



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 68 OF 2010**

**ABSOLOM U.P. ABEBE.....PLAINTIFF**

**=VERSUS=**

**MBUKONI HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MIRIAM JUMA ISMAIL.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The first defendant is a land buying company which is involved in the business of buying land, subdividing the same for sale to interested individuals. The Plaintiff and the second defendant are both claiming to be the rightful owners of plot No.17 comprised in LR No. 12715/232 (now number 4083) (suitland).

2. The Plaintiff brought this suit against the defendants seeking the following reliefs:-

*i. A declaration that he is the owner of plot No.17 of LR No. 12715/232 (4083).*

*ii. General damages for trespass and loss of value of the property.*

*iii. An order that the defendants do remove all structures erected and or materials deposited on plot No. 17 of LR No. 12715/232 ( 4083) and the restoration of the plot to its original status.*

*iv. Costs of the suit.*

3. The second defendant filed her defence and raised a counter-claim in which she sought the following reliefs:-

*a. A permanent injunction restraining the Plaintiff, himself, agents, servants or otherwise howsoever from demolishing any structures erected thereon, trespassing into interfering with the possession of and use of the land known as plot No.17 of LR No 12715/232.*

*b. Costs of this suit.*

4. The Plaintiff testified that he is a resident of Syokimau in Machakos County. Sometime in 2007 he saw an advert advertising a plot for sale which was next to his home. He contacted the person who had put up the notice. A lady came and told him that the plot belonged to her brother but that she had authority to sell

the plot on behalf of her brother. The lady told him that she was in the process of transferring the plot into her name before she could transfer it to him. The two agreed on the purchase price at Kshs.430,000/=.

5. The two then proceeded to the offices of the first defendant where the lady known as Zaida Abubakar caused the records in the first defendant's books to be changed from her name into that of the plaintiff upon paying transfer fees. The Plaintiff was then given a certificate of ownership and beacon certificate by the first defendant. He paid Zaida Abubakar after which he took possession of the plot which he fenced

6. In December 2008, he received a call from a person who introduced himself as a police officer who told him that he was occupying someone else's land. In April 2009, the same officer called him with the same information. He was subsequently charged in court with the offence of malicious damage to property but he was finally acquitted.

7. The second defendant in her evidence stated that in 2002, she purchased a plot from the first defendant. She made payment through instalments until 11<sup>th</sup> August 2006 when she cleared paying. The purchase price was Kshs.250, 000/=. She was given a beacon certificate and certificate of ownership by the first defendant. When she moved in and put up a structure and accumulated building materials ready to build, the plaintiff came and destroyed her fence and demolished the structure on the plot. She made a complaint to the police who arrested the plaintiff and charged him with the offence of malicious damage to property.

8. The first defendant through its director Thomas Maingi Wambua testified that the company sold the suitland to the second defendant who paid for it in instalments with effect from 2002 to 2006 when she cleared paying the purchase price. This witness testified that he had sold two plots to the plaintiff but that the suitland was not part of the two plots which the company sold to the plaintiff.

9. I have carefully considered the evidence adduced herein and the documents relied on by the plaintiff and the second defendant. The Plaintiff and the second defendant are both claiming to have bought the suitland. The two have produced documents which they state are from the first defendant company. The issue for determination in the circumstances is who is the genuine owner of the suitland. In a suit like this where two parties are claiming the same plot, the court has to examine the documents critically to arrive at a decision on who has a genuine case. A case like this is won or lost based on the strength of the evidence, its credibility as well as the pleadings.

10. It is trite law that a party is bound by his pleadings and cannot be allowed to depart from his pleadings in evidence. In the instant case, the plaintiff pleaded in his plaint that he bought the suitland from Ibrahim Abubakar Shaaban. This is contained in paragraph 5 of his plaint filed in court on 19<sup>th</sup> February 2010. In his testimony in court, the plaintiff stated that he purchased the suitland from Zaida Abubakar, a sister to Ibrahim Abubakar Shaaban who had a power of attorney from her brother. A look at the documents relied on by the Plaintiff shows that there was actually no power of attorney from Ibrahim Abubakar Shaaban. What the Plaintiff may have referred to as a power of attorney is a letter dated 3<sup>rd</sup> May 2007 from Ibrahim Abubakar Shaaban authorising Zaida Abubakar to sell any of his properties.

11. The Plaintiff also relied on a certificate of ownership dated 17<sup>th</sup> May 2007 and a beacon certificate dated the same day issued by the first defendant to Zaida Abubakar. Zaida Abubakar had paid Kshs.5,000/= on 17<sup>th</sup> May 2007 probably for transfer of the suitland from her brother to her name. On 14<sup>th</sup> June 2007 the Plaintiff also paid Kshs.5000/= and was issued with beacon certificate and certificate of ownership by the first defendant on the same day.

12. Though the Plaintiff produced a beacon certificate and certificate of ownership both dated 27<sup>th</sup> November 2003 in the name of Ibrahim Abubakar Shaaban there was no evidence that the said Ibrahim Abubakar ever owned the suitland as alleged. The Plaintiff's evidence is that the said Ibrahim Abubakar Shaaban was said to be living out of the country. The Plaintiff had never met him. Though it was alleged that the suitland was bought for him by his sister, there was no evidence to show that this was the case. The plaintiff produced a certificate of ownership and beacon certificate issued to Ibrahim Abubakar

Shaaban dated 4<sup>th</sup> December 2003. These certificates were cancelled. No explanation was given for this.

13 .During cross-examination, the plaintiff stated that Zaida Abubakar was in Kenya but he did not say why he did not call her as a witness. The second defendant testified that she bought the suitland in instalments. The first instalment was for Kshs.50,000/= made on 11<sup>th</sup> April 2002 . The second instalment was for Kshs.140,000/= made on 22<sup>nd</sup> June 2004. The last two instalments for Kshs.20,000/= and 40,000/= were made on 11<sup>th</sup> August 2005. All the receipts issued to her were produced in evidence.

14. The director of the first defendant testified that the suitland was bought by the second defendant and that there is no way the same property could have been sold to the said Ibrahim Abubakar Shaaban as it was not available for sale the same having been sold to the second defendant. The second defendant was issued with beacon certificate and certificate of ownership on 16<sup>th</sup> January 2006.

15. The Plaintiff was issued with the beacon certificate and certificate of ownership on 14<sup>th</sup> June 2007. This is after Zaida Abubakar had surrendered her beacon certificate and certificate of ownership issued to her on 17<sup>th</sup> May 2007. The plaintiff produced a blank passbook allegedly issued to him by the first defendant. This pass book was for instalment payment. The Plaintiff had cleared paying Zaida Abubakar and there was no need for him to be issued with a passbook as he was not going to pay the first defendant since he did not owe them anything. These contradictions and suspect documents put to doubt the claim that Ibrahim Abubakar Shaaban ever owned the suitland or any other plot for that matter.

16. There were issues raised on who signed the documents for both the Plaintiff and the second defendant. The first defendant's director while admitting that both documents were signed by him went ahead to clarify that the documents presented by the plaintiff may have been signed by mistake. This could be true because the plaintiff's evidence is that he dealt with a manager called Kanyeki. The manager may have presented the certificates to the director who signed without knowledge that the same plot had already been sold.

17. The second defendant produced a letter from the first defendant in which the first defendant confirmed that according to their list, the owner of the suitland was the second defendant and that the deed plans from the surveyor indicated that the particular plot was for the second defendant. If by any chance it turns out that Ibrahim Abubakar Shaaban ever bought the suitland, then in the circumstances he cannot take precedence because it is the second defendant who was the first to purchase the land.

Whichever way one looks at this case, the fact remains that the second defendant has adduced credible evidence. I will for this reason find that the plaintiff has failed to prove his case on a balance of probability. I proceed to dismiss the same with costs to the defendant. On the other hand, I find that the second defendant has proved her case on a balance of probability. I enter judgement in her favour in terms of prayer (a) and (b) of the counter-claim. For avoidance of doubt I must point out that the second defendant had filed an application seeking to amend her defence and counter-claim but this application was not argued. There was therefore no amendment effected and any decree should not be based on the proposed amended defence and counter-claim.

Dated, Signed and delivered at **Nairobi** on this **4<sup>th</sup>** day of **October, 2017**.

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Ochieng for Plaintiff

Mr Musyoka for M/s J N Pareno & Co.for 2<sup>nd</sup> defendant

M/s Serem for Mr Wangila for 1<sup>st</sup> defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**