



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 195 OF 2017**

**SAMMY NZIOKA MULWA.....PLAINTIFF**

**VERSUS**

**JACKSON MATATA MULWA.....1<sup>ST</sup> DEFENDANT**

**STEPHEN NTHENGE MULWA.....2<sup>ND</sup> DEFENDANT**

**JOSEPHAT MUTUNGA MULWA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In the Complaint dated 30<sup>th</sup> March, 2017, the Plaintiff averred that he is the owner of land known as Mitaboni/Mbee/587 (*the suit property*); that he acquired the suit property by purchasing the same from his siblings who were joint owners of the land and that he took occupation of 2/3 of the suit property.
2. It is the Plaintiff's case that in the year 2010, the Defendants started cultivating the suit property without his permission; that the Defendants have subsequently denied the Plaintiff the quiet enjoyment of his land, and that the clan members deliberated on the dispute and found that he was entitled to 2/3 of the suit property.
3. The Plaintiff has prayed for a declaration that he is the absolute owner of 2/3 of the suit property; that the Defendants should deliver to him the 2/3 of the suit property and that the Defendants should pay him damages for trespass and *mesne* profits.
4. Although the Defendants were served with Summons to Enter Appearance, they neither entered appearance nor filed a Defence. The matter proceeded for hearing in their absence.
5. The Plaintiff, PW1, informed the court that he bought the suit property from the Defendants who are his brothers; that he paid the purchase price by installments and that in the year 2010, the Defendants started invading the land.
6. According to PW1, he took possession of 2/3 of land known as Mitaboni/Mbee/587; that the clan settled the dispute between him and the Defendants in his favour and that he should be awarded 2/3 of the suit property.
7. The sons of the joint proprietors of the suit property, PW2 and PW3, informed the court that the Plaintiff bought a portion of the suit property from the Defendants.
8. The Plaintiff submitted that he produced in evidence the Agreement dated 23<sup>rd</sup> March, 1994 showing how he purchased 2/3 of parcel of land known as Mitaboni/Mbee/587; that the Defendants have not disputed the signing of the said Agreement and that he is entitled to the prayers in the Complaint.
9. The testimony by the Plaintiff, PW2 and PW3 is that the Plaintiff purchased a portion of land being 2/3 of Mitaboni/Mbee/587 vide two Agreements. The Plaintiff produced the two Agreements dated 23<sup>rd</sup> March, 1994 and 21<sup>st</sup> May, 1994.
10. It is alleged that in the Agreement dated 23<sup>rd</sup> March, 1994, the three Defendants purportedly agreed to sell to the Plaintiff Plot No. 587 situated within Mbee Section for Kshs. 65,000. However, the Agreement of 23<sup>rd</sup> March, 1994 was not signed by the three proprietors. Indeed, there is no evidence before me to show that the four (4) witnesses who purportedly were present when the Agreement of 23<sup>rd</sup> March, 1994 was entered into signed the Agreement.
11. In the Agreement of 21<sup>st</sup> May, 1994, the three vendors purportedly agreed that they had received Kshs. 1,200 from the Plaintiff for the

purchase of parcel number 587. The said Agreement was also never signed by the vendors.

12. The copy of the official search produced by the Plaintiff shows that the Defendants were registered as the proprietors of Mitaboni/Mbee/587. According to the said searches, each proprietor owned 1/3 share of the land. If indeed the Plaintiff purchased 2/3 of the suit land, it is not clear from the Agreement, who, amongst the three proprietors of the suit property, sold to the Plaintiff the 2/3 of the suit property he is claiming.

13. The analysis of the evidence before me shows that the purported Agreement between the Defendants and the Plaintiff does not comply with the provisions of Section 3(2) of the Law of Contract Act which provides as follows:

***“(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.”***

14. Furthermore, the suit land is owned by the three Defendants as tenants in common. Each of the three Defendants can and should independently sell his portion of land. There is no evidence before this court to show which of the three Defendants sold their respective shares amounting to 2/3 of the suit land.

15. In the absence of answers to the questions raised above by the court, I find that the Plaintiff did not prove his case on a balance of probabilities.

16. For those reasons, I dismiss the Plaintiff's suit but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**