that the portion of land sold to the defendants, which is a subplot within the subdivision Number 11162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality was the entitlement of Frazer Sambo.**

**(d) An order of permanent injunction is hereby issued restraining the plaintiffs by themselves, their servants, agents, assigns, employees, and/or any other person or persons claiming under them from interfering in any manner whatsoever with the suit portion of land described in the Sale Agreement subject matter of this suit in which is a sub plot within the subdivision Number 11162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality.**

**(e) A mandatory injunction is hereby issued directing the administrators of the estate of Frazer Sambo to transfer the sub-plot as described in the agreement for sale dated 9/1/2003 into the names of the defendants in the main suit who are the plaintiffs in the counterclaim, and upon that event the defendants shall be liable to pay the balance of the purchase price being Kshs. 100,000/- within 30 days of such transfer.**

**(f) No damages shall be awarded to the defendants as none were proved at trial.**

**(g) The plaintiffs shall bear the costs of this suit.**

It is so ordered.

**DATED AND SIGNED AT KITALE ON THIS 26TH DAY OF FEBRUARY, 2021**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**

**Delivered this 23<sup>rd</sup> day of March, 2021.**

**MUNYAO SILA**

**JUDGE, ELC, MOMBASA**