



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 59 OF 2017**

**DANIEL MUSYOKA NGALU.....PLAINTIFF**

**VERSUS**

**HENRY MUSYOKA KIOKO.....DEFENDANT**

**AND**

**JEREMIAH MALULA KIAMUKO....THIRD PARTY**

**JUDGMENT**

1. In the Plaintiff dated 2<sup>nd</sup> February, 2017, the Plaintiff has averred that at all material times, he was and has been the rightful owner of Unsurveyed Commercial Plot No. 142 Athi River having bought it from Umiisyo Women Group.
2. According to the Plaintiff when he visited the plot in July, 2015, he found the plot vacant. However, in August, 2015, he found the Defendant had unlawfully encroached on the suit land; that the Defendant has constructed 21 iron sheet structures on the suit land; that the Defendant let the said structures to the tenants and that he has been denied access to the land.
3. The Plaintiff finally averred that the Defendant was arrested and charged in Mavoko Criminal Case No. 277 of 2015 for forceful detainer, which claim he withdrew after the Defendant agreed to vacate the suit land and that the Defendant thereafter agreed to purchase the suit land from him at an agreed price of Kshs. 1,300,000. According to the Plaintiff, the Defendant paid him Kshs. 600,000 leaving a balance of Kshs. 700,000 and that the Defendant has declined to pay the balance of the purchase price.
4. The Plaintiff is seeking for a permanent injunction to issue restraining the Defendant from interfering with the suit land; a declaration that the Defendant is in breach of the Agreement of 11<sup>th</sup> May, 2016 and an order for the payment of *mesne* profits for use of the suit land since August, 2015 at the rate of Kshs. 42,000 per month upto the time of the Judgment.
5. In his Statement of Defence, the Defendant averred that the Plaintiff's claim is a fraudulent and corrupt scheme designed to defraud him; that the Plaintiff induced him to enter into a Sale Agreement with full knowledge that he did not have any property capable of being sold and that the Plaintiff obtained from him Kshs. 600,000 for a non-existent parcel of land.
6. The Defendant averred that he is the owner of plot number 101, Athi River Town, having purchased it from Jeremiah Malula Kiamuko who was the original owner; that he has constructed semi-permanent structures on the land; that the plot that the Plaintiff purported to sell to him was Plot No. 142 which was different from Plot No. 101 on the ground and that as a result of the said misrepresentation, he could not complete the transaction as the land that the Plaintiff was selling to him did not exist on the ground. The Defendant finally averred that he is entitled to a refund of the money that he paid to the Plaintiff together with interest.
7. The Plaintiff, PW1, informed the court that in the year 2003, he entered into an Agreement with the officials of Umiisyo Women Group to purchase Plot No. 142 situated within Mavoko Municipality from them. It was the evidence of PW1 that he was taken to the *locus quo* by the said officials and that the Municipal's Surveyor accompanied them to the suit land.
8. PW1 informed the court that after seeing the suit plot, which was vacant, he fenced the entire land; that when he went to the plot in the year 2015, he was surprised to find the Defendant had developed 21 semi-permanent mabati structures on the land; that the said structures were fully occupied by the tenants and that the officials of Umiisyo Women Group assured him that they had not sold the plot to the Defendant.
9. It was the evidence of PW1 that he reported the matter to the police whereupon the Defendant was arrested; that the Defendant was

charged with the offence of forcible detainer in Mavoko Criminal Case No. 277 of 2016 and that the Defendant convinced him to have the dispute settled out of court.

10. PW1 stated that he agreed to sell to the Defendant the suit land vide an Agreement dated 17<sup>th</sup> June, 2016; that the Defendant paid him a deposit of Kshs. 600,000 leaving a balance of Kshs. 700,000 and that the Defendant has declined to pay him the said balance. PW1 informed the court that the Defendant has been receiving rent of Kshs. 42,000 from the iron sheet structures situated on the suit land. It was the evidence of PW1 that he was ready and willing to refund to the Defendant the deposit paid to him less 10% being the penalty for breach of the Agreement.

11. PW1 informed the court that Plot No. 142 was later surveyed vide Survey plan number F/R 392/134 and became L.R. No. 337/3138; that he is waiting for the issuance of the title document in his favour and that Plot No. 101 is different from Plot No. 142. The Plaintiff produced several documents in evidence.

12. The Treasurer of Umiisyo Women Group, PW2, informed the court that the Group sold to the Plaintiff Commercial Plot No. 142 situated in Athi River; that the said plot was allocated to the Group by the Government on 5<sup>th</sup> January, 1995 and that they handed to the Plaintiff all the ownership documents relating to the suit land.

13. PW2 informed the court that on 25<sup>th</sup> January, 2001, they signed the transfer form in favour of the Plaintiff; that they showed the Plaintiff the suit land which he fenced and that when the Defendant encroached on the suit land, he was arrested and charged in court. PW2 informed the court that he was present on the day the criminal case was withdrawn by the Plaintiff on condition that the Defendant vacates the land. According to PW2, the Defendant agreed to purchase the suit land from the Plaintiff for Kshs. 1,300,000. However, he has since reneged on that Agreement.

14. On his part, the Defendant, DW1, informed the court that he owns Plot No. 101 within Athi River Town. According to DW1, he purchased the said plot from one Jeremiah Malula who represented to him as the owner of the plot.

15. DW1 stated that after purchasing the suit land, he put up semi-permanent structures on the suit land and started paying the requisite rates to the local authority. DW1 stated that the Kshs. 600,000 he paid to the Plaintiff was in respect of Plot No. 142 and not Plot No. 101; that when he went to the ground, the Plaintiff pointed to him Plot No. 101, which is the same plot that he had purchased from Mr. Jeremiah, and that he could not complete the transaction due to the Plaintiff's misrepresentation about the plot he was selling.

16. While testifying in court, DW1 departed from his filed statement and stated that he was threatened by the Plaintiff and the CID officers into signing the Agreement between him and the Plaintiff; that he did not sign the said Agreement voluntarily; that the Plaintiff threatened the tenants who were living in the houses situated on the suit land and that the said tenants vacated the land. According to DW2, he paid the Kshs. 600,000 to the Plaintiff out of fear.

17. The Plaintiff's advocate submitted that the Plaintiff has proved his case on a balance of probability; that the fact that the Defendant entered into an Agreement of Sale with the Plaintiff and paid the Plaintiff Kshs. 600,000 demonstrates that the land did not belong to the Defendant and that the Plaintiff's Plaint should be allowed.

18. On his part, the Defendant's advocate submitted that the Plaintiff did not adduce evidence to prove that either Umiisyo Women Group or himself complied with the terms and conditions given to them in the letter of allotment; that the Plaintiff has not produced a title document in respect to the suit land and that the Agreement between the Plaintiff and the Defendant did not have a completion date.

19. The Defendant's advocate finally submitted that the Plaintiff is asking the court to re-write the Agreement he entered into with the Plaintiff and that in any event, the Defendant has agreed to move out of the suits land.

20. On the issue of *mesne* profits, the Defendant's advocate submitted that the Defendant was on the land lawfully and with the permission of the Plaintiff and that the deposit that was paid to the Plaintiff should be refunded in full.

#### **Analysis and findings:**

21. The evidence adduced in this matter by the Plaintiff, PW1, and the Treasurer of Umiisyo Women Group, PW2, shows that Umiisyo Women Group was allocated a piece of land known as Unsurveyed Commercial Plot No. 142, Athi River. PW1 produced in evidence the letter of allotment dated 5<sup>th</sup> January, 1995 in support of that assertion. The Plaintiff also produced a copy of the Transfer that was signed between him and the Women's Group in respect of Plot No 142 on 9<sup>th</sup> January, 1995.

22. According to PW2, Plot No. 142 was subsequently surveyed and became to be known as L.R. 337/3138. However, before a title could be processed in his name, he discovered that the Defendant had constructed 21 semi-permanent structures on the land which he leased to third parties. It was the evidence of PW1 that the Defendant has been collecting Kshs. 42,000 from the tenants since August, 2015.

23. On discovering that the Defendant had put up semi-permanent structures on what he believed to be his land, the Plaintiff lodged a complaint with the police. The said complaint led to the arrest of the Defendant who was charged in Mavoko Criminal Case No. 277 of 2016. According to the charge sheet that was produced in evidence, the Defendant was charged with the offence of "*Forcible Detainer contrary to Section 91 as with Section 36 of the Penal Code.*"

24. The proceedings in the lower court shows that the Plaintiff herein agreed to withdraw the complaint because the two of them had agreed to settle the matter out of court. It is on that account that the Defendant was acquitted on 17<sup>th</sup> June, 2016.

25. Indeed, the withdrawal of the criminal case by the Plaintiff on 17<sup>th</sup> June, 2016 was premised on the Agreement that he entered into with the Defendant on 11<sup>th</sup> May, 2016. According to the said Agreement, the Plaintiff agreed to sell to the Defendant Plot No. 142 for Kshs. 1,300,000. The Agreement shows that the Defendant paid to the Plaintiff Kshs. 600,000 leaving a balance of Kshs. 700,000.

26. The Defendant has agreed having signed the said Agreement. Although in his written statement the Defendant stated that he changed his mind when he realized that Plot No. 142 that he was buying was the same as Plot No. 101 which he had bought from a Mr. Jeremiah, in his testimony before the court, he stated that he was coerced into signing the Agreement of 11<sup>th</sup> May, 2016.

27. As I have stated above, the proceedings in Mavoko Criminal Case No. 277 of 2016 clearly shows that the Defendant signed the Agreement of 11<sup>th</sup> May, 2016 as a condition precedent to his release. Indeed, the Agreement of 11<sup>th</sup> May, 2016 was entered into after the Defendant realized that he had no Defence to the Plaintiff's claim viz-a-viz, the ownership of Plot No. 142. The issue of Plot No. 142 being the same as Plot No. 101 that he purportedly bought from a Mr. Jeremiah cannot arise.

28. In any event, the Defendant did not call the said Mr. Jeremiah to adduce evidence showing that he owned Plot No. 101, and that he is the one who sold it to the Defendant. In the circumstances, I find and hold that the land on which the Defendant has had semi-permanent structures since the year 2015 is Plot No. 142 which he had agreed to buy from the Plaintiff. Having reneged on his Agreement of 11<sup>th</sup> May, 2016, the Defendant should give way and allow the Plaintiff to take possession of his land.

29. The Agreement of 11<sup>th</sup> May, 2016 between the Plaintiff and the Defendant did not state what would happen in the event the Defendant does not complete the transaction. Indeed, the Agreement did not have a completion date. In the circumstances, justice demands that every party should be put in a position where he would be if the Defendant had not encroached on the suit land, meaning that the Plaintiff should take possession of his land and refund the Kshs. 600,000 that was paid by the Defendant.

30. Although the Plaintiff has prayed for *mesne* profit for use of the suits land at the rate of Kshs. 42,000 per month since 2015, the Plaintiff did not adduce evidence on the payable monthly rent. Indeed, the Plaintiff should have called either a current or former tenant of the premises on the suit land to tell the court the rent that the Defendant was collecting from the premises. Alternatively, a licenced land valuer should have been called to testify on the comparable payable rent of such premises. Having failed to do so, I find that the prayer for *mesne* profits was not proved.

31. However, having trespassed on the suit premises in the year 2015, and having utilized the suit land since the year 2015 to the detriment of the Plaintiff, the Plaintiff is entitled to damages for trespass. Considering that the land in question is a commercial plot situated in Mlolongo, on which land the Defendant has 21 semi-permanent structures, I shall award to the Plaintiff Kshs. 1,000,000 as damages for trespass.

32. In the circumstances, I allow the Plaintiff's Plaint dated 2<sup>nd</sup> February, 2017 as follows:

- a. A declaration be and is hereby issued that parcel of land otherwise known as Unsurveyed Commercial Plot No. 142 Athi River is rightfully owned by the Plaintiff.**
- b. An order of permanent injunction be and is hereby issued restraining the Defendant whether by himself, servants, agents, sons, daughters, wives, tenants or anybody claiming under him from entering upon, interfering with, putting up structures, letting tenants or in any other way utilizing the Plaintiff's plot of land known as Unsurveyed Commercial Plot No. 142 Athi River.**
- c. The Defendant to pay to the Plaintiff Kshs. 1,000,000 being damages for trespass.**
- d. The Plaintiff to refund to the Defendant Kshs. 600,000 being the deposit paid.**
- e. The Defendant to pay the costs of the suit.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**