



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 14 OF 2018**

**(FORMERLY MERU HCCC NO. 71 OF 1995 and NYERI HCCC NO. 60 OF 1987)**

**MBOGORI BAICHU .....PLAINTIFF**

**VERSUS**

**DAVID GITONGA MUNGANIA**

**(Sued as the Legal Representative of the estate of**

**LIVINGSTONE M'MUGANIA - DECEASED).....DEFENDANT**

**JUDGMENT**

**Background/History**

1. *“Poise the cause in justice’s equal scales, whose beam stands sure, whose rightful cause prevails” -William Shake spear.*
2. The Odyssey of litigation herein spans 33 years in the corridors of justice! The plaintiff sued one Livingstone M’Mungania (deceased) in Nyeri H.C.C No. 60 of 1987 vide a plaint filed on 26.2.1987, which suit was transferred to Meru High Court where it was registered as Meru H.C.C. No. 71 of 1995. Eventually the case landed in this Court where it was registered as Meru ELC No. 14 of 2018. It must surely be one of the oldest matters in this court.
3. The dispute arose out of land sale agreements of 1981 and 1982, whereby Livingstone M’Mungania was to sell to the plaintiff 15 acres out of land parcel no.84 in Timau settlement scheme. The Nyeri court attempted to have the matter resolved through arbitration, but this did not materialize as the arbitration decision was set aside by the court.
4. In the course of litigation, Livingstone M’Mungania became senile and an application was filed in court dated 3.2.2004 for the current defendant to be his guardian. This application was allowed on 13.5.2005. However as fate dictated, Livingstone passed on thereafter on 24.10.2006. The plaintiff embarked on a gallant mission to substitute the defendant as captured in my ruling delivered on 28.11.2018. David Gitonga Mungania son of Livingstone M’Mungania is now the legal representative of the original defendant.

**Plaintiff’s case**

5. The initial plaint filed on 26.2.1987 was amended on 13.5.2018, where the following orders have been sought against the defendant;
  - a) *“An order for specific performance of the agreement of sale being an order directed to the Land Registrar Meru to put the names of the plaintiff MBOGORI BAICHU as the proprietor of ALL that parcel known as TIMAU SETTLEMENT SCHEME 192 while cancelling the names therein.*
  - b) *Mesne profits from 1981 to date.*
  - c) *Cost of this suit.*
  - d) *Any other relief this Honorable Court may deem fit and just to grant”.*
6. Through his pleadings, the plaintiff has stated that he bought a portion of the suit land (plot no. 84 Timau ssettlement Scheme) amounting to fifteen (15) acres at a consideration of Kshs. 83,500/-. They entered into an agreement in writing on 23/10/1981 and subsequently amended by a supplementary agreement dated 13/04/1982. They duly signed the application for consent of the Land Control

Board to subdivide and transfer 15 acres to the plaintiff. The consent was granted on 03/05/1984 and the defendant further confirmed his agreement to transfer the land in his letter dated 7/07/1986. The defendant breached the agreement occasioning the plaintiff loss and damage.

7. Plaintiff, **Mbogori Baichu** testified as **PW1**. He adopted his statements dated 10/04/2018 and 10/05/2019 as his evidence. He also produced the documents in his lists dated 10/04/2018 and 10/05/2019 as his exhibits 1-11 respectively. He stated that on 23/10/1981 he entered into an agreement with the defendant to buy eleven (11) acres out of Plot No. 84 Timau Settlement Scheme for Kshs. 59,500/-. Before the transaction was completed, they entered into another agreement on 13/04/1982 which amended the initial agreement and he purchased four (4) more acres. He therefore bought a total of fifteen (15) acres for Kshs. 83,500/-.

8. They attended the North Imenti Land Control Board and consent was issued on 3/05/1984. The consent was for subdivision and transfer of 15 acres from the deceased to him. After consent to subdivide and transfer was granted, the deceased allowed him to take possession of the suit land in February 1985. The defendant also confirmed that he would transfer the land to the plaintiff as per a letter dated 7.7.1986. Plaintiff fenced the land, cultivated wheat and was able to harvest 60 bags thereof. He stayed there until January 1986 when he was evicted by the deceased (initial defendant).

9. When the titles were issued, the defendant did not meet his obligation. Defendant had subdivided the land into Timau Settlement Scheme/192, 193, 194, 195 and 196 with plaintiff's parcel being Timau Settlement Scheme/192. When plaintiff availed himself to sign the transfer documents, the same were never prepared. He questioned the deceased who stated that he could not transfer the land for their families may quarrel.

10. Plaintiff is claiming mesne profits amounting to Ksh. 180 000 per year for the last 37 years as well as specific performance in respect of parcel 192.

### **Defence Case**

11. The initial statement of defence was dated 12.11.1987 but was further amended on 25.6.2019, where the defendant denied the plaintiff's allegations and put him to strict proof thereof. He stated that the suit is frivolous and raises no reasonable cause of action and ought to be dismissed.

12. **DW1, David Gitonga Mungania** adopted his statements dated 10/04/2019 and 20/05/2019 as his evidence. He produced three exhibits to be found in his list of documents dated 10/04/2019.

13. He stated that he is aware that his father entered into an agreement to sell a portion of the suit land with the plaintiff but the same was entered fraudulently, discreetly and without the knowledge of the family. The agreement was negotiated at the plaintiff's sister's bar at Kibirichia market where the plaintiff lured the deceased, intoxicated him and purported to pay for the land in form of beer. The only consideration paid by the plaintiff was a sum of Kshs. 3,700/- which he is ready to refund. Besides, the plaintiff has never occupied the Suit Land for deceased's family has always been in occupation of it. The area where the Suit Land is situated remained unregistered land until 1991, therefore transactions such as sub-divisions and transfers could not be effected making the purported consents questionable. Thus, the agreement is unenforceable.

### **Submissions**

14. The plaintiff submitted that from the evidence, it is apparent that the plaintiff and the deceased entered into a sale agreement for the purchase of 15 acres out of the suit land. The deceased, who is the initial owner, admitted to the plaintiff's claim before the amendment of the pleadings as at 12/11/1987 during his lifetime. It was submitted that the equitable doctrine of specific performance comes to the aid of a party in a case like this one, where a court orders a person to fulfill his obligation under a contract. The plaintiff performed his obligation and paid the purchase price therefore the defendant ought to be obligated to transfer Parcel No. 192 to him.

15. When the plaintiff took possession of the land for one year from 1985 – 1986 he cultivated wheat until he was thrown out. He has not been in possession of the suit land for about 36 years. In one year he made Kshs. 180,000/-. He seeks Kshs. 6,480,000/- being mesne profits for 36 years.

16. It is further submitted that, plaintiff's claim is proper and competent. The cause of action arose in the year 1986 when the plaintiff was restrained and evicted from the Suit Land. This suit was then filed in 1987 as Nyeri HCCC No. 60 of 1987. It was filed within six (6) years after the cause of action arose. The defendant therefore cannot argue that the suit is incompetent.

17. He supported his submissions by relying on the following cases; **Jeremiah Mucheru Ndibui v David Gichure Ngugi [2019] eKLR** and **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR**.

18. The defendant submitted that ***Section 28 (b) of the Land Registration Act 2012*** provides that trusts including customary trusts shall be recognized to be overriding interests over the land. The deceased was holding the suit land in trust for himself and his family. Therefore, he could not sell the land without the family's consent which was not given. Thus, the sale agreement between the plaintiff and deceased was illegal, null and void. Moreover, the plaintiff did not provide any proof of payment of the purchase price as the alleged cheque or receipts to show that he used to pay the children's school fees. Accordingly, the plaintiff is not entitled to an award of mesne profits from 1981 to date. The amount of Kshs. 180,000/- per year is speculative and far fetched for the same has not been proved considering that the plaintiff has never been in occupation of the Suit Land. Therefore, the suit should be dismissed with costs.

19. Defendant relied on the following cases to support his arguments; **Peter Gitonga v Francis Maingi M'ikiara [2007] eKLR**, **Mukangu vs. Mbui (2004) KLR 256**, **Mwangi v Mwangi [1986] KLR 328**, **Patel vs. Singh (1987) KLR 585**, **Mapis Investment (k) Ltd v Kenya Railways Corporation [2005] 2 KLR 410**, **Peter Mwangi Msuitia & Another vs. Samow Edin Osman ( 2014) eKLR**, **John Mithamo**

**Determination**

20. The issues for determination are: *whether the sale agreement between the deceased and the plaintiff is valid* and *whether the plaintiff is entitled to any mesne profits.*

21. The first issue is whether the sale agreement between the deceased and plaintiff is valid. **Section 3 (3) of the Law of Contract Act** provides that:

**“(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: ...”**

22. Parties are bound by the terms of the contract they have entered into. A court of law cannot rewrite for parties the terms but can only seek to implement what the parties agreed upon unless it is proved that there was fraud, coercion or undue influence. In the case of **Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR** F. Gikonyo J held as follows:

**“The court cannot deviate from the intention of the parties to a contract; the sacred duty of the court is to enforce and/or legitimize what parties have agreed between themselves.**

23. The plaintiff produced two agreements dated 23/10/1981 and 13/04/1982 indicating that him and the deceased entered into those agreements for the sale of fifteen (15) acres out of parcel no. Timau No. 84. The 15 acres are now contained in parcel Timau Settlement Scheme No. 192 belonging to the deceased. Plaintiff paid the consideration in full. The plaintiff was clear that the board did not sit on 10.6.1982. The board sat on 3.5.1984. The letter dated 23/12/1986 (P-Exh 9) is a letter to the District Land Adjudication and Settlement Officer – Nyeri by the District Officer North Imenti Division Kinoru stating that the deceased is the owner of parcel No. Timau/84 who applied for consent for subdivision of his land where 15 acres was to be transferred to the plaintiff and that consent was issued on 3/05/1984. The defendant has not challenged this evidence in anyway.

24. *How long is too long?* I pose this question in regard to the defence maintained by the defendant through the decades. The statement of the initial defence was dated 12.11.1987 and it was not amended until more than 31 years later on 26.3.2019 and again on 25.6.2019. Thus for the last 32 years or so, the defence advanced was that the delay in subdividing the land was occasioned by administrative issues since the land was not registered. It was also alleged that the consideration had not been paid in full as there was a balance of sh. 7700. It is however noted that the 15 or so acres of land were hived off from the mother parcel no. 84 at Timau settlement scheme years ago and a title was issued in 1991 for the disputed parcel no. 192. I find that for the last 32 years, the defendant took the plaintiff in circles while maintaining a rather hopeless defence.

25. *Have the amendments cured the lacunae’s in the defence pleadings?* In the further amended defence, the issue of inability to subdivide the land since it is not registered has been abandoned. In paragraph 3B of the further amended defence, it is contended that **“plaintiff failed to pay the consideration as required of him and thus breached the agreement”**. This appears to be the only defence put forth by defendant which is, but a slight variation of what was captured in paragraph 4 of the initial defence. DW1 did not adduce any evidence to support the averments of none payment of the consideration. Instead, DW1 introduced another line of defence during the trial claiming that the purported sale of the suit land was done fraudulently and without the consent of the family members. Defendant had claimed that the plaintiff lured the deceased in a bar at Kibirichia, intoxicated him and purported to pay for the land in form of beer. Further, defendant went ahead to introduce a claim of customary trust in his submissions.

26. It is trite law that he who asserts must prove his case. **Section 107 of evidence Act** succinctly states:

**“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

27. In addition, the issues to be proved must flow from the pleadings. In **Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR** the court held as follows;

**“It is trite law, ..... that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.**

28. In **Gandy v. Caspair [1956] EACA 139** it was held that;

***“Unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record....”***

Also see- ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR.***

29. Nowhere in the defence, the amended defence and the further amended defence has the defendant pleaded the issues of fraud, illegality or customary trust. He is therefore estopped from raising the said issues in his evidence and through submissions. He ought to have confined himself on the issue of payment of the purchase price as captured in his further amended defence.

30. Furthermore defendant has merely alleged but has not proved the said allegations of fraud illegality and family claim on the suit land. Defendant has made a mere assertion which is not corroborated by any evidence, considering that he is not in occupation of Parcel No. 192. He has built and settled on parcel No. 195 and 196. His claim that he uses Parcel No. 192 for farming is neither here nor there since the agreement of sale was entered into thirty nine (39) years ago. He might have used the land for farming within the same period but that does not prove the claim of trust.

31. It is apparent that the two, deceased and plaintiff, entered into a sale agreement. Did each party abide by their obligation? The plaintiff was to pay Kshs. 83,500/- as the purchase price. He did not produce any cheque and or receipt to show that he paid the purchase price. However, looking at the application for consent of Land Control Board it indicates the purchase price has been paid in full. Also, the letter dated 7/7/1986 ( P-EXH 4) to the plaintiff’s advocate from the deceased’s advocate acknowledging receipt of Kshs. 3,700/- and that the deceased has agreed to transfer the land is another tell-tale sign that the purchase price had been made. All that the plaintiff was required to do was to pay transfer fees as per that letter of 7.7.1986.

32. A perusal of P-EXH 5 (the certificate of official search indicates that Livingstone Mungania was registered as the owner of parcel no. TIMAU/SETTLEMENT SCHEME/192 on 21.2.1991. This parcel is 6.273 hectares (15.5 acres). This is a clear indication that during his life time, deceased defendant was able to subdivide the suit parcel no. 84 whereby he got titles to the resultant parcels. Indeed his son, the current defendant was registered as the owner of another resulting parcel No.195 (as per DW1’S evidence).

33. It is clear that the person who reneged on the agreement is the defendant and he cannot run away from the terms thereof. At paragraph 9 of ***Halsbury’s Laws of England 4th Edition Vol. 27*** it is stated that:

***“On the refusal or omission of either party to an agreement on his part, the other is usually entitled to maintain an action for specific performance. As this is an equitable remedy, the court has a discretion whether to grant it and it will not be ordered if the agreement is uncertain in any material respect or if it involves hardship for example where it would entail the ejection of tenants in possession.”***

34. It is the considered view of this court that the agreement between the initial parties is valid and ought to be enforced through an order of specific performance. The plaintiff has suffered for too long due to the non-compliance of the terms of the agreement between the parties.

35. The second issue is whether the plaintiff is entitled to mesne profits from 1981 to date. The plaintiff’s claim is that for the one year he was in possession of the land, he earned Kshs. 180,000/- for that year from wheat farming. Therefore, he is entitled to a sum of Kshs. 6,480,000/- for the thirty six (36) years he has not been in occupation of the land. The defendant has termed this claim as speculative.

36. **Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya** defines mesne profits as follows:-

***“Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;***

37. **Order 21 Rule 13 of the Civil Procedure Rules** provides that;

***“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder”.***

38. In **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR**, the court stated as follows on the issue of mesne profits;

***“It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal”.***

39. The Court of Appeal had this to say in reference to mesne profits in the case of **Attorney General v Halal Meat Products Limited [2016] eKLR**;

***“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne***

*profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”*

40. In the instant case, defendant is the one who utilizes the suit land and in his own evidence while making reference to wheat farming in Timau, he stated thus-;

*“sometimes I would make profits, sometimes 3 or 5 bags per acre depending on the input.....one can even harvest 10 bags per acre..”*

41. I find that plaintiff’s claim on mesne profit is not far-fetched. There was an infraction of his legal right to the use of the land. He was denied utilization of the said land for decades and he is entitled to some degree of compensation.

42. Going by the evidence of both the plaintiff and defendant regarding the returns on crop (read wheat) harvests in Timau area, I find that the calculation of profits done by the plaintiff at sh. 180 000 per year is reasonable. The same however ought to run from year 1986 and not 1981. This is because plaintiff had farmed the suit land in 1985, and the consent of the land control board was given in 1984. The loss to date hence runs for 34 years which gives a figure of 6, 120 000. The loss is however continuous until the relinquishment of the land by defendant

43. **COSTS**

44. On the issue of costs, I find that though defendant took over this case from his deceased father, he appears to have been the one who incubated the dispute. In his own evidence, he is the one who objected to the sale of the land. He also took over the case ages ago, long before the death of his father on 13.7.2005 when he became his guardian. Over the decades, defendant never made any attempts to mitigate the situation by giving the plaintiff the land. Instead, he made it extremely difficult for this case to be prosecuted. During cross examination, he had stated as follows;

*“My father died in 2006. I had refused to take the letters of administration for 12 years. On 3.2.2004, I had taken over my father’s case when he was alive...”*

45. This defendant bears full responsibility for the injustices occasioned to the plaintiff in so far as the dispute is concerned. He shall therefore bear the cost of the suit.

46. **Final orders:**

*a) An order for specific performance is hereby issued directing the Land Registrar Meru to put the name of the plaintiff MBOGORI BAICHU as the proprietor of ALL that parcel of land known as TIMAU SETTLEMENT SCHEME 192 while canceling the names therein.*

*b) An order is hereby issued against the defendant awarding the plaintiff mesne profits amounting to the sum of Ksh.6,120,000. However this claim shall continue to attract a sum of Kshs.180,000 yearly until the time when the Judgment debtor shall give vacant possession to the plaintiff.*

*c) Defendant is condemned to pay costs of the suit plus interest at court rates.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 7.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**