



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCA E022 OF 2023

ISAAC MUTUA MWANGANGI APPELLANT
VERSUS

PAUL MUTHINI MWANGANGI1ST RESPONDENT
PETER MUTHAMA MWANGANGI 2ND RESPONDENT

JUDGMENT

- 1) In this appeal the Appellant seeks two orders.
 - i) That the judgment and decree of the learned magistrate in Murang'a CM's Case No. 134 of 2019 and dated 2-11-2023 be set aside.
 - ii) That the costs of the appeal and those of the lower court plus interest at Court rates be awarded to the appellant.

- 2) The four grounds of appeal are as follows.
 - (i) The learned trial magistrate erred in law in finding that the Plaintiffs had proved their case on a balance of probability.**
 - (ii) The learned trial magistrate erred in law in finding that the oral agreements for sale of land were valid and that the Appellant herein acquired title unprocedurally.**
 - (iii) The learned trial magistrate erred in law and in fact in entering judgment for the Respondents against the Appellant.**
 - (iv) The learned trial magistrate erred in law and in fact by not awarding the Appellant the costs of the suit.**

- 3) The facts of the case according to the Appellants who were the Plaintiffs are as follows. One, on 2-6-1987 the two Plaintiffs entered into a sale agreement with the Defendant whereby the Defendant sold one share of his shares with Mathengeta Farmers Company Limited to the Plaintiffs. Each Plaintiff was in effect buying half a share. Two, the

Plaintiffs occupied the land immediately and built their homesteads thereon. They have since utilized the land unhindered and without any objection from the Defendant. Three, the agreement was witnessed by the Defendant's wife Joyce Kivinya, the mother of the three parties since they are all brothers, Ruth Ndululu and their sister Teresia Mbatha. Four, in the year 2018, the Defendant threatened to evict the Plaintiffs from the land even though they had lived thereon for many years after paying the full purchase price. Five, on investigating the status of the property, the Plaintiffs found out that the Defendant had amalgamated the suit land with another parcel and obtained one title deed for the two parcels. Six, even though they had purchased 2.9 acres, the title deed for some of the land that they occupied was known as Makuyu/Kambiti/Block 2/1008 and is only 0.8 Ha in size. When the survey exercise was carried out, the Plaintiffs were not at home and they had entrusted their mother with the task. Finally, the property is the only home that the Plaintiffs know as home and they had even buried one of their kin thereon.

- 4) The facts of the case according to the Defendant are as follows. One, he was a member of Mathengeta land buying company and he was allocated L.R No. Makuyu/Kambiti/Block 2/282 as his share. He was issued with a title deed for the said land in the year 1992. He allowed the Plaintiffs to build on the suit land and till the same as they had nowhere else to build. They have been living on the suit land with the consent of the defendant. Two, later, he bought L.R Nos. Makuyu/Kambiti/Block2/285 and 286 from one Wilson Kithome. Three, in the year 2019, the Plaintiffs started making demands to the Defendant that he gives them half of the land claiming that it belonged to their late father and it was their share of inheritance. The Defendant refused to accede to their demands. The dispute was referred to the Chief and the DO at Makuyu but there was resolution. Finally, the Defendant denied having sold the land to the Plaintiffs and asked the Court to dismiss their suit.
- 5) In his judgment dated 2-11-2023, the learned trial magistrate found the oral agreements valid and further found that the Defendant acquired the title deed to the suit land unprocedurally for failing to consider the portion bought and occupied by the Plaintiffs.

- 6) Counsel for the parties filed written submissions dated 6-12-2024 and 16-10-2025. The Appellant's counsel identified two (2) issues for determination in the appeal.
- (i) **Burden and standard of proof.**
 - (ii) **Validity of the sale agreement.**
- 7) This being a first appeal, this Court has a duty to do the following in considering the appeal. Firstly, it must re-evaluate, re-assess and reconsider the evidence presented before the trial Court. Secondly, it must make its own independent conclusion based on that evidence. Thirdly, it should bear in mind that it did not hear and see the witnesses and therefore make allowance for this limitation. Finally, it must exercise its own independent judgment. This was the holding in the case of **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123 by the East African Court of Appeal.**
- 8) I have carefully considered the appeal in its entirety including the grounds of appeal, the entire record and the written submissions by the learned counsel for the parties. I agree with the learned counsel for the Appellant that the two issues as identified will determine the appeal conclusively.
- 9) On the first issue, I find there is sufficient evidence adduced by the Respondents and their sister Ruth Ndululu to prove that the Appellant sold the suit land to the respondents and that they paid full purchase price before they occupied the land. In making this finding, I have relied on the evidence adduced by the Respondents before the trial Court and corroborated sufficiently in material particulars by the evidence of Ruth Ndululu. In contradistinction, the evidence by the Appellant stands alone uncorroborated by any other independent evidence. I find that the respondents fully discharged the burden placed on them by the law which is proof on a balance of probabilities.
- 10) Regarding the second issue of the sale agreement, I find that Appellant did acknowledge selling the suit land to the Respondents as per the two acknowledgments on record both dated 2-6-1987. While it is true that sale agreements are mandatory in case of a disposition of an interest in land, the proviso in **Subsection 3(3) of the Law of Contract Act** creates two exceptions to this rule. They include,

(a) Sale by an Auctioneer and

(b) Situations where one party creates a resulting, implied or a constructive trust.

The proviso reads as follows.

“Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

11) The facts of this case are similar to those in the case of **Willy Kimutai Kitilit Vs Michael Kibet Civil Appeal No. 51 of 2015, Eldoret.** In the case, the registered owner put the buyer in possession of the disputed land after payment of the full purchase price. The seller never obtained the consent of the Land Control Board as required by Section 6 of the Land Control Act (Cap 302). Later when the seller sought to refund the purchase price and recover the land that he had sold, the dispute ended up in Court. The Court of Appeal held as follows, inter alia, that the buyer having fully paid the purchase price and taken possession, a constructive trust was created in favour of the buyer and the seller became a trustee of the buyer.

Both **Section 30(g)** of the **Registered Land Act (Cap 300)**, now repealed and Section 28(b) of the Land Registration Act recognize trusts and customary trust as overriding interests even if they are not noted in the register. In this case, the Respondent’s occupation of the suit land from 1987 after having paid the full purchase creates an overriding interest over the Appellant’s title to the suit land. This means that a sale agreement was not necessary in the first place and even the ones produced in evidence in this case are superfluous.

12) In conclusion and for the reasons already given, I find no merit in the Appellant’s appeal which I dismiss and make the following orders.

(a) A declaration is hereby issued that the Respondents are the owners of all that property known as Makuyu/Kambiti/Block2/285 measuring 1.3260 Ha.

(b) A permanent injunction is hereby issued against the Appellant or anybody claiming under him from interfering with the Respondent’s possession of the said land.

- (c) The Appellant to transfer all the land described in (a) above to the Respondents and in default the Deputy Registrar to execute all instruments necessary to ensure the registration of the Respondents as owner of the land described in (a) above.
- (d) If any title has been issued for the land occupied by the Respondents, such title to be cancelled in so far as it concerns the Respondents' land.
- (e) To foster harmony between the parties who are all brothers, each party to bear its own costs in this Court as well as in the lower Court.

It is so ordered.

Dated, signed and Delivered virtually at Murang'a this 16th day of December, 2025.

M.N. GICHERU
JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant's Counsel – Absent

Respondent's Counsel – Mr. Morigori