



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 92 OF 2012**

**JOHN MUNYAO MASILA.....PLAINTIFF**

**VERSUS**

**BONIFACE PETER MUSYOKA.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 1<sup>st</sup> March, 2012, the Plaintiff averred that at all times material to this suit, he was, and still is, the absolute registered proprietor of all that agricultural parcel of land known as Muputi/Kimutwa/1885 measuring 2.733 Hectares or hereabouts.
2. The Plaintiff averred that his aforesaid parcel of agricultural land is a sub-division of the family land parcel No. Muputi/Kimutwa/500, which was registered in the name of both the Plaintiff and his two brothers, Simon Mutua Masila and Justus Kiseli Masila and that in or about the year 2008, he borrowed Kshs. 5,000 from the Defendant for purposes of paying school fees for his (*the Plaintiff's*) children.
3. The Plaintiff stated in the Plaintiff that in or about the year 2008, the Defendant started demanding the aforesaid sum of money and a further sum of Kshs. 52,150, which he alleged arose from monies given to his brothers during sub-division of the family land.
4. According to the Plaintiff, in or about the year 2009, the Defendant and a group of people, who included his (*the Plaintiff's*) aforesaid two (2) brothers, accosted and coerced him into signing a purported "*agreement*" to the effect that he would surrender to the Defendant a portion of land equivalent to Kshs. 57,150.
5. The Plaintiff averred that the relevant Land Control Board's consent was not sought, and that none has been granted regarding the said purported Agreement of Sale touching his agricultural land and that the coerced transaction has become null and void for want of the relevant Land Control Board's consent.
6. The Plaintiff finally averred that on or about 1<sup>st</sup> June, 2011, the Defendant wrongfully and unlawfully entered into land parcel No. Muputi/Kimutwa/1885 (*the suit property*) and excised for himself a sizeable portion thereof, purporting to have bought the same from him; that the Defendant is unlawfully cultivating the aforesaid portion of land and that the Defendant's redress, if any, lies in civil recovery of any money paid to him. The Plaintiff averred that the Defendant has no interest in land parcel No. Muputi /Kimutwa/1885.
7. The Plaintiff prayed for a declaration that the Defendant's acts of entering into land parcel number Muputi /Kimutwa/1885 and having a portion thereof is wrongful and unlawful and for an order that the Defendant be evicted from the suit property.
8. In his Defence and Counter-claim, the Defendant averred that it is the Plaintiff who called for a meeting to discuss how he (*the Plaintiff*) will offset the debt due and owing to him; that the Plaintiff agreed in writing to surrender to the Defendant one (1) acre of the suit land in lieu of refund of the monies lent which was Kshs. 57,150 and that the agreed purchase price for the said one (1) acre piece of land was Kshs. 70,000.
9. The Defendant stated in the Defence that the Agreement between himself and the Plaintiff in respect to the one (1) acre piece of land was voluntarily entered into; that he was to up the purchase price; that the excised portion of land was demarcated using sisal plants and that the Plaintiff put him in possession of the portion of the suit property which he developed by putting up terraces and benches.
10. According to the Defendant, the Plaintiff subsequently uprooted the boundary and grazed his cattle on the land in dispute and that the Plaintiff was charged with a criminal offence for trespassing on the suit property.
11. In the Counter-claim, the Defendant averred that by 1<sup>st</sup> June, 2009, the Plaintiff had received from him a total of Kshs. 57,150; that the Plaintiff should put him in the same position he was in before he entered into the sale of the suit property by refunding the said monies or in the alternative, to transfer the one (1) acre portion of the suit property to him.

**The Plaintiff's case:**

12. The Plaintiff, PW1, informed the court that he lives on land parcel number Muputi/Kimutwa/1885 (*the suit property*) with his entire family. According to PW1, he has three brothers and that they inherited land known as land parcel No. Muputi /Kimutwa/500 from their father. After sub-division of the family land, he retained the suit property.

13. PW1 informed the court that he did not borrow any money from the Defendant during the sub-division of parcel number 500; that it is the Defendant who catered for the costs of the sub-division of the land after he bought two portions of the larger parcel of land from his two brother; that he only borrowed Kshs. 5,000 from the Defendant to pay school for his children; that he borrowed a further sum of Kshs. 35, 000 from Simon Masila and that he was coerced into signing an Agreement by his brothers and the Plaintiff.

14. PW1 admitted that he was charged in court for receiving money by false pretenses; that he was acquitted by the court; that he never attended the Land Control Board and that he is in possession of the entire suit land.

15. In cross-examination, PW1 stated that him, together with his wife signed the impugned Agreement; that the Agreement was also signed by the Defendant's wife and that in the Agreement, he agreed to pay Kshs. 5,000 and Kshs. 35, 000 which he has never paid.

16. PW1 informed the court that he was forced to sign the subsequent Agreement in which he purportedly agreed to transfer to the Defendant one (1) acre of the suit property and that the Defendant excised the one (1) acre by force.

17. The Chairman of the Atangwa East Africa Clan, where the Plaintiff is a member, PW2, informed the court that the Plaintiff together with his wife reported to him that some people were claiming for a sum of Kshs. 52,150 from the Plaintiff; that he held a meeting on 21<sup>st</sup> September, 2009 to resolve the dispute and that after hearing all the parties, the clan resolved that the Plaintiff do refund a total of Kshs. 19,600 to the Defendant being the Kshs. 5,000 that the Plaintiff had borrowed and Kshs. 14,600 which the Defendant had spent in sub-dividing the parcel number 500. According to PW1, the Defendant declined to receive the said refund.

18. It was the evidence of PW2 that they directed the Plaintiff to uproot the sisal boundary that had been planted by the Defendant. It is the act of uprooting the sisal boundary that led to the arrest and charging of the Plaintiff. It was the evidence of PW2 that the Defendant should be evicted from the suit property

**Defence case:**

19. The Defendant, DW1, informed the court that he purchased a portion of the suit property from the Plaintiff; that he paid the Plaintiff the purchase price in installments and that the first instalment was paid to the Plaintiff when his mother died.

20. According to DW1, the next instalment was paid to the Plaintiff during the sub-division of the land and the last instalment was paid in the form of school fees for his children. DW1 stated that when the Plaintiff was unable to refund him the money lent, he agreed to sell to him one (1) acre of the suit property; that the said portion was valued at Kshs. 70,000 and that the Plaintiff agreed that he owed him Kshs. 57,150 which was to offset part of the purchase price. DW1 stated that Plaintiff signed the Agreement of 1<sup>st</sup> June, 2009 voluntarily and that he agreed to give him a further sum of Kshs. 12,850 to make a sum of Kshs. 70,000.

21. In cross-examination, DW1 stated that the Plaintiff borrowed from him Kshs. 35,150 and Kshs. 5,000 personally; that he later borrowed from him Kshs. 3,000 and that the Plaintiff, together with his two brothers had borrowed from him Kshs. 43,500 for the burial of their mother, and that each one of them was to refund him Kshs. 14,500.

22. According to DW1, the Plaintiff's brothers agreed to give him land in lieu of cash that they had borrowed; that in the Agreement of 16<sup>th</sup> December, 2007, the Plaintiff agreed to repay him the money and that the Plaintiff signed the Agreement with his wife.

23. DW1 stated that the last Agreement that was signed by the parties is dated 1<sup>st</sup> June, 2009 in which the Plaintiff agreed that he owed the Defendant Kshs. 57,150 and that it was not true that he was forced into signing it. According to DW1, the Plaintiff declined to receive the additional sum of Kshs. 12,850 to make up the purchase price of the portion of the suit property that he was to transfer to him.

24. The Plaintiff's brother, DW2, stated that he witnessed the signing of the Agreement dated 1<sup>st</sup> June, 2009; that he Agreement was signed at the Plaintiff's home and that it is the Plaintiff who convened the meeting. According to DW2, the Plaintiff admitted owing the Defendant Kshs. 57,150 and that he agreed to transfer to the Defendant one (1) acre piece of land in lieu of the cash.

**Submissions:**

25. The Plaintiff's advocate submitted that the Plaintiff is the absolute registered owner (*proprietor*) of all that agricultural parcel of land known as Muputi/Kimutwa/1885, measuring approximately 2.733 Hectares and that the suit parcel of land is a sub-division of large parcel of agricultural land (No. Muputi/Kimutwa/500).

26. The Plaintiff's advocate submitted that the Defendant and the Plaintiff's two (2) brothers accosted him and forced/coerced him to sign a purported "*agreement*" to the purported effect that the Plaintiff was indebted to the Defendant in the sum Kshs. 52, 150 arising from monies given to the Plaintiff's said two (2) brothers during sub-division of their family land parcel No. Muputi/Kimutwa/500.

27. Counsel submitted that the Plaintiff further testified that the aforesaid purported coerced "*agreement*" further stated that the Plaintiff would surrender to the Defendant a portion of land equivalent to the said sum of Kshs. 52,150 and another Kshs. 5,000 which the Plaintiff

was alleged to have borrowed from the Defendant earlier for purposes of paying school fees for his child (*making an alleged total of Kshs. 57,150*).

28. The purported coerced “*agreement*”, it was submitted, did not give the description of the land which the Plaintiff was to surrender to the Defendant, or the size/acreage therefore; that even assuming that there was a valid Sale Agreement, all transactions relating to (*title to*) an agricultural land/controlled transactions are subject to the provisions of the Land Control Act, and in particular Sections 6, 7 and 8 thereof.

29. It was submitted that no Land Control Board’s consent was either sought or obtained regarding the aforesaid coerced purported “*agreement*” touching on agricultural land, either within the six (6) months’ statutory period or at all and that the purported controlled transaction, if any, was thus voided, and any money (*if any*) paid by the Defendant to the Plaintiff became recoverable as a debt.

30. Counsel submitted that the Defendant’s alternative prayer for “*specific performance of the contract of sale*” cannot be granted as it was not demonstrated that there existed any contract of sale between the Plaintiff and the Defendant and that the Defendant’s document dated 1<sup>st</sup> June, 2009 is not a contract of sale.

31. In summary, it was submitted, the Defendant has not proved his Counter-claim against the Plaintiff on a balance of probability.

32. The Defendant’s advocate submitted that through an Agreement dated 1<sup>st</sup> June, 2009, it is clearly evident that the Defendant had advanced Kshs. 57,150/= to the Plaintiff; that the Agreement was witnessed and ascertained by a total of five (5) witnesses excluding the Defendant and the Plaintiff herein and that the Agreement being in vernacular language (Kamba) shows that the Plaintiff was aware of the terms.

33. It was submitted that the Agreement made on 1<sup>st</sup> June, 2009 between the Plaintiff and the Defendant confirms that the Plaintiff willingly and without coercion surrendered a portion (*1 acre*) to the Defendant in settlement of his debt and that the witnesses present planted sisal plants to demarcate the sold parcel of land.

34. The Defendant’s counsel submitted that the jurisdiction of specific performance is based on the existence of a valid enforceable contract; that specific performance will not be ordered if the contract suffers from some defect such as failure to comply with the formal requirement or mistake or illegality which makes the contract invalid or unenforceable and that specific performance will however not be ordered where there is an adequate alternative remedy.

35. Counsel submitted that the existence of a valid Agreement between the Plaintiff and the Defendant serves to reveal that the Agreement was enforceable.

#### **Analysis and findings:**

36. The evidence before this court shows the Plaintiff is the absolute registered owner (*proprietor*) of all that agricultural parcel of land known as Muputi/Kimutwa/1885 (*hereinafter referred to as the suit property*), measuring approximately 2.733 Hectares. According to the Title Deed, the Plaintiff was registered as the owner of the land on 23<sup>rd</sup> October, 2007.

37. The Plaintiff pleaded, and indeed testified in court, that in or about the year 2009, the Defendant herein and his two (2) brothers accosted him and forced/coerced him to sign the Agreement dated 1<sup>st</sup> June, 2019 in which he acknowledged being indebted to the Defendant in the sum Kshs. 57, 150 arising from monies given to him by the Defendant.

38. The same Agreement provided that the Plaintiff had surrendered “*1 acre of his portion of land to Peter in settlement of the debt of Kshs. 57, 150*” and that the Defendant was to pay to the Plaintiff an additional amount of Kshs. 12,850 to make a total sum of Kshs. 70,000 being the purchase price for the said land.

39. The Agreement of 1<sup>st</sup> June, 2009 was signed by seven people, including the Plaintiff and the Defendant. Prior to the Agreement of 1<sup>st</sup> June, 2009, the Plaintiff had signed the Agreement dated 16<sup>th</sup> December, 2007 in which he acknowledged owing the Defendant Kshs. 49,650 which he agreed to repay at the end of February, 2008. On 3<sup>rd</sup> February, 2008, the Plaintiff and his wife acknowledged receipt of Kshs. 5,000 for school fees for their daughter which they were to repay at the end of February, 2008.

40. Although the Plaintiff stated in evidence that he was coerced to sign the Agreement of 1<sup>st</sup> June, 2009, the evidence before me shows that he had signed the Agreements in the year 2007 in which he acknowledged owing the Defendant money. According to the Agreement of 17<sup>th</sup> Mach, 2008, the Plaintiff owed the Defendant Kshs. 54,650 as at that date.

41. Considering that the Plaintiff did not tell the court how he was going to settle his debts with the Defendant before the Agreement of 1<sup>st</sup> June, 2009 was drafted, it follows that he voluntarily signed the Agreement of 1<sup>st</sup> June, 2009 as a way of either buying more time to settle his debt, or with the intend of settling the debt, before he changed his mind.

42. Indeed, there is no evidence before me to show that the Plaintiff was coerced into signing the impugned Agreement. The Plaintiff neither reported the issue of the alleged coercion to the police, nor sought to repudiate the Agreement. Consequently, it is my finding that the Agreement of 1<sup>st</sup> June, 2009 was signed by the Plaintiff without threats or coercion as alleged.

43. The suit property is agricultural land, and governed by the provisions of the Land Control Act. All transactions relating to (*title to*) an agricultural land/controlled transactions are subject to the provisions of the Land Control Act and in particular Sections 6, 7 and 8 thereof.

44. Under Section 6(a) of the Land Control Act,

*“the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area...is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”*

45. Section 8 of the Land Control Act provides as follows:

*“an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto...”*

46. Section 7 of the Land Control Act provides:

*“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid...”*

47. In the present case, no Land Control Board's consent was either sought or obtained regarding the Agreement of 1<sup>st</sup> June, 2009. The transaction was thus voided after the lapse of six (6) months and any money paid by the Defendant to the Plaintiff became recoverable as a debt (See Section 7 of the Land Control Act).

48. Indeed, where a transaction is voided by operation of the law, an order of specific performance cannot issue. In the case of *Hirani Ngaithe Githire vs. Wanjiku Munge [1979] eKLR*, the court held as follows:

*“Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural Land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes. This means that by virtue of section 6(2) of the Act, an agreement in respect of a controlled transaction, where the necessary consent of the land control board has not been obtained within the stipulated time, becomes an illegal contract for all purposes. No specific performance can be ordered in respect of an illegal contract. As the agreement between the parties in this case had become an illegal contract the trial magistrate grossly erred in law in ordering specific performance, and his order cannot stand.”*

49. Considering that the Agreement of 1<sup>st</sup> June, 2009 which purported to allow the Defendant acquire one (1) acre piece of land from the suit property is not enforceable for want of the consent of the Land Control Board consent, the prayer for specific performance in the Counter-claim fails.

50. However, pursuant to the provisions of Section 7 of the Land Control Act, the Defendant is entitled to a refund of Kshs. 57,150, which is the debt that the Plaintiff admitted as owing to the Defendant.

51. For those reasons, I shall allow both the Plaintiff and the Counter-claim as follows:

***a. A declaration be and is hereby issued that the Defendant's act of entering the Plaintiff's land parcel number Muputi Kimutwa/1885 and taking a portion is wrongful and unlawful.***

***b. An order that the Defendant be evicted from land parcel number Muputi/Kimutwa/1885 be and is hereby issued.***

***c. The Plaintiff to refund the Defendant a sum of Kshs. 57,150 with interest at court rates from the date of filing this suit until payment in full.***

***d. Each party to cater for his own costs.***

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

**O. A. ANGOTE**

**JUDGE**