



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 75 OF 2008**

**MUTUKU NGEI.....PLAINTIFF**

**VERSUS**

**JULIUS MAKENZI MWATU** (*Suing as the legal representative*)

*and on behalf of the Estate of MWATU MUTUNE alias*

**MWATU WAITA NGUYO – (Deceased).....1<sup>ST</sup> DEFENDANT**

**ROBERT MUTYANGO MUSAU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. In the Plaintiff dated 13<sup>th</sup> June, 2008 and filed on the same date, the Plaintiff averred that by a written Agreement dated 11<sup>th</sup> May, 1972 between himself and the husband of the late Mwatu Mwalu (*deceased*), he purchased parcel of land known as Muputi/Kiima-Kimwe/701 (*the suit property*) for Kshs. 1,700; that he paid the purchase price in full and that he thereafter fell ill and was flown to London for specialized treatment.

2. The Plaintiff has averred that sometimes in the month of July, 2005, he commenced the process of transferring the suit property to himself; that he was surprised to learn that the seller was deceased and that after tracing the seller's wife (*now deceased*), she declined to transfer the suit property in his favour.

3. According to the Plaintiff, the deceased later on sold the suit property to the 2<sup>nd</sup> Defendant while knowing that she had no good title to pass to the 2<sup>nd</sup> Defendant; that he should be declared the owner of the suit property; that the title that was issued to the 2<sup>nd</sup> Defendant should be cancelled and that an order of specific performance directing the Defendants to transfer the suit property to him should issue. The Plaintiff amended his Plaintiff on 7<sup>th</sup> November, 2017 in which he substituted the 1<sup>st</sup> Defendant (*deceased*) with the current 1<sup>st</sup> Defendant.

4. In his Defence, the 1<sup>st</sup> Defendant (*deceased*) averred that the suit property was sold to the Plaintiff by her late husband; that she was not aware of the sale of the suit property to the 2<sup>nd</sup> Defendant and that she was ready and willing to transfer the suit property to the Plaintiff.

5. In his Defence, the 2<sup>nd</sup> Defendant averred that on 27<sup>th</sup> April, 1981, he purchased the suit property from Mwatu Nguyo with the express permission of his sons; that the suit property was transferred to him by the seller and that the suit as against him is incompetent, bad in law and should be struck out.

**The Plaintiff's case**

6. The Plaintiff's wife, PW1, informed the court that she is the appointed Attorney of the Plaintiff; that the Plaintiff entered into a Sale Agreement with the late Mwatu Waita Nguyo on 11<sup>th</sup> May, 1972 in respect of parcel of land known as Muputi/Kiima-Kimwe/701 (*the suit property*) and that the Plaintiff fell sick and was flown to London for specialized treatment.

7. According to PW1, when the Plaintiff sought to have the suit property transferred to him in the year 2005, he discovered that the same land had been purportedly sold to the 2<sup>nd</sup> Defendant; that on further inquiry, the Plaintiff discovered that the 2<sup>nd</sup> Defendant had the suit property unlawfully and fraudulently transferred to him and that the purported sale of the suit property to the 2<sup>nd</sup> Defendant should be nullified.

8. According to PW1, the 2<sup>nd</sup> Defendant is in occupation of the suit property; that the late Nguyo died before transferring the suit property to the Plaintiff and that she is not aware that the suit property has since been sub-divided.
9. In cross-examination, PW1 stated that the Plaintiff fell ill in the year 1978; that between the year 1972-1978, the land was under adjudication and that the Plaintiff went to London in the year 1985 for specialized treatment. It was the evidence of PW1 that although the Plaintiff appeared before the Chief in the year 2005 and agreed to be refunded the purchase price, he was not in a good frame of mind.
10. PW2 stated that the Plaintiff was a friend to his late father; that in the year 1972, he was requested by the Plaintiff to be present during the demarcation of the suit property using sisal plants and that the Plaintiff had purchased the said land from the late Nguyo. According to PW2, they demarcated the entire land by using sisal and that there was no one in occupation of the land during the demarcation process; that he did not witness the signing of the Agreement between the Plaintiff and the seller and that he was only involved in the demarcation of the boundaries of the suit property.
11. The 1<sup>st</sup> Defendant informed the court that he is the son of the late Nguyo; that he is aware that his late father sold the suit property to the Plaintiff vide a written Agreement dated 11<sup>th</sup> May, 1972 and that his late father was paid the full purchase price by the Plaintiff.
12. According to DW1, he was present when his late father sold the suit property to the Plaintiff; that he neither witnessed nor was he told about the signing of the Agreement between his father and the 2<sup>nd</sup> Defendant and that the suit property belongs to the Plaintiff.
13. In cross examination, it was the evidence of DW1 that he is the only surviving son of the late Nguyo; that he is the only son of the late Nguyo who witnessed the signing of the Agreement between the Plaintiff and his late father in 1972 and that he was not present when the Agreement of 1981 between his late father and the 2<sup>nd</sup> Defendant was signed.
14. The 2<sup>nd</sup> Defendant, DW2, informed the court that he purchased the suit property from the late Nguyo vide an Agreement dated 27<sup>th</sup> April, 1981; that the purchase price was Kshs. 37,000 which he paid and that the said Agreement was witnessed by the seller's three sons.
15. According to DW2, after paying the purchase price, the suit property was transferred to him; that he then took possession of the suit property and that he subsequently sub-divided the land into six portions which are all registered in his name. DW2 informed the court that he only became aware of the Plaintiff's claim when he was summoned by the Chief in the year 2008 and that he never signed a document before the Chief acknowledging that he bought the suit property while aware that the same had been bought by the Plaintiff.
16. According to DW2, he sub-divided the suit property in 1984 on the advice of the bank; that he started developing the suit property in the year 1981; that the Plaintiff did not raise any complaint when he was developing the suit property and that the Agreement was witnessed by the late Nguyo's family members. According to DW2, when the Chief summoned them in the year 2008, the Plaintiff was unable to express himself because he was ill and that if indeed the Plaintiff bought the land in the year 1972, he should have had it transferred to him.
17. DW3 informed the court that his late uncle had a dispute over the suit property in the year 1971 with the late Nguyo; that when the adjudication process was completed, the late Nguyo sold the suit property to the 2<sup>nd</sup> Defendant and that he never saw the Plaintiff on the suit property. According to DW3, the 2<sup>nd</sup> Defendant started using the suit property immediately after purchasing it in 1981 and that the Plaintiff has no interest over the suit property.
18. In cross examination, it was the evidence of DW3 that he resides on his land known as Maputu/Kiima-Kimwe/327 which borders the suit property; that he is not aware that the late Nguyo sold the suit property to the Plaintiff and that the Plaintiff was a Councilor of the area.

### **Submissions**

19. The Plaintiff's advocate submitted that PW1 produced an Agreement for Sale dated the 11<sup>th</sup> May, 1972 made between the Plaintiff and the deceased; that the deceased acknowledged having received the purchase price from the Plaintiff herein and that the parties herein executed the Agreement and the same was attested to by witnesses.
20. Counsel submitted that it is imperative to consider whether the Agreement between the Plaintiff and the deceased meets the essential ingredients for a valid contract. Counsel relied on the provisions of *Section 3 (3) of the Law of Contract Act, Cap 23* which provides as follows:

*“No suit shall be brought upon a contract for the disposition for an interest in land unless –*

*(a) The contract upon which the suit is founded –*

*(i) is in writing*

*(ii) is signed by all the parties thereto*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”*

21. It was submitted by the Plaintiff's counsel that the three above elements for a valid contract were demonstrated to the court; that as a matter of fact, Julius Makenzi Mwatu, who testified on behalf of the Defence case, disclosed to the court that he was present when the

Agreement for the sale of the subject parcel of land was being done and executed as between the Plaintiff and his deceased father and that the said witness duly confirmed that the family of the deceased had received the full purchase price from the Plaintiff herein for the purchase of the subject parcel of land.

22. The Plaintiff's counsel submitted that DW1 confirmed that as per the family of the deceased, including himself, the subject parcel of land known as Muputi/Kiima-Kimwe/701 belongs to the Plaintiff having lawfully and legally acquired the same and that the two Defendants herein have not disputed the fact that there was a Sale Agreement as between the Plaintiff and the deceased. Counsel submitted that the said Agreement has not been vitiated by any of the parties thereto and as such it is a legal and binding document.

23. Counsel submitted that upon cross-examination, the 2<sup>nd</sup> Defendant informed the court that as at the year 1972, he was not living in the area and as such could not have known whether there was an earlier Agreement of Sale with regard to the subject property between the deceased and the Plaintiff; that the Agreement of 1981 produced by the 2<sup>nd</sup> Defendant amounts to complete forgery and that on the execution part by the transferor, the signature as indicated therein is indicated in words as 'Mwatu Waita Nguyo' a clear distinct from the earlier purported signature of the deceased in the Agreement and that the inconsistencies in the two documents illustrates that there are three distinct signatures purportedly executed by the same person, a clear sign of forgery and fraud.

24. The Plaintiff's counsel submitted that in any event, the purported Agreement by the 2<sup>nd</sup> Defendant indicates that they entered into the Agreement on the 27<sup>th</sup> day of April 1981 with the deceased, which is about nine (9) years later from the initial Agreement and that by the time the deceased entered into the purported second Agreement, the vested proprietorship of the subject parcel of land had already changed from himself to the Plaintiff by virtue of the first Agreement which his son acknowledged.

25. Counsel submitted that the deceased had no legal capacity to transfer the subject parcel of land to any third party other than the Plaintiff herein. Counsel relied on Section 26 of the Land Registration Act, 2012 provides as follows:

*"Certificate of title to be held as conclusive evidence of proprietorship thus that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (emphasis added)"*

26. The Plaintiff relied on the case of *Sitonik Cherose Arap Soi vs. Richard K. Soi [2016] eKLR*, where the court held that where a person has no legal title to land, he cannot transfer the same to another party. It was submitted that the deceased did not have the requisite title to transfer the 2<sup>nd</sup> Defendant.

27. It was submitted that the court should proceed to declare that the Plaintiff is the lawful owner of the suit property known as Muputi/Kiima- Kimwe/701 and the subsequent sub-divisions.

28. The 2<sup>nd</sup> Defendant's advocate submitted that the Sale Agreement dated 27<sup>th</sup> April, 1981 between the deceased and the 2<sup>nd</sup> Defendant satisfied all the conditions set out in Section 3(3) of the Law of Contract Act; that the said Agreement was executed by the sons of Mwaitu Mutune (*Nguyo*) being Julius Makenzi Mwatu, Mutuku Mwatu Mutune and Robert Mukonzi Mwatu and that it is therefore appalling when the 1<sup>st</sup> Defendant claims that he was not aware of the said Sale Agreement yet he was present at the time of execution.

29. It was submitted that the allegations of fraud by the Plaintiff cannot hold any water since no evidence has been tendered to support the aforesaid fraudulent activities; that the standard of proof for an allegation of fraud must be higher than on a balance of probabilities and that although the Plaintiff filed the suit more than twelve (12) years ago alleging forgery of the transfer of the said land to the 2<sup>nd</sup> Defendant, he did not tender any document from a handwriting expert or a document examiner to support the allegation.

30. Counsel relied on the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another (2000) eKLR (Civil Appeal No. 106 of 2000) Tunoi, JA (as he then was)* stated as follows:

*"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts."*

31. On the standard of proof, counsel relied on the case of *Ndolo vs. Ndolo (2008) 1 KLR (G&F) 742* where the court held that:

*"...We start by saying that it was the respondent who was alleging that the Will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."*

32. It was submitted by the 2<sup>nd</sup> Defendant's counsel that the Sale Agreement dated 24<sup>th</sup> April, 1981 is valid and that no evidence had been tendered to controvert that fact; that the 2<sup>nd</sup> Defendant is the registered legal proprietor of Muputi/Kiima-Kimwe/701 and that the 2<sup>nd</sup> Defendant conducted the expected due diligence that any ordinary purchaser would conduct when intending to purchase any property.

33. Counsel submitted that Section 26 of the Land Registration Act provides that the Certificate of Title should be held as conclusive evidence of proprietorship; that the 2<sup>nd</sup> Defendant produced the transfer of land documents dated 20<sup>th</sup> May, 1981 that was duly executed by the deceased and himself and that the suit should be dismissed.

#### **Analysis and findings**

34. Both the Plaintiff and the 2<sup>nd</sup> Defendant are claiming to have bought parcel of land known as Muputi/Kiima-Kimwe/701 (*the suit property*) from the late Mwatu Waita Nguyo (*the deceased*). While the Plaintiff is relying on the Agreement dated 11<sup>th</sup> May, 1972 to claim the suit property, the 2<sup>nd</sup> Defendant has placed reliance on the Agreement of 27<sup>th</sup> April, 1981. I have perused both Agreements.

35. The Sale Agreement dated 11<sup>th</sup> May, 1972 purportedly between the Plaintiff and the deceased shows that the Plaintiff paid to the deceased Kshs. 1000 for an unsurveyed parcel of land. The Agreement further shows that the Plaintiff was to pay to the deceased the balance of the purchase price “*at the end of the month of May, 1972*”. DW2 is one of the people who witnessed the signing of the Agreement. DW2 testified and stated that he indeed witnessed the signing of the said Agreement, and that the Plaintiff paid the full purchase price. According to DW2, it is the Plaintiff who is entitled to the suit property, having bought it from his father, and not the 2<sup>nd</sup> Defendant.

36. On the other hand, the 2<sup>nd</sup> Defendant is relying on an Agreement dated 27<sup>th</sup> April, 1981 which was purportedly signed by the deceased and himself. The Agreement shows that it was witnessed by the deceased sons, including DW1, who is the only surviving son of the deceased. However, DW1 denied having witnessed the signing of the Agreement.

37. The evidence before me shows that the suit property was registered in favour of the deceased on 25<sup>th</sup> May, 1977. A Title Deed was then issued in his favour on 12<sup>th</sup> July, 1980. The said land was then transferred by the deceased to the 2<sup>nd</sup> Defendant on 1<sup>st</sup> July, 1981. The copy of the extract of title shows that the 2<sup>nd</sup> Defendant sub-divided the land into new parcel numbers 2408 – 2413 on 19<sup>th</sup> March, 1984.

38. The suit property was registered in favour of the 2<sup>nd</sup> Defendant during the lifetime of the late Mwatu Waita Nguyo under the Registered Land Act (*repealed*). According to the 2<sup>nd</sup> Defendant, he put up a house on the said land in 1981 without any objection from the Plaintiff or the deceased.

39. Section 143 of the Registered Land Act (*repealed*) states as follows:

*“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”*

40. In view of the provisions of Section 143 of the Registered Land Act (*repealed*), the burden of proving that the suit property was registered in favour of the 2<sup>nd</sup> Defendant fraudulently, or by mistake, was on the Plaintiff. As was held in the case of *Ndolo vs. Ndolo (2008) 1 KLR (G&F) 74*, the standard of proof required of the Plaintiff for fraud was higher than that required in ordinary civil cases, namely proof upon a balance of probabilities.

41. Although the Plaintiff has claimed that he bought the suit property from the deceased in 1972, he did not adduce any evidence to show that the land he bought vide an Agreement dated 11<sup>th</sup> May, 1972 was actually the suit property. Indeed, it was the responsibility of the Plaintiff to adduce evidence before this court to show the nexus between the land that he purchased and the suit property considering that he bought the parcel of land in question before the adjudication process commenced.

42. Furthermore, the Plaintiff did not adduce any evidence to show that indeed, he had paid the entire purchase price to the deceased. I say so because the Agreement dated 11<sup>th</sup> May, 1972 that the Plaintiff is relying on stipulates that the Plaintiff was required to pay the balance of the purchase price before the end of the year 1972. No evidence was placed before the court to show that the said sum was paid in compliance with the Sale Agreement.

43. Having alleged that the Agreement that was purportedly signed by the deceased and the 2<sup>nd</sup> Defendant in 1981 was a forgery, the Plaintiff should have produced more cogent evidence to show that indeed the deceased never signed the said Agreement. Such evidence should have entailed calling a document examiner. In the case of *Kimotho vs. Kenya Commercial Bank (2003) 1 EA 108*, the court stated as follows:

*“Failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons evidence be favourable to him, may prompt a court to infer that the person’s evidence would not have helped the party’s case.”*

44. The Plaintiff having failed to adduce evidence to show that the Sale Agreement that the 2<sup>nd</sup> Defendant entered into with the deceased was a forgery, and the suit property having been transferred to the 2<sup>nd</sup> Defendant in 1981, I find that the Plaintiff has not proved his case on a balance of probability.

45. For those reasons, I dismiss the Plaintiff’s Plaint with costs to the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE