



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL SUIT 91 OF 2007**

**MUTETE NDONYE.....PLAINTIFF**

**VERSUS**

**1. MULI MUNYAO**  
**2. KIOKO KIMONDO**  
**3. MBATHA KIMONDO**  
**4. MUTUA KIMONDO**

**5.BETH SAMUEL.....DEFENDANTS**

**JUDGMENT**

By an amended plaint dated 9<sup>th</sup> July, 2010 and filed in court on 15<sup>th</sup> July, 2010, the Plaintiff sought the following orders against the defendants jointly and severally.

§ The Defendants be barred from in any manner encroaching into the land of the Plaintiff known as Mbiuni/Kabaa/850 “*the suit premises*”

§ The Defendants be evicted from the suit premises

§ Damages for trespass

§ Costs and interest

The suit was informed by the following salient facts; that the plaintiff was the sole registered proprietor of the suit premises under the Registered Land Act though she does not reside on it. However, sometimes in April, 2007, to her utter dismay, she found out that the defendant had trespassed into the suit premises without her consent and embarked on acts of farming, grazing, cutting down trees, burning charcoal and completely putting the suit premises into utter waste. Despite the Plaintiff’s repeated demands for vacant possession of the suit premises, the defendants had refused to heed to those demands, hence the suit.

In their defence, the defendants averred that they are not aware that the plaintiff was the registered proprietor of the suit premises. In the alternative, they pleaded that the Plaintiff’s late husband, **Ndonye Ndolo** entered into a sale agreement with the 1<sup>st</sup> defendant’s late father, **Munyao Ndolo**, for the sale of the suit premises and the plaintiff is aware of it. Accordingly, if the plaintiff got registered and obtained the title to the same, the transaction was fraudulent, conspiratorial and was as a result of misrepresentation. The defendants then proceeded to give as required by law, the particulars of fraud and or

mis-presentation. They therefore denied any acts of trespass. If anything, it was the plaintiff who had in fact trespassed on the suit premises.

The plenary hearing of the suit commenced before **Lenaola, J** on 30<sup>th</sup> July, 2008. PW1 **Mutete Ndonge**, the plaintiff testified that the defendants were occupying her land. She did not know their names. She was last on the suit premises during registration. Her husband, **Ndonge Ndolo** had passed on leaving the suit premises in his name. Later she obtained the title to it in her name. She had not been able to utilize the suit premises as it is occupied by the defendant. She had asked them to move out to no avail. She therefore urged the court to order the defendants eviction and costs of the suit.

Cross-examined by **Mr. Mutia**, learned counsel for the defendants, she stated that the suit premises initially belonged to **Ndolo**, her husband. She could not tell when she transferred it into her name. She was also not aware that her late husband had sold the suit premises to anyone. She however conceded that she had never utilized the land.

Soon thereafter PW1 testified as aforesaid, **Lenaola, J** left the station on transfer. It was not until 30<sup>th</sup> January, 2012 that the case was resurrected. It came before me for mention for directions as to the way forward. Parties agreed that I should take over from where **Lenaola, J** left and conclude the case. It was so ordered, whereupon **Mr. Mungata**, learned counsel for the Plaintiff closed the Plaintiff's case.

The case for the defence was led by the 1<sup>st</sup> defendant, **Charles Munyi Munyao**. He knew the plaintiff as a widow of **Ndonge** who had sold the suit premises to their father **Munyao**. **Ndonge** and **Munyao** were stepsons. **Ndonge** was his uncle. Whereas **Ndonge** stayed at Ithanga, **Munyao** and his family stayed at Kabaa. Prior to his relocation to Ithanga, **Ndonge** was staying with **Munyao**. **Ndonge** later left for Ithanga to look for land. Though he had been given his share of ancestral land at Kabaa, he sold it to the defendants' father **Munyao** by an agreement entered into on 3<sup>rd</sup> May, 1993. The purchase price was Kshs. 23,000/=. **Munyao** had since passed on. Before that he had called a family meeting and shared out his estate amongst his five wives, and children. The 1<sup>st</sup> defendant's mother and a co-wife, **Ndunge** were given the suit premises. As at the time he was testifying the suit premises were in his occupation and that of the 5<sup>th</sup> defendant, a sister in law. After **Ndonge** passed on, the plaintiff came to the scene and wanted to refund the money so that she could get the suit premises back which offer was rejected. The Plaintiff then reported the matter to the area assistant chief who arbitrated over the dispute and resolved it in favour of **Munyao**. Since then they had remained in occupation of the suit premises. Otherwise he came to know that the suit premises had been transferred and registered in the name of the plaintiff when she sued them. The suit premises had even been treated as the asset of **Munyao** in the succession cause that he took out with regard to his estate.

Cross-examined by **Mr. Mungata**, learned counsel for the plaintiff, he conceded that the plaintiff was their aunt. The suit premises were shared out in 1993. Nonetheless he was aware that the suit premises had since 16<sup>th</sup> August, 1996 been registered in the name of the plaintiff. **Munyao** bought the suit premises on 3<sup>rd</sup> June, 1993. However, the agreement of sale does not make any reference to any title or acreage. He also did not know whether the consent of the relevant Land Control Board was obtained with regard to the transaction. **Munyao** though, died without having obtained the title deed to the suit premises. He was not also aware that the plaintiff had sued his father in the Land Disputes Tribunal.

The 2<sup>nd</sup> witness called by the defence was the 5<sup>th</sup> defendant. She confirmed that she was in occupation of the suit premises. Otherwise she fully subscribed to the evidence which had been tendered by DW1. With that, the defendants, closed their case.

Parties then agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

The issues for determination in this suit are essentially two, whether the plaintiff is entitled to the ownership of the suit premises, and whether the defendants are trespassers liable to being evicted.

It is common ground that the plaintiff has a title deed to the suit premises. It is also common ground that the suit premises were sold by the plaintiff's late husband to the defendants' late father. Indeed it is the plaintiff accompanied by one, **Musyimi** who collected the final instalment of the purchase price being Kshs. 10,000/=. The Plaintiff did not at all dispute her involvement in the transaction. Infact, it came out very clearly that the plaintiff was at all material times fully involved in and aware of the fact that her husband's interest in the suit premises had been sold and disposed of to **Munyao**. The mere fact that she does not stay on the suit premises and does not even know when she was last on the suit premises attests to that fact and is a testimony to the fact that she had no interest in the suit premises and that indeed such interest had been sold and transferred to **Munyao**. Further her evidence as to her interest in the suit premises is so casual such that one is left wondering whether she was really keen on this suit or she was merely testing waters.

On the other hand the 1<sup>st</sup> and 5<sup>th</sup> defendants took the court through the oral and documentary evidence that showed the relationship between the 1<sup>st</sup> defendant's father and the plaintiff's husband leading to the sale of the suit premises to the 1<sup>st</sup> defendant's father and reasons behind the sale. The Plaintiff initially denied any relationship between them. But as it turned out, she is infact an aunt to the defendants. Clearly, by such denial, the plaintiff was not being candid with court. The plaintiff having been aware of the transaction and indeed collected the final instalment of the purchase price; can a court of equity allow her to benefit from her own acts of mischief by allowing her to hide behind the provisions of sections 27, 28 and 143 of the Registered Land Act? I do not think so, It rattles the conscience of a court of equity that a person knowing very well that the suit premises has been sold, goes ahead to receive the final installment but against all expectation acts behind the back of the purchaser, have the suit premises transferred into her name and thereafter seek to evict the third parties without as much as talking about the fate of the purchase price. It smacks of fraud and is totally unconscionable. This court must of necessity frown on such unpalatable acts.

No doubt, the defendants are beneficiaries of the estate of **Munyao**. This fact has not been discounted by the plaintiff. Indeed the 1<sup>st</sup> defendant produced in evidence a grant of letters of Administration intestate issued to him in that regard. Before his death, **Munyao** had acquired rights over the suit premises. Believing that it was his, he had gone further and shared it to the first defendant's mother and the mother-in-law to the 5<sup>th</sup> defendant.

It is also self-evident that the said defendants have been in active and continuous occupation of the suit premises since the 1990's. Indeed their occupation commenced in the lifetime of the plaintiff's husband. They have developed the suit premises. In those circumstances, can a party like the plaintiff as she has sought to do, hide behind the provisions of sections 27, 28 and 143 of the Registered Land Act, to defeat legitimate expectation of the defendants and more so when the conduct of the plaintiff smacks of fraud and unlawful Act? I do not think so. Again, it is not in contention that the plaintiff has a parcel of land in Ithanga where she resides. The 1<sup>st</sup> and 5<sup>th</sup> defendants have no other parcel of land where they can retreat if I was to rule in favour of the plaintiff. This court is not willing to turn them into squatters, more so where the conduct of the plaintiff as is in this case, is questionable.

It is not in dispute that the plaintiff's registration is a first registration. I am also aware that sections 27, 28 and 143 of the Registered Land Act confers absolute title to a registered owner of a parcel of land. However, a close scrutiny of these provisions, as against other provisions of the law will reveal that such registration does not confer absolute rights. It is qualified; especially in circumstances where registration is illegal or has been procured through fraud.

The first judge to debunk the myth that sections 27, 28 and 143 of the Registered Land Act conferred title that could not be impeached was **Nambuye, J.** I entirely agree with her reasoning and conclusion. She delivered herself thus in the case of **Rotich Koimur vs Kiptoo Sogong eKLR-**

***“The court has on its own referred to section 28 of the same Act [Registered Land Act] which states that the rights of a proprietor under the Act are not liable to be defeated whether acquired through first registration or subsequently for valuable consideration or by an order of court shall not be liable***

*to be defeated save as provided for under the Act. There is a proviso to that section which states that provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.*

*In the case of Limuli vs Marko Sabayi [1979], 251, it was held that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents. This court is also alive to the principle that rules of procedure should be adhered to by parties as they are not for a fashion show. However, these rules are meant to be vehicles of justice and not tools of oppression where they operate to oppress the party on the right and go to benefit of the party in the wrong then the court will go in for substantial justice and rule on the matter as justice demands. It has to be noted that the parties have been disputing over the 2 acres for over 35 years and holding that the two acres rightfully belong to the defendant and then require him to go and initiate fresh litigation to plead trust, as that trust be brought to an end so that he is registered in respect of the same will be unnecessarily prolonging the dispute herein and then causing the parties unnecessary expenses and anxiety. The evidence herein shows that the 2 acres belong to the defendant and this court will not hesitate in saying that a prima facie trust exist in favour of the defendant from the plaintiff in respect of the two acres. This court is not devoid of its fountain of justice and discretions and it will not be shy neither will hesitate in saying so as justice to both parties demand (sic) so failure to plead so in the counterclaim by the counsel for the defence notwithstanding.”*

On my part, I entertain no illusions whatsoever that such registration is not absolute and can be revoked or impeached in appropriate circumstances where there is obvious fraud, illegality and where a party is clearly bent on stealing a match on the other. A party cannot be allowed to benefit from her own mischief on account of the provisions of law. It is just harsh and unconscionable. I do not think that a plaintiff who has unlawfully and un-procedurally caused herself to be registered as the proprietor of the suit premises in this case, should be protected by court from her unconscionable act. This is good for the rule of law and accords well with the dictates of public policy. A court should not be called in aid of a party who is guilty of unlawful acts. In the circumstances of this case, I decline to entertain the thought that the aforesaid provisions were intended to protect fraud as perpetrated on the defendants by the plaintiff. Obviously it is against public policy and order, for a court of law to protect instances of fraud regardless of the justification.

The other judge to take aim at section 143 of the Registered Land Act, which again I respectively agree with is **Gacheche, J** in **National Housing Corporation vs the Commissioner of Lands and 7 Others [2005] eKLR**. She delivered herself thus-

*“it is evident that the Attorney General has on previous occasions dealt with similar matters conclusively, as per the exhibit, in which the Attorney General had confirmed to counsel for NHC that other similar erroneous allocations of land parcels that had been originally allocated to NHC, had been cancelled after NHC had moved the court for orders of certiorari and mandamus. It is thus evident that section 142 and 143 of the Act do not deny the Commissioner of Lands or the Chief Land Registrar the powers to revoke annul, cancel or even reverse titles, however obtained”.*

It is therefore abundantly clear from the foregoing that section 143 is not cast in stone.

Again the report of the Commission of Inquiry into the illegal/irregular allocation of public land (*the Ndung'u Report*) had occasion to ponder over the effect of section 143 aforesaid. The commission proposed an alternative argument against the absolute protection of a first registration. According to the commission it was possible for a court of law to override the protection given by section 143 by arguing that a law which seeks to protect or has the effect of protecting fraud is unconstitutional. See a report published by Africa Centre for Open Governance at pg 19. In the special circumstances of this case, I am tempted to take this route gladly if necessary. In any event section 143 (2) makes an exception to the absolute protection of the first registration if the proprietor is aware of fraud or error in the land transaction leading to his registration. In this case, I have no doubt at all that the plaintiff was fully aware of the fraud she was perpetrating on the defendants when she sought registration of the suit premises in

her name, fully aware that her late husband had sold the land and infact she was the one who received the final instalment of the purchase price.

As counsel for the defendants correctly submitted it is clear that the rigid protection of a first registration has now through court interventions and innovations somewhat been relaxed and it is no longer open for any person to hide behind the cloak of the law to perpetuate fraud. Accordingly, he invited me which I whole heartedly do, to look behind the cloak of section 143 to uncover the fraud perpetuated by the plaintiff.

My answers to the two questions framed are that, Yes, the plaintiff has title to the suit premises. However, that title is impeachable on grounds of fraud as well as trust. The defendants in the circumstances are therefore rightly and legally in possession of the suit premises and are not trespassers. For these very reasons, the plaintiff's claim fails and is accordingly dismissed with costs to the defendants.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 6<sup>TH</sup> day of JULY, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**