



**REPUBLIC OF KENYA**

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

**ELC. APPEAL NO. 83 OF 2011**

**SAMUEL MUSINGILA MWINZI.....APPELLANT**

**VERSUS**

**ESTHER MASAA KAESA (*Suing on behalf of the***

***Estate of KAESA KIITI (Deceased).....RESPONDENT***

***(Being an Appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Mwingi in Civil Case No. 111 of 1988 delivered on 18<sup>th</sup> May, 2011 by Hon. Gichimu W.J – (RM)***

**JUDGMENT**

1. This Judgment is in respect to an Appeal that was filed by the Appellant who was the 3<sup>rd</sup> Defendant in Mwingi RMCC No. 111 of 1988. In his Memorandum of Appeal, the Appellant averred that the Magistrate erred in failing to consider Appellant's evidence; that the learned Magistrate failed to appreciate that Trust Land within Kitui County Council vested in the said Council and that the learned Magistrate erred in law and fact in giving probative value to the Agreement dated 4<sup>th</sup> June, 1983 which was not registered and was produced without the leave of the court.
2. The Appellant further averred that the learned Magistrate erred by failing to appreciate that the Respondent's Further Amended Complaint was null and void *ab initio* for non-compliance with the law.
3. The Appeal proceeded by way of written submissions. In his submissions, the Appellant's advocate submitted that the evidence tendered in the lower court did not prove the Respondent's case and that the particulars of fraud were not proved.
4. Counsel submitted that the basis of the Respondent's suit in the lower court was a purported Sale Agreement; that none of the purported witnesses to the Agreement were called to testify in the suit and that PW2 who purportedly signed the Agreement was illiterate.
5. The Appellant's advocate submitted that the purported Agreement of 4<sup>th</sup> June, 1983 is a forgery and that both the purported Vendor and the purported Purchaser were long dead at the time the purported Sale Agreement was entered into.
6. Counsel submitted that the alleged Vendor never owned the suit land; that the Appellant's ownership of the plot in issue is well documented and that the construction of a three storey building was done over a period of fourteen (14) years.
7. The Appellant's counsel submitted that neither Mungai Koigi nor Kahunyo Koigi ever owned plot number 160 at Mwingi Market; that whatever plot the two owned was swallowed up by the construction of the Highway whereafter the Government compensated them and that the forged Sale Agreement that the Respondent relied on could not amount to evidence. The Respondent's advocate did not file his submissions.
8. In the "*Amended Amended Complaint*" dated 15<sup>th</sup> August, 2003, the Plaintiff (*Respondent*) averred that sometimes in 1983, her late husband, Kaesa Kiiti (*deceased*) purchased a parcel of land measuring 100 x 50 feet within Mwingi County Council (*the suit land*); that the 1<sup>st</sup> Defendant, who is a nephew of the deceased, requested the deceased to allow him to utilize the suit plot for purpose of running a Jua Kali Welding business, which request the deceased acceded to, and that in the year 1988, the deceased learnt that the Defendants had sub-divided the suit plot into two plots of 50 feet by 50 feet and given them plot numbers 158 and 160. According to the Complaint, the 1<sup>st</sup> Defendant was allocated Plot No.160, while the 2<sup>nd</sup> Defendant was allocated plot number 158.
9. The Plaintiff/Respondent averred in the Complaint that while the suit was pending in court, the 1<sup>st</sup> Defendant caused sub-plot number 160 to be transferred to the 3<sup>rd</sup> Defendant (*the Appellant herein*). The Plaintiff (*Respondent*) prayed for a declaration that the sub-division of the suit plot into two plots was illegal, null and void.

10. The Plaintiff/Respondent also prayed for an order directing Mwingi County Council to cancel the purported transfers of plot numbers 160 and 158 to the 3<sup>rd</sup> Defendant (*the Appellant*) and the 4<sup>th</sup> Defendant respectively and for the demolition of the 3<sup>rd</sup> Defendant's structure standing on Plot No. 160 and for vacant possession.
11. In his Amended Defence dated 2<sup>nd</sup> September, 2003, the 3<sup>rd</sup> Defendant (*Appellant*) averred that he lawfully purchased Plot No.160 from the 1<sup>st</sup> Defendant who was the registered owner of the land; that he has extensively developed Plot No. 160 which is within Mwingi Market and that a declaration to that effect should issue.
12. After numerous Applications and Rulings, the matter commenced trial on 1<sup>st</sup> February, 2006. The Plaintiff's first witness, PW1, informed the court that she sold to Mr. Kaesa Kiiti, the suit land; that the land she sold to Kaesa was divided by a road and that Mr. Kaesa used to work with her late husband. PW1 informed the trial court that the written Agreement that they had in respect of the land they sold to Mr. Kaesa got lost.
13. It was the evidence of PW1 that they sold the suit property to the Plaintiff's husband for Kshs. 6,000; that the purchase price was paid to them by way of instalments and that she was paid Kshs. 5,000 while her husband was paid Kshs. 1,000. PW1 stated that she is aged 84 years old and could not remember where the location of the land was.
14. After taking the court to the site where the land that she sold is located, PW1 informed the court that the portion of land she sold was not wholly developed and that she could not recall the size of the plot that she sold. According to PW1, the people who witnessed the Sale Agreement were her husband (*deceased*), Kaesa's daughter, Zakayo and her co-wife Njoki.
15. In cross-examination, PW1 stated that she could not read or write; that she used a thumb print to sign documents and that she used to live in Mwingi. According to PW1, she remembers signing an Agreement although she was not present when the Agreement was entered into between Kaesa and her late husband.
16. PW1 informed the court that they had about 4 to 5 acres of land within Mwingi Town and that they sold the suit land to the Plaintiff (*Respondent*) before they distributed the rest of the land to their children.
17. PW1 stated that they purchased the suit land with her late husband from one Mbila; that they lived on the land before they sold it and that they had not sold the land by the time their houses were demolished for the construction of the Garissa-Nairobi Road. PW1 finalized her evidence by stating that she was not present when her late husband sold the land to Kaesa although he informed her about the sale; that the plot they sold was on the right side facing the Thika direction and that she could not recollect the rest of the buyers of the entire land.
18. The Plaintiff, PW2, informed the court that the late Kaesa Kiiti was her husband and died in 1989; that her husband died during the pendency of the suit and that she is the legal administrator of the Estate of the late Kaesa Kiiti.
19. It was the evidence of PW2 that her husband bought the suit land from Mr. Kahunyo in June, 1983 for Kshs. 6,000 and that they already had another plot next to the one that her husband purchased. PW2 stated that when the Agreement was entered into, there were other people present including Mathu Makau, Mulyungi Kaesa, Katee Kelmia and herself. It was the evidence of PW2 that the Agreement was in a booklet which she had and was in Kamba language.
20. PW2 stated that the 3<sup>rd</sup> Defendant (*the Appellant*) later on purported to buy half of the plot that they had bought and that the other half was given to a Mr. Mutio. In cross-examination, PW2 stated that PW1 was not present when the Agreement in respect of the sale of the suit land was signed; that the name of PW2 was entered in the Agreement by Peter Kahunyo's son and that it is the son of Kahunyo that signed the Agreement.
21. The Plaintiff called PW3 who informed the court that he was a Councilor of Kitui County Council in 1963; that he ceased being a Councilor in 1974 and that he knew the Respondent and her late husband.
22. According to PW3, the suit land is outside the boundary of County Council land and is private land; that the late Kaesa bought the land from Mr. Kahunyo; that he had left the County Council by the time the late Kaesa bought the land and that Kahunyo bought the land from Luka and Mbila. It was the evidence of PW3 that he was not present when Kahunyo bought the land, neither was he present when Kaesa bought the land from Kahunyo.
23. PW3 informed the trial court that Kahunyo's land was divided by the road and that part of the land was taken up during the construction of the Garissa road whereupon Mr. Kahunyo was compensated.
24. The Surveyor, PW5, informed the trial court that the suit land is within Kanzanzu adjudication area within Mwingi Town Council, adjacent to Nairobi-Mwingi road; that the plot in dispute is  $\frac{1}{4}$  an acre; that the register at lands shows the first owner of the disputed land to be Kahunyo Kihanjo who sold it to a Mr. Kaesa; that the Kanzanzu area adjudication process has not been finalized; that the suit plot was part of land known as Mwingi/Mwingi/271 which belongs to many people and that he could not establish the original owner of the bigger piece of land.
25. The Plaintiff's son, PW6, stated that his father bought the disputed plot in 1983; that he was involved in the transaction and that he signed the Agreement as a witness. According to PW6, he is the one who handed to the seller Kshs. 5,000 upon signing the Agreement and that the plot was vacant.
26. On his part, the Land Adjudication Officer of Mwingi District, PW7, stated Kanzanzu was declared an adjudication area on 30<sup>th</sup> August, 1990; that the subject area had been reserved for Mwingi Market and that he did not know if the land in dispute was owned by an individual

before 1988. PW7 stated that the area in question was reserved for Mwingi Market and owned by Mwingi Town Council.

27. The 2<sup>nd</sup> Defendant, DW1, stated that when his father died in the year 2004, he discovered that he had been allocated the suit land by the County Council of Kitui on 16<sup>th</sup> July, 1985; that he was born in 1973 and that he did not have evidence to show that he paid any money to the County Council of Kitui. DW1 admitted that he was a minor when he was allocated the land.

28. The Mwingi Town Council Market Inspector, DW2, stated that Plot No. 160 belongs to the 3<sup>rd</sup> Defendant (*the Appellant*); that the said land is along the main Highway; that initially, the plot belonged to Peter Kiiti Ngui (*the 1<sup>st</sup> Defendant*) and that the Kitui County Council allocated the land to the 1<sup>st</sup> Defendant vide the Minutes of the Council of 20<sup>th</sup> May, 1983. The 1<sup>st</sup> Defendant produced the Council's Minutes which purportedly approved the transfer of the plot from the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant.

29. The Appellant herein, DW3, informed the court that he bought Plot No.160 from the 1<sup>st</sup> Defendant; that the plot is a long Mwingi-Thika Road and that it measures 50 x 50 feet. It was the evidence of PW3 that he bought the plot vide an Agreement dated 5<sup>th</sup> November, 1987 and that the 1<sup>st</sup> Defendant was the initial allottee of the land.

30. The 4<sup>th</sup> Defendant, DW4, stated that he purchased plot number 158 from the 2<sup>nd</sup> Defendant's father; that he then formally applied to the Council to be allocated the plot and that the plot belonged to the Kitui County Council.

31. After hearing the evidence as enumerated above, the learned Magistrate held that he was convinced that the Plaintiff (*the Respondent herein*) bought a parcel of land from the late Kahunyo Koigi vide an Agreement dated 4<sup>th</sup> June, 1983; that the land that the Plaintiff's husband bought is the suit properties (*Plot No. 160 and 158*) and that the two plots were fraudulently allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who sold them to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.

32. This dispute cannot be resolved without putting into context the land tenure system that existed in this country between 1963, when the independent Constitution was enacted and the year 2010 when the current Constitution was promulgated.

33. It is not in dispute that Plot Nos. 158 and 160 are situated along the Mwingi-Nairobi Highway. It is also not in dispute that the two suit properties are in Mwingi Market, which Market was previously under the jurisdiction of Mwingi Town Council. Before the establishment of the Mwingi Town Council, the suit land fell within the larger Kitui County Council. Indeed, all parcels of land within and without of the then Mwingi were categorized as Trust Land.

34. This court discussed in great detail how Trust Land was supposed to be managed under the repealed Constitution and the Trust Land Act in the case of *Bahola Mkalindi Rhigho vs. Michael Seth Kaseme & Others, Malindi ELC. No. 168 of 2012*. In the said case, this court stated as follows:

***“85. Under the repealed Constitution and the Trust Land Act, Trust land was neither owned by the Government nor by the County Councils within whose area the land fell under. The County Council simply held such land on behalf of the local inhabitants of the area.***

***86. For as long as Trust land remained adjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land was transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.***

***87. Indeed, Section 115(2) of the repealed Constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual.***

***88. The Constitution also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.***

***89. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while setting apart removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.***

***90. Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act.***

***93. Section 117(1) of the repealed Constitution allowed, through an Act of Parliament, County Councils to set apart any area of Trust land vested in a County Council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the County Council is likely to benefit the person ordinarily resident in that area or any other area of Trust land vested in that County Council either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof.***

***94. Where an area of Trust land has been set apart by the County Council for the purposes that I have enumerated above, section 117(2) of the repealed Constitution provided that any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.”***

35. From the above discourse, it can be seen that County Councils, or Town Councils, could set apart any area of Trust Land and allocate it

to individuals. Indeed, this is the provisions that Town Councils used to allocate people plots within their areas of jurisdiction notwithstanding that the said land was Trust Land.

36. According to the Appellant (*the 3<sup>rd</sup> Defendant in the lower court*), the land that he has since put up a storeyed house, and which is within Mwingi Township was allocated to one Peter Kiiti Ngui (*the 1<sup>st</sup> Defendant*) in 1983 by the then County Council of Kitui. The Appellant and the 1<sup>st</sup> Defendant produced letter dated 25<sup>th</sup> July, 1983 in which the then County Council of Kitui approved the Application of the 1<sup>st</sup> Defendant for Plot No. 160 (*the suit property*) measuring approximately 50 feet by 50 feet.

37. The Appellant and the 1<sup>st</sup> Defendant also produced the letter dated 16<sup>th</sup> February, 1999 by the then Town Clerk of the Town Council of Mwingi approving the Transfer of Plot No. 160 to the 3<sup>rd</sup> Defendant. By this time, the Respondent herein had already sued the 1<sup>st</sup> Defendant, together with the 4<sup>th</sup> Defendant claiming for Plot No. 158 and 160. The suit in the lower court was filed in 1988.

38. While the 1<sup>st</sup> Defendant in the lower court produced the letters and Minutes showing that he was allocated plot number 160 by the then County Council of Kitui, the Respondent's claim is that her late husband, Mr. Kaesa, had purchased a larger portion of land, which included the suit land, from the late Mr. Kahunyo in the same year, that is in 1983.

39. The Respondent herein, who is the wife of the late Kaesa, produced in evidence the Agreement dated 4<sup>th</sup> June, 1983 between Kahunyo Koigi and Ben Kaesa Kiiti in respect to "*a piece of land which is adjacent to his plot number 34 and 33.*" The land that Mr. Kahunyo was selling to Mr. Kaesa or the acreage was not described at all.

40. From the Agreement, it is not clear exactly the plot that the late Kaesa was buying. Indeed, no effort was made by the Respondent and his witnesses to bring the map or the Part Development Plan which had plot numbers 34 and 33 to enable the court draw the nexus between these two plots and plot numbers 158 and 160.

41. The lack of clarity of the land that Mr. Kaesa bought is compounded by the Respondent's own evidence that she lost some portions of land when the Garissa-Nairobi Highway was being constructed. If that is so, how sure is she that the land Mr. Kaesa bought was not taken up by the road?

42. The other issue that the Respondent did not respond to while prosecuting her claim in the lower court is why the Agreement which was entered into on 4<sup>th</sup> June, 1983 did not specifically mention plot numbers 158 and 160, which, according to the Minutes of the Town Planning, Markets and Housing Committee County of 20<sup>th</sup> May, 1983, were already in existence.

43. The evidence before this court shows that as per the Minutes of the Kitui County Council dated 20<sup>th</sup> May, 1983, which were not challenged by the Respondent, Plot numbers 158 and 160 were allocated to Simon Munyasya and Peter Kiiti Ngui respectively. Peter Kiiti, with the approval of the Town Council of Mwingi, then transferred his portion to the Appellant. In fact, PW7, the Land Adjudication Officer, informed the court that the suit land was left out during the adjudication process because the suit land was within the market and belonged to the Mwingi Town Council.

44. On the other hand, the Respondent did not prove on a balance of probabilities that the plots that her late husband bought in 1983 from Mr. Kahunyo formed part of plot numbers 158 and 160. Indeed, the Sale Agreement that was purportedly entered into in 1983 did not make any reference to these two plots, and yet the plots existed in the records of the Town Council of Mwingi.

45. Furthermore, Kahunyo Koigi, the purported Vendor, never signed the Agreement of 4<sup>th</sup> June, 1983. PW1, who is the wife of the said Vendor, did not also prove by way of documentary evidence or otherwise how Kahunyo Koigi became the owner of the land, which is within Mwingi Town, before he sold it to the Respondent's late husband.

46. The evidence that was placed before the learned Magistrate leads to only one conclusion, that the Plaintiff did not prove her case on a balance of probabilities.

47. For those reasons, I allow the Appeal and set aside the Judgment and Decree of the court in Mwingi SRMCC No. 111 of 1988 dated 18<sup>th</sup> May, 2011, and substitute the same with an order dismissing the Respondent's Plaintiff with costs. The Appellant's Counter-claim amended on 2<sup>nd</sup> September, 2003 is allowed as prayed. The Respondent to pay the costs of this Appeal.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**