



**REPUBLIC OF KENYA**

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

**ELC NO. 117 OF 2014**

ZAPHANIA SAUL KHISA.....1<sup>ST</sup> PLAINTIFF

JACKLYNE N. KHISA.....2<sup>ND</sup> PLAINTIFF

WINSTONE OGADA.....3<sup>RD</sup> PLAINTIFF

RISPER NAFULA.....4<sup>TH</sup> PLAINTIFF

**VERSUS**

COLLINS MALILI MAKIO.....1<sup>ST</sup> DEFENDANT

DUNCAN MASINDE MAKIO.....2<sup>ND</sup> DEFENDANT

MARY MASINDE MAKIO.....3<sup>RD</sup> DEFENDANT

EVANS MUSHIKANI.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

1. This is a consolidated judgment in respect of two suits, **Kitale ELC No 9 Of 2015 Zephaniah Saul Khisa & Risper Nafula Vs Evans Mushikani** and **Kitale ELC 117 Of 2014 Zaphaniah Khisa And Jackline N Khisa Vs Collins Malili And Evans Mushikani**.

2. The plaintiffs in **Kitale ELC 117 Of 2014** filed in court their initial plaint dated 3/7/2014 in this matter on 14/7/2014. It was later amended on 8/12/2014. The amended plaint seeks the following orders:-

(a) A declaratory order that the plaintiffs are the lawful owners of Plot No. 347 and 349 ADC ZEA.

(b) A permanent injunction restraining the defendants, their agents and or servants or anyone claiming through the defendants from trespassing or any manner interfering with the plaintiffs' quiet enjoyment of Plot No. 349 (now 653) ADC ZEA.

(c) In the alternative a refund of the actual market value of property No. 347 and 349 from the deceased estate.

(d) Cost of the suit and interest on (c) at court rates.

3. The defendants filed their initial defence on 24/9/2014 and subsequently filed an amended defence on 20/1/2015.

4. The plaintiffs in **Kitale ELC No 9 of 2015** filed their plaint dated 29/1/2015 on the same date. They sought the following orders against the defendant:

a. A declaration that the plaintiffs are the lawful registered owners of plot no. 652 Zea settlement scheme;

b. Damages for trespass and conversion;

c. An order prohibiting the defendant from interfering with the plaintiff's quiet and peaceful possession of the suit property;

d. Costs of the suit and interest on (c) above.

5. The defendant in the suit filed his defence on 4/3/2015 denying the claim.

6. On 7/2/2018 when the matter came up for hearing Ms Munialo counsel for the defendants applied for consolidation of the two suits and Mr Maritim for the plaintiff supported her application whereupon this court ordered that the suits be consolidated and that the order of the parties be as in the present title in this judgment.

### PLEADINGS

#### The Claim.

7. The 1<sup>st</sup> and 4<sup>th</sup> plaintiffs claim that they owned **plot no 652 ADC Zea** –formerly known as **ADC Zea plot No 785**) in Zea settlement scheme and that the 4<sup>th</sup> defendant encroached on that land thus rendering it impossible for the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs to engage in farming activities hence the suit.

8. The 1<sup>st</sup>-3<sup>rd</sup> plaintiff's claim against all the 4 defendants is that the plaintiffs had unregistered interest in **Plots Nos 347 348 and 349 ADC Zea Settlement Scheme** which they purchased from Peter Makio Okumu, the father to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who was also husband to the 3<sup>rd</sup> defendant.

9. Peter Makio sold the 3 plots on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are said to have owned **plots nos 349 and 347** respectively while **plot number 348** was owned by the 3<sup>rd</sup> defendant.

10. At the time of the said purchase however, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were minors. Peter promised to effect the transfer to them on behalf of his two sons.

11. The plaintiffs state that they entered into the said agreements under a mistake of law on the understanding that Peter Makio would transfer the plots to them.

12. They also plead fraud on the part of Peter Makio, stating that he knowingly sold parcels of land procured in the names of the 1<sup>st</sup> – 3<sup>rd</sup> defendants without obtaining a court order; that the plaintiffs bought and took possession without any notice of defect in title passed on to them and that the 3<sup>rd</sup> defendant having noted the defect of title sold **plot no 349** to the 4<sup>th</sup> defendant with the knowledge that the sale would dispossess the plaintiffs of the land. It is stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants knew of the fact that their father had disposed of the suit land and that they have no equitable interest in the land, and that their action will lead to unjust enrichment.

13. It is stated that the 1<sup>st</sup> defendant has now purported to have sold **plot no 349** to the 2<sup>nd</sup> defendant. It is further stated that the transaction by the 1<sup>st</sup> defendant lacked the land control board consent, and that consent was only issued after 7 years. The plaintiffs aver that they have been in occupation of the suit land without interruption since 2007 to date.

#### The Defence to the plaintiff's claims.

14. In their joint defence the 4 defendants denied the alleged sale by Peter Makio or any promise to transfer the suit land to them. They stated in the alternative that such sale lacked the consent of the Land Control Board and is null and void. They stated that the alleged sale on behalf of the 3<sup>rd</sup> defendant could not have occurred as she was an adult when it occurred. They dismiss the alleged agreements between the plaintiffs and Peter as forgeries and deny the particulars of fraud or mistake. They also aver that want of a land control board consent rendered the agreements void. They stated that **Plot No 347** is the subject of litigation in the High Court. The defendants deny that **plot no 349** had ever been sold to the plaintiffs by the 1<sup>st</sup> defendant of his father and disputes the signature on the agreement dated 26/4/1999. The 1<sup>st</sup> defendant avers that his sale of **Plot No 349** to the 4<sup>th</sup> defendant is legal. It is denied that the plaintiffs have been in occupation of the suit lands since 2007, and in the alternative that if they indeed have, they have been trespassing on the suit land. Finally, it is pleaded that the instant suit is *res judicata* in that in **Kitale PMCC No 266 of 2005** the court had dealt with the dispute and ordered a refund of **Ksh 260,000/=**.

15. On his part the 4<sup>th</sup> defendant in his defence filed on 4/3/2015 denied the 1<sup>st</sup> and 4<sup>th</sup> plaintiff's claim against him and stated that he has settled on **Plot Number 653** and not **Plot No 652 Zea Settlement Scheme**.

### THE EVIDENCE OF THE PARTIES

#### The Plaintiffs' Evidence.

16. **PW1, Zephaniah Khisa Saul**, the 1<sup>st</sup> plaintiff testified on 7/2/2018. He adopted his written statement filed on 14/7/2014 as his evidence-in-chief in this case. His evidence is that the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs are his wives; that **plot number 653** (originally known as **plot no 349**) was allotted to Collins Malili Makio the 1<sup>st</sup> defendant; that the plot was subsequently transferred to Johnstone Abuka; that Abuka sold the said plot to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in 2007 for **Ksh 300,000/=**; that before he purchased it the 1<sup>st</sup> plaintiff was farming on **plot no 349** since

1999 and had built a house and a toilet thereon; that the 1<sup>st</sup> plaintiff used to harvest about **300** bags of maize per year from the land; that after the 1<sup>st</sup> plaintiff had farmed on the land for **18** years the 4<sup>th</sup> defendant appeared with a tractor and ploughed the land comprised in **Plots Nos 652 and 653** and stationed **7** guards thereon; that this court ordered a surveyor to visit the suit land and a report was filed in court; that at the time when the plaintiff filed suit, the land was not titled; he stated that he had sold other land in order to be able to purchase the suit land on which he now lives; he prayed the court to order that **Plot Number 653** belongs to him and that he be compensated in respect of **Plot No 652**.

17. Upon cross-examination he stated that Abuka never gave him the original letter of allotment or transfer form in respect of **Plot No 653**; that Abuka is deceased; that the land still had a charge registered against it when he bought it; that he is not aware whether the charge still exists; that the 1<sup>st</sup> defendant was about **12** and was present at the time of the execution of the sale agreement.

18. **PW2, Winstone Ogada**, the 3<sup>rd</sup> plaintiff testified the same date as **PW1**. He adopted his written statement filed on **8/12/2014** as his evidence-in-chief in this case. His evidence is that he is the administrator of the estate of Johnstone Ogada who purchased **Plot No 349** from Mr Peter Makio. Peter gave them a letter of allotment issued in **1998** and said that the land had a charge over it; that Johnstone paid **Ksh 260,000/=** to the 1<sup>st</sup> defendant, who was about **12** then, who gave it to his father Peter Makio. He stated that **Plot No 349** should be reinstated to the 1<sup>st</sup> plaintiff.

19. Upon cross examination by Ms Munialo, he admitted that the 1<sup>st</sup> defendant never signed the agreement, and that the same was signed by his father.

20. The evidence of the would be 3<sup>rd</sup> witness in the plaintiffs' case was not taken orally as he was deceased; however upon the application of the plaintiffs' counsel his statement was admitted in evidence with the cautionary remarks that the court would weigh its probative value while considering that it had not been subjected to verification by way of cross-examination.

21. At that juncture plaintiffs closed their case.

#### **The Evidence of the Defendants**

22. **DW1, Mary Nanjala Makio**, the 3<sup>rd</sup> defendant, testified **26/2/2020**. She adopted her written statements dated **24/9/2014** and **19/1/2015** as her evidence-in-chief in this matter. Her evidence is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are her sons and Peter Makio, now deceased, was her husband; that the 4<sup>th</sup> defendant is her neighbour; that the 1<sup>st</sup> defendant was born in **1984**; that her plot is **no 649**; that the 1<sup>st</sup> defendant's plot is **no 581**; that she never got to know that the plots had been sold; that the 1<sup>st</sup> defendant could not sell the land as he was underage; that in any event the 1<sup>st</sup> defendant never signed the agreement; that in **2007** she discussed with the 1<sup>st</sup> defendant and he agreed to sell **Plot No 349** to the 4<sup>th</sup> defendant and part of the proceeds were applied to payment of school fees; that the 1<sup>st</sup> plaintiff had secured a decree in the lower court ordering a refund of **Ksh 260,000/=** to him in respect of the sale of **plot no. 581**; that an appeal against that decision is still pending; that the 1<sup>st</sup> plaintiff has never bought the land.

23. **DW2, Duncan Masinde Makio**, the 2<sup>nd</sup> defendant, testified on **12/3/2020** and on **9/12/2020**. He adopted his written statement dated **19/1/2015** as his evidence-in-chief in this matter. His evidence is that he does not know the 1<sup>st</sup> plaintiff and that he sold **Plot No 581** (original number **347**) which he had been allocated by **ADC** on **17/2/1997** to the 4<sup>th</sup> defendant; that on **7/4/2008** he was issued with a letter of offer by the Settlement Fund Trustees through the Director of Land adjudication and settlement; that he sold the land allocated to him to the 4<sup>th</sup> defendant in **2014**; that a letter of consent of the land control board was issued for the transaction; that he was not aware that his father sold the 1<sup>st</sup> plaintiff the said plot; that a court had already ruled that the 1<sup>st</sup> plaintiff be refunded his money.

24. **DW3, Cornelius Malili Makio aka Collins**, the 1<sup>st</sup> defendant, testified on **9/11/2020**. His evidence is that he sold **plot no 653** (original number **349**) for a consideration of **Ksh 300,000/=** to the 4<sup>th</sup> defendant in **2007**; that the Settlement Fund Trustee through the Director of Land Adjudication and Settlement issued him with a letter of offer dated **7/4/2008**; that he did not execute the agreement produced as **PEXh 2** and did not sell the land to Johnstone Kelly and he has only known him recently in court through these proceedings; that he does not know Wafula Advocate; that he has cleared the loan over the land and has taken the 4<sup>th</sup> defendant to the land control board; that a consent of the land control board was issued and the land transferred to the 4<sup>th</sup> defendant who at the time of the hearing lived on the land and that the 1<sup>st</sup> plaintiff lives on **plot no 652** and not **653**.

25. **DW4, Evans Bogwocha Musigani**, the 4<sup>th</sup> defendant, testified on **9/11/2020**. He adopted his written statement dated **19/1/2015** as his evidence-in-chief in this matter. His evidence is that he purchased **plot no 653** of land from the 1<sup>st</sup> defendant in **2007** and now lives and farms on that plot; that the sale obtained the approval of the land control board vide a letter of consent dated **17/3/2014**; that he paid conveyance fee and that the land was transferred to his name in **2014**; that he is in possession of the plot and the 1<sup>st</sup> plaintiff is his neighbour; that he also paid stamp duty in the same year; that a discharge of charge was issued and a title prepared in the name of the 1<sup>st</sup> defendant in **2020**;

26. Upon cross-examination by Ms Rotich for the plaintiffs, he stated that he is the registered owner of **plot number 581** while the 1<sup>st</sup> defendant is the registered owner of **plot number 653**; that he is not aware of the previous litigation over the suit land; that he lives on **plot no 581**. However on re-examination by Ms Munialo he acknowledged the subordinate court decision but maintained that the 1<sup>st</sup> plaintiff can not be paid for the land over which the 4<sup>th</sup> defendant now possesses title.

27. **DW5, Protus Moindi**, County Surveyor in Trans Nzoia County testified on **22/4/2021**. He stated that in **2015** he established the positions of **plots nos 652 and 653** on the ground and found that their position on the ground was correct and that it corresponded with the RIM; that

Plot No 653 is occupied by the 1<sup>st</sup> plaintiff and Plot no 652 by the 4<sup>th</sup> defendant.

28. At that point the defence case was marked as closed.

### **Submissions**

29. The plaintiffs filed their written submissions on 2/6/2021 and the defendants filed theirs on 16/6/2021. I have considered the plaintiff's case, the defendants' defence, the evidence tendered in support thereof as well as the submissions filed.

### **Issues for Determination**

30. There are two plots in contention in the instant suit. It is common ground that Plots nos 347 and 349 were allocated to the 1<sup>st</sup> and 2<sup>nd</sup> defendants while they were still infants and that they were allocated new numbers that is 581 and 653 respectively.

31. The main issues arising for determination in this suit are as follows:

*(a) Did the father to the 1<sup>st</sup> and 2<sup>nd</sup> defendant sell the 1<sup>st</sup> and 2<sup>nd</sup> defendants' interest in the two plots to the 1<sup>st</sup> plaintiff and 3<sup>rd</sup> plaintiff?*

*(b) If so, was the sale sufficient to grant the purchasers any proprietary interest in the plots?*

*(c) What orders should issue?*

32. The issues are addressed as hereunder:

*(a) Did the father to the 1<sup>st</sup> and 2<sup>nd</sup> defendant sell the 1<sup>st</sup> and 2<sup>nd</sup> defendants' interest in the two plots to the 1<sup>st</sup> plaintiff and 3<sup>rd</sup> plaintiff?*

33. The plaintiff submitted that he was a bona fide purchaser for value. He cited the case of **Arthi Highway Developers Ltd Vs West End Butchery Ltd & 6 Others [2015] eKLR**.

34. It is not in doubt that the 1<sup>st</sup> plaintiff is in occupation of plot number 653 and that he has been in such occupation over a long period of time. The surveyor's reports states so. The 4<sup>th</sup> defendant's claim that he is in possession of plot no 653 fell flat on its face. Indeed this court has no doubt from the evidence on the record that he has been in possession since the year 1999. That is the plot that he claims to have bought from one Johnstone Kelly Abuka vide the agreement dated 6/1/2007.

35. This court has no doubt that Johnstone Kelly Abuka had purchased the same plot from the 1<sup>st</sup> defendant's father. The agreement whose copy was produced as **PExh 2** is testimony to this fact.

36. Though the 1<sup>st</sup> defendant claims not to have executed that agreement or involved in the sale, I find that he was also not involved in the allocation of the land into his name and that his father must have secured the land in his name for reasons best known to himself.

37. It was not demonstrated by the defendants that the late Peter Makio obtained the land in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants so that they may secure and retain interest in the same for themselves. The fact that he later sold the same land he had secured in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs speaks volumes about his intention while he was acquiring the said land. There is no other reason why the 1<sup>st</sup> and 3<sup>rd</sup> defendants could have obtained the possession of the land parcels save that they had purchased them from the 1<sup>st</sup> and the 2<sup>nd</sup> defendants' father.

38. I find that the plaintiff's interest in the two plots can only arise directly out of the agreements that the defendants' deceased father entered into with the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs.

***b. Was the sale by the 1<sup>st</sup> and 2<sup>nd</sup> defendant's father sufficient to grant the purchasers any proprietary interest in the plots?***

39. The plaintiffs submit that the doctrine of constructive trust applies. The decisions of **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri 2014 eKLR** and **Willy Kimutai Kitilit Vs Michael Kibet 2018 eKLR** have been cited.

40. In this case there is no issue raised by the defendants that the purchase price had not been paid in full by the 1<sup>st</sup> and 4<sup>th</sup> plaintiff while the suit lands were being purchased. After the consideration was paid the interest in the suit plots passed to the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs; the 3<sup>rd</sup> plaintiff subsequently transferred his interest in plot no 349 to the 1<sup>st</sup> plaintiff who then became the owner of the two plots. I find that consideration and possession having changed hands the doctrine of constructive trust applies.

41. In the course of time the defendants caused plot no 581 to be transferred to the 4<sup>th</sup> defendant while the plot no 653 remained in the 1<sup>st</sup> defendant's name. Both the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant testified to this although no title was produced in evidence. This court must however believe them.

42. I find that the transfer of the plots to the names of the 1<sup>st</sup> and 4<sup>th</sup> defendants was improper while agreements had been entered into between their father on the one part and the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs on the other.

43. Since the dispute regarding **plot no 347** had been resolved by another court and its decision is pending appeal I find that the claim regarding it in this suit is *res judicata*.

44. I must focus on the remaining plot that is **plot no 349**. Since the said plot has already been transferred into the name of the 4<sup>th</sup> defendant I must apply equity in this matter. This court is therefore inclined to order that the defendants do refund the plaintiff the value of the land.

45. Since this decision has to be final and the plaintiffs have failed to bring forward evidence of the current market value of the land, this court takes judicial notice that on a conservative scale the prevalent market value of land in Kitale and its environs is approximately **Ksh 1000,000/= per acre**. Considering that the plaintiffs have already developed the suit land, I will therefore allocate a conservative estimate of **Ksh 1000, 000/- per acre** for the 5 acres, bringing the aggregate value to **Ksh 5000, 000/= (Kenya Shillings Five Million only)**

**c. What orders should issue?**

46. The upshot of the foregoing is that I find that the 1<sup>st</sup> -3<sup>rd</sup> plaintiffs have proved their case on a balance of probabilities against the defendants and I hereby enter judgment in their favour against the defendants jointly and severally and I issue the following orders:

**a. A declaration that the plot no 349 was properly sold to the 3<sup>rd</sup> plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendant's father thus passing proprietary interest therein to the 3<sup>rd</sup> plaintiff;**

**b. A declaration that the plot no 349 was properly sold by Johnstone Abuka to the 1<sup>st</sup> defendant thus passing proprietary interest therein to the 1<sup>st</sup> plaintiff;**

**c. An order that in lieu of cancellation of title issued in the name of the 4<sup>th</sup> defendant in respect of plot no Trans Nzoia/Zea/653 the defendants shall within 60 days of this judgment jointly and severally refund the 1<sup>st</sup> plaintiff the sum of Ksh 5,000,000/= (in words Kenya Shillings Five Million only) being the estimated current market value of the suit land comprised in Plot No 349-Zea.**

**d. In default of settlement of the sum in order no (c) above, Plot No 349-Zea shall be transferred to the plaintiffs and the Deputy Registrar of this court shall execute all documents requisite for the transfer of Plot No 349 to the plaintiffs or as they may direct;**

**e. The defendants shall bear the costs of this suit.**

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021**

**MWANGI NJOROGI**

**JUDGE, ELC.**