



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT GARISSA**

**ELC CASE NO. 66 OF 2017**

**GIDEON KITHUKA MALEVE.....PLAINTIFF**

**-VERSUS**

**KASYOKA MUSYA.....1ST DEFENDANT**

**MUTHUI MUSYA.....2ND DEFENDANT**

**JUDGEMENT**

The Plaintiff instituted this suit by a plaint dated 16<sup>th</sup> October, 2017 seeking the following orders;

- (a) A permanent injunction to restrain the Defendants whether by themselves, their agents and/or servants from trespassing or occupying or in any other way interfering with the Plaintiff's unsurveyed property situated Kathanze Malawa Sub-location, Wingemi Location, Nuu Division, Mwingi East District, Kitui County.
- (b) A permanent mandatory injunction for the Defendants to forthwith vacate the Plaintiffs unsurveyed property situated at Makutano Kwa Salee, Kathanze in Malawa Sub-location, Wingemi Location, Nuu Division, Mwingi East District, Kitui County.
- (c) General and special damages for trespass and for destruction of vegetation and trees.
- (d) Costs of the suit.

The plaint was filed contemporaneously with a Notice of Motion dated the same day in which the Plaintiff was seeking interlocutory injunction pending the hearing and determination of the suit.

By a statement of defence dated 3<sup>rd</sup> November, 2017, the Defendant denied the Plaintiff's claim.

**PLAINTIFF'S SUMMARY OF FACTS**

The Plaintiff testified on 27/3/2019 as PW1. He was referred to his supporting affidavit to the Notice of Motion filed with the Plaint sworn on 16/10/2017 which was treated as his witness statement and adopted in his evidence. He stated that on or about 22<sup>nd</sup> July, 2015, he purchased from one Martha Kavungo Mbaluka a portion of unsurveyed land situated at Makutano kwa Salee Kathenze, Malawa Sub-location, Wingemi Location, Nuu Division, Mwingi East District, Kitui County at a purchase price of Kshs.180,000/=

She produced the sale agreement as P. Exhibit No. 1. The Plaintiff further testified that he was aware that the said land was subject of a Civil Suit No. 10 of 1999 (Mwingi) between Mbaluka Kiema (husband to Martha Kavungo Mbaluka) and Musaya Mutyongo (husband and father to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively). Upon hearing the dispute, the court awarded Mbaluka Kiema the suit property. He produced a copy of the award, judgement and sketch map. On or about 28<sup>th</sup> June, 2017, the Defendant illegally and unlawfully trespassed into the suit property and cleared the vegetation and cut down trees in readiness for planting. He stated that the Defendants also erected temporary structures. He produced the same as P. Exhibit 3 (a), (b) and (c). On 30/6/2017, the area chief wrote a letter to the Defendants to stop their activities but in vain. He produced a copy of the letter marked P. Exhibit No. 4. On 5<sup>th</sup> July, 2017, the Assistant County Commissioner wrote a letter to confirm his efforts to resolve the dispute had been frustrated by the Defendants. The letter was also produced as P. Exhibit No. 5. On 4/9/2017, his Advocate wrote a demand letter to the Defendants asking them to stop their unlawful actions but in vain. The letter was produced as P. Exhibit No. 6. The Plaintiff stated that he uses the suit property for grazing and food crops but the Defendants action has made him not to plant and graze in the said land.

On cross-examination, the Plaintiff admitted that the suit land is a Community Land and that the Adjudication which is currently taking place has not reached that area. He stated that the seller, Kabungo Mbuuko showed him documents that she was the owner of the land. He gave the documents to his lawyer. He admitted that he is not living in the suit land. He also stated that there is a construction going on in the suit land. He stated that he was not aware there was another case in Mwingi being CMCC No. 10 of 1999.

The 2<sup>nd</sup> witness called by the Plaintiff was Martha Kavungo Mbaluka alias Martha Kabungo. She stated that she sold a portion of land to the Plaintiff whom she has known since 2005. She said that she sold him the land which they were cultivating with her husband Mbuuko. She stated that the land she sold has been having a case between Mbuuko and Musya. According to her, the case was finalized and the court gave the land to her husband Mbaluka. She sold the land to the Plaintiff at Kshs.180,000/=. They entered into a sale agreement in the presence of the area chief and other witnesses.

On cross-examination, the witness stated that she took her National Identity Card before she got married. She also stated that the suit land has not been surveyed. She said that when she got married, she found the suit land being cultivated by her mother-in-law. She said that her mother-in-law is the one who gave her the suit land. She confirmed that they do not live on the suit land now but they used to live on the land until they sold it. She stated that she has not been sued by the Defendants in respect of the suit land in Mwingi.

PW3 was Benedict Mulei. He referred to his witness statement filed in court on 15/3/2018. He stated that he was Chief of Wangemi Location between 1988 to June, 2002. He stated that in 1998 or thereabouts, one Mbuuko Kiema made a report to him complaining that one Musya Mutyango had trespassed into his land by fencing it. He summoned the said Musya Mutyango to his office thrice but failed to attend. He then referred the matter to the District Land Tribunal Mwingi for purposes of filing a case. He stated that he knew the land in dispute is ancestral land having been inherited by Mbuuko Kiema from Kyumbu Kiema (mother to Mbuuko Kyema) who had also inherited I from Kaviti Kayoli (mother-in-law to Syumbu Kiema).

### **DEFENDANTS SUMMARY OF FACTS**

DW1 was Kasyoka Musya who is the 1<sup>st</sup> Defendant herein. He stated that she is married to one Musya Mutyango (deceased). She stated that there is a case filed by her husband before he passed away which is in respect of the suit land. They were blessed with nine children. One of them passed on and was buried in the suit land. She said that they lived in the suit land where she found her late husband residing when they got married. Her mother-in-law was also buried in the suit land. She said that the family of Kavungo are their neighbours. She said that the suit land was given to her late husband by the community/clan. She further said that the suit land is a community land.

DW2 was Muthui Benson Musya (2<sup>nd</sup> Defendant). He was referred to his statement dated 3<sup>rd</sup> November, 2017 which he adopted in his evidence. He stated that he was born in the disputed land and has never heard any complain from the Plaintiff until 1999 when their neighbor Mbuuko Kiema started claiming that the disputed land belonged to him. He further stated that his father Musya Mutyango acquired the suit land early in 1942 when it was bare land and left it under his mother's case.

The 2<sup>nd</sup> Plaintiff also stated that on 17/11/1999, his father passed away and was buried in the disputed land together with his grandparents. He testified that there is a water well which they have been using for their domestic purposes and that there was no complain raised by the Plaintiff until the year 1999 when their neighbor one Mbuuko Kiema started claiming that the land belonged to him. He stated that there was a Land Case No. 10 of 1999 between his late father one Musya Mutyango and the late Mbuuko Kiema, husband to Martha Kavungo (the seller of the said disputed land) which was determined on 23<sup>rd</sup> November, 1999 in the absence of his late father who passed away on 17<sup>th</sup> November, 1999. In conclusion, the 2<sup>nd</sup> Defendant stated that they have been using the suit land since he was born to date and has not heard of any claim pertaining to the same from the Plaintiff and that the Plaintiff has never used the suit land or occupied the same.

DW3 was Mutwii Ngole. He testified that the suit property belongs to Musya. He is a neighbor to the disputed land and that the same was gathered by Musya and lived on the land until he died and was buried on the land. He said that the land does not belong to Martha Kavungo.

DW4 was Wilson Mutei. He stated that the suit property belongs to Musya Mutyango who is his neighbor for more than 55 years. He stated that he acquired the land in 1940s by gathering.

DW5 was Muthiani Mutia. He testified that the suit property belongs to Musya Mutyango and Muthui Musya (2<sup>nd</sup> Defendant) his son. He is a neighbor to the suit land. He stated that when Musya Mutyango died, he was buried in the suit land and that his son Muthui Musya lives on the suit land. He knows the Plaintiff, Gideon Kithuva Maleve whom he said does not own land around that area. He said that Martha Kavungo is the wife of his brother and that the suit land do not belong to her.

### **PLAINTIFF'S SUBMISSION**

The Plaintiff through the firm of Kinyua Mwaniki & Co. Advocates framed the following issues for determination;

- i. Whether the court in Mwingi Senior Resident Magistrate Court Land Case No. 10 of 1995 between Mbuuko Kiema and Musya Mutyango determined the dispute in favour of Mbuuko Kiema.
- ii. Whether the Plaintiff is the beneficial owner of suit property or whether the suit property is owned by the Defendant.

On the first issue, the learned Counsel submitted that as per Plaintiff exhibit 1, the outcome of the suit in Mwingi being SRMCC No. 10/1999 was an award adopted as judgement of the court on 24<sup>th</sup> November, 1999. He argued that the said award decreed that the suit property belonged to Mbuuko Kiema.

In relation to the second issue, Counsel for the Plaintiff submitted that the Plaintiff produced agreements for sale as evidence of his beneficial ownership of the suit property and that PW2 testified to the effect that she sold the suit property to the Plaintiff and that she has no interest thereof.

### **DEFENDANTS SUBMISSION**

The Defendant did not file any submissions within the timelines given.

### **LEGAL ANALYSIS AND DECISION**

I have considered the evidence by the Plaintiff and his witnesses. I have also considered the evidence by the Defendants and their witnesses as well as the documents produced by both sides. From my reading of the pleadings, the following are issues for determination;

- (i) Whether the Plaintiff has proved his claim on a balance of probabilities.
- (j) What appropriate orders to issue.
- (k) Who will bear the costs of the suit.

#### **Whether the Plaintiff has proved his claim on a balance of probabilities:**

The Plaintiff's claim against the Defendant is an unurveyed parcel of land situated at Makutano kwa Salee in Kathanze, Malawa Sub-location, Wingemi Location, Nuu Division, Mwingi East District within Kitui County. According to the Plaintiff, he bought the alleged parcel of land from one Martha Kavungo Mbaluka. The Plaintiff stated that the suit property was a subject of a suit in Mwingi Law Courts being SRMCC No. 10 of 1999 between Mbuuko Kiama (husband to Martha Kavungo Mbaluka and one Musya Mutyango (husband and father to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively). The Plaintiff further stated that upon hearing the dispute in the Mwingi Case, the court decreed that the land was owned by Mbuuko Kiama, husband to Martha Kavungo who thereafter sold the land to the Plaintiff. From the testimony of the Defendants and the witnesses, the suit property is unurveyed. This court takes Judicial Notice that except in Kitui township and Sub-county township where survey was conducted and approved. Land in the outskirts are largely unregistered community land. Community land is governed under the Community Land Act No. 27 of 2016. Section 6 of the said Act provides that the County Governments shall hold in trust all unregistered Community Land on behalf of the communities for which it is held. The Act goes on to explain the process in which unregistered community land can be registered and the process and manner in which accounts can be opened and funds deposited in respect of properties acquired compulsorily of any unregistered community land.

Section 21 of the Community Act also provides for the conversion of Community Land to either private or public land.

Section 23 provides as follows;

#### **Conversion of Community Land to Private Land**

**“Registered Community Land may, subject to approval of the Registered Community, be converted to private land through;**

- (a) Transfer; or**
- (b) Allocation by the registered community subject to ratification of the assembly as provided in Section 2 (2)”**

The law is categorical in the manner in which Community Land is converted into private. The Plaintiff in his plaint and testimony has stated that he acquired the suit land by way of Sale with one Martha Kavungo Mbaluka who was the vendor. He produced an award by a Land Disputes Tribunal based in Mwingi and adopted by the Senior Resident Magistrate's Court in SRMCC No. 10 of 1999. The order of the court read as follows;

**“We have received the land dispute tribunal's typed order. It awarded the land to the Plaintiff Mbuuko Kiama pursuant to the provisions of Act No. 18/90. I decree the land to the Plaintiff Mbuuko Kiama”.**

The Plaintiff did not annex a copy of the proceedings before the tribunal to know what the dispute was all about. From the order by the Magistrate adopting the award of the tribunal, it would appear that the dispute was a claim for land. The jurisdiction of the Land Disputes Tribunal Act No. 18 of 1990 (repealed) can be found in Section 3 which states as follows;

#### **3(1) Subject to this Act, all cases of a civil nature involving a dispute as to;**

- (a) The division of, or the determination of boundaries to land, including land held in common;**
- (b) A claim to occupy or work land; or**
- (c) Trespass of land.”**

The decision by the tribunal to award land which was erroneously adopted by the Magistrate Court in SRMCC No. 10/99 was ultra vires the jurisdiction of the tribunal and by extension that of the Magistrate. The award by the tribunal and subsequently adopted by the Magistrate's Court Mwingi on 24/11/99 was a nullity and of no legal effect. It therefore follows that any claim based on the award and adoption of the orders by the Magistrate's Court in SRMCC No. 10 of 1999 has no legal effect in law. The Plaintiff claim based on those proceedings is null and void. consequently, the Plaintiff claim fails.

(2) What appropriate orders to issue?

Having found that the Plaintiff has not proved his case on the required standard, the claim fails and the same ought to be dismissed. On the other hand, the Defendants filed a statement of defence and counter-claim in which the 1<sup>st</sup> Defendant averred that she inherited the suit land from her late husband Musya Mutyango who acquired the same in 1942. The 1<sup>st</sup> Defendant further averred that she has utilized the said land ever since she was married to the late Musya Mutyango back in 1952 and has never received any claim from the Plaintiff until December 2014 when one Martha Kavungo trespassed into the suit land.

As noted therein above, the suit land is a community land which can only be converted either into private or public land in accordance with the Community Land Act No. 27 of 2016. This Honourable court cannot make a declaration as to the ownership of the suit property as that mandate is donated by statute to the Land Adjudication Officer either under the Land Adjudication Act Cap 284 or the Land Consolidation Act Cap 283 Laws of Kenya. Until the Adjudication process commences and in order to maintain law and order, I make the following directions.

1. **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to continue working and occupying the disputed land until it is declared an adjudicated area.**
2. **The Plaintiff shall bear the costs of this suit.**
3. **Either party has a right of Appeal within 30 days from today.**

**READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 30TH DAY OF JULY, 2021**

.....

**E. C. Cheronno (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. **Mr. Musili holding brief Kinyua for Plaintiff**
2. **Defendant/Advocate –Absent**
3. **Fardowsa; Court Assistant**