



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 85 OF 2018**

**DANIEL MULANDI MASAKU.....PLAINTIFF**

**-VERSUS-**

**FLORENCE MUNYIVA DAVID.....1<sup>ST</sup> DEFENDANT**

**MUTISYA HUSSEIN MASAKU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through an amended plaint dated 30/08/2018, the Plaintiff prays for orders against the Defendants for;

**a) A declaration that the sale agreement entered into between the Plaintiff and 1<sup>st</sup> Defendant on 20/04/2015 over parcel of land Makueni/Ngandani Scheme/1319 is null and void.**

**b) An order of permanent injunction restraining the Defendants whether by themselves, their agents, employees, servants or any other person working under the Defendants' instructions and authority from in any way entering, trespassing, occupying, grazing, cultivating, building or in any other way at all dealing with the Plaintiff's parcel of land Makueni/Ngandani Scheme/1319.**

**c) An order that the Defendants do forthwith vacate from the suitland known as Makueni/ Ngandani Scheme/1319 and in default, the Plaintiff be at liberty to forcefully evict the Defendants from the suit land and demolish all structures thereon and the OCS Makueni Police Station do escort and physically supervise said eviction and demolition.**

**d) Costs of the suit and interest at Court rates.**

**e) Any other relief the Court may deem fit to grant.**

2. The Plaintiff's case is that he entered into a sale agreement with the 1<sup>st</sup> Defendant for the sale of Makueni/ Ngandani Scheme/1319 (*the suit land*) for a consideration of Kshs. 225,000/= which she failed to pay but nevertheless took possession with her son, the 2<sup>nd</sup> Defendant.

3. The Plaintiff avers that the consent to transfer the suitland was not obtained within the statutory period hence making the sale agreement null and void. He also avers that the Defendants have erected structures, have been harassing his farmhands and have wasted the suit land.

4. The Defendants filed a joint statement of defence in which they stated that the 2<sup>nd</sup> Defendant constructed on the suit land through an agreement between the Plaintiff and the 2<sup>nd</sup> Defendant's father, Masaku, in the presence of family members. She averred that the sale agreement was done after the 2<sup>nd</sup> Defendant settled on the suit land. She blamed financial constraints for failure to pay the purchase price and agreed that the Land Control Board consent to transfer was not obtained.

5. She averred that on 07/08/2018, they were advised by the Deputy County Commissioner to honour the order made by Sammy Masaku to the effect that the 2<sup>nd</sup> Defendant should occupy the land in Ngangani and Sammy Masaku to occupy the one in Mbuvo.

6. The Plaintiff produced a title deed as **P. Exhibit 1**, an agreement in Kikamba as **P.Exhibit 2(a)** and its translation as **P.Exhibit 2 (b)**. He said that on 25/07/2017, the Chief told him that he had written a reminder to the 1<sup>st</sup> Defendant. He later went to the District Commissioner, Kibwezi who directed him to come to court. He produced two demand letters as **P.Exhibit 3 (a)** and **(b)** and a certificate of search as **P.Exhibit 4**.

7. On cross examination by the 1<sup>st</sup> Defendant, he said that he did not know the 2<sup>nd</sup> Defendant before he moved to the suit land. He found out

that the 2<sup>nd</sup> Defendant was in occupation of his farm in 2010. He agreed being the 1<sup>st</sup> Defendant's brother in-law. He said that his brother, the 1<sup>st</sup> Defendant's husband, died in 2006 but was not aware if by that time, the 2<sup>nd</sup> Defendant had made bricks in the suit land.

8. On cross examination by the 2<sup>nd</sup> Defendant, he said that he was in occupation of his (Plaintiff) father's land and denied that it was purchased by the 2<sup>nd</sup> Defendant's father.

9. In answering a question from Court, he said that the 1<sup>st</sup> Defendant's husband sold his share of their father's land.

10. The Plaintiff closed his case at that juncture.

11. The 1<sup>st</sup> Defendant testified that her late husband and the Plaintiff agreed verbally that the 2<sup>nd</sup> Defendant could occupy the land and get a share of 46 acres. Further, she said that the Plaintiff was in occupation of a *shamba* purchased by her late husband (*the deceased*), a fact which he admitted before the District Officer.

12. On cross examination, she said that the agreement between the deceased and Plaintiff was made in the year 2007 and agreed that she had not produced documents to show that the land was purchased by the deceased. Her husband was the eldest of three brothers including the Plaintiff. She agreed that the Plaintiff's land was in the name of his father, one Mulandi Masaku Nguta. She said that when she appeared before the Chief with the Plaintiff and 2<sup>nd</sup> Defendant in 2015, she agreed to purchase the suit land.

13. She agreed to pay the 1<sup>st</sup> installment of Kshs. 50,000/= but assumed that the agreement was of no effect after failing to pay. She agreed being in receipt of the demand letters and said that she was ready to move out on condition that the Plaintiff vacates his father's land.

14. The 2<sup>nd</sup> Defendant testified that he moved into the suit land in 2007 and the Plaintiff was aware. In 2015, the Plaintiff summoned him before the Chief and demanded to know why he was building on his land. The 1<sup>st</sup> Defendant reminded the Plaintiff of the agreement between him and the deceased.

15. On cross examination, he agreed that when they appeared before the chief in 2015, the 1<sup>st</sup> Defendant offered to buy the suit land and he (*2<sup>nd</sup> Defendant*) signed the agreement. The chief demanded that they should not introduce the issue of the deceased's land with respect to the land occupied by the Plaintiff. He agreed that the land where the Plaintiff resides is in his grandfather's name. He said that his father objected when the clan attempted to sub divide the land into three portions. He said that his uncle Mutangili also resides in the land that is registered in his grandfather's name. He insisted that the land belongs to his father (the deceased) but agreed that he did not have documents to show that it was purchased by his father.

16. Vitalis Ogur (DW1), the Deputy County Commissioner of Kibwezi Sub County adopted his statement dated 03/06/2019 as his evidence in chief where he stated that on 07/08/2018, he arbitrated over a land dispute involving the parties herein and the suit land was the subject matter. The Plaintiff had complained that someone had encroached onto his land. The Plaintiff admitted being in occupation of a land in Mbuvo registered in the name of Mulandi Masaku Nguta.

17. On arbitration, his office established that the land in Mbuvo was purchased by the deceased husband of the 1<sup>st</sup> Defendant but registered in the name of the deceased's father who is also the 2<sup>nd</sup> Defendant's grandfather.

18. In Court, he testified that the Plaintiff agreed that the land in Mbuvo was bought by the deceased. According to DW1, it was the deceased who insisted that the 2<sup>nd</sup> Defendant should reside in Ngandani as he had not been given his land in Mbuvo. He produced a letter dated 07/08/2018 as D.Exhibit 1.

19. On cross examination, he said that he did not have the arbitration proceedings and agreed that he had not produced the summons to the Plaintiff. He also agreed that he had not produced the short notes which, he said, he had written during the meeting. He agreed that he had advised the parties to maintain the *status quo* and to approach the Court over the issue of ownership as he did not determine it. When asked about Makeni/ Ngandani Scheme/1319, he said that the number given to him was 11319. He said that Mbuvo land was not family land and had no knowledge as to whether it had been divided into 3 portions. He also had no knowledge as to how the Defendants entered into Ngandani land. The Defendants did not admit the issue of buying the land when they went to his office.

20. The Defendants closed their case at that juncture and thereafter, the parties filed their respective submissions.

21. The Plaintiff submitted that the suit land is agricultural land hence it was mandatory to obtain the Land Control Board's consent for any transaction concerning it. He submitted that failure to obtain the consent made the sale agreement null and void and restored the parties to *status quo ante*. He contends that the Defendants' occupation of the suit land is unlawful and constitutes trespass in law. He relies *inter alia* on Kisii ELC Case No. 1250 of 2016: **Josephine Moraa Nyamweya & Anor –vs- Haron King'oina Bogita** where the Court held;

*“...there is no dispute that the land the subject matter of the sale to the Defendant/counter claimer falls within the land control area within the meaning of the Land Control Act. The transaction that the counter claimer purported to enter into was a controlled transaction and it was therefore mandatory for the consent of the Land Control Board to be sought and obtained. The Defendant/counter claimer agrees none was sought. The sale agreement dated 3<sup>rd</sup> June 2003 consequently became null and void after the expiry of 30 days from the date thereof by operation of the law. The Court cannot force a contract that the law declares to be null and void. There is simply no agreement that can be enforced..”*

22. The Plaintiff submitted that all the denials made by the Defendants in their evidence are not in the pleadings and contend that any

evidence which is at variance with the pleadings goes to no issue and must be disregarded. He relied on **Independent Electoral & Boundaries Commission & Anor –vs- Stephen Mutinda Mule & 3 Others (2014) eKLR** where it was held;

*“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...”*

23. The Plaintiff submits that the Defendants admission of being on the suit land is contrary to **section 7 (b) of the Land Control Act** which makes it a criminal offence to enter into or remain in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement.

24. The Defendants submitted that failure to obtain the Land Control Board consent makes the agreement null and void.

25. They submitted that their defence was ‘*home made*’ and may not have captured their wishes hence the reason why the Court gave them leave to call further witnesses and produce further documents. They contend that although there was an agreement for sale, the parties entered into a further agreement to have the 2<sup>nd</sup> Defendant occupy the Plaintiff’s suitland in exchange for an alternative portion of their family land at Mbuvo.

26. They urge the Court to find that both parties were at fault.

27. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the only issue for determination is whether the Plaintiff has proved his case on a balance of probabilities.

28. The title deed and search certificate show that the Plaintiff is the registered owner of the suit land. The Defendants acknowledge the sale agreement and admit that they have never paid anything towards the purchase price of Kshs. 225,000/=.

29. It is not in dispute that the suit land is agricultural land hence requires the Land Control Board consent for any dealings in accordance with the provisions of section 6 of the Land Control Act. The Defendants acknowledge that the Land Control Board consent was a requirement and agree that it was never obtained. They also agree that failure to obtain the said consent made the sale agreement null and void. Accordingly, it is clear that the Defendants’ occupation of the suit land is illegal and constitutes trespass.

30. Their allegation that the suit land was exchanged with another land in Mbuvo is neither here nor there as the evidence on record does not even remotely point to such a possibility. On the flipside, the evidence shows that the Mbuvo land belongs to the 2<sup>nd</sup> Defendant’s grandfather and is currently occupied by the Plaintiff and his brother Mutangili. If the Defendants have evidence to prove that the Mbuvo land was purchased by the deceased, they should institute a different suit otherwise; the sub division of that land is the preserve of the proceedings under the Law of Succession Act.

31. Further, the evidence of the Deputy County Commissioner, DW1, did not advance the Defendants case as he only reproduced what was apparently said at the meeting. He did not even have the minutes to show that what he was telling the Court was a true reflection of what had transpired.

32. The upshot is that the Plaintiff has proved his case to the required standard and I proceed to enter judgement in his favour and against the Defendants as hereunder: -

**a) It is declared that the sale agreement entered into between the Plaintiff and 1<sup>st</sup> Defendant on 20/04/2015 over parcel of land Makueni/ Ngandani Scheme/1319 is null and void.**

**b) An order of permanent injunction is hereby issued restraining the Defendants whether by themselves, agents, employees, servants or any other person working under the Defendants’ instructions and authority from in any way entering, trespassing, occupying, grazing, cultivating, building or in any other way at all dealing with the Plaintiff’s parcel of land Makueni/Ngandani Scheme/1319.**

**c) An order is hereby issued that the Defendants do vacate the suit land known as Makueni/Ngandani Scheme/1319 within 6 months of the order hereof failure of which the Plaintiff will be at liberty to apply for an order of eviction.**

**d) Costs of the suit and interest at Court rates.**

Signed, dated and delivered at Makueni via email this 26<sup>th</sup> day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi