



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 185 OF 2013

KAHASO MAKUPE YAWA

**JOHN MWAMUYE MAKUPE (Suing as the Legal Representative/Administrator of the Estate of
MAKUPE YAWA MWALUNGO.....PLAINTIFFS**

-VERSUS-

OMAR TSUMA BAYA.....1ST DEFENDANT

LUCY TSUMA.....2ND DEFENDANT

JUDGEMENT

1. The claim by the plaintiffs is contained in the plaint dated 22nd August 2013. The plaintiffs have brought this suit on their own behalf and on behalf of the estate of Makupe Yawa Mwalungo – deceased against the two defendants. They have pleaded that the deceased sold to the defendants a portion measuring 3 acres of the suit property title No Kilifi/Mtwapa/1944 formerly plot No 211 Mtwapa Settlement Scheme sometime in July 1988. That the deceased was paid a deposit of Kshs 10000= leaving a balance of Kshs 44,000 that was unpaid upto the time Mwalungo – deceased died on 21st January 2002.

2. The plaintiffs aver further that the defendants who are in occupation of the suit land are claiming additional 4 acres and they have trespassed and encroached on the same thereby preventing the plaintiffs and other beneficiaries of the deceased estate from utilising and or accessing the 4 acres. Consequently the plaintiffs are asking the Court to enter judgment against the defendants as follows:

- a) A declaration that the agreement dated the 29th July 1988 is not binding on the plaintiffs due to non-completion of the same.
- b) An order compelling the defendants and their authorized agents and or servants to hand over vacant possession of the three (3) acres and any extra land they claim on plot number Kilifi/Mtwapa/1944 to the plaintiffs.
- c) Alternatively to prayer (b) hereinabove, the Court bailiff to evict the defendants and or their authorised agents and or servants from plot number Kilifi/Mtwapa/1944 and give the plaintiffs vacant possession thereof at the defendants' cost.
- d) That the O.C.S., Mtwapa police station or any other police station with jurisdiction to provide security during the eviction of the defendants and or their authorized agents and or servants from plot number Kilifi/Mtwapa/1944.
- e) A permant injunction restraining the defendants and or their authorized agents and or servants from trespassing into plot number Kilifi/Mtwapa/1944 and or dealing with the said plot in any manner whatsoever.
- f) Costs of the suit and interest
- g) Any other order and or relief that the Court may deem fit to grant.

3. The claim is denied by the defence and counter – claim dated 11th November 2013 and later amended on 7th March 2016. The defendants pleaded that the claim as presented is incompetent, bad in law and amounts to abuse of Court process. The defendants state that the sale was completed in the year 1988 and the only thing remaining was the transfer of the title into the defendants' name.

4. In the counter – claim, the defendants pleaded that they paid for the entire 4 acres of land sold to them together with the 3 acres they bought from a Mr Joseph Ndungu Irungu who had earlier bought the stated portion from the deceased. That on completion, the 1st defendant organised with his surveyors to place the beacons on the 7 acre piece in the presence of the deceased and after the survey exercise, the 1st defendant put a fence to define the boundaries. That he has been residing on the suit land with his family without any disturbance.

5. The defendants pleaded further that the delay in obtaining a title was because of monies owed to the Settlement Fund which was cleared in 1990 and later the process of clearance from the Settlement Fund which processes were completed in November 2001. The defendants contend that the plaintiffs are holding the title for the seven (7) acres portion in trust for them and urged the Court to direct the plaintiffs to effect the transfer by allowing the prayers contained in the counter – claim as below:

a) A declaration that the defendants are the lawful legal owner of 7 (seven) acreage of all that portion of land known as plot No Kilifi/Mtwapa/1944 formerly No 211 Mtwapa Settlement Scheme and as such are rightfully in possession and use of the said parcel of land.

b) The plaintiffs be compelled to sign the transfer documents in favour of the 1st defendant in regard the 7 (seven) acreage duly purchased by the 1st defendant for value in the year 1988.

c) The plaintiffs be compelled to release the original title document to enable the 1st defendant effect and register the subdivision and transfer and have the said original title surrendered awaiting release of two titles, for the 7 acres (for 1st defendant) and remainder of the acreage in favour of plaintiffs.

d) Orders of permanent injunction restraining the plaintiffs either by themselves, their servant and/or agents from trespassing and/or otherwise interfering with the defendants' quiet possession and enjoyment of the suit property.

e) Such further and other relief that this honourable Court shall deem fit so to grant in the interest of justice.

6. The plaintiffs then filed a reply to the defence and counter – claim on 7th December 2017. The plaintiffs denied the claim of the defence and put them to strict proof. The plaintiffs in particular denied that the defendants have been in peaceful occupation of the 7 acres. That the defendants do not merit the reliefs sought and urged the Court to dismiss the counter – claim and allow the plaintiffs' claim as presented.

7. On 6th February 2018, the 1st plaintiff testified as PW 1. She said that the 2nd plaintiff is her child. That Makupe Yawa deceased was her husband. She adopted her statement dated 22.8.2013 as her evidence. She also produced documents in her list which included the following:

a) Death certificate of Makupe Yawa.

b) Certificate of Grant issued in succession cause No 97 of 2013.

c) Copy of sale agreement dated

d) Certificate of search and receipt paid for it.

e) Title deed issued in the name of Makupe Nyawa.

f) Summons dated 14.9.2012

g) Demand letter dated 24.1.2013.

8. PW 1 said that her husband wanted to sell to Mr Irungu 3 acres of the land. Irungu gave him Kshs 10,000= but later asked to be refunded his money. That the deceased then decided to sell the same portion to the 1st defendant and they agreed on a purchase price of Kshs 54,000=. They made an agreement (Pex 3) when Kshs 10,000 was paid and a balance of Kshs 44000 remained.

9. That the 1st defendant was put into possession but never paid the balance until Makupe died. That after the death, the 1st defendant came with a sum of Kshs 5,500 to give to the plaintiffs which he claimed was the balance. However the 1st plaintiff refused to accept the money. That the 1st defendant then started claiming 7 acres. She reported him to the local administration who summoned him for a meeting on 14.9.2012. PW 1 said that from the time she refused to accept the Kshs 5500, they have been having issues with the 1st defendant. As far as she knows, only 3 acres was sold to the 1st defendant. She asked the Court to allow her claim.

10. In cross – examination, PW 1 stated that Uchi was the 1st wife of Makupe that and they had lived together on the suit land. That her husband had more than 16 acres of land. PW 1 did not know how much Irungu sold the 3 acres to the 1st defendant. That the 3 acres was sold to Irungu before she got married. She was not aware that the deceased also sold 3 acres to the 1st defendant neither did she know if the 1st defendant made any further payments to the deceased. That Makupe died in under two months of getting the title deed. That the defendant still lives on the suit land. In re – examination, PW 1 said Uchi separated with her husband before his death. This evidence marked the close of the plaintiffs' case.

11. The defence gave evidence on 16th July 2018. Mr Omar Tsuma Baya adopted his witness statement filed in Court on 9th March 2016. In

addition, the witness stated that he was informed by a land agent called Mr Kalenga about a Kikuyu selling his land. They arranged to see the land and during the visit, he met the deceased who told him he was also selling another 3 acres. DW 1 continued that after they agreed on the purchase price, they went before the chief to write the agreement. That for the 1st 3 acres, the purchase price was agreed at Kshs 54000 same to the 2nd portion of the 3 acres. He paid a deposit of Kshs 10,000= to each of the vendors and produced the two sale agreements as Dex 1(a) & 1(b).

12. DW 1 continued that they did not get consent of the Land Board until after they made 3 visits. The letters of consent were produced as Dex 2 and Dex 3. That after he received the consent, he took Mr Irungu to his boss where Mr Irungu was paid the whole balance. However Makupe – deceased on this day was paid a sum of Kshs 15000=. The witness stated that after a year Makupe came to him that he needed more money to assist his child from a previous relationship and wanted to sell more land. A purchase price of Kshs 25000 was agreed and a deposit of Kshs 15000 paid. That a sale agreement was prepared at DW 1's place of work on 19.11.1989 which agreement he produced as Dex 4. DW 1 said he told Makupe he would pay the balance after getting the title.

13. DW 1 further stated that he built his house on the suit land but later moved out after the death of his wife. That they have lived on the land peacefully as family and he even supported Makupe during the death of his father and mother. That John Makupe died before the 1st defendant got his title. That the surviving wife was to notify him (1st defendant) once they got the title. DW 1 gave names of his neighbours at the suit land as Roda and Nymabura with a road on frontage of the suit plot. He denied grabbing anyone's land. DW 1 also produced the letter of consent dated 27.3.1986 as Dex 5 and 6, Discharge of Charge – Dex 7, Transfer of land Dex – 8. He denied the plaintiffs' claim and instead urged the Court to grant orders prayed for in his counter – claim.

14. In cross – examination, DW 1 stated that he was not aware Makupe got a title deed in 2001. That the consents were issued before the time. He has not brought documents to show that he had paid the balance. That the share Irungu sold to him had not been carved out of the original plot No 211 B. That at the time of purchase, Makupe was married to Uchi. That Kahaso (1st plaintiff) is also Makupe's wife. Currently it is DW 1's child (2nd defendant) living on the land. That he does not agree that Rhoda has been given the title because she has complied with the agreement.

15. UCHI MAKUPE YAWA testified as DW 2. She adopted her statement dated 11th September 2015 as her evidence. She said that she is the first wife of Makupe – deceased. She stated that the 1st defendant was her neighbour for long and knew that he had bought 7 acres portion of land from her deceased husband. That her husband had informed her sometime in 1988 of having found a buyer for the 3 acres portion of the land they were living on. DW 2 also confirmed that due to financial problems, they agreed to sell to the 1st defendant an additional 1 acre. That after the monies were paid in full, the 1st defendant brought surveyors to place the beacons and fence the 7 acres. That she was present during this exercise and saw the 1st defendant fence off the land sold to him.

16. In cross – examination, DW 2 said she was present when the plot was first sold to Irungu and subsequently to the 1st defendant. That she is still a widow of the deceased because she has not gone back to her parents.

17. Kenyatta Chege Ramadhan testified as DW 3. He lives in Kisauni and is a businessman. He adopted as his evidence the statement dated 14.9.2015. In cross – examination, DW 3 said he knew the plot in dispute is in Mtwapa. That they worked together with the 1st defendant at Integrated Cooling Equipment Limited. DW 3 said he witnessed the sale between the 1st defendant and Makupe – deceased. That he accompanied the 1st defendant to the Chief's Office where a deposit of Kshs 20,000= was paid. That 1st agreement was for plot 211/B and 2nd agreement was for plot 211. DW 3 said he had not seen the documents for payment of balance but he saw Mr Makupe – deceased come to their office and was paid the balance. As far as he knew, the title had not been issued. DW 3 added that his name was not included in the agreement of 13.11.1989. This evidence also marked the close of the defence case.

18. The parties filed written closing submissions. In their submissions, the plaintiffs argued that the amended defence and counter – claim filed on 7th March 2016 without leave of the Court therefore ought to be struck out. Secondly that the agreement dated 29th July 1988 is not enforceable because; it is time barred and two because the 1st defendant breached the express terms of that agreement. The 1st defendant also raised the issue of limitation in his submissions so I will deal with it since it has been raised by both parties.

19. It is not in dispute that the 1st defendant entered into a sale agreement with Makupe Yawa – deceased for purchase of a portion of plot No 211 Mtwapa Settlement Scheme. The dispute arising is what was the size of land bought and whether the 1st defendant paid the entire purchase price or not. Secondly, the year the transaction commenced is agreed to be 1988.

20. Section 4 (1) of the Limitation of Actions Act puts a cap that actions founded on contracts must be brought before the expiry of six years from the date when the cause of action arose. Under section 7 of Cap 22, a claim to recover land shall not be brought after the lapse of 12 years. The evidence shows that the 1st defendant was put in possession the year the agreement was executed. The occupation of the defendants is admitted by the plaintiff in paragraph 8 of the plaint and in her oral testimony.

21. According to the plaintiffs' submissions, the balance was to be paid in full immediately the consent of the Land Control Board to transfer was obtained and that such consent was obtained on 30th September 1988. Based on the plaintiffs' submission that the agreement of 29.7.1988 is invalid for non-payment of the purchase price within the agreed time; the time being referred by the plaintiffs is then calculable to run from 30th September 1988. For this Court to declare the agreement as not binding for breach (of contract), the claim ought to have been brought on or before the end of the sixth (6th) year from 30th September 1988 had lapsed which time fall on or before 29th September 1994.

22. By 1994, Makupe Yawa was still alive yet no claim was made by him despite the fact that he was the party to that contract. No application to extend time was made by the administrators of his estate before this suit was filed. This prayer for an alleged breach of

contract now made about 25 years later cannot have legs to stand on. Further in prayer (b) of the plaint, the plaintiffs sought for vacant possession of the 3 acres and any extra land the defendants are claiming on plot number Kilifi/Mtwapa/1944. The limitation to claim this portion of the land assuming they were entitled to it also expired after the end of the twelfth (12th) year from the date when the “balance of purchase price” was due and vacant possession was not demanded. Again the time lapsed during the lifetime of the seller. The upshot of this is that I make a finding that the issue of limitation raised by the plaintiff favours the defendants rather than them.

23. On merits of the suit, the plaintiffs claimed the defendant was only sold 3 acres portion of the suit land and not 7 acres. That the balance of the purchase price was also not paid. On the question of how much land was bought, the plaintiffs relied on the sale agreement dated 29th July 1988 between the 1st defendant and the deceased. The sale transaction took place before the deceased got married to the 1st plaintiff and before the 2nd plaintiff was born. In rebuttal, the defendant produced two sale agreements dated the same day. The 1st was between him and Joseph Irungu in respect of plot No 211 B while the 2nd agreement was between him and Makupe – deceased. Both agreements were witnessed by the Chief and none referred to the other. Infact the agreement between the 1st defendant and the deceased referred to plot No 211.

24. The letter of consent dated 27.3.1986 shows plot No Mtwapa Settlement Scheme/211 was subdivided into two portions. Portion 211 A – measuring 9 acres and portion 211 B measuring 3 acres. This supports the defence evidence as demonstrated by the sale agreement that the plot sold by Joseph Irungu was plot No 211 B. See also the letter of consent dated 27.3.1988 from Makupe to Joseph Irungu. The area Chief who witnessed the sale by the 2nd defendant was not called to give audience to refute the averment that the two agreements referred to two distinct portions of the suit land. Neither did the plaintiff tell the Court that this Chief was unavailable. The plaintiffs opted not to call any local administration representative to corroborate her evidence.

25. The defendants on their part called DW 2 and DW 3 who were present during the transaction to corroborate their evidence that the portion sold was 7 acres and the entire purchase price was paid. The plaintiffs in their submission referred to the case of **Faith Wambua Kilo vs Patel Deviska (2018) eKLR** where Justice Kemei D. K Court State discussed on the issue of a party failing to call a material witness to testify in a suit. The Judge held thus,

“.....I must add that it is unclear why the respondent was reluctant to call her son so to give an account of how exactly he was accosted by the alleged car-jackers. Having such evidence and choosing not to tender it in Court leads to a presumption that the respondent’s son’s evidence would be detrimental to her case. In the circumstances, those allegations remain just that, mere allegations. The failure by Respondent to call his son raised doubts as to his claim that a carjacking incident had taken place.

26. What is interesting is that the plaintiffs are shifting the burden of proof to the defence. They are the ones claiming that the balance was not paid. In law the burden rested on them to discharge and I find they failed to do so for two reasons. First, there is no evidence of demand made for the balance during the lifetime of the deceased. The deceased died about 12 years from the time the sale was conducted. Since the 1st defendant was in occupation, nothing would have stopped the deceased from taking steps to recover the balance including reporting the matter to the Chief who witnessed the agreement or any Chief for help. Secondly DW 3 who was living with the deceased at the time of sale confirmed payment of the purchase price in full. Whether Uchi’s name was not included in list of the witnesses to the agreement does not change her position as a wife of the late Makupe Yawa at the time the transaction was done.

27. The plaintiffs urged the Court to dismiss the amended defence and counter- claim filed on 7th March 2016 that the same was filed without leave. I find this to be a non – issue because there is a defence and counter – claim filed on 11th November 2013 which has not been submitted to have been filed out of time. In that defence and counter – claim filed on 11th November 2013, the defendants asked the Court to be declared as the lawful owners of the 7 acres alongside other prayers. The amendment effected did not change the substance of the defendants’ claim.

28. In conclusion, I find that the plaintiffs’ main prayers in paragraph (a) & (b) are time barred and also lacking in merit for lack of proof. Consequently, they are dismissed. The remainder of the prayers in paragraph (c) – (d) were dependent on either of the first two prayers succeeding and since both have failed; prayer (c) to (d) also fail. Accordingly the plaintiffs’ suit is dismissed in its entirety with costs to the defendants.

29. On the other hand, I find the defendants’ case as proved that they are entitled to the land by virtue of their occupation and use. It is my finding that the plaintiffs are holding the title in trust and for the benefit of the defendants in respect to the 7 acres they are in occupation of. Accordingly I enter judgment in favour of the defendants as prayed in paragraphs (b) (c) and (d) of the counter – claim. To give effect to prayer (c) of the counter – claim, I make an order under prayer (f) that the plaintiffs to execute within 30 days of this judgment the subdivision & transfer documents as well as avail the necessary documents that would enable the process of subdivision and transfer to be effectualised in having the suit land being registered in the 1st defendant’s name. In default of the plaintiffs signing these documents and or availing the required documents, the deputy registrar of the Court shall sign the said documents after the expiry of 30 days.

Dated, signed & delivered at Mombasa this 15th March 2019

A. OMOLLO

JUDGE