



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 36 OF 2017**

**MUSYOKI NZUE.....PLAINTIFF**

**VERSUS**

**KAMENE MWALIMU.....DEFENDANT**

**JUDGEMENT**

**BACKGROUND**

The plaintiff instituted this suit against the defendant for a permanent injunction restraining him or her agents from interfering with the plaintiff's land Number Mwingi/Mwingi/2901. The plaintiff is also seeking costs of this suit. In paragraph 4 of the said plaint dated 29<sup>th</sup> May 2017 the plaintiff averred that on or about 26<sup>th</sup> August, 1997 he sold a portion of his land to the defendant is late husband one Mwalimu Mukungo (deceased) at a consideration of Kshs.74,000/=. However the defendant's husband died before the sub-division and transfer was effected in favour of the defendant's husband.

The plaintiff averred that on or about the 21<sup>st</sup> July 2016, the defendant and the plaintiff met at the office of the Deputy County Commissioner Mwingi Central together with the Assistant Chief, Kisama Sub-location with a view to facilitate the sub-division of the suit land so that the defendant can be given her husband's portion. The plaintiff further averred that he was forced by the said Deputy County Commissioner and the Assistant Chief to surrender the original title deed of the suit land to the defendant so that she could fast track the process.

It is further averred that on or about the 9<sup>th</sup> May, 2017 the plaintiff was arrested by the Assistant Chief, Kisama Sub-location and taken to the DCC's office where he found the defendant. He was forced to sign by thump printing several documents unknown to him which were not read and interpreted to him. Thereafter, he was taken by the Assistant Chief to the Mwingi District Lands Registry where he signed other documents unknown to him before being released.

The plaintiff also averred that at the time of signing those documents, the Assistant Chief held him by the belt threatening to confine and harm him unless he complied with the orders. The following day on 10/5/2017 the Assistant Chief came to his home and demanded with threats the plaintiff's National Identity Card and he gave it to him. Later the same day the Assistant Chief returned his National Identity Card.

As a consequence of those events, the plaintiff is suspicious that the defendant in collusion with the said Assistant Chief have conspired to transfer the whole of the suit land to the defendant through fraud, threats, intimidation and coercion.

The plaintiff therefore sought for an order of permanent injunction restraining the defendant either by herself or through her agents from interfering with the plaintiff's parcel of land Number Mwingi/Mwingi/2901. The plaintiff also seeks the costs of this suit.

The plaintiff filed the suit simultaneously with a Notice of Motion dated 29<sup>th</sup> May 2017 seeking temporary injunction orders restraining the Mwingi District Land Registrar from effecting transfer or dealing with any transaction whatsoever in parcel No. Mwingi/Mwingi/2901 pending hearing and determination of the said application and the suit herein. After hearing of the said application under certificate of urgency, the duty court granted temporary injunction orders which were confirmed after the inter-parties hearing. In a statement of defence dated 13<sup>th</sup> September and filed on 18<sup>th</sup> September, 2017, the defendant denied the plaintiff claim and all particulars of fraud, collusion, threats and or coercion.

In the alternative the defendant averred that the plaintiff willingly filled all the transfer forms and the Land Control Board summons to transfer the suit land to the defendant free from any fraud, coercion or collusion.

**PLAINTIFF'S CASE**

When this case came up for inter parties hearing the plaintiff testified on oath and stated that he sold his land to one Mwalimu Mukungo who was the defendant's husband before his demise. He sold it to him at a purchase price of Kshs.74,000/= but the purchaser passed away before

the land was sub-divided and the transfer effected. He referred to his witness statement signed on 29/5/2017 which was adopted in evidence. He called four (4) witnesses in support of his claim. PW2 was Munyoki Muli whose witness statement dated 5<sup>th</sup> September 2017 was adopted in evidence. In his brief testimony the witness stated that sometime in July 1997, the plaintiff approached him saying that he had agreed to sell a portion of his Land L.R No. Mwingi/Mwingi/2901 measuring 1½ Hectares to the defendant's husband, one Mwalimu Mukongo at a price of Kshs. 74,000/=. He was paid Kshs.56,000/= leaving a balance of Kshs.14,000/=.

PW3 was Grace Njoki Wambua who also gave sworn testimony and recalled that sometime on 27/8/1997, the defendant's late husband, one Mwalimu Mukongo came to their home and purchased a portion of their father's (plaintiff's) Land Parcel No. Mwingi/Mwingi/2901 measuring 1½ Hectares at an agreed price of Kshs.74,000/=. The defendant's late husband paid a deposit of Kshs. 56,000/= leaving a balance of Kshs. 18,000/= to be paid on or before 10/12/97.

PW4 was Esther Kivivya Kinuva who is the plaintiff's nephew. He stated that sometime in the year 2013, the plaintiff told him that the Assistant Chief of Kisama Sub-location went to his home accompanied by the defendant and another person and the Assistant Chief told him that he had brought a buyer to purchase the whole of his land parcel No. Mwingi/Mwingi/2901.

### **THE DEFENDANT'S CASE**

The defendant recalled that on or about the 26/8/97 the plaintiff sold her late husband land parcel no. Mwingi/Mwingi/2901 measuring 9½ acres at a purchase price of Kshs.74,000/=. The late husband paid a down payment of Kshs.56,000/= leaving a balance of Kshs.18,000/= to be paid by instalments and/or in kind. They paid the balance in cash and/or through taking of vegetables at her shop situated in Mwingi market. They wrote a sale agreement which was signed by all the parties and their witnesses.

Their witnesses were William Kanyola and Kalunda Nzoka. The defendant also relied on her list of documents dated 20<sup>th</sup> June 2017 and filed on 18<sup>th</sup> September 2017. After paying by instalments and in kind, they remained with a balance of Kshs. 2660/=. On 21/7/2016, they wrote another agreement in which she paid the plaintiff the balance of Kshs.2660/= plus Kshs.7,000/= being a share of compensation paid by a road construction company who had acquired part of their land by compulsory acquisition to construct a road passing through their land.

The defendant stated that upon making the said payments the plaintiff signed the transfer forms and the application for consent to the Land Control Board. The defendant further stated that they planted trees on the boundaries upon purchase of the suit land. The defendant called DW2 namely William Kanyola who is a village elder, Kisama Sub-location Kyanundu village. He recalled that on 26/8/97 he witnessed the plaintiff selling the defendant's husband a parcel of land at a purchase price of Kshs.74,000/=. The defendant's husband paid a deposit of Kshs.56,000/=. They were shown the boundaries where the trees were planted. The sale agreement was drawn by someone known as Kalunda Nzoka. He does not know the acreage of the land sold by the plaintiff to the defendant's late husband.

### **ANALYSIS AND DECISION**

I have considered the viva voce evidence adduced by both the plaintiff and the defendant together with the documents produced in support of their respective positions. I have also looked at the demeanour of the witnesses and their answers in cross examination. The plaintiff in his evidence admitted having sold a parcel of land to the defendant's late husband Mwalimu Mukongo at a consideration of Kshs.74,000/=. Copy of sale agreement contained in the plaintiff's list of documents and translated from Kikamba to English are shown as item No. 3 and 4 respectively. From the English translated version, the description of the land being sold and the portion or acreage of the demised suit premises is not indicated in a letter written by Musyoka Wambua and Katiku Advocates for the defendant addressed to the plaintiff dated 15<sup>th</sup> September, 2011.

The counsel on behalf of his client Mr. Mwalimu Mukongo were informing him that he had sold their client a portion of his land at a purchase price of Kshs.74,000/=. The description of the suit property is not indicated neither is the size, and/or acreage. That letter which is attached to the plaintiff's supporting affidavit to the Notice of Motion dated 29<sup>th</sup> May 2017 has not been challenged and/or controverted by the defendant by way of a replying affidavit or grounds of opposition thereto.

In her testimony, the defendant referred to her list of documents which included a letter by the Assistant Chief, Kisama Sub-location dated 10/9/2012 a sale agreement dated 10/5/2017 and an application for consent of the Land Control Board dated 13/4/2017. The letter by the Assistant Chief is purported to be an agreement between the seller and the purchaser on the payment of an outstanding balance of Kshs.2660/= and the process of transfer of the suit property. The second document is another agreement to purchase land between Musyoki Nzue Mutweli (plaintiff) on one hand and Kalekye Ngovi. The agreement is in the letter head of the Office of the President dated 4/1997. It is not clear whether the agreement was made on the 4<sup>th</sup> day or the month of April, 1997. The agreement also refers to the size of the demised property as 3.3 hectares. However, the description of the plot is not given.

On part B of the alleged agreement, it's shown that the purchaser completed the balance of the purchase price of Kshs.9660/= on 21/7/2016. It is not clear whether the Assistant Chief has been retaining the sale agreement from 4/1997 until 21/7/2016 when the defendant completed the payments or the parties took it to him after the payments were completed. Be that as it may, the parties and their witnesses have admitted that the demised property was bought by the defendant's late husband Mwalimu Mukongo sometime in 1997 at a price of Kshs.74,000/=. The description and size of the property was not given.

The plaintiff and the defendant have produced two sets of agreements and documents in support of their respective positions. I find the evidence adduced by the plaintiff more reliable and probable. The sale agreement produced by the plaintiff indicates that the subject property was bought by Mwalimu Mukongo who is the defendant's late husband on 26/08/97 at a price of Kshs.74,000/=. He paid a down payment of Kshs.56,000/= leaving a balance of Kshs.18,000/=. The size and location of the property being sold is not shown.

The defendant also in her evidence admitted that her late husband bought a portion of land from the plaintiff on 26/8/97 at a price of kshs.74,000/=. However, her testimony that the size of property sold was 9½ acres is not true as that is not shown in the original sale

agreement. I also find and hold that the documents relied by the defendant shown in the defendant's list of documents were obtained through coercion threats and intimidation.

The sale agreements and the transfer and consent of the Land Control Board were not obtained willingly from the plaintiff. In the upshot, I find and hold that the plaintiff has proved his case against the defendant on a balance of probabilities.

Consequently, I enter judgement for the plaintiff against the defendant as follows;

- 1. A permanent injunction restraining the defendant either by herself or through her agents from interfering with the plaintiff's parcel of land Number Mwingi/Mwingi/2901.**
- 2. The plaintiff to sub-divide and process the transfer of the portion he sold to the defendant's late husband in accordance with the sale agreement entered on 28<sup>th</sup> August, 1997.**
- 3. Each party to bear her own costs of this suit.**

**Read, Delivered and Signed in the open court this 11<sup>th</sup> day of July, 2018.**

**Hon. Justice E. C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Defendant
2. Plaintiff/Advocate (absent)
3. Court clerk: Ijabo/John Paul present