



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 261 OF 2017**

**THADDEUS MUTUNE NZIVO.....PLAINTIFF**

**VERSUS**

**DAVID MUSYOKA MUTAVI.....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Complaint dated 30<sup>th</sup> May, 2017, the Plaintiff averred that he is the administrator of the Estate of the late Peter Nzyoka Nzivo who is the registered owner of land known as Mwala/Mango/212 (*the suit property*); that on 16<sup>th</sup> November, 2016, a Title Deed was issued in respect of the suit property in his name to hold the same in trust for the beneficiaries of the Estate of the deceased and that the Defendant has since trespassed on the suit property.
2. According to the Plaintiff, he sold a portion of the suit property to the Defendant before the Grant was confirmed; that the other beneficiaries protested at the sale of the suit property to the Plaintiff; that he refunded to the Plaintiff the purchase price and that a permanent injunction should issue restraining the Defendant from trespassing on the suit property.
3. In his Defence, the Plaintiff averred that he purchased a portion of the Plaintiff's share of the suit property between May, 1997 and October, 1998 and took possession of the land; that he has been waiting for the Plaintiff to obtain the Letters of Administration so that he can transfer to him the land that he bought and that he sued the Plaintiff in HCCC No. 138 of 2001.
4. In the Counter-claim, the Defendant averred that an order of specific performance should issue compelling the Plaintiff to transfer to him a portion of the suit property measuring approximately 2.5 acres.

**The Plaintiff's case:**

5. The Plaintiff, PW1, informed the court that he is the sole administrator of the Estate of the late Nzivo Muli Kamelo; that land parcel No. Mwala/Mango/212 (*the suit property*) is the only asset of the Estate of the late Nzivo Muli Kamelo and that as per the confirmed grant of the Estate of the late Nzivo Muli Kamelo, he is the sole registered owner of the Land Parcel No. Mwala/Mango/212 in trust of all the beneficiaries.
6. PW1 stated that on 16<sup>th</sup> November, 2016, a Title Deed for land parcel No. Mwala/Mango/212 was issued in his name to hold in trust for: Theresia Mumbua Mulwa; Philisilla Mumbua Mulwa; Cecilia Kaswii Mukiti; Peter Nzyoka Nzivo; Rose Ndule Mutiso and Simon Kitavi Nzivo and that the Defendant unlawfully, intentionally and without any colour of right entered into the suit property and started clearing the bush, digging terraces, grazing, putting up structures and carrying out other acts of waste and destruction thereon.
7. PW1 stated that the Defendant has no interest whatsoever in the suit land; that the Defendant is not a beneficiary and/or Interested Party in the Estate of the late Nzivo Muli Kamelo; that he sold a portion of the land to the Defendant without a confirmed Grant to the Estate of the late Nzivo Muli Kamelo and that later when the other beneficiaries protested, he refunded the purchase price to the Defendant through Civil Suit Number 138 of 2001 at Machakos.
8. PW1 stated that the Defendant's acts of trespassing on land Parcel No Mwala/Mango/212 claiming ownership through purchase is without any legal basis and therefore malicious and intended to defraud and annoy him and the other beneficiaries of the Estate of the late Nzivo Muli Kamelo.
9. The Plaintiff's son, PW2, stated that they are ten (10) siblings; that the entire family did not know that the Plaintiff had sold the suit

property to the Defendant and that the suit property belonged to their grandfather.

10. According to PW2, they informed the Plaintiff to refund to the Defendant the purchase price, which he did; that he never signed the Agreement of Sale and that the Title Deed was always in the name of their late grandfather. The Plaintiff's co-administrator, PW3, repeated the averment of the Plaintiff.

**The Defence case:**

11. The Defendant, DW1, informed the court that in 1997, the Plaintiff, in the company of his wife, went to his house and informed him that he wanted to sell a portion of his land to enable him raise school fees for his children; that he started buying a portion of the suit property in 1997 until 1998 and that he took possession of the suit property and developed it by planting oranges and mangoes.

12. According to the Defendant, he bought 2.5 acres of the suit property; that he sued the Plaintiff in HCCC No. 138 of 2001; that he is not aware of any refund that was made by the Plaintiff in respect to the purchase price and that the suit property belonged to the Plaintiff's late father.

13. In cross examination, PW2 stated that Machakos HCCC No. 138 of 2001 was dismissed for want of prosecution; that PW2 did not sign the Agreement between him and the Plaintiff and that the issue of the payable interest in the event the Sale Agreement fell through was never discussed.

14. The Chief in whose locality the suit property falls, DW2, stated that he is aware that the Plaintiff sold a portion of the suit property to the Defendant; that the Plaintiff's brother, one Raymond, witnessed the signing of the Agreement and that the Plaintiff's entire family was aware of the transaction.

**Submissions:**

15. The Plaintiff's advocate submitted that the Plaintiff had no capacity to sale a portion of land belonging to the Estate of a deceased person when the same had not been legally distributed among the beneficiaries of the Estate of the deceased registered owner and that the portion sold by the Plaintiff to the Defendant comprised in land parcel No. Mwala/Mango/212, which was registered in the name of the late Nzivo Muli Kamelo as at then and Letters of Administration to the Estate had not been taken out.

16. Counsel submitted that the Estate of the late Nzivo Muli Kamelo comprises of seven (7) beneficiaries as per the confirmed Grant; that currently, land parcel No. Mwala/Mango/212 is registered in the Plaintiff's name to hold it in trust of all other beneficiaries as per the Title Deed; and that the sale transaction took place on 14<sup>th</sup> May, 1997 long before the administrators to the Estate of the late Nzivo Muli Kamelo had petitioned for Letters of Administration, which they petitioned in the year 2012.

17. The Plaintiff's counsel submitted that the Defendant knew that the Plaintiff lacked capacity to deal with the Estate of his late father; that the Plaintiff lacked the capacity to enter into a Sale Agreement over land parcel No. Mwala/Mango/212 and that ignorance of the law is no Defence.

18. The Defendant's advocate submitted that there was a valid sale transaction in respect to the suit property; that the Plaintiff admitted having sold a portion of his share of the suit premises; that there was consideration for the said sale and that the contract for sale was in writing and was witnessed.

19. Counsel submitted that the Plaintiff sold a portion of his share of the suit premises; that what the Plaintiff sold was his (*Plaintiff's*) interest in his share of the suit premises and '*NOT*' the deceased's Estate and that the Plaintiff's share of the suit premises was already identified and was to be legally transferred after the succession process.

20. Counsel submitted that the suit was not brought by any other beneficiary claiming any interest over the portion sold and/or occupied by the Defendant; that what was sold was and remains a portion of the Plaintiff's share of the suit premises even after distribution and that the Plaintiff is therefore not genuine in bringing the suit as he intends to have his own cake and eat it.

21. The Plaintiff admitted in evidence that he sold a portion of land known as Mwala/Mango/212 (*the suit property*) measuring approximately 2.5 acres to the Defendant. According to the Plaintiff, the beneficiaries to the Estate of the late Nzivo Muli, who was his father, objected to the said sale. It is the Plaintiff's case that as at the time he sold the suit land, he had no capacity to do so, and that he refunded to the Defendant the purchase price.

22. The Plaintiff produced in evidence the copy of the Certificate of Confirmation of a Grant dated 28<sup>th</sup> February, 2014 which was issued in Machakos Succession Cause No. 1030 of 2012. According to the said Certificate of Confirmation of a Grant, the suit property was the only asset that the late Nzivo had.

23. The Certificate of Confirmation of a Grant also shows that the suit property was to be registered in the name of the Plaintiff in trust of all the beneficiaries of the late Nzivo.

24. The Defendant informed the court the he bought a share of the Plaintiff's entitlement in the suit property between the years 1997 and 1998. However, it was obvious that by the time the Defendant purchased the portion of the suit property, the same was still in the name of the deceased.

25. Indeed, even after the distribution of the Estate of the deceased by the court in the year 2014, the Plaintiff was required to hold the Title Deed in trust for the beneficiaries of the Estate of the deceased, meaning that he cannot sell a portion of the suit property without their express approval.

26. Having sold the suit property before the same was distributed by the court, the Sale Agreement between the Plaintiff and the Defendant was contrary to the provision of Section 45 of the Law of Succession Act which provides as follows:

*“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”*

27. To the extent that the Plaintiff did not have the legal capacity to sell the portion of the suit property to the Defendant or at all, I find that the purported sale of the suit property to the Defendant between the year 1997 and 1998 was null and void. That being the case, an order of specific performance as prayed in the Defendant’s Counter-claim cannot issue.

28. The only recourse that the Defendant has is to sue for a refund of the purchase price. Indeed, the Defendant having failed to pray for an order for refund, and the Plaintiff having produced in evidence a copy of the receipt showing that he deposited in court the purchase price that he paid to the Plaintiff, I shall not make an order for the said refund.

29. In the circumstances, and for the reasons I have given, I allow the Plaintiff’s Plaint dated 30<sup>th</sup> May, 2017 as follows:

***a) A permanent injunction be and is hereby issued restraining the Defendant either by himself, his servants, relatives and/or agents from trespassing into and/or interfering with the Estate of the deceased Nzivo Muli Kamelo and in particular the peaceful possession and/or occupation of Land Parcel No Mwala/Mango/212 by the Plaintiff and the other beneficiaries of the Estate of the late Nzivo Muli Kamelo.***

***b) Costs of the suit to be paid by the Defendant.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**O.A. ANGOTE**

**JUDGE**