



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 74 OF 2018

JOSEPH NDAVI MUSEMBI PLAINTIFF

VERSUS

MBYUTA NZIOKA DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit on 21st February, 2014 vide Plaintiff dated 20th February, 2014. He prays for judgment against the Defendant for:

- a) **A permanent order of injunction restraining the Defendant, his servants, agents and/or assigns from trespassing into land parcel Kiteta/Ngiluni/1802, from preparing the land, remaining therein and from planting any crops therein or cutting any trees on the land.**
- b) **General damages.**
- c) **Costs of the suit.**
- d) **Interest.**

2. The Defendant filed a Defence and Counterclaim on 9th May, 2016 in which he prays for judgment against the Plaintiff for:

- a) **Cancellation of the Plaintiff's name in the land Title for the suit land and have it substituted with the Defendant's name.**
- b) **Permanent injunction against the Plaintiff restraining him, his agents and or servants from entering into and or interfering with the Defendant's occupation and use of the suit property.**
- c) **Costs of the suit.**
- d) **Any other or further relief this Honourable Court deems fit and just to grant.**

3. The matter came up for hearing on 6th May, 2019. The Plaintiff adopted his statement dated 20th February, 2014. In his sworn evidence, the Plaintiff stated that he is the registered owner of all that suit property known as Title No. Kiteta/Ngiluni/1802 issued on 3rd October, 2013. That he filed this suit after finding out that the Defendant had cut down and sold a tree which was on the suit property. That, initially, he had reported the incident to the area Assistant Chief but was dissatisfied with the resolution thereof. That in or about 1985, the Plaintiff and Jimmy Waita (deceased), the Defendant's brother, agreed on a lease agreement for suit property for a period of four years. That the agreed fee was Kshs. 19,000/=. That only Kshs. 18,300/= was paid by Jimmy Waita. That he never signed any sale agreement with Jimmy Waita. That the contents of the record purporting to be the sale agreement drawn by Jimmy Waita were never read out to him. That he signed the record believing it to be a lease agreement. That at the time of signing the record, three witnesses were present; Musyoka Kieti, Nzioka Lole and Mutua Lole. That the Defendant cultivates the suit property without his authority.

The Plaintiff produced P. Exhibits 1 and 2 which are the Title Deed and Summons from the Area Chief dated 3rd July, 2009.

4. The Plaintiff called one witness, Musyoka Kieti (PW1). The witness adopted his statement dated 21st January, 2019. In his evidence, Musyoki (PW1) stated that he was the one who introduced the Plaintiff to Jimmy Waita. That in 1985, it was agreed Jimmy Waita would lease the suit property for four years and the agreement was duly recorded. That he witnessed the agreement and duly appended his signature. That he used to collect money periodically on behalf on the Plaintiff from both Jimmy and the Defendant pursuant to their agreement. That he used to sign the record each time he collected the monies. That it is the Defendant who cultivates the suit property. That in 2013, he attended a meeting before the area Assistant Chief following a report that a tree which was on the suit property had been cut down and sold

by the Defendant. That he witnessed the delivery of the decision by the Assistant Chief. That the Plaintiff refused to sign the decision of the Assistant Chief after delivery.

5. In his examination in chief, the Defendant adopted his statement filed in court on 9th May, 2016. He also adopted a further statement filed on 3rd May, 2016. He stated that the Plaintiff signed a sale agreement together with Jimmy Waita on 25th May, 1985. He produced the agreement as D.Exhibit 1(a) and the English translation as D.Exhibit 1(b). He produced a written acknowledgment of the balance of the purchase price for the suit property paid to PW1 as D.Exhibit 2(a). The English translation thereof was produced as D.Exhibit 2(b). He produced another letter dated 9th August, 1995 where an additional Kshs. 7,044/= was paid to the Plaintiff. It was produced as D.Exhibit 3(a) and the English translation thereof as D.Exhibit 3(b). He produced the record of payments and acknowledgments as D.Exhibit 4(a) and the English translation as D.Exhibit 4(b). He stated that it was his late brother Jimmy Waita who was purchasing the suit property. He stated that sometimes, he would pay some money on his brother's behalf. That he had been cultivating the land since 1985 wherein he planted maize, beans and sorghum. He prayed that this Court cancels the title deed obtained by the Plaintiff since he was never notified of its issuance.

6. In cross-examination, the Defendant confirmed that the suit property belongs to his late brother. That his brother gave him the land to cultivate. That he was not present when the agreement between the Plaintiff and his brother was prepared in 1985. That he did not know whether the Plaintiff was present at that time. That Jimmy bought the land as opposed to leasing it. He stated that the land cost was about Kshs. 34,000/=. That he did not know how much he had contributed towards its purchase. That Jimmy had not used the land prior to his demise in 2005.

7. The Defendant called three witnesses. Monica Waita (DW1) adopted her statement filed in court on 9th May, 2016. She stated that she was the wife of Jimmy Waita (deceased) and the sister in-law to the Defendant. She produced D.Exhibit 7 which is a certificate of confirmation of grant issued to her. She stated that she was present when her deceased husband purchased the suit property for Kshs. 19,000/= from the Plaintiff. That even though her name is not in the agreement she was in their home when it was signed. She stated that she was the one who provided the family book where the agreement had been recorded. That PW1 who is the village elder and a friend of Jimmy Waita was present in 1985 when the agreement was signed. That her husband bought the land along with the trees therein and allowed the Defendant to cultivate it.

8. Pius Mwendwa *alias* Pius Muthembwa (DW2) adopted his statement dated 3rd May, 2019. He stated that he was present in 1988 when the Defendant paid Kshs. 2,300/= to Joseph Kieti (PW1) and that he signed D.Exhibit 4(a) as a witness. That the money was paid towards the purchase of the suit property by Jimmy Waita.

9. Nzama Mutunga (DW3) adopted his statement dated 3rd May, 2019. He stated that he was present in 1987 when Jimmy Waita paid Kshs. 1,000/= part payment of the purchase price to PW1. That the suit property was being sold to Jimmy Waita by the Plaintiff. That he did not sign D.Exhibit 4(a).

10. Justus Muli (DW4) the Assistant Chief of Utuneni Sub-location in Mbooni East Sub-county. He stated that in October 2013, the Plaintiff went to his office and reported that one of his trees at his shamba in Kyambae had been cut down. That he summoned the Defendant and the Plaintiff on 7th October, 2013 to resolve the issue. That at the meeting, it was revealed that the tree had been cut and sold by the Defendant. That he recorded the proceedings and delivered his findings and observations on 14th November, 2013. That in his findings, he stated that the suit property was sold in the year 1985 by the Plaintiff to Jimmy Waita even though a balance of Kshs. 700/= was unpaid. He produced the proceedings as D.Exhibit 5. That he prepared a final report concerning the dispute which is dated 4th December, 2013. That he had recommended the Defendant refunds the cost of the felled tree to the person he had sold it to. He produced the final report as D.Exhibit 6. That the Plaintiff refused to sign the report as he was dissatisfied with the findings therein. That there was no evidence of a transfer of ownership by Jimmy Waita to the Defendant.

11. I have perused the parties' respective sets of submissions. The Plaintiff identified four issues for determination namely;

i) Who is the registered owner of the suit property LR. No. Kiteta/Ngiluni/1802 and when was it registered?

ii) What was the nature of the transaction between the Plaintiff and the late Jimmy Waita, was it a sale or a lease of land transaction?

iii) Does the Plaintiff merit the grant of orders of injunction and for general damages against the Defendant?

iv) Has the Defendant satisfied the conditions for the grant of decree for adverse possession? And does he deserve the grant of orders prayed for in the counterclaim?

12. In turn, the Defendant identified five issues for determination namely;

i) Whether or not the Plaintiff sold the suit property and whether or not the Defendant contributed?

ii) Whether or not the Defendant has been in the suit land?

iii) Whether the Defendant has satisfied the condition for the grant of adverse possession and whether he deserves the orders sought in the counterclaim?

iv) Whether or not the Plaintiff obtained the title to the suit land through fraud and through a corrupt scheme?

v) Whether or not the suit land was under the Settlement Fund Trustee?

13. From the outset, I have observed that both parties have submitted at length on the aspect of adverse possession. However, it is noteworthy from the pleadings that no single claim was made by either party for adverse possession. Similarly, the said aspect did not arise at the hearing of the matter and therefore I shall disregard it.

14. In my view, the dispute can be condensed to two main issues for determination as follows: -

i) Whether the Defendant has an enforceable right over the suit property?

ii) Whether the Plaintiff is entitled to the orders sought in the plaint?

14. In the evidence that was tendered, one fact came about clearly. It is not in doubt that in or about 1985, there was a transaction over the suit property between the Plaintiff and the Defendant's brother, Jimmy Waita (Deceased). The overriding theme has been that Jimmy Waita either purchased or leased the suit property from the Plaintiff. The Defendant's claim to the suit property becomes solely anchored from that standpoint.

15. The crucial question is whether the Defendant has privity of contract from which he can successfully mount his claim? This question was answered conclusively by the Defendant at paragraphs 5, 8 and 9 of the Defence and Counterclaim. Admittedly, at the hearing, the Defendant along with his witnesses reiterated that indeed it was his brother Jimmy Waita who had entered into a sale agreement with the Plaintiff for the suit property in 1985 and thereafter allowed him to utilize it for cultivation. The common law doctrine of privity of contract states that no one may be entitled to or bound by the terms of a contract to which he is not an original party. See *Prince v Easton [1833] 4 B&Ad 433*.

16. The above principle has been echoed innumerable times in the hierarchy of our courts. The Court of Appeal in *William Muthee Muthami -Vs- Bank of Baroda [2014] eKLR* held as follows;

*“The dispute was essentially grounded on the law of contract. The nature of our civil process is that only a person who has incurred loss as a result of another’s action can bring a claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract. This doctrine was stated as long ago as 1861 by Wightman, J. in *Tweddle v Atkinson [1861] EWHC QB J57* in the following oft-cited words:- “...no stranger to the consideration can take advantage of a contract, although made for his benefit.”*

17. In *Aineah Liluyani Njirah -Vs- Agha Khan Health Services [2013] eKLR*, the Court of Appeal held as follows;

*“4. Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See *Dunlop Pneumonic Tyre -Vs- Selfridge and Co. Ltd. [1]* The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.”*

18. Further reference on the subject of privity of contract may also be made to the Court of Appeal's decision in *Mwangi -Vs- Braeburn Ltd [2004] 2 EA 196 (CAK)*.

19. As far as I am aware, not only is there want of privity of contract on the part of the Defendant, he also lacks a statutory cause of action. The only person who succeeded the rights of Jimmy Waita was his wife, Monica Waita (DW1). She has a certificate of confirmation of grant through which she may derive the right to file a claim for and on behalf of the deceased's estate. Before this Court, there is no such claim from her.

20. That said, I find the submission by the Defendant's Counsel in the closing paragraph of his submission that the suit property either be registered in the names of either the Defendant or his witness, Regina Monica Waita (DW1), to be a hopeless attempt to amend a defective counterclaim. It is trite law that parties are bound by their pleadings.

21. The Court of Appeal in *Housing Finance Company of Kenya v J. N. Wafubwa [2014] eKLR* aptly held as follows;

*“That position accords with the decision in *Abdul Shakoor -Vs- Abdul Majied Sheikh Nairobi Civil Appeal No. 161 of 1991* to the effect that in general a plaintiff is not entitled to a relief which he has not specified in his claim.”*

22. Similarly, the Court of Appeal in *Independent Electoral and Boundaries Commission & Another -Vs- Stephen Mutinda Mule & 3 Others [2014] eKLR-Civil Appeal No 219 of 2013*, cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd – vs- Nyasulu*,

23. At this juncture, it is quite clear that the counterclaim cannot succeed. On what prayers commend themselves with reference to the Plaintiff and from the circumstances of the case, I am not convinced and neither has the Plaintiff submitted on general damages for trespass to the suit property.

24. Accordingly, I am inclined to enter judgment in favour of the Plaintiff in terms of prayer i) and iii) of the Plaintiff. The Defence and Counterclaim is dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 19TH DAY OF APRIL, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi