



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 157 OF 1996**

**M'TWAMWARI M'MWIRICHIA.....PLAINTIFF**

**VERSUS**

**M'MUGIRIA M'THUURA.....1<sup>ST</sup> DEFENDANT**

**JOSEPHINE KINANU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff commenced these proceedings by a plaint dated 23<sup>rd</sup> October, 1996 which was filed on 25<sup>th</sup> October, 1996. He sought the following orders:-

- a. Rectification of the register in respect of NKUENE/U-MIKUMBUNE/1198 and NKUENE/U-MIKUMBUNE/1199 in the plaintiff's name**
- b. General damages for breach of contract and properties of the plaintiff which have been either (sic) or destroyed by the defendants.**
- c. Costs and interest.**
- d. Any other relief that this honourable court may deem fit to grant.**

2. The 1<sup>st</sup> defendant and 2<sup>nd</sup> defendants filed separate both defences both dated 13/11/1996 and both filed on 14/11/1996.

**THE PLEADINGS**

**The Plaintiffs' Case**

3. According to the plaint the plaintiff's case is that on the 14/9/1974 he entered into a sale agreement with the 1<sup>st</sup> defendant for two acres from Parcel No. Nkuene/U-Mikumbune/74.
4. Prior to the agreement the plaintiff had taken possession of the suit land with the consent of the defendant in 1970.
5. After the defendant refused to transfer the said parcel the plaintiff filed **RMCC No. 321 of 1977** against the defendant in which the court on 16/5/1996 ordered the transfer of the 2 acres to the plaintiff and empowered the executive officer to sign all the necessary documents to effect the transfer of the land to the plaintiff.
6. The plaintiff avers that after the defendant failed to surrender the title deed to facilitate the subdivision it was advertised in the Kenya gazette of 31/3/1996 and the defendant given 30 days to surrender the same.
7. It is the case of the plaintiff that the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant initiated **Meru CMCC No. 501 of 1995** where the 1<sup>st</sup> defendant filed a defence admitting the claim hence causing one of the plaintiff's acres to be fraudulently to the 2<sup>nd</sup> defendant. The other one acre was retained by the 1<sup>st</sup> defendant.
8. The plaintiff avers that he has developed the 2 acres extensively with 210 coffee trees, 100 banana trees, piped water and semi-permanent

house. He had also planted different kinds of trees including fruits trees on the land. It is the plaintiff's claim that the filing of **Meru CMCC No. 501 of 1995** was a fraudulent act on the part of the two defendants as was the refusal to surrender the title deed and the alleged secret subdivision of the land and the giving of possession of one acre to the plaintiff hence the suit.

### **The 1<sup>st</sup> Defendants' Defence**

9. The 1<sup>st</sup> defendant admits the agreement but avers that in his defence that the plaintiff breached that agreement by refusing to pay the balance of the agreed consideration thereby rendering the agreement null and void.

10. He also disputes the existence of a decree in **Meru RMCC No. 321 of 1977** saying that the suit has not been determined and terms the instant suit a duplication of that suit.

11. He denies collusion with the 2<sup>nd</sup> defendant in the institution of **Meru CMCC No. 501 of 1995** and avers that the 2<sup>nd</sup> defendant got a portion of the land by virtue of and in compliance with order of the court.

12. He maintains that he has a legal right to retain the other portion and avers that there is no court order affecting it. He also denies that there is no development effected by the plaintiff on the land.

13. In addition he terms the 2<sup>nd</sup> defendant as a bona fide purchaser for value with clean hands who obtained her title procedurally and paid full consideration and denies all particulars of fraud in the plaint. He maintains that the 2<sup>nd</sup> defendant was at liberty to enforce her contractual rights; that the 2<sup>nd</sup> defendant was not party to **Meru RMCC No. 321 of 1977**; that the 1<sup>st</sup> defendant has no legal obligation to surrender his title deed.

### **2<sup>nd</sup> Defendant's Defence**

14. The 2<sup>nd</sup> defendant maintains in her defence that she was not the only litigant in **CMCC No. 501 of 1995**; that she is a bona fide purchaser for value; that she was not a party in **RMCC No. 321 of 1977** and is a stranger to any consequence thereto; that the plaintiff has no *locus standi* against her; that she bought the land with all the developments thereon from the 1<sup>st</sup> defendant; that there was no collusion between the 1<sup>st</sup> and the 2<sup>nd</sup> defendants to institute **CMCC No. 501 of 1995**.

### **Proceedings**

15. An application was filed on **20/4/2000** seeking an inhibition order against Parcel No. **Nkuene/U-Mikumbune/1199** on the basis that the respondents are selling parts of that land to 3<sup>rd</sup> parties yet the plaintiff lives on it.

16. The plaintiff filed a list of **16** documents to be produced in evidence dated 12/7/2013 as well as his statement and list of witnesses. On **19/6/2017** an application was filed to substitute one Teresa M'Mungiria as the legal representative of M'Mungiria MThura who is said to have died on **10/5/2015** whereupon the said Teresa was appointed his legal representative in **Meru CMCC Misc. Succ. Cause No. 43 of 2017**. That application was allowed on **24/10/2017**. The plaintiff further filed a further record of documents to be relied on on **22/6/2018**. The main suit herein proceeded to hearing on the **25/6/2018**.

### **THE EVIDENCE OF THE PARTIES**

#### **The Plaintiff's Evidence**

17. The plaintiff testified on **25/6/2018** as **PW1** and adopted his statement dated **4/7/2012** as his evidence-in-chief. He also produced his bundle of documents dated **22/6/2018** as his evidence in the suit. The court adopted that list and bundle of documents. He added that the defendants are his neighbours; that the deceased original 1<sup>st</sup> defendant is his nephew while the 2<sup>nd</sup> defendant is his wife. He stated that he bought the land from M'Thura and he has been in occupation of the land since **1974**. According to the plaintiff the agreement between the parties was entered into **14/9/1974** before Mbaya & Rimita Advocate; the consideration was **Kshs.3,500/=** acknowledgment of receipt of the monies were made; that he took possession of the land and developed it; that M'Thura later claim that the original title was lost and reported the alleged loss to Nkubu police station; that later on he saw the land being subdivided into three portions and a mutation issued; that **Plot No. 1197** was given to Moses Mbaabu Ngaruthi, **Plot No. 1198** to Josephine Kinanu and **Plot No.1199** to M'Thura. He testified that the undivided parcel was **3.12 acres** and he is occupying **2 acres**. He identified his plot as lying on the land registered in the name of the deceased 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant that is **Plot No. 1998** and **Plot No. 1999**. He stated that he sued M'Thura in case No. **321 of 1977** and adopted the order in that case as his evidence. He recalled that the executive officer was empowered to transfer the land to him and that M'Thura was asked to bring the original title; He further testified that the Registrar gazetted the allegedly lost title for **Plot No. 74** and in the **Gazette Notice No. 1712 on 31/3/1995** and that the executive officer signed the transfer for the 2 acres the plaintiff had purchased and produced the signed transfer as **P. Exhibit 17**. He prayed for nullification of the other titles issued over the suit land and that he be issued a title deed in respect thereof.

18. Upon re-examination he testified that he had leased the land from M'Thura Njeru the father to M'Mungiria M'Thura and that the vendor's family knew of that sale. He further stated the two houses on the land belongs to his son and that the 2<sup>nd</sup> defendant does not have any house on the land.

#### **The 1<sup>st</sup> Defendant's Evidence**

19. The 1<sup>st</sup> defendant testified on 25/6/2018. She stated that the plaintiff was leased suit land by M'Thura Njeru and when M'Thura died, M'Mungiria leased the land again to the plaintiff. She further stated that when M'Mungiria died the plaintiff came to their home alleged that he had been taking care of the land belonging to M'Mungiria so the family should see him so as to get the land but later on he sued her. Upon cross examination she admitted that she is the wife to the late M'Mungiria M'Thura; that her family had land which they were living on at Nkubu; that she was not living on the suit land but used to go there for food; that the land used to be her father-in-law's (that is Njeru's) property; that when Njeru was alive the plaintiff was not using the land and he entered the land when it came into M'Mungiria's hands. On further cross examination she admitted that M'Thura Njeru had leased the plaintiff the land and that the plaintiff worked the land even during Njeru's lifetime. She admitted that the plaintiff lives on the land with his children. She stated that she has only heard in this court that the land owned by M'Mungiria M'Thura was later subdivided. She denied that the plaintiff had been sold the land; that however she did not know if there were any efforts M'Mungiria M'Thura to evict the plaintiff; that the children she had with M'Mungiria M'Thura live on a another parcel of land at Moni; that the 2<sup>nd</sup> defendant bought M'Mungiria M'Thura's land though she did not know when that happened. She denied knowing any particulars of the sale between her M'Mungiria M'Thura and the 2<sup>nd</sup> defendant.

20. PW2 also testified on 25/6/2018. She stated that she was sold the land by M'Mungiria; that she was taken to the land control board where they obtained consent and 3 titles were issued after subdivision. She averred that she sold her land after her husband fell sick and needed money for medical fees; that when she went to cultivate on the land the plaintiff chased her away and the Chief advised her to come to court and obtain an eviction order against the plaintiff. She attributed her inability to come to court for eviction orders to lack of funds. She prayed that the plaintiff be ordered to get out of the land. Just like the 1<sup>st</sup> defendant she never produced any documentary evidence in support of her case. However she admitted that M'Mungiria's wife and children were not involved in the sale transaction either by way of being witnesses or attending the land control board. She averred that she stayed on the land for 5 years and that when her husband died the plaintiff chased her away just when she was preparing to construct a house on the land. However she also added that she has since transferred the land to one Lucy for Kshs.400,000/=.

21. The plaintiff then filed his submissions on 17/7/2018. I have perused through the record and find that there are no submissions filed on behalf of the defendants.

## **DETERMINATION**

### **Issues for Determination**

22. The issues that arise in this suit are as follows:

**a. Was the plaintiff guilty of any act of breach of sale agreement between him and M'Mungiria M'Thura?**

**b. Was there any fraud on the part of the M'Mungiria M'Thura aimed at denying the plaintiff ownership of the suit land?**

**c. What orders should issue?**

**(a) Was the plaintiff guilty of any act of breach of sale agreement between him and M'Mungiria M'Thura?**

23. The agreement between the parties was produced as **P.Exhibit 1**. It is dated **14/9/1974**. It is an elaborate document. It was admitted by the original 1<sup>st</sup> defendant in his defence. His only dispute with the plaintiff was whether the purchase price had been paid in full. It is however notable that the 1<sup>st</sup> defendant never pleaded the amount of consideration that was in dispute, which he alleged to be outstanding. It was also not proved by way of any oral or documentary evidence of the 1<sup>st</sup> defendant at the hearing that any balance of consideration existed. On the other hand the plaintiff produced evidence that he had paid a total of **Kshs. 3351/=** to the 1<sup>st</sup> defendant through the law firm of Mbaya & Rimita Advocates in various instalments even before the title was transferred to him despite **Clause (c)** of the agreement which reads that "**Kshs. 1713.60 shall be paid upon the official transfer of the said land in the name of the purchaser.**" According to the agreement **Kshs. 586.40** had been paid prior to its execution. Going by the receipts produced by the plaintiff, he had already paid **Kshs. 2764.60** more by **19<sup>th</sup> August 1977**. If the particulars in the agreement are to be strictly construed there is **Kshs. 150/=** in respect of which the plaintiff has not produced any evidence of receipt. However that amount is not pleaded in the 1<sup>st</sup> defendant's defence. Neither was any other amount alleged to be the balance mentioned by the 1<sup>st</sup> defendant at the trial. The witness **PW1** stated that she did not even know that the land had been sold to the 2<sup>nd</sup> defendant and **PW2** admitted that the 1<sup>st</sup> defendant and her children were not involved in the transaction at all. For those reasons I find that it can not be held that the plaintiff had any balance outstanding over the suit land, upon which the 1<sup>st</sup> defendant could rely to effectively plead breach.

24. I therefore find that the 1<sup>st</sup> defendant has failed to prove that there was any breach of the agreement dated **14/9/1974** on the part of the plaintiff.

**(b) Was there any fraud on the part of the M'Mungiria M'Thura aimed at denying the plaintiff ownership of the suit land?**

25. The defence of the 1<sup>st</sup> defendant who owned the land at the time of the transaction stated that the plaintiff breached the agreement. As per the court's findings herein above there is no evidence to that effect.

26. However there is evidence that there was litigation between the parties to the agreement. That fact is admitted by the 1<sup>st</sup> defendant whose only defence to the claim that the said litigation ended in favour of the plaintiff is that that litigation is still pending. No evidence was availed

by the 1<sup>st</sup> defendant to that effect. However the plaintiff produced a copy of an order that appears to be signed by the chief magistrate on an unclear date. That order seems to remove the caution over parcel number **74** and at the same time to empower the executive office of the court to sign all the necessary documents to effect transfer of the land title number **Nkuene/U-Mikumbune /1062** to the applicant who is named as the plaintiff herein. I have looked at **P.Exhibit 7**. It is a copy of a mutation form in respect of **Parcel Number Nkuene/U-Mikumbune/74**, that seems to divide the said land into two parts one measuring **0.81 ha** and the other **0.44 ha**. The same appears to have been executed by the District Surveyor on **30/4/87**. A letter of consent to transfer dated **23/6/94** appears to have been issued to enable the transfer of one of the portions appearing on the mutation that is **Nkuene/U-Mikumbune /1062**. The transferor is said to be the Executive Officer of the court and the transferee is the plaintiff herein. It reflects that the land is being transferred by virtue of a court order to the plaintiff herein. **P.Exhibit 17** was also produced. It is a copy of a transfer of the land comprised in **Nkuene/U-Mikumbune/1062** to the plaintiff. It is dated **8/12/94**. It has all the hall marks of a document already submitted for stamp duty assessment and franking at the Lands office. It has been signed by the Executive Officer. It was the evidence in the statement of the plaintiff that in the process M’Mungiria claimed that his original title was lost. A copy of a letter from the Land Registrar to the 1<sup>st</sup> defendant dated **31/1/95** demanding the surrender of the title to the land failure to which it shall be dispensed with was produced as **P.Exhibit 15**. It was expressed in that letter that the purpose of the demand was to enable the registration of a mutation and transfer documents which arose as a result of **Meru RM civil case number 321 of 1977**. A copy of a **Gazette Notice No 1712** issued under the **Registered Land Act** (repealed) on **31/3/1995** was produced as **PExh 13**. It signifies that the 1<sup>st</sup> defendant in the instant suit never surrendered the title and for the purpose of the registration of the mutation and transfer the same had to be dispensed with and in order for that to happen the gazette notice had to be issued. The Gazette Notice reads that upon the expiry of **30** days from the date of the publication of that gazette notice and upon the registration of the plaintiff herein as owner, the 1<sup>st</sup> defendant’s title would be deemed as cancelled and of no effect. Apparently no registration ever took place even after the **30** days. The cautions registered over the land by three persons including the plaintiff appear to have been removed by virtue of an order of court registered in the title on the **19/7/1995**. On the same day portions of the land was subsequently transferred to three persons who included the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. The plaintiff claims that his land is comprised in two of these portions, **Plot Number 1198** and **Plot No 1199**.

27. A copy of the proceedings in **Meru CMCC 501 OF 1995** was produced in court in evidence. It shows that the 2<sup>nd</sup> defendant and another person had sued the plaintiff who filed his admission in the matter on which the judgment of the court was issued in favour of the plaintiffs therein on **21/6/95**. The suit lasted a period akin to the lifespan of *Simon Makonde* the subject of a traditional African fable: the plaint was filed on **13/6/1995**, the return of service was filed on **20/6/1995**; the **defence by way of admission** was filed on **20/6/1995**; the memorandum of appearance was filed on **20/6/1995**; and the request for judgment on admission was filed on **21/6/1995**. On the **27/6/1995** the matter came up before the Magistrate who recorded the 1<sup>st</sup> defendant herein as saying that he has admitted the claim and that he wished to give the plaintiffs land as they had prayed. A further judgement, this time round christened a **“consent judgment”** was entered into, whereby the defendant was to transfer portions of the land measuring one acre to each of the plaintiffs therein respectively. Then on the **11<sup>th</sup> July 1995** an application was allowed without any opposition by the defendant, that the **“caution”** on the land be removed. It is noteworthy that it refers to only **one caution**. This is the order which, as has been seen, was registered seven days later on **19<sup>th</sup> July 1995** purporting to lift the cautions registered vide **entries numbers 4,5, and 6** on the 1<sup>st</sup> defendant’s main title, and subsequently the transfers to the 2<sup>nd</sup> defendant herein and another party were registered. The plaintiff not having been a party to **Meru CMCC 501 of 1995**, the removal of his the caution registered in his favour under **entry number 5** using the court order obtained in **Meru CMCC 501 of 1975** was illegal. From the bundle produced by the plaintiff it is clear that an application was made dated **4/4/2000** to stop the registration of any dealings with parcel number **Nkuene/U-Mikumbune /1199** on the basis that the applicant is claiming two acres from the suit land. The only thing discernible from the record concerning this application is that it was on **10/4/2000** fixed for hearing on **18/5/2000**. No doubt this application was filed long after the horse had bolted. But was the plaintiff herein to blame? Absolutely not, in my view. The 1<sup>st</sup> defendant knew all along of the existence of **Meru RMCC 321 of 1976** and he should have, in the absence of the plaintiff herein from the list of parties in **Meru CMCC 501 of 1995**, sought to inform the plaintiff and the court and the other parties generally, assuming that they did not already know, of that former suit and its effects on the land which had already been ordered to be transferred to the plaintiff herein. In my view the conduct of the two defendants herein was not honest, and it was calculated to defeat, and did indeed defeat the process of registration of the suit land in the name of the plaintiff. I find that their conduct was fraudulent. It may be sympathetically urged that the other parties involved in that litigation in **Meru CMCC 501 of 1995** were innocent and do not deserve to suffer any adverse effects of the orders of this court. But were they? A look at the extracts from the register reflect that as at the time of the registration of the order in **Meru CMCC 501 of 1995** there still existed a caution in favour of the plaintiff herein in respect of that land. In my view this was the point at which the due diligence of the other parties would have been expected. However, it is either that the other parties did not exercise due diligence in that they appear not to have bothered to enquire of the plaintiff what the plaintiff’s interest in the land or that they were fully complicit in the fraud. The reason I state that is that clearly the order they obtained in **Meru CMCC 501 of 1995** did not expressly or implicitly envisage the removal of the caution lodged by the plaintiff. I find that they may not have been alone in this exercise as the Land Registrar should also have enquired of the plaintiff the same question and restrained himself from including the plaintiff’s caution among those to be lifted by virtue of the order made in **Meru CMCC 501 of 1995**. The consequence of those omissions was that the land was subdivided and transferred to the disadvantage of the plaintiff herein. So, was the subdivision of the land and subsequent sale to third parties pending the hearing of this suit excusable for the reason that it was pursuant to another judgment of the court? This court frowns on transactions relating to property pendent lite. The doctrine of *lis pendens* is a common law principle which was incorporated into the law under **Section 52** of the **Indian Transfer of Property Act 1882** which provides as follows:

**“52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”**

28. In the case of **Carol Silcock Vs Kassim Sheriff Mohamed 2013 eKLR (Case No 55 Of 2011)** the court stated as follows:

**“The Plaintiff’s counsel relied on the case of FREDRICK JOSES KINYUA & ANOTHER VS E. N. BATED, NAIROBI CIVIL CASE NO. 4819 OF 1989 in which Justice G. S. Pall quoted with approval a passage in Sir H. S. Gaur’s Transfer of Property Act, 7th Ed; pg 579:**

**“Every man is presumed to be attentive with what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”**

29. Any transferor and transferee engaging in transactions while litigation is pending do so at their own peril once the litigation is concluded and they will not have anyone but themselves to blame. No want of notice of the subject litigation can reverse the situation. As I have noted the earlier proceedings in *MERU RMCC 321 of 1976* have not been shown to have been brought to the notice of the court in *Meru CMCC 501 of 1974* and vice versa. The plaintiff was not a party in the latter suit. The extremely short lifespan of that other suit and the hurried admissions made by the 1<sup>st</sup> defendant herein in that suit are symptomatic of massive fraud. If the earlier proceedings had been brought to the attention of the court in *Meru CMCC 501 of 1974* by the 1<sup>st</sup> defendant herein - and I find that it was incumbent upon him to bring them to the court's notice-the orders made in *Meru CMCC 501 of 1995* may never have been made for indeed a court should not countenance the making of orders that contradict earlier orders save on review. This court noted as much in **KITALE LAND CASE NO. 126 OF 2004 RABECCA NASOMBI KHISA (as legal representative of the estate of JOHN KHISA MUMELO (Deceased) VERSUS ALICE LUSWETI** stating: **“This is sufficient ground for review, for it is improper in a justice system for two proceedings having different conclusions over the same subject matter to exist side by side without any conscious rationalization for that existence.”** It is the conclusion of this court that the proceedings and judgment on *Meru CMCC 501 of 1975* can not be relied on to validate the illegal acts of the defendants. I therefore find that the subdivision of the land and the transfers in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in this suit and one **Moses Mbaabu M’Ngaruthi** were done fraudulently and solely for the purpose of defeating the plaintiff's interest in the suit land. They are therefore illegal and subject to cancellation at the instance of this court.

## **CONCLUSION**

### **(c) What orders should issue?**

30. I find that the plaintiff has proved his claim on a balance of probabilities against the defendants and I issue the following orders:

- a. The title registered in the name of the 2<sup>nd</sup> defendant in respect of NKUENE/U- MIKUMBUNE/1198 on 6/9/95 and any other title or titles that may have been consequently issued to any other person following any subsequent transfer of NKUENE/U-MIKUMBUNE/1198 are hereby cancelled and in lieu thereof the plaintiff shall be registered as the proprietor thereof.**
- b. The title registered in the name of the 1<sup>st</sup> defendant in respect of NKUENE/U- MIKUMBUNE/1199 on 6/9/95 and any other title or titles that may have been consequently issued to any other person following any subsequent transfer of NKUENE/U-MIKUMBUNE/1199 is hereby cancelled and in lieu thereof the plaintiff shall be registered as the proprietor thereof.**
- c. The 1<sup>st</sup> defendant shall pay to the plaintiff the sum of Kshs. 300,000/ being general damages for breach of contract.**
- d. The Deputy Registrar of this court shall execute all documents necessary to transfer the suit lands into the plaintiff's name.**
- e. General damages for properties of the plaintiff which have been either (sic) or destroyed by the defendants will not be awarded for lack of proof.**
- f. The 1<sup>st</sup> and 2<sup>nd</sup> defendant alone shall bear the costs of this suit.**

It is so ordered.

Dated, signed at Kitale this 12<sup>th</sup> day of October, 2018.

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

**Delivered at Meru on this 31<sup>st</sup> day of October, 2018**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MERU**