



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 33 OF 2016**

**EDWARD MARENYE KIGURU**

**LILIAN MUTHEU TIMOTHY.....PLAINTIFFS**

**VERSUS**

**1. NYEVU KILANGO CHARO.....1<sup>ST</sup> DEFENDANT**

**2. KAVUE KILANGO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In their Complaint filed herein on 17<sup>th</sup> February 2016, Edward Marenye Kiguru and Lilian Mutheu Timothy (the Plaintiffs) pray for a permanent order of injunction to issue restraining the two Defendants from dealing with, constructing, selling, wasting, damaging, trespassing and/or interfering with parcel of land known as Plot No. Kilifi/Mtwapa/393 situated at Ndonga Area, Mtwapa together with all sub-divisions emanating therefrom. In addition, they seek a declaration that they have acquired legal or beneficial ownership interest in the said parcel of land.

2. The Plaintiffs' claim arises from their contention that on or about 14<sup>th</sup> May 2010, they purchased two acres of the said parcel of land at a sum of Kshs 1,600,000/- from the Defendants who were the registered owners thereof. It was a term of the Agreement of sale that the Plaintiffs would pay a 10% deposit and thereafter make other payments by instalment. It is the Plaintiffs case that they have since paid a total sum of Kshs 800,000/- but the Defendants have refused to transfer their portion of the land and have instead sub-divided the land into portions which they are busy selling to other third parties.

3. In a brief 3-paragraph Statement of Defence filed herein on 17<sup>th</sup> June 2016, the 1<sup>st</sup> Defendant-Nyevu Kilango Charo denies the existence of a valid Sale Agreement in respect of the said parcel of land and further denies that the Plaintiff is entitled to the orders sought herein.

4. The 2<sup>nd</sup> Defendant-Kavue Kilango (a.k.a Kavumbi Kilango Charo) filed a Notice of Appointment on 17<sup>th</sup> May 2016 by which she indicated that she would be represented by Mess Jane Kagu & Company Advocates. I was however unable to locate any Statement of Defence filed by the said Law Firm.

5. On the date fixed for hearing, neither the Defendants nor their Advocates attended Court. Being satisfied that they were duly served, this Court allowed the Plaintiffs to proceed with their case.

6. In support of their case, the 1<sup>st</sup> Plaintiff (PW1) testified as their sole witness. He told the Court he did together with the 2<sup>nd</sup> Plaintiff who is his wife enter into a sale agreement dated 14<sup>th</sup> May 2010 with the Defendants for the purchase of two acres of the suitland. The land was at the time registered in the name of the Defendants' deceased father.

7. PW1 told the Court that the deceased had left two widows-the two Defendants herein. The 1<sup>st</sup> Defendant agreed to sell two acres of her portion of the land at Kshs 800,000/- per acre. At the date of the agreement, the Plaintiffs paid a sum of Kshs 160,000/- as deposit. On 30<sup>th</sup> July 2010, they paid Kshs 250,000/-, on 31<sup>st</sup> July 2010-Kshs 500,000/- and on 21<sup>st</sup> February 2011 they paid Kshs 115,000/- making it a total of Kshs 800,000/-.

8. According to PW1, the amount paid was the equivalent of the purchase price for one acre of the land but they are yet to be given their portion to-date. PW1 told the Court that at first, the Defendants told them to wait for the Grant of Letters of Administration but later on they realised the Defendants were already selling the land to other people. When they did a search in the Land Registry, the Plaintiffs realised that the land had long been transferred to the Defendants' names.

9. I have considered the pleadings filed herein, the testimony of the Plaintiff's sole witness and the evidence placed before me. I have also considered the submissions and authorities filed herein by Mr. Kedeki, Learned Counsel for the Plaintiffs.

10. From the material placed before me, it is apparent that the Plaintiffs entered into a contract with the 1<sup>st</sup> Defendant for the purchase of a portion of land measuring two acres which portion was to be excised from a parcel of land known as Kilifi/Mtwapa/393 measuring approximately 4.55 Ha. That parcel of land was previously registered in the name of Kilango Charo Chula who had died by the time the parties executed the agreement dated 4<sup>th</sup> May 2010 Pexh. 1(a).

11. According to the Plaintiffs, the said Kilango Charo Chula (deceased) left behind the two widows named as the Defendants herein. It is apparent from the sale agreement (Pexh 1(a) that it is the 1<sup>st</sup> Defendant who had entered into a sale agreement with the Plaintiffs to sell to them the two acres from her side of the large parcel of land as marked on a sketch plan/map that was attached to the Agreement.

12. The said contract which was also signed by the 1<sup>st</sup> Defendants sons-Kitsao Kilango, John Kilango and Joseph Kilango stipulated that the sellers would obtain the consent to sub-divide the larger parcel of land into two portions from the Bahari Divisional Land Control Board after which the seller and the purchaser would obtain consent to transfer the two acre portion that was sold to the Plaintiffs. This must have been in recognition of the fact that the two herein controlled distinct portions of the land that was being sold.

13. This is confirmed by a Replying Affidavit of the 2<sup>nd</sup> Defendant-Karue Kilango that she filed in opposition to the Plaintiffs' application for injunction dated 16<sup>th</sup> February 2016 in which she deposes at paragraphs 4-6 as follows:-

***4. That it is true my co-wife and I were the legal and beneficial owners of property Plot No. Kilifi/Mtwapa/393A (hereinafter referred to as "the Land) the same having devolved to us as the wives of Kilango Charo Chula the deceased.***

***5. That it is true that the said land has since been sub-divided and Title Numbers Kilifi/Mtwapa/3413, 3414 and 3415 respectively issued by the Land Registrar Kilifi;***

***6. That whereas the subdivisions above mentioned in clause 5 above were registered in both our names as tenants in common, each of us together with our respective families own their particular parcels where we also reside."***

14. The above arrangement being the case herein and given the clearly marked sketch map showing the position of the land that the Plaintiffs were purchasing it is difficult to appreciate the 1<sup>st</sup> Defendant's contention in her Statement of Defence that there was no valid Sale Agreement herein.

15. As it were, she does not deny that she did with her sons execute the Sale Agreement. Neither does she deny that they received the instalment payments as evidenced by the subsequent Sale Agreements dated 31<sup>st</sup> July 2010(Pexh 1(b) and 21<sup>st</sup> February 2011(Pexh 1(c).

16. As Onguto J stated while citing a decision of the Supreme Court of the United Kingdom in *Marita Peeush Mahajan –vs Yashwant Kumani Mahajan(2017)eKLR:-*

***"...Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."***

17. A review of the conduct of the parties herein in my view can only lead to the inference that there existed an objective intention by the parties to have a mutually binding contract. That must be the reason the Plaintiffs paid and the 1<sup>st</sup> Defendant received and accepted various sums of money paid as instalments towards the purchase of the two acres of the 1<sup>st</sup> Defendant's parcel of land.

18. As it were however the 2<sup>nd</sup> Defendant neither executed any contract with the Plaintiffs nor did she receive any money from them pursuant to the sale. In that regard, I think the suit as filed against the 2<sup>nd</sup> Defendant was without basis.

19. I am otherwise satisfied that the Plaintiffs have proved their case as against the 1<sup>st</sup> Defendant. As it were however, the Plaintiffs only paid a sum of Kshs 800,000/- which sum in their own admission was equivalent to the purchase price of one acre of the said parcel of land. The original parcel of land Kilifi/Mtwapa/393 has also since been sub-divided into parcel Nos. 3414(for the 1<sup>st</sup> Defendant) and No. 3415 (for the 2<sup>nd</sup> Defendant) as can be discerned from paragraphs 7 and 8 of the 2<sup>nd</sup> Defendant's Replying Affidavit afore cited.

20. Accordingly, I hereby make the following orders:-

***a) A declaration is hereby issued that the Plaintiffs have acquired a legal and/or beneficial interest in all that parcel of land known as Kilifi/Mtwapa/3414 and any sub-divisions emanating therefrom.***

***b) A permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant either acting by itself, her agents, and/or servants from dealing in, constructing upon, selling, wasting, damaging, trespassing and/or interfering in any manner with the portion of land***

*measuring one half of the two acres depicted in the Sketch Map attached to the Sale Agreement dated 14<sup>th</sup> May 2010 as executed between the Plaintiffs and the 1<sup>st</sup> Defendant.*

c) *The 1<sup>st</sup> Defendant shall bear the costs of this suit.*

Dated, signed and delivered at Malindi this 28<sup>th</sup> day of March, 2019.

J.O. OLOLA

JUDGE