

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E021 OF 2021

MBENYA NGENGA NZYOKA1ST PLAINTIFF
SALMON MUTEMI KIVUVA2ND
PLAINTIFF

-VERSUS-

MUTUNDA KING'OO KILUMO1ST
DEFENDANT
WELLINGTON MUEMA MBUTHU2ND DEFENDANT
DANIEL KYALO MBUTHU3RD DEFENDANT
LAND REGISTRAR, MAKUENI4TH DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide the Plaint dated 9th July, 2021, the Plaintiffs sought the following relief against the Defendants: -

1) An order directing the Defendants jointly and severally to remove the said caution to enable a transfer of Plot No. 244 at Ikangavya take place failing which the court do issue an order to the Land Registrar to remove the caution.

2. Opposing the Plaintiffs' suit, the 1st, 2nd and 3rd Defendants filed a Defence and Counterclaim on 15th September, 2021. It was their case that they had purchased their respective portions of land Parcel No. Nzau/Ikangavya/244 from the 1st Plaintiff and that they have been in possession of the land since purchasing.

3. The Defendants sought the following orders in their counterclaim: -

1) An order compelling the 1st Plaintiff to transfer portions of land purchased by the 1st, 2nd and 3rd Defendants to be hived from land parcel being Title No. NZAUI/IKANGAVYA/244 within 30 days of the judgment and in default, the Executive Officer of this court to execute the requisite transfer documents.

2) Costs of this suit.

4. The Plaintiffs filed an amended reply to defence and defence to counterclaim dated 26th January, 2024. They urged the court to dismiss the 1st – 3rd Defendants' counterclaim with costs.
5. The 4th Defendant filed a statement of defence on 24th July, 2023. It was contended that the suit does not raise any cause of action against the 4th Defendant and that it ought to be dismissed with costs.
6. The Plaintiffs called two witnesses at the hearing of their case.
7. PW1, Mbenya Ngenza Nzyoka adopted her further witness statement dated 26th January, 2024 as her evidence in chief. She went on to produce the documents in her list dated 9/7/2021 as PEX 1 – 3 and in her further list dated 26/1/2024 as PEX 4 (a) and 4 (b).
8. It was her case that she had sued the 1st – 3rd Defendants for placing a caution on her Title No. NZAUI/IKANGAVYA/244 after she sold the land to the 2nd Plaintiff. She urged the court to issue an order for the removal of the caution so that she can transfer the land to the 2nd Plaintiff.
9. On cross-examination by Mr. Muthui, PW1 stated that the suit property belonged to her father and that it was transferred to her by way of transmission through succession in court. She added that she knew the 1st, 2nd and 3rd Defendants who reside within the suit property. She stated that she was unaware of when the three started living there. PW1 averred that she has never sold the land to the Defendants and that three agreements in their possession are forgeries.
10. PW1 stated that she did not have a document examiner's report to confirm that the three agreements were forgeries. She further stated that the three Defendants were cultivating the land as at the time she sold the land to the 2nd Plaintiff. PW1 averred that her father died in the year 1980 even though she could not

produce any document to confirm the same. She stated that all the documents which confirm the death of her father were in Machakos.

11. On re-examination by Mr. Mukula, PW1 insisted that the agreements relied on by the Defendants are not genuine because she was not involved in the sale transactions.
12. PW2, Salmon Mutemi Kivuva adopted his statement dated 26/1/2024 as his evidence in chief. He averred that he purchased the suit property on 1/9/2020 from the 1st Plaintiff at the price of Kshs. 375,000/= which he paid in full. He further averred that when he wanted to have the land transferred to himself, he learnt that it had been cautioned. He urged the court to order the removal of the caution in order to enable him to get a title.
13. In cross-examination, PW2 confirmed from PEX1 that the caution had been placed on the title to the land before PW2 entered into an agreement with PW1 on 1/9/2020. He also confirmed that the certificate of official search was issued on 3/9/2020. PW2 stated that he inspected the suit property before he purchased it and confirmed that there was no one staying there except that the land was being cultivated by the 1st, 2nd and 3rd Defendants. PW2 stated that PW1 pointed out that she had not sold the land to the 1st, 2nd and 3rd Defendants.
14. In re-examination, PW2 reiterated that PW1 told her that she had not sold the suit property to any other person.
15. The Defendants called three witnesses at the hearing of their case. DW1 Mutinda King'oo Kilumo adopted her statement dated 7/2/2022 as her evidence in chief. She averred that she resides in the suit property where she has also planted fruit trees like mangoes. She went ahead to produce the list and bundle of documents dated 7/2/2022 as DEX 1 – 3 respectively.
16. DW1 averred that she had been in possession of the suit property since 1985 and that the suit property was purchased by her husband.

17. On cross-examination by Mr. Mukula, DW1 stated that her husband purchased the suit property from Kalondu Nzioka who was the mother-in-law of the 1st Plaintiff. She added that the suit property was purchased between 1985 and 1994 and that the suit property was originally registered in the name of Nzioka Museo.
18. DW1 averred that she had not put up any structure at the suit property but she maintained that she cultivates it. She further averred that she had not obtained letters of administration in respect of her late husband's estate. DW1 reiterated that she entered the land in 1985. She pointed out that she had not filed any suit claiming the land from the Plaintiffs.
19. In re-examination, DW1 stated that she was not involved in the agreement which was done between her husband and Kalondu Nzioka. She reiterated that she is in possession of the suit property where she grows mangoes, oranges and maize.
20. DW2, Wellington Muema Mbuthu adopted his statement dated 7/2/2022 as his evidence in chief. He produced the list of documents of even date in support of his evidence. He averred that he purchased a portion of the suit property from the 1st Plaintiff sometimes between 20/8/1994 and 27/12/2001. He further averred that he has been in possession of the suit property since purchasing it and that he has grown orange, pixie and mango trees.
21. On cross-examination by Mr. Mukula, DW2 stated that the 1st Plaintiff wrote her name on the sale agreement as her signature. On further interrogation, DW2 stated that he did not know whether the 1st Plaintiff knows how to write nor if she thumbprints her documents.
22. DW2 stated that his agreement does not contain the parcel number that he was purchasing. He reiterated that he cleared paying the purchase price in 2001. DW2 averred that the 1st Plaintiff was given title to the suit property in 2009.

He further averred that twelve years after issuance of title to the 1st Plaintiff lapsed in 2021 yet he had not filed a claim against the 1st Plaintiff between that period.

23.DW2 insisted that he grows fruit trees in the suit property.

24.On re-examination, DW2 stated that he did not provide his identification number in the sale agreement as the elders did not insist on it.

25.DW3, Daniel Kyalo Mbuthu adopted his statement dated 7/2/2022 as his evidence in chief. He went on to produce the list and bundle of documents of even date in support of his evidence. DW3 averred that he purchased a portion of the suit property from the 1st Plaintiff.

26.On cross-examination by Mr. Mukula, DW3 averred that he purchased the land from Munywoki Muthoka. He further averred that the signature and ID No. of Munywoki Muthoka was not in the sale agreement. Again, DW3 pointed out that the Plot number he was purchasing. DW3 stated that the 1st Plaintiff's signature and ID No. were not in the sale agreement.

27.In re-examination, DW3 insisted that it was the 1st Plaintiff who had sold the land to him.

28.The 4th Defendant elected to close its case without calling any witnesses.

29.The parties agreed to file written submissions at the close of their respective cases.

30.Only the Plaintiffs had filed their submissions dated 14th May, 2025 at the time of writing this judgment.

31.On their behalf, Counsel identified the following issues for determination: -

a) Whether the Plaintiffs' agreement is valid and enforceable?

b) Whether the 1st, 2nd and 3rd Defendants' agreements are valid and enforceable?

c) Whether the Plaintiffs are entitled to the reliefs sought?

d) Whether the Defendants are entitled to the reliefs sought?

e) Whether the Defendants are entitled to costs and interest?

32. Submitting on the first issue, Counsel contended that PEX 2 which is the sale agreement between the 1st Plaintiff and the 2nd Plaintiff constitutes a valid and legally binding contract as per the requirements of Section 3 (3) of the Law of Contract Act.

33. Submitting on the second issue, Counsel contended that the Defendants' sale agreements were not lawfully signed by either the alleged sellers or buyers nor the attesting witnesses.

34. On the third issue, Counsel submitted that the 1st Plaintiff is the registered owner of the suit property by virtue of transmission in Machakos HCSC No. 136 of 2004. That evidence of her ownership was demonstrated through the search certificate produced as PEX 1. That having also demonstrated that the Defendants' sale agreements are invalid, then the Plaintiffs are entitled to orders for the removal of the caution.

35. On the fourth issue, Counsel contended that the Defendants' sale agreements are void and unenforceable hence, they are not entitled to the orders they have sought.

36. On the fifth issue, Counsel submitted that the Plaintiffs had demonstrated their case on a balance of probabilities and hence they ought to be awarded costs of the suit.

37. After perusal of the pleadings, the evidence and the submissions herein, the apparent issues for determination are as follows: -

i) Whether Defendants have demonstrated that they lawfully purchased their respective portions of the suit property?

ii) Whether the Plaintiffs are entitled to the orders for removal of the caution as sought?

iii) Who bears costs?

38. It is the 1st, 2nd and 3rd Defendants' case that they are entitled to their respective portions of the suit property by virtue of sale agreements which were executed between themselves and the owner of the land.

39. The essentials of a valid contract for the sale of land in Kenya are outlined in the Law of Contract Act. Section 3(3) of the Law of Contract Act provides as follows: -

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:

40. In the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No. 956 of 1991 (LLR 7670 (HCK)), the court aptly held that:-

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract.”

41. Similarly, in JK Patel v Spear Motors Ltd. Supreme Court of Uganda, Civil Appeal No.4 of 1991(1993) 1 KALR 40, the Court observed as follows: -

“Under the rules of the Law of Contract, particularly relating to offer and acceptance, if there has been an offer to enter into legal relations or definite terms and that offer is accepted, the law considers that a contract has been made, whether there has been an acceptance of an offer or

documents that have been passed between the parties or from their conduct.”

42.DW1 contended that her husband Titus King’oo Kilumo purchased land measuring 130M x 145M comprised in Title No. Nzau/Ikangavya/244 from Kalondu Nzioka vide the sale agreement dated 25th December, 1985. This property was originally registered in the name of Nzioka Museo the husband of Kalondu Nzioka. These two were parents of the 1st Plaintiff. DW1 was put in possession in 1985.

43.The purchase price was Kshs.26,000/=. DW1’s husband paid the purchase price in instalments on various dates between 25th November, 1985 and 5th May, 1994. It was agreed that the balance of Kshs.3,000/= was to be paid after title is processed. None of these payments are contested. The sale agreement on how the purchase money was paid was produced. The 1st Plaintiff while testifying conceded that the 1st to 3rd Defendants are in possession but that she did know the time they took possession.

44.DW2 testified that he purchased land measuring 43m x 108m from the 1st Plaintiff vide sale agreement dated 20th August, 1984. The 1st Plaintiff appended her signature to the sale agreement. The purchase price was Kshs.21,600/=. The 1st Plaintiff was paid the entire purchase price as per the sale agreement.

45.DW3 testified that between 5th June, 1994 and 27th December, 2001, he purchased a portion of land measuring 40m x 100m from the 1st Plaintiff. He stated that the purchase price was Kshs.25,000/= and that he paid it in full.

46.In the agreement which DW3 produced the seller was Munywoki Muthoka and the purchase price was Kshs.23,500/=. On 30th December, 1995, the first Plaintiff is said to have received Kshs.5,500/= but it is not known why she was receiving this amount yet she was not the seller. The 1st Plaintiff did not sign the sale agreement. DW3 did not give evidence to show who was Munywoki

Muthoka or how this person was related to the 1st Plaintiff. The persons who are said to have witnessed the sale agreement did not sign it.

47. It is the 1st Plaintiff who claims that the sale agreements produced by the Defendants were forgeries. It is on this basis that she wants the cautions removed. The burden of proving that the agreements were forgeries was on her. She did not discharge this burden.

48. I have found that the agreements by the 1st and 2nd Defendants were valid agreements. The husband of the 1st Defendant paid the purchase price save for a balance of Kshs.3,000/= which was to be cleared upon receiving title. The 2nd Defendant cleared the purchase price.

49. Removal of cautions is governed by Section 73 (1) of the Land Registration Act which states as follows:

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar”.

50. In the case of **Maria Ngangi Gwako –vs- Charles Nawenzi Ngangi (2014) eKLR**, it was held as follows:

“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place”.

51. In the instant case the Plaintiffs wanted the caution by the 1st to 3rd Defendant removed. The 1st and 2nd Defendants have demonstrated that they purchased portions of LR. No. Nzai/Ikangavya/244. They were put in possession in the 1980's and they are still in possession. Their possession is not disputed by the Plaintiffs. This being the case, the caution they lodged against the title to LR No. Nzai/Ikangavya/244 cannot be removed until after they get their entitlements as per the agreements. There is therefore no basis for the removal of caution lodged by the 1st and 2nd Defendants.

52. Consequently, I dismiss the Plaintiffs' suit against the 1st and 2nd Defendants with costs. On the other hand, I find that the 1st and 2nd Defendants have proved their counterclaim against the 1st Plaintiff on a balance of probabilities. I enter judgment for the 1st and 2nd Defendants against the 1st Plaintiff for an order compelling the 1st Plaintiff to transfer portions measuring 130m x 145m and 43m x 108m respectively from LR No. Nzau/Ikangavya/244 within 30 days of this judgment and in default the Deputy Registrar of this court do execute the requisite transfer documents. The 3rd Defendant's claim against the 1st Plaintiff is dismissed with costs. The 1st and 2nd Defendants shall have the costs of the counterclaim.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 21ST OCTOBER, 2025.**

Mr. Mukula for Plaintiff.

Mr. Muthui for Mr. Munyasya for 1st to 3rd Defendants.

Court assistant - Steve Musyoki