



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CASE NO. 197 OF 2010**

**BALWANT SINGH.....PLAINTIFF**

**VERSUS**

**LIBEY NJOKI MUNENE.....1<sup>ST</sup> DEFENDANT**

**JAMES CHEGE MUNENE.....2<sup>ND</sup> DEFENDANT**

**FACKSON WAINAINA KAGWA.....3<sup>RD</sup> DEFENDANT**

**EIGHTY FOUR INVESTMENTS LTD.....4<sup>TH</sup> DEFENDANT**

**(AS HEARD TOGETHER WITH:**

**CASE NO. ELC CASE NO. 664 OF 2010**

**Between**

***EUNICE NYAMBURA IRUNGU.....PLAINTIFF***

**VERSUS**

***LIBEY NJOKI MUNENE.....1<sup>ST</sup> DEFENDANT***

***JAMES CHEGE MUNENE.....2<sup>ND</sup> DEFENDANT***

***FACKSON WAINAINA KAGWA.....3<sup>RD</sup> DEFENDANT***

***(Sued as the executors of the Estate of:***

***JAMES FLAVIAN CHEGE MUNENE (Deceased))***

***BALWANT SINGH.....4<sup>TH</sup> DEFENDANT***

***EIGHTY FOUR INVESTMENTS LTD.....5<sup>TH</sup> DEFENDANT)***

**J U D G M E N T**

**INTRODUCTION**

1. This suit was heard together with an earlier suit, to wit **Nairobi ELC 664 of 2009** in which I have already given judgment in favour of the plaintiff therein. The parties therein were as shown in the heading above, a clear sign that the two suits are very closely interconnected for indeed the suit land is the same in both cases. This judgment is only in respect of the plaintiff's claim in **Nairobi ELC 197 of 2010**.

**THE PLEADINGS**

**The plaintiff's claim in Nairobi ELC 197 of 2010**

2. In the instant suit the plaintiff filed a plaint dated **26<sup>th</sup> April 2010** seeking the following prayers:

- a) A declaration that the sale of land reference number 7699/2 was conducted and conveyed fraudulently;**
- b) A declaration that the sale and transfer of land reference number 7699/2 is a nullity and that the transfer be annulled;**
- c) In the alternative and without prejudice to the foregoing general damages for the loss occasioned to the plaintiff by the illegal and fraudulent sale of land reference 7699/2;**
- d) Costs of the suit;**
- e) Any other or further relief that this honourable court may deem fit to grant.**

3. The plaintiff has stated in his plaint that he as at all material times a co-owner and he was entitled to possession of the suit land as a tenant in common with James Flavian Chege Munene who died on 23<sup>rd</sup> December 2007; The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants obtained a grant of letters of administration to the estate of the said deceased whereupon they tried to disentitle the plaintiff of his half share in the suit land; that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants have illegally and unlawfully and fraudulently transferred the suit property to the 4<sup>th</sup> defendant without the plaintiff's consent or knowledge and under a purported statutory power of sale terms as non-existent. The particulars of fraud are well set out in the **8<sup>th</sup> paragraph** of the plaint as follows:

- a. Transferring and selling the said property to the exclusion and detriment of the plaintiff;**
- b. Failing to obtain and/or procure the plaintiff's consent to the said transaction;**
- c. The defendants concealing from the plaintiff the sale of the said property to the fourth defendant.**
- d. The first second and third defendants illegally and unlawfully selling off the subject property to the 4<sup>th</sup> defendant;**
- e. The defendants colluding to dispossess the plaintiff his fifty percent share in the said property.**

4. The plaintiff avers that he did not execute a sale agreement in favour of the 4<sup>th</sup> defendant to dispose of and/or convey the said property as is required by the law and as such there is no binding contractual obligation for the sale of the subject property between the plaintiff and the 4<sup>th</sup> defendant. The plaintiff avers that by reason of the foregoing he has been deprived of the use and enjoyment of his property. In his plaint the plaintiff pleads that **Nairobi HCCC No 664 OF 2009** is pending, showing that he was well aware of it by the time he filed his claim.

**The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendant's defence in Nairobi ELC 197 of 2010.**

5. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their defence to the claim on the 2<sup>nd</sup> June 2010. The gist of that defence is that: the plaintiff has failed to disclose that upon purchase the deceased paid the plaintiff's share of the purchase price in the sum of Ksh 518,000/= which sum was secured by a charge by the plaintiff of his half undivided share in the suit land, which charge was registered over the property on 30<sup>th</sup> December 1986 to secure that sum with interest at the rate of 12% per annum compounded; that the plaintiff has failed to pay the said sum; that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants became entitled as administrators of the deceased's estate to exercise their statutory power of sale; that the 1<sup>st</sup> -3<sup>rd</sup> defendants issued a statutory notice before exercising their power of sale and that the plaintiff did not respond to that notice; that the plaintiff, having failed to raise objection to the successful sale of the suit property for long despite knowledge, is guilty of laches; that there was no fraud in the transaction; that the allegations of fraud lack material particulars; that the plaintiff's title to the suit property was vitiated by lack of any or any adequate consideration, and the plaintiff has no legal or equitable claim to the property and that in the alternative the plaintiff's title has been extinguished by prescriptive rights accruing to the deceased.

**The plaintiff's reply to defence of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants in Nairobi ELC 197 of 2010**

6. The plaintiff's reply to defence of the 1<sup>st</sup> -3<sup>rd</sup> defendants was filed on 11<sup>th</sup> June 2010. The new core averments in that pleading are as follows: that he paid the 10% deposit required to secure the suit property before the deceased advanced him a loan to purchase his half share, that he spent Ksh 2,000,000/= towards construction and development of the suit property while the deceased did not; that he has not received any of the estimated Ksh 300,000/= monthly income from the property since 2003 when the deceased became hostile and refused him participation in enjoyment of the rent income; that he owes no monies to the deceased; that any monies that were owing from him to the deceased have been duly redeemed by his share in the rental income that was not paid to the plaintiff by the deceased and the plaintiff's investment of Ksh 2,000,000/= in the suit property and that the 1<sup>st</sup> -3<sup>rd</sup> defendants lacked capacity to sell the property.

**The 4<sup>th</sup> defendant's defence in Nairobi ELC 197 of 2010**

7. The 4<sup>th</sup> defendant filed his defence on 12<sup>th</sup> August 2010. In that defence the 4<sup>th</sup> defendant pleads that : the plaintiff's claim is non suited against it; that it is not aware of the particulars of the plaintiff's co-proprietorship in common with the deceased; that there was no fraud and the suit land was lawfully acquired pursuant exercise of a statutory power of sale after an agreement between it and the deceased; that the

exercise of the statutory power of sale put the 4<sup>th</sup> defendant under no duty to enter into a sale agreement with the plaintiff and thus precluded the need for the plaintiff to be signatory to the sale agreement and that by not having possession of the suit property during the lifetime of the deceased, the plaintiff is now estopped from claiming possession of the suit property.

8. The two related suits having been heard together the only issues arising from this suit which did not feature in the **Nairobi ELC 664 of 2009** and which this court has to address herein are as follows:

*a. Whether the plaintiff is guilty of material non-disclosure;*

*b. Whether the plaintiff's title is vitiated by lack of any or any adequate consideration;*

*c. Whether the plaintiff is guilty of laches;*

*d. Whether the plaintiff's title has been extinguished by prescriptive rights accruing to the deceased.*

*a. Whether the plaintiff is guilty of material non-disclosure;*

9. Though this could have been a serious issue it is necessary to note that the administrators of the estate of the deceased were party to the earlier suit to wit **NBI ELC 664 of 2009** in which the various matters had been pleaded by all the parties.

10. I find that the nature of litigation over the suit property is such that the defendant can not validly claim to have been not provided with facts which were so clearly pleaded in the documents filed in **NBI ELC 664 of 2009** in which it was a party.

11. In any event the filing of the request for further and better particulars promised in paragraph 4 of the 4<sup>th</sup> defendant's defence was never undertaken and in addition, the submissions of the 4<sup>th</sup> defendant in this matter have not addressed this issue and.

12. I therefore find that there was no material non-disclosure on the part of the plaintiff. In the event I am wrong, the true position regarding pleadings is that they are progressively filed and they are meant to bring the parties to an issue. In the instant suit in have noted that the plaintiff filed a reply to the defence of the 1<sup>st</sup> to 3<sup>rd</sup> defendants; this suit has also been heard alongside **NBI ELC 664 of 2010** where the pleadings are deemed to have been complete to each party's satisfaction. I therefore dismiss this contention. These suits were also heard together and parties consented to this. Inter relationship of pleadings and evidence therefore makes this a non-issue at this stage and the defendants can not be said to have been in any way prejudiced.

*b. Whether the plaintiff's title is vitiated by lack of any or any adequate consideration;*

13. The 1<sup>st</sup> – 3<sup>rd</sup> defendant's evidence on this issue is that the plaintiff did not have the money to pay for his share of the land at the time of purchase and that he was lent funds for the purpose by the deceased. However, this issue is put to rest by the failure on the part of the 1<sup>st</sup> -3<sup>rd</sup> defendants to respond to or to call evidence against the allegation by the plaintiff that he paid Ksh 50,000/= of the initial ten per cent deposit required to secure the land. A look at the letter of offer dated 30<sup>th</sup> June 1986 (PEXh 6) shows that two banker's cheques were received from the Thika Branch of the Jimba Credit Corporation Limited where the plaintiff and the deceased held a joint account. Indeed the receipt dated 25/7/1986 (PEXh 7) is issued against the name of that joint account.

14. The agreement dated 27/11/1986 shows that Ksh 100,000/ was paid as deposit. I find that the plaintiff has proved on a balance of probabilities that he paid Ksh 50,000/= as part of the down payment whereas the balance of his obligation to pay the purchase price was secured by a charge in favour of the deceased. I consider this valuable consideration and therefore the transaction, in so far as it was in his favour cannot be said to be vitiated by absence of any or any adequate consideration.

*(c) Whether the plaintiff is guilty of laches;*

15. On this issue the submission by the defendants is that that the plaintiff, having failed to raise objection to the sale of the suit property to the 4<sup>th</sup> defendant for long despite knowledge, is guilty of laches. The defence is drawn from the principle of equity that "*equity does not aid the indolent*" and that "*delay defeats equity.*"

16. What I understand the defendants to say is that notwithstanding any other successful plea that the plaintiff may have put up he has delayed too long and does not deserve the remedies that he seeks.

17. From **paragraph 7** of their defence the doctrine of laches is only pleaded relative to the plaintiff's knowledge that the deceased, and subsequently, the 1<sup>st</sup> -3<sup>rd</sup> defendants were seeking to sell the property to the 4<sup>th</sup> defendant.

18. In the case of **Njuguna Githiru v Attorney General [2016] eKLR**, the court, while considering the issue of laches stated as follows:

**"On the doctrine of laches in Common law, in Smith vs Clay [1767] Eng R 55, (1767) 3 Bro CC 646, (1767) 29 ER 743, Lord Camden LC stated that:**

**'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these**

*are wanting, the Court is passive, and does nothing.’ Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: ”Expedit reipublicae ut sit finis litium’, is a maxim that has prevailed in this court at all times, without the help of parliament.”*

19. An examination of the documents in this case will show if the plaintiff is guilty of delay. However with regard to laches relative to the sale to the 4<sup>th</sup> defendant (and I purposely limit the discussion of the issue of laches to only that transaction because there is a claim of title having been extinguished by way of prescription) it must first be noted that there is no assertion to the effect that the plaintiff has brought his claim outside any legal limitation period. This court is only left with the option of determining if the alleged delay was unreasonable.

20. The transaction between the deceased and the 4<sup>th</sup> defendant began in **December 2006**, going by the evidence in the statement of the 4<sup>th</sup> defendant’s witness, John Muiru dated **3/5/2016**.

21. By that time, at least according to the plaintiff’s evidence the deceased had long ceased sharing rent with him. 1<sup>st</sup>-3<sup>rd</sup> defendants did not involve the plaintiff in transaction with the 4<sup>th</sup> defendant and thus the plaintiff may be properly deemed to have been unaware of it until the issuance of the statutory notice dated **14<sup>th</sup> October 2008**, about two years after the transaction began.

22. The plaintiff responded to this notice by demanding vide a letter dated **3<sup>rd</sup> December 2008** for an account, which the defendants never furnished him with. The transfer to the 4<sup>th</sup> defendant took place on **13<sup>th</sup> October 2010**, almost two years after the demand for an account. It is clear that the plaintiff was waiting for an account during this period, while all the defendants’ conviction was, and still is, that the plaintiff was not entitled to be involved in the sale.

23. This court fails to see how the plaintiff could have been expected to know of the goings on regarding the suit land while he was not a party to the agreement or the transfer in favour of the 4<sup>th</sup> defendant. However the period between the registration of the transfer in favour of the 4<sup>th</sup> defendant and the institution of this suit that is from **13/1/2010 to 29<sup>th</sup> April 2010**, is four months.

24. In my view, the four month period is the only period of delay that this court must refer to in determining whether the plaintiff is guilty of laches.

25. It is clear that that doctrine can not be related to any other sale or transfer subsequent to the transfer to the 4<sup>th</sup> defendant; If any subdivision and sale to other persons by the 4<sup>th</sup> defendant has taken place, the same can only be dealt with under the overriding doctrine of *lis pendens*, as it must have occurred after the filing of **Nairobi ELC 664 of 2009**. The doctrine of *lis pendens* relative to this the transfer to the 4<sup>th</sup> defendant is addressed in **Nairobi ELC 664 of 2009**.

26. In conclusion, considering the secrecy and the fraudulent intent which accompanied the activities of the defendants this was not an unreasonable delay and the plea of *laches* can not succeed in this case.

**d. Whether the plaintiff’s title has been extinguished by prescriptive rights accruing to the deceased.**

27. The defendants did not lead any evidence on this issue and neither did they address it in their submissions and it is considered as abandoned. Notwithstanding that, it is difficult for this court to fathom how the title to the plaintiff could be deemed as having been extinguished in the light of only two events which acknowledged that title: the inclusion of the plaintiff in the agreement for sale dated **25<sup>th</sup> November 2004** (P.Exh 2) and the statutory notice issued by the administrators (P.Exh 21). It is trite that doctrine of adverse possession can not apply where the acts of the deceased and, later on, the administrators of his estate after his demise acknowledged the plaintiff’s title to the land.

28. In addition to the above events, there is the handwritten note dated 10/5/1995 in the plaintiff’s bundle of documents in which the deceased acknowledged the plaintiff’s title by undertaking to pay his expenses incurred in developing the suit property.

29. The plaintiff is admitted to have participated in the rent from the premises till about the year 2002, that is about 7 years later, which makes each period in respect of which allegations of non-assertion of title by the plaintiff could be made since 30<sup>th</sup> December 1986 to the institution of this suit, to be short of the requisite 12 years. This defence cannot therefore stand.

30. The upshot of the foregoing is that the plaintiff’s claim has merit. However, this being a suit that was instituted after **Nairobi ELC 664 of 2009**, the orders made herein must be in rhyme with the orders made in that related earlier suit. Consequently, I find that the plaintiff herein shall be entitled to share in the proceeds of the sale to the plaintiff in **Nairobi ELC 664 OF 2009**.

**CONCLUSION.**

31. I therefore enter judgment for the plaintiff against the defendants herein jointly and severally and issue the following final orders:

**(a) The judgment in this suit shall therefore abide the orders made in the judgment in Nairobi ELC 664 Of 2009 – Eunice Nyambura Irungu Versus Libey Njoki Munene And 4 Others ;**

**(b) The costs of this suit shall be borne by the defendants.**

It is so ordered.

**Dated and signed at Kitale on this 8<sup>th</sup> day of May 2018.**

**MWANGI NJOROGE**

**JUDGE**

**Delivered at Nairobi on this 21<sup>st</sup> day of May, 2018**

**E.O. OBAGA**

**JUDGE**

**21/5/2018.**

**In the presence of:-**

**Mr. Mogoi for Mr. Aboge for Plaintiff**

**M/s. Kivindu for M/s. Gaituri for 4<sup>th</sup> Defendant**

**M/s. Kivindu for Mr. Koech for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Court Assistant - Kevin**