



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO.225 OF 2017**

**MICHAEL KING'OO MBALUKA.....PLAINTIFF**

**-VERSUS-**

**ASHVIN BHOGOITA.....1<sup>ST</sup> DEFENDANT**

**RAVJI KANJI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By his plaint dated 07<sup>th</sup> November, 2012 and filed in court on 16<sup>th</sup> November, 2012 the Plaintiff prays for judgement against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for:-

**(a) The eviction order do issue against the Defendants to vacate from the Plaintiff's two parcels of land namely 199 Kitengei "A" Settlement Scheme and 140 Kitengei "A" Settlement Scheme or alternately compensate to the Plaintiff the same at current value.**

**(b) The Land Registrar Makueni District do rectify the Register and transfer the said two parcels of land to the Plaintiff.**

**(c) Cost of this suit and any other order this court deems fit to grant.**

2. The Plaintiff has averred in paragraph 6 of his plaint that the Defendants took advantage of his sickness to unlawfully and without his consent to fraudulently transfer land parcels known as 199 Kitengei "A" Settlement Scheme, the particulars of fraud were itemized as follows: -

**(i) Registering themselves as sole proprietors of the above parcels of land namely 199 Kitengei "A" Settlement Scheme and 140 Kitengei "A" Settlement Scheme without informing the Plaintiff.**

**(ii) Forging the Plaintiff's signatures purporting that the Plaintiff has allowed transfer facilitation.**

**(iii) Misrepresenting themselves to the land officers.**

**(iv) Registering themselves as sole proprietors of the land knowing very well that it is Plaintiff's property.**

The Plaintiff has also averred in paragraph 7 of the plaint that the Defendants have completely refused to give vacant possession and vacate from the Plaintiff's two parcel of land namely 199 Kitengei "A" Settlement Scheme and 140 Kitengei "A" Settlement Scheme and have further refused to transfer the same to him.

3. The Plaintiff's claim is denied by the 2<sup>nd</sup> Defendant vide his statement of defence dated 13<sup>th</sup> December, 2012 and filed in court on 14<sup>th</sup> December, 2012. The 2<sup>nd</sup> Defendant has averred in paragraphs 4 and 6 of his defence that the Plaintiff sold to him plot No.140 for valuable consideration which he fully paid and the Plaintiff acknowledged the fact, that he has refused to comply with the Plaintiff's demands as he is the lawful proprietor of plot No.140 Kitengei "A" Settlement Scheme.

4. The 1<sup>st</sup> Defendant has denied the Plaintiff's claim vide his statement of defence dated 14<sup>th</sup> May, 2018 and filed in court on even date.

5. The 1<sup>st</sup> Defendant has pleaded in paragraphs 4, 5 & 7 of his defence that he is the legal owner of parcel of land known as 199 Kitengei "A" Settlement Scheme having purchased it from Joseph K. Kyala in 1994, and subsequently was allocated the same land by the Government of Kenya after due process of land demarcation and adjudication, that in the 1980s the suit property was crown land and hence

the Plaintiff had no proprietary right over it, that he did not forge the Plaintiff's signature nor misrepresent himself to the land officers.

6. During the hearing of the Plaintiff's case on 19<sup>th</sup> February, 2019, the Plaintiff adopted the statement that he recorded on 23<sup>rd</sup> May, 2018 as his evidence in chief. Briefly stated his evidence was that plot Nos.139 Kitengei "A" Settlement Scheme and 140 Kitengei "A" Settlement Scheme belong to his father, King'oo Mbaluka. He said that he came to know Ravji Kanji (2<sup>nd</sup> Defendant) in 1992 when the latter went to buy his father's land. That the two parcels of land were allocated to his father in 1972 when he was not yet born. That he was brought up in the two farms when they were one. He said that demarcation had not been carried out when his father acquired the two parcels of land. He added that he does not know how Ashvin Bhogoita (1<sup>st</sup> Defendant) came to own one of the parcels of land.

7. The Plaintiff produced documents in his list of documents filed in court on 16<sup>th</sup> November, 2012 as P.Exhibit Nos.1 to 7 respectively. The documents were two demand letters dated 12<sup>th</sup> April, 2012 as P.Exhibit Nos.1 and 2, reply from the 2<sup>nd</sup> Defendant's advocate dated 13<sup>th</sup> June, 2016 (P.Exhibit No.3), 3 letters from the District Land Adjudication/Settlement Officer Kibwezi dated 11<sup>th</sup> April, 2011, 24<sup>th</sup> April 2009 (P.Exhibit Nos 4, 5 and 6 respectively) and a letter from the District Commissioner Kibwezi dated 02<sup>nd</sup> August, 2011 (P.Exhibit No.7).

8. His evidence in cross-examination by Mr. Mutua Makau for the 1<sup>st</sup> Defendant was that his claim is for land parcel number 199 and 204 Kitengei "A" Settlement Scheme as well as 139 and 140 from Kanji (2<sup>nd</sup> Defendant). He said that plot Nos. 139 and 199 had mango trees. The Plaintiff went on to say that parts of plot Nos.140 and 204 had not been cultivated. He agreed that his father offered the land for sale so that he (father) could pay school fees for him. He said that although he had complained of forgery, he had not produced any documents that were forged. He also conceded that he did not produce any documents to show that the land in question belonged to his father and stated that he does not know John Munguti Mainga nor civil case No.77/04 where his father and Ashvin Bhogoita (1<sup>st</sup> Defendant) sued the said John Munguti Mainga. He also said that he was not aware of any objection proceedings by his father before the District Land and Settlement Officer, Makueni. He said that he does not know if the 1<sup>st</sup> Defendant has documents to prove ownership of the suit property. He pointed out that the 2<sup>nd</sup> Defendant was the one who carried out the forgery in 1992 when survey exercise had not commenced. And on being cross-examined by Mr. Swanya for the 2<sup>nd</sup> Defendant, the Plaintiff told the court that the suitland is in a Settlement Scheme. He went on to say that the sale transaction between his father and the 2<sup>nd</sup> Defendant did not go through. That the 2<sup>nd</sup> Defendant was allowed to take possession after the latter paid an instalment. He said that he does not know if the parcel of land has a title deed. He said that Kitengei "A" Settlement Scheme belonged to the Government and denied having obtained money by false pretences. He said that apart from one voucher where the 2<sup>nd</sup> Defendant paid his father, the rest of the vouchers are forged. He said that they reported the matter to the District Commissioner where the 2<sup>nd</sup> Defendant was ordered to pay his (Plaintiff's) father.

9. The Plaintiff's evidence in re-examination by his advocate Mr. Musyimi, was that the forged documents are the ones relied upon by the Defendants.

10. Joseph Kithome Muindi's (PW1) evidence in chief was that the suitland belongs to King'oo Mbaluka because when they appeared before the District Commissioner, Kibwezi around the year 2007, it was agreed that the 2<sup>nd</sup> Defendant would pay King'oo for the suitland but he did not do so. The witness went on to say that the 2<sup>nd</sup> Defendant only wanted to lease the suit property which was allocated to King'oo by elders appointed by the chief.

11. Joseph (PW1) adopted the statement that he recorded on 23<sup>rd</sup> May, 2018 as his evidence.

12. Joseph's (PW1) evidence in cross-examination by Mr. Mutua Makau for the 1<sup>st</sup> Defendant was that he last visited the suitland in 1997 and that the Defendants were the ones who were using the land. He went on to say that he does not know that plot No.199 was found to belong to the 1<sup>st</sup> Defendant when they appeared before the District Lands and Settlement Officer. He also said that he does not know if the Defendants have ownership documents. And on being cross-examined by Mr. Swanya, Joseph (PW1) told the court that the land was a Settlement Scheme belonging to the Government. He reiterated that King'oo was allocated land even though he never saw him with an allotment letter from the Settlement Officer. He said that when they appeared before the District Commissioner, the issue was about payment vouchers which were forged. In his evidence in re-examination, Joseph (PW1) reiterated that King'oo was allocated land by the Government.

13. Ashvin A. Bhogoita, the 1<sup>st</sup> Defendant herein, in his defence adopted the statement which he recorded on 14<sup>th</sup> June, 2018 as his evidence. He asked the court to rely on the 13 documents in his three (3) lists of documents dated 22<sup>nd</sup> May, 2018, 14<sup>th</sup> June, 2018 and 17<sup>th</sup> January, 2019 when passing judgment. The 1<sup>st</sup> Defendant produced the 13 documents as D.Exhibit Nos.1 to 13 respectively. He said that Kitengei 199 "A" Settlement is his land. He went on to say that he has a letter of offer dated 24<sup>th</sup> September, 2012 from the Ministry of Lands and Settlement. That when he met Michael King'oo Mbaluka, the latter did not have any claim. That the case before the Lands Settlement Adjudication Officer Makueni pitted him and Michael King'oo Mbaluka one hand against one John Mutunga Mainga and pointed out the decision arrived at was in his favour. That it was upon that decision the letter dated 24<sup>th</sup> September, 2012 from the Ministry of Lands was issued requiring him to pay Kshs.528,847.40/= for outright purchase of the suitland. He said that he paid the same and was issued with the receipt dated 05<sup>th</sup> December, 2012. He said that his land is 85 hectares and he has been using it since 1994. He referred to a certificate of official search dated 06<sup>th</sup> November, 2006 and a letter dated 13<sup>th</sup> March, 2008 confirming ownership of the land. According to him, the Plaintiff does not have documents of ownership.

14. The 1<sup>st</sup> Defendant's evidence in cross-examination by Mr. Musyimi for the Plaintiff was that in 1994, he approached Joseph K. Nyalia, Reuben K. Kami and others to sell land to him. He pointed out that although he and the sellers entered into a sale agreement dated 01<sup>st</sup> September, 1994, the agreement did not indicate the parcel number of the land that was to be sold. (*emphasis are mine*). He further said that the agreement indicates that the seller did not have any document of ownership. He denied the suggestion by the Plaintiff's Counsel that his documents are irregular and admitted that he and Joseph K. Kyala appeared before the Land Control Board.

15. His evidence in re-examination was to reiterate that he got the suitland from the Kenya Government.

16. Ravji Kanji (2<sup>nd</sup> Defendant) adopted his recorded statement dated 14<sup>th</sup> May, 2018 as his evidence. His evidence was that he learnt that the suitland belonged to the Government after he had paid Michael for it. He said that Government officers gave him papers and that he has a title deed to the land. The 2<sup>nd</sup> Defendant was stood down to 14<sup>th</sup> May, 2019 to enable him re-arrange his list of document. These documents were produced as D.Exhibit Nos.1 to 30 respectively.

17. When hearing resumed on 14<sup>th</sup> May, 2019, the 2<sup>nd</sup> Defendant said that he bought the suitland for Kshs.150,000/= (D.Exhibit No.2) from the Plaintiff in 1992. Like the 1<sup>st</sup> Defendant, Ravji (2<sup>nd</sup> Defendant) told the court that he too had a letter of offer (D.Exhibit No.6) from the Government. He said that he accepted the letter of offer upon which he got a letter of acceptance (D.Exhibit No.16). That he paid Kshs.240,538/= (D.Exhibit No.15) to the Government upon which he was issued with a confirmation certificate (D.Exhibit No.17) and later a title deed (D.Exhibit No.7). He went on to say that the Plaintiff tried to force him to pay additional money for the suitland with the assistance of the District Commissioner.

18. Ravji's (2<sup>nd</sup> Defendant) evidence in cross-examination by Mr. Musyimi was that when he and Mbaluka entered into an agreement for the sale of land, the latter assured him that the land was his. He said that the proceedings before the Lands Officer involved Philip Masyuko as the Plaintiff while he and his wife were the Defendants. That Michael Mbaluka was a witness in the proceedings.

19. And on being cross-examined by Mr. Makau, Ravji (2<sup>nd</sup> Defendant) told the court that the Plaintiff did not give him any title documents. He said that he had Ashvin (1<sup>st</sup> Defendant) should not have paid the Plaintiff for the suitland.

20. In his written submissions the Plaintiff's Counsel framed two (2) issues for determination namely:-

**1. Whether the Plaintiff is the rightful allottee of land known as Plot No.139 and 140 Kitengei Settlement Scheme?**

**2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold Parcels Number 199, 139 and 140 lawfully?**

On the other hand, the Counsel for the 1<sup>st</sup> Defendant framed 4 issues namely:-

**1. Who is the owner of the suitland Kitengei "A" 199 Settlement Scheme;**

**2. How is land acquired from a settlement scheme?**

**3. How is fraud proved in a civil case?**

**4. Under the law what is the prove of and ownership?**

The Counsel for the 2<sup>nd</sup> Defendant was of the view that the only issue for determination as regards the 2<sup>nd</sup> Defendant is whether the Defendant is the owner of the suit property.

21. Arising from the above, my view is that the issues for determination are: -

**(a) Who are the owners of suitland Kitengei "A" 199 Settlement Scheme and Kitengei "A" 140 Settlement Scheme.**

**(b) Whether or not in having their respective parcels of land registered in their names, the Defendants did so fraudulently.**

22. The Counsel for the Plaintiffs submitted that the Defendants have failed to show how the transfer of the suit properties was done in their names. The Counsel further submitted that since the plots in issue in this matter were public land, then any agreements entered into were mere null and void and the Defendants did not acquire any proprietary interest based on the said agreements. In my view, this would conversely work against the Plaintiff as well since he too had no proprietary interest to pass to the two defendants.

23. The Counsel for the 1<sup>st</sup> Defendant submitted that there is proof of ownership of Kitengei 199 "A" Settlement Scheme by the 1<sup>st</sup> Defendant based on the letters produced as D.Exhibit Nos. 8, 9, 11 and 12 respectively.

24. It was also the Counsel's submissions that the 1<sup>st</sup> Defendant followed due procedure in acquisition of the suit property.

25. The Counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiff's allegation that he is the owner of parcel of land No.140 Kitengei "A" Settlement Scheme cannot be true because the land was public land owned by the Settlement Fund Trustees before it was sold and transferred to the 2<sup>nd</sup> Defendant. The Counsel went on to submit that the Plaintiff ought to have substantiated his allegation of ownership of the suit property and cited the case of ***Samuel Kipngeno Letting vs. Ezekiel Tonui [2016] eKLR*** where the Court stated thus: -

*".....in fact, the Plaintiff produced absolutely no document to demonstrate that he was the person who was supposed to be allotted the suit land. Allotment of land is certainly done through documentation as acknowledged by the Plaintiff and his witnesses. It was incumbent upon the Plaintiff to exhibit these documents to prove that indeed he was the proper allottee of the suit land and that the title of the Defendant was therefore obtained fraudulently. The Plaintiff did not, and I cannot see how the Plaintiff*

can succeed...”

The Counsel went on to submit that the 2<sup>nd</sup> Defendant has categorically stated in his statement of defence that he purchased the suit property from the Plaintiff for valuable consideration in the year 1992 although it later became clear that actual ownership of the land lay with the Government. It was also the Counsel’s submission that the 2<sup>nd</sup> Defendant is the owner of the suit property having procedurally and lawfully obtained a title to it from the Government. Regarding the procedure of acquisition of suit Settlement Scheme Land, the Counsel cited the case of **Christopher Kagwiri Ngari vs. Settlement Fund Trustee & 2 others [2011] eKLR** where the Court stated thus: -

*“The procedure of allotment of land in a settlement scheme is described ..... that Settlement Fund Trustee is represented in the districts by the District Commissioners who chair the District Squatter Selection Committee. The District Commissioner identified deserving persons and forwards the names to the Director of Land Adjudication and Settlement who in turn makes an offer to the identified deserving persons. Those who accept the offer are then shown the parcels proposed to be allocated and payment made. It is clear from the totality of the evidence presented that after payment is made in full there would be discharged of the charge and thereafter the title deed would be issued.”*

The Counsel further submitted that the 2<sup>nd</sup> Defendant has an indefeasible title to the suit property and cited **Section 25 of the Land Registration Act No.3 of 2012** which provides that: -

*(i) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –*

*(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”*

The Counsel further submitted that the Plaintiff has never been the owner of the suit property and therefore his allegation of fraudulent transfer of the said suit property is baseless. The Counsel pointed out that the Plaintiff has not discharged the burden of proof on the allegation of fraudulent transfer. To buttress his submissions, the Counsel cited the case of **Kennedy Nyamumbo Sese v. Settlement Fund Trustees & 2 others [2017] eKLR** where the Court of Appeal at Kisumu stated thus;

*“[21] under section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless any law provides expressly that proof of that fact shall lie on any particular person.”*

The Counsel further submitted that the Plaintiff has not proved his claim that the suit property was fraudulently transferred to the Defendants, though specifically pleaded in the plaint and the particulars of fraud given. The Counsel cited the case of **Vivo Energy Kenya Ltd v. Maloba Petrol Station Ltd & 3 others [2015] eKLR** where the Court of Appeal sitting at Kisumu stated thus:-

*“From the evidence where the Plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities.”*

26. As for the Plaintiff being the owner of Plot No.139 Kitengei Settlement Scheme, the Counsel for the 2<sup>nd</sup> Defendant correctly submitted that the claim was never pleaded by the Plaintiff in his plaint dated 07<sup>th</sup> November, 2012 and filed in court on 16<sup>th</sup> November, 2012 and thus the same should not be entertained by the court as it would amount to introducing new issues in the submissions.

27. From the evidence on record, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the owners of the suit properties herein namely Kitengei “A” 199 Settlement Scheme and Kitengei “A” 140 Settlement Scheme. The two produced title deeds to prove ownership of the same. The Plaintiff cannot be heard to say that the two parcels of land belonged to him since the evidence on record shows that Kitengei Settlement Scheme was public land prior to its allotment. Even though the Plaintiff claims that the land was allocated to him by elders appointed by the area chief, he did not show any evidence on whether the chief and the elders had the power to allocate such public land. No wonder in the sale agreements with the two Defendants, the Plaintiff did not avail any documents to show that he was the owner of the said land. It is therefore clear that the Plaintiff could not pass any proprietary interests to the two Defendants. It should however be noted that the two Defendants have adduced evidence to show how they came to own the suitland. The two accepted letters of offer in respect of their parcels of land. They paid whatever fees was required of them by the Government.

28. Even though the Plaintiff alleges that the Defendants fraudulently had the suitland registered in their names, he admitted in his evidence in cross-examination that he had not tendered any evidence to prove fraud. The burden was on him to prove fraud beyond a mere balance of probabilities (see *Vivo Energy Kenya Ltd vs. Maloba Petrol Station Ltd & 3 others [2015] eKLR*). The Plaintiff was on a fishing expedition as there was no evidence to support his claim.

29. The upshot of the foregoing is that the Plaintiff has not satisfied this court that on a balance of probabilities, he has a cause of action against the two Defendants. His claim against the two (2) Defendants must therefore fail. In the circumstances, I hereby proceed to dismiss his suit against the two Defendants with costs.

**Signed, dated and delivered at Makueni this 05<sup>th</sup> day of November, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Kioko holding brief for Mr. D. M. Mutinda for the Plaintiff

Ms. Mbuvi holding brief for Mr. Mutua Makau for the 1<sup>st</sup> Defendant

Ms. Kyalo holding brief for Mr. Swanya for the 2<sup>nd</sup> Defendant

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**05/11/2019.**