



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**T AT KITALE**

**ELC CASE NO. 65 OF 2015**

**JULIUS KING'ORI KIMBUI.....PLAINTIFF**

**VERSUS**

**LOIS NYEGERA KIMBUI.....1<sup>ST</sup> DEFENDANT**

**PAMELA KARAMBU KIMBUI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In this suit **Julius Kingori Kimbui** sued his half-brother **Jason Kiamba Kimbui** for eviction from the suit land which Julius had acquired through his membership in **Kaura Wa Bechau Cooperative Society Limited**, also known as Meru Farm. The society distributed its land to its members and Julius was allocated **10** acres. Jason claimed to have purchased the land from Julius, which allegation Julius disputed, saying that Jason merely expressed an intention to purchase the suit land but never paid any consideration therefor, hence this suit. The rest of the history of the land will unravel in this judgment as this court determines the salient issues in the suit.

**PLEADINGS**

**The Plaintiff**

2. The plaint dated **18/7/2015** was filed on the same date. An application dated **6/5/2018** was then filed by the defendants and a consent dated **9/7/2018** was adopted as an order of the court whereby it was agreed that the original defendant, now deceased, be substituted with the current defendants. Subsequently, an amended plaint dated **16/7/2018** was filed, in which the original defendant was substituted with the legal representatives to his estate. That amended plaint sought the following orders against the defendants:-

- (a) **A declaration that title No. Kitale Municipality Block/16/Kaura Wa Bechau/113 measuring 3.456 Hectares or thereabouts belongs to the plaintiff;**
- (b) **An order of eviction of the defendants, their agents/servants and all those claiming under them from the said parcel of land.**
- (c) **An order that the caution lodged by the defendants on the parcel number be removed.**
- (d) **Costs.**
- (e) **Interest on (d) above.**
- (f) **Any other relief this court may deem fit to grant.**

3. In his amended plaint the plaintiff pleaded that he was a member of Kaura wa Bechau, then a land buying company and that he is the proprietor of the suit land which is known as **Kitale Municipality Block/16/Kaura Wa Bechau/113** measuring **3.456 Hectares**. Due to the nature of his work he asked **Jason Kiamba Kimbui** his biological brother (now deceased) to take care of the suit land. The deceased at one point expressed a desire to purchase the suit land. The plaintiff, trusting his kin and believing that the deceased would pay the consideration wrote a letter dated **10/9/1998** to authorize the chairman of Meru Farm to transfer his shares to the deceased. The plaintiff also alleges that the said letter was written under the influence of alcohol. He states that the consideration of **Kshs. 800,000/=** was to be paid within **2 weeks**,

and in any event, before the deceased's name was entered into the records of the land buying company. However after the two weeks lapsed the deceased refused to pay the consideration and taunted the plaintiff by saying that the documents in his possession showed that consideration had been fully paid. Subsequently the plaintiff wrote to the chairman of the society indicating that his shares should not be transferred to the deceased. When he took that latter letter to the chairman he found that the earlier letter dated **10/9/1998** had not been received in that office. The plaintiff states that the deceased occupied and utilised the land as his trustee and the purported sale was null and void and the deceased had no legal right to be on the suit land. On **5/2/2015** the deceased lodged a caution against the title to the suit land. Despite demands the deceased failed to vacate the suit land hence the suit.

### **The Defence and Counterclaim**

4. The defendants filed their Amended defence and counterclaim dated **3/8/2018** on **6/8/2018**. In their amended defence and counterclaim the defendants stated that they are the administrators of the deceased's estate having obtained a grant of letters of administration on the **4/4/2018**; they retained in their amended defence and counterclaim the statement that the deceased and the plaintiff were brothers and that much regarding the suit land was undertaken on the basis of trust; that the plaintiff rose through the police ranks to become an Inspector; that the plaintiff never took possession of the land and on account of the distance, he offered the suit land to the deceased for the consideration of **Kshs. 220,000/=** which he paid in full and in cash to the plaintiff and upon which payment the plaintiff granted the deceased possession of the land which he has used as of right to date to the exclusion of the plaintiff; that a *resulting trust* was created in the deceased's favour. The defendants denied fraud or that the letter dated **10/9/1998** was written under the influence of alcohol; they also deny knowledge of the letter dated **17/10/1998**. They aver that on the **26/1/2015** the plaintiff fraudulently obtained title to the suit land in his own name. They aver that the plaintiff's claim is time barred. In their counterclaim the defendants reiterate the contents of the defence and state that a *constructive trust* was created in favour of the deceased and pray for a declaration that the plaintiff is holding the suit land in trust for the defendants which trust should now terminate. They further pray for an order that the plaintiff do execute all documents to facilitate the transfer of the suit land to the defendants and in default the Deputy Registrar of this court be mandated to do so.

### **The Amended Reply to Defence and Defence to Counterclaim**

5. In his amended reply to defence and defence to counterclaim dated **16/7/2018** the plaintiff reiterated the contents of his plaint and added that the deceased brought him the typed letter of **10/9/1998**. He also stated that the deceased's possession of the suit land was not peaceful. He denies that he holds the land in trust for the defendants, and reiterates that no purchase price was paid by the deceased and that on the contrary it is the deceased who should be deemed to have held the land in trust for him. He denied that he fraudulently obtained the title to the land. He denied that he has only recently changed his mind and backdated the latter to the society chairman and avers that he changed his mind in **1998** when no consideration was paid for the suit land. He denies ever having received **Kshs. 220,000/=** from the deceased. He stated that the deceased only stationed his agents on the land in **2015** solely to bar the plaintiff from entering the land. He denies that the claim is time barred.

### **EVIDENCE OF THE PARTIES**

#### **The Plaintiff's Evidence**

6. **PW1, Julius King'ori Kimbui**, the plaintiff testified on **22/7/2019**. His evidence followed the contents of the plaint and his witness statement. He admitted that he is a retired policeman; he stated that he joined the Kaura Wa Bechau Co-operative Society in **1976**; that the society's land was distributed in **1980**, that he was given **10.23 acres** and he took possession thereof; that since members were compelled to build on the land he built a house on the suit land which he used till **1993**; in **1994** he retired from the service. According to him the deceased took possession of the land between **1995** and **1996**. By then the plaintiff was in Meru while the deceased was living in Nairobi. The deceased asked the plaintiff for permission to farm on the land. In **1998**, the plaintiff asked the deceased if he could buy the land for **Kshs. 800,000/=**. During a normal visit to the deceased's home in Meru later in that year the two brothers went to a room where the deceased asked the plaintiff to sign a document. The plaintiff signed the document without reading it. The deceased also promised to take the plaintiff to an advocate's office the next day so that he could be paid the consideration. The plaintiff went to the deceased's house early the next morning hoping to be paid **Kshs. 800,000/=** but the deceased told him that he would pay him only **Ksh 300,000/=**. The two therefore disagreed and the plaintiff went away. After about two or three weeks the deceased who was then a manager in Nairobi came to Meru and the two discussed the matter again and disagreed yet again. The plaintiff averred in his evidence that the deceased taunted him that even if he refused to accept the **Kshs. 300,000/=** he had already signed the document authorizing transfer to the deceased and he sent the plaintiff away. The plaintiff then became concerned that the defendant could tamper with his share and visited the Society's office to establish if there had been any interference. He informed the officials of his disagreement with the deceased and asked them to call him if the deceased came to their office. He also wrote the letter dated **17/10/1998** saying that no one should interfere with his share without his consent. After the plaintiff obtained his title deed the deceased came and planted on the suit land using forceful means. The parties subsequently went to the police and it was then that the deceased produced the letter dated **10/9/1998** and the plaintiff obtained a copy thereof. The plaintiff denied that he had received any consideration from the deceased, or that he sold the land to the deceased. He faulted the letter dated **10/9/1998** on several grounds, saying that it was not signed by the deceased, or made before an advocate, and that it bore no identity card numbers. The deceased lodged a caution over the title after the plaintiff obtained title. The plaintiff produced the proceedings before the Land Registrar over the caution. He prayed to be declared owner and the caution be removed and that those in occupation of the land be evicted. He denied holding the land in trust for them. He denied ever taking the deceased to the land control board.

7. On cross-examination the plaintiff stated that he had taken **Kshs. 80,000/=** from the deceased's son called David on account of the sale of the suit land in **1988**; that the full consideration between them was **Kshs. 800,000/=** which David had been unable to pay; that David had stated that he needs come to Kitale to find out what the prevailing land prices were; that the plaintiff later refunded David the money paid after he failed to pay the balance; that in **1988** the plaintiff was then in possession of the land; that he went to the deceased's home and gave him a copy of the letter dated **17/10/1998**.

8. **PW2, Abdalla Hamisi Suleiman**, testified on **30/7/2019**. His evidence is that he was secretary to the Kaura Wa Bechau Cooperative Society also known as Meru Farm, that he knew the plaintiff to be a pioneer member who owned **10 acres**; that in **1998** the plaintiff went to the company offices to establish the status of the land and he stated that he had disagreed with a third party and he was advised to write a

letter, and he wrote the letter dated **17/10/1998**. According to **PW2**, the defendant did not ever call in the offices of the society to claim the suit land.

### **The Defendants' Evidence**

**9. DW1, Loice Nyegera Kimbui**, the 2<sup>nd</sup> defendant testified on **9/3/2020**. Her evidence is that she is widow to the original defendant in the suit and the administrator of his estate; that the deceased lived at Nairobi and Meru; that the plaintiff is a half-brother to her late husband; that the deceased had informed her that he had purchased land from the plaintiff and paid him **Kshs. 220,000/=**; that a worker by the name of Tirigoi was posted to the suit land and he still resides there, working the land; that her deceased husband had informed her that the plaintiff had written him a letter upon sale of the land; that the plaintiff had ploughed a part of the land and her husband had chased the plaintiff away and one Peter Tirigoi went on farming as before. She testified that after the demise of her husband the plaintiff had asked her to pay him additional moneys for the land in instalments. Upon cross-examination she stated that she did not know the manner in which her husband paid consideration. She was also not present when **P. Exh 3**, the letter of transfer of shares was written. She is not aware of the reason why her husband's name was not entered into the society's records. She has never lived on the land. During her cross-examination by Mr. Kaosa, she stated that she was illiterate but later it turned out that she had been a lower primary school teacher.

**10. DW2, Peter Tirigoi Manjai**, testified on **9/3/2020** and adopted his statement dated **11/7/2016** as his evidence-in-chief in this case. His evidence is that the deceased built a house for him to reside in on the suit land; that he merely relocated to the suit land from Endebess where he had been working for the deceased on the deceased's farm. He has been residing and working on the suit land since **1993**; he never found any house on the suit land; that from the time he entered onto the land the plaintiff has never utilized the land; in **2015** the plaintiff entered the land and ploughed all of it and **DW 2** called the deceased on phone and informed him of the developments. The deceased then sent his son, one Douglas and the matter was taken up by the police and the plaintiff did not plant crops on the suit land in that year.

11. At that juncture the defendants closed their case.

### **Submissions of Counsel**

12. The plaintiff filed his written submissions on **6/5/2020**. The defendants filed theirs on **30/6/2020**. I have considered the pleadings, the evidence and the submissions.

### **DETERMINATION**

#### **Issues for Determination**

13. The issues for determination in this suit are as follows:

- a. Whether the plaintiff's claim is barred by the law of limitation of actions.**
- b. Whether there was a valid agreement for sale between the plaintiff and the deceased.**
- c. Whether the plaintiff holds the title to the suit land in trust for the defendants.**
- d. Whether the plaintiff should be compelled to transfer the title to the suit land to the defendants.**
- e. What orders should issue.**

14. The issues are addressed as here below:-

#### **a. Whether the plaintiff's claim is barred by the law of limitation of actions.**

15. The instant suit should not be seen as grounded on the fraud since the deceased never effected any transfer of the plaintiff's shares in the society into his name. It must also be remembered that the plaintiff's original claim which had stated that the defendant's *intention was to defraud him*, was subsequently amended to expunge that part of the claim and this was done with the consent of the parties. However, even if had not been the case, the claim in the original claim remained merely one based on an *intention to defraud* and nothing more.

16. The defendants failed to raise the defence of limitation in the defence as would have been expected. They instead raised it in their counterclaim. They have addressed that issue in their final submissions though the plaintiff has not done so.

17. The defendant's counsel's argument is that the occupation and cultivation of the land by the original defendant was founded on an alleged fraudulent document, the letter dated **10/9/1998 (P.Exh 3)**. He further submits that as soon as the plaintiff discovered the said letter to be a fraud, he wrote the letter dated **17/10/1998** to inform the chairman of Meru Farm not to transfer the land. Therefore by the date of the latter letter the plaintiff had discovered the alleged fraud, on whose basis he had lost the land to the defendant. The plaintiff therefore had **12** years within which to commence proceedings to recover the land from the deceased which he failed to do. They state that this suit was filed **17** years later. Citing **Kitale ELC 21 of 2011 - Estate of John Mwenesi Adulu (Represented By Ebby Musimbi Mwenesi) Vs Saul Egunza Bunyali And 2 Others** and **Section 26(A)** of the **Limitation of Actions Act**, counsel states that where the action is based on fraud the period of limitation, does not begin to run until the discovery of the fraud by the plaintiff. According to the defendants the cause of action in this suit lapsed on **16/10/2010**. Counsel submits that it matters not that the land was not titled by that time.

18. However in this court's view, **Kitale ELC 21 of 2011 - Estate of John Mwenesi Adulu (Represented by Ebby Musimbi Mwenesi) Vs Saul Egunza Bunyali and 2 Others** can be distinguished on the basis that the land subject matter therein was already titled and title had already been transferred to the defendants by the time the plaintiff commenced suit. In claims for ownership by virtue of prescription, which is not the mainstay of the defendants' defence and counterclaim in the instant suit, the law of limitation operates to affect the interest of a registered proprietor and not an unregistered proprietor. The land in the present suit was not titled as at the time the letter dated **17/10/1998** was written by the plaintiff.

19. It must be remembered that the plaintiff in the instant suit has already claimed that he had, owing to the nature of his work then, asked the deceased to look after the farm on his behalf.

20. In this court's view then, the plaintiff shows clearly that the entry of the deceased on to the suit land was by consent of the parties which, despite expression of intention by the parties towards a sale, never translated into a full disposal of the plaintiff's total rights and interest in the suit land.

21. There is no material to persuade this court that the limitation period could have ran against the plaintiff while he was unregistered, when there is no evidence of payment of consideration and while the uncontroverted evidence in the suit is that he entered into possession by virtue of the consent of the plaintiff. In the absence of evidence of a valid agreement therefore the instant suit remains an action for the termination of a licence.

22. The defence of limitation in this matter therefore has no merit and it must be rejected.

**b. Whether there was a valid agreement for sale between the plaintiff and the deceased.**

23. The plaintiff seems forthright in his evidence that there exists a letter to the chairman of the Society instructing him that he should ensure that the title to the suit land should be issued in the name of the deceased since the plaintiff had transferred his shares to the deceased. This document was produced as **P. Exh 3** and remains the sole documentary evidence upon which the defendants' claim to the suit land is hinged.

24. This court observes that there was therefore an intention to sell the suit land on the part of the plaintiff and an intention to purchase the same land on the part of the deceased.

25. **Section 3(3)** of the **Law of Contract Act** provides as follows:

**“(3) No suit shall be brought upon a contract for the disposition of 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; and**

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

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

26. An agreement for the sale of land must therefore be in writing, executed by the parties thereto and appropriate witnessed.

27. Does **D. Exh 3** possess these statutory features?

**28. D.Exh 3** is in writing. However it appears not to be an agreement but a letter to the chairman of Meru Farm Kitale informing him that the plaintiff had transferred his shares in the Farm which would have entitled him to **10** acres to the deceased.

29. Even if this court had deemed it to be an agreement, **DExh 3** also appears to have been signed by only one person - the plaintiff. **D.Exh 3** therefore fails the first test under **Section 3** of the **Law of Contract Act**.

30. Secondly it is not witnessed as required by **Section 3(3)** of the Act and it therefore fails the second test.

31. Thirdly the plaintiff, though he admits having signed the same claims that he did so under the influence of alcohol such that he did not know what he was signing at the material time. There is no evidence from the plaintiff to prove this allegation.

32. A normal feature of an agreement for the sale of land is that it would provide for consideration. There is no acknowledgment of receipt of any consideration in **P. Exh 3**. Any agreement without consideration is void and unenforceable. The plaintiff's testimony is that he expected that he and the deceased would proceed to an advocate's office where he would be paid the consideration for the suit land. According to the plaintiff that never happened and the deceased therefore never paid the purchase price. The defendants never produced any evidence of payment of the consideration to the plaintiff, either through an advocate's office or otherwise.

33. In this court's view **D. Exh 3** does not therefore amount to a valid sale agreement between the plaintiff and the deceased.

**(c) Whether the plaintiff holds the title to the suit land in trust for the defendants.**

34. This court has already found that there is no evidence of payment of consideration to the plaintiff by the deceased for the suit land and that **D. Exh 3** does not amount to a valid agreement between the plaintiff and the deceased. The title to the suit land is in the name of the plaintiff, having been so issued in the year **2015**.

35. The defendants aver that the plaintiff holds the land title in trust for them.

36. Trust can only be proved by way of evidence. It can never be presumed. The defendants' only concrete pillar to support their claim of trust is their long occupation of the land through a worker, **DW2**. However, long occupation *per se* is not conclusive evidence of trust. It *may* form part of the evidence of trust only if considered in conjunction with other factors, which are now lacking. Proof of full payment of the consideration may have provided the defendants with a lifeline, in that the court may, considering possession as an added factor consider that in the circumstances there exists a *constructive* or a *resulting* trust in the defendants' favour. The defendants however failed to provide evidence of payment of the purchase price.

37. Not only did the defendants fail in proving payment, but they also failed to establish that any valid sale agreement for shares between the deceased and the plaintiff was endorsed by the Society, with the effect that the society, which owned the land before the plaintiff, had nothing to inform it of the sale.

38. For the foregoing reasons I find that the defendants have failed to establish that the plaintiff holds the title to the suit land in trust for the estate of the deceased.

**d. Whether the plaintiff should be compelled to transfer the title to the suit land to the defendants**

**39. The defendants having failed in their quest to prove that there as a valid sale agreement between the deceased and the plaintiff or that the plaintiff otherwise held the title to the suit land in trust for the estate of the deceased there is no basis upon which this court can hold that the plaintiff should be compelled to transfer the suit land to the estate of the deceased.**

**CONCLUSION**

**(e) What orders should issue?**

**40. I find that the plaintiff's case therefore has merit while he defendants' counterclaim has no merit.**

**41. I therefore enter judgment in favour of the plaintiff for in this suit and I issue the following final orders:-**

**a. The plaintiff's claim against the defendants is allowed.**

**b. The defendant's counterclaim is dismissed.**

**c. A declaration that title No. Kitale Municipality Block/16/Kaura Wa Bechau/113 measuring 3.456 Hectares or thereabouts belongs to him.**

**d. An order of eviction of the defendants, their agents/servants and all those claiming under them from the said parcel of land.**

**e. An order that the caution lodged by the defendants on the parcel number be removed by the County Land Registrar.**

**f. An order that each party shall bear their own costs of the suit and counterclaim.**

**It is so ordered.**

**Dated, signed and delivered via teleconference at Kitale on this 21<sup>th</sup> day of July, 2020.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**