



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 27 OF 2009**

**FRANCIS MAINGI K. NDUMBU .....PLAINTIFF**

**VERSUS**

**JOSEPH MUNYASYA MATOLO .....DEFENDANT**

**(ORIGINAL SUIT)**

**AND**

**JOSEPH MUNYASYA MATOLO .....PLAINTIFF**

**VERSUS**

**FRANCIS MAINGI K. NDUMBU .....1<sup>ST</sup> DEFENDANT**

**PETER WAMBUA KIETI .....2<sup>ND</sup> DEFENDANT**

**ANNASTACIA KATUMBI .....3<sup>RD</sup> DEFENDANT**

**MBATHA KALOKI .....4<sup>TH</sup> DEFENDANT**

**MARY MBITHE .....5<sup>TH</sup> DEFENDANT**

**(BY WAY OF COUNTER-CLAIM)**

**JUDGMENT**

**Introduction:**

1. In his Complaint dated 4<sup>th</sup> February, 2009, the Plaintiff averred that he was the registered proprietor of parcel of land known as Matungulu/Kyaume/2515 which he purchased from Peter Wambua Kieti who was acting on behalf of the beneficiaries of the estate of Kitoila Ingui.

2. The Plaintiff averred that he was subsequently included in the schedule of the beneficiaries as a buyer in the certificate of confirmation of grant in Succession Cause No. 301 of 2004 and that on 24<sup>th</sup> October, 2006, the Defendant trespassed on the suit land.

3. The Plaintiff is seeking for an order of permanent injunction and for special damages for the destroyed

fence.

4. In his Defence and Counter-claim, the Defendant averred that the issues herein were a subject in Kangundo SRMCC No. 185 of 2006 between himself and the 4<sup>th</sup> Defendant in the Counter-claim; that parcel number 2515 is a sub-division of parcel number 1540 and that between 1978 and 1979, Mbithe Kitoila (*deceased*) sold a portion of parcel number 1540 measuring 50 x 100feet to Joseph Kitulu Nzyoki (*deceased*); that he purchased the said portion from the wife of Nzyoki in 1997 and that having bought it, the rights of the beneficiaries of the Estate of Kitoila Ingui, including the 3<sup>rd</sup> to the 5<sup>th</sup> Defendants, had been extinguished.

5. According to the Plaintiff in the original suit, neither the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants had a good title to the suit land as at 11<sup>th</sup> January, 2006 to pass to the Plaintiff and that the purported sell was null and void.

6. In the Counter-claim, the Defendant has sought for a declaration that the sale of parcel of land known as Matungulu/Kyaume/2515, the confirmation of grant and the transfer of the suit land to the Plaintiff was null and void.

7. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in the Counter-claim averred that Mbithe Kitoila was the initial Petitioner for grant of letters of administration for the estate of the late Kitoila Ingui; that the 1<sup>st</sup> Defendant (*the Plaintiff in the original suit*), together with four others were named as purchasers of the suit land and that the Defendant never bought any from Kitoila Ingui or his wife Mbithe Kitoila.

8. According to the 2-5<sup>th</sup> Defendants, they are not aware of the alleged sell of a portion of the suit land to Joseph Nzyoki and that they abandoned Kangundo RMCC No. 185 of 2006 because the land had already been transferred to the Plaintiff upon confirmation of grant in Machakos Succession cause No. 301 of 2004.

#### **The Plaintiff's case:**

9. The Plaintiff, PW1, informed the court that he bought the suit land from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants through the 2<sup>nd</sup> Defendant with the consent of their mother, the late Mbithe Kitoila.

10. PW1 stated that he was issued with a Title Deed for parcel of land number 2515 and that the Defendants trespassed on the land on 24<sup>th</sup> October, 2016 and started constructing on the land.

11. The Plaintiff produced in evidence the Sale Agreement of 11<sup>th</sup> January, 2006, the gazette notice, the certificate of confirmation that was issued in Machakos Succession Cause No. 301 of 2004 and the Title Deed for Matungulu/Kyaume/2515.

12. It was the evidence of PW1 that he was included in the certificate of confirmation as one of the beneficiaries of the estate of Mr. Kitoila and that when he fenced the suit land, he found the Defendants had brought it down.

13. In cross-examination, PW1 stated that as at the time he bought the land, Peter Wambua (*the Vendor*) was not the proprietor of the suit land and that Ms. Mbithe was alive when he bought the land.

14. The 4<sup>th</sup> Defendant, PW2, stated that on 11<sup>th</sup> January, 2006, the family of Mbithe Kitoila, with the consent of their mother, Mbithe Kitoila, sold part of their plot to the Plaintiff for Kshs. 210,000 and that the family has never sold to the Defendant the suit land.

15. According to PW2, it is her mother-in-law, Mbithe Kitoila, who sold to the Plaintiff the suit land in January, 2006 and that she witnessed the execution of the Sale Agreement.

16. PW2 stated that Peter Wambua, who is his son, signed the Agreement on behalf of her old

grandmother and that the family has never sold land to Mr. Nzyoki.

17. The 3<sup>rd</sup> Defendant, PW3, stated that the family of Mbithe Kitoila sold part of Plot No. 1540 to the Plaintiff and that the Plaintiff was included in the certificate of confirmation of grant that was issued in Machakos Succession Cause No. 301 of 2004.

18. PW3 denied that it is not Peter Wambua who sold the land and stated that it is their mother who actually sold the land to the Plaintiff.

19. PW4, a surveyor, informed the court that he received instructions from the administrator of the Estate of the late Kitoila and that he sub-divided the land into seven (7) portions.

**The Defence case:**

20. The Defendant stated that on 9<sup>th</sup> January, 1997, he purchased a plot measuring 50feet x 100feet out of parcel of land known as Matungulu/Kyaume/1540 from Ruth Mbaika Kitulu who was the wife of Joseph Nzyoki.

21. It was the evidence of DW1 that Mr. Nzyoki had purchased the land from Ms. Mbithe on 5<sup>th</sup> January, 1979 after paying her Kshs. 16,000.

22. DW1 stated that at the time the Plaintiff purported to buy the land, he was already the owner of the said land and that the Title Deed that was issued to the Plaintiff should be cancelled.

23. DW1 produced in evidence the Agreement of 22<sup>nd</sup> January, 1978, the letter of 5<sup>th</sup> January, 1979 acknowledging receipt of part payment of the purchase price and the agreement of 9<sup>th</sup> January, 1997 between him and the Nzyoki's wife.

24. DW1 stated that Peter Wambua was not the owner of the suit land and could not have sold the land to the Plaintiff.

25. DW2 informed the court that he was a witness when Ms. Mbithe Kitoila sold to Joseph Nzyoki a parcel of land measuring 50 x 100 feet on 22<sup>nd</sup> December, 1978; that he was present when the purchase price was paid and that he was again present when Ruth Mbaika Kitulu sold to the Defendant the same land on 9<sup>th</sup> January, 1997 for Kshs. 23,000.

26. It was the evidence of DW3 that he was present on 6<sup>th</sup> January, 1979 when Joseph Nzyoki and other elders put up a boundary for a plot measuring 50 x 100 feet which had been sold to him by Ms. Mbithe Kitoila; that he signed the Agreement of 6<sup>th</sup> January, 1979 to confirm the boundary demarcation and that those who were present included the Chief of the area and Joseph Malelu Ndunda, Joseph K. Nzyoki, Ms. Mbithe, Kaloki Kitoila and Daudi Musyoki.

27. DW3 further informed the court that he was present when Ruth Mbaika sold the same land to the Defendant for Kshs. 23,000 on 9<sup>th</sup> January, 1997.

28. DW4 stated that she is the wife of the late Joseph Nzyoki who bought the suit land from the late Mbithe; that she sold the land to the Defendant in 1997 and that when they referred the dispute to the District Officer, he agreed that indeed she was the one who was entitled to the land.

29. In cross-examination, DW4 stated that she sold the land to the Defendant before commencing the succession proceedings in respect to her late husband's land.

**Submissions:**

30. The Plaintiff's advocate submitted that Section 80 of the Land Registration Act provides that a title can only be cancelled in the event the proprietor had knowledge of omission, fraud or mistake in consequence of which the cancellation is sought.

31. Counsel submitted that the Defendant has not proved omission, fraud or mistake on the part of the Plaintiff and that the Plaintiff was a purchaser for value.

32. The Defendant's advocate submitted that the person who sold the suit land to the Plaintiff, Peter Wambua Kaloki, was not the registered proprietor of the suit land, neither was he the administrator of the Estate of Kitoila Ingui.

33. According to the Defendant's advocate, the purported sell of the suit land was done even before the grant could be confirmed and is therefore null and void and that the Land Control Board never gave its consent for the sale of the suit land to the Plaintiff.

### **Analysis and findings:**

34. The evidence before me shows that by way of an Agreement dated 11<sup>th</sup> January, 2006, Peter Wambua Kaloki, entered into an Agreement of Sale of land with the Plaintiff for a parcel of land measuring 50ft x 100ft of Matungulu/Kyaume/1540.

35. According to the Agreement, the Vendor was paid Kshs. 210,000 for the plot on the same day the Agreement was signed.

36. It was the evidence of PW1 that although the Agreement was only signed by the 2<sup>nd</sup> Defendant in the Counter-claim, the sale was authorized by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and their late mother, Ms. Mbithe.

37. Indeed, the Plaintiff produced in court the written consent of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants for the sale of the suit land to the Plaintiff by Peter Wambua Kaloki dated 11<sup>th</sup> January, 2006.

38. According to the consent of the three, being beneficiaries of their mother's land, they had authorized the said Peter Wambua to sell the land so that they could *"make a follow up a case in the High Court Machakos and the Title Deeds of our plots."*

39. It would appear that their mother, who had already commenced succession proceedings in respect to her husband's Estate in Machakos High Court Succession Cause No. 301 of 2004, did not sign the consent. According to the copy of the Death Certificate, their mother (*and grandmother to Peter Wambua*) died on 6<sup>th</sup> October, 2006.

40. Upon the demise of their mother, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants replaced her in the succession proceedings and had the certificate of confirmation confirmed on 16<sup>th</sup> July, 2007 by the court.

41. By the time the certificate of confirmation was issued, Plot No. 1540 had already been sub-divided and distributed amongst the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and five buyers. One of the buyers who was indicated in the certificate of confirmation is the Plaintiff in whose name parcel of land number 2515 was eventually registered by way of transmission. This is the land that the Defendant claims that he purchased from the wife of Nzyoki.

42. According to the Defendant and the evidence of the wife of Joseph Nzyoki, Joseph Nzyoki bought the suit land from Ms. Mbithe Kitoila on 22<sup>nd</sup> December, 1978 for Kshs. 16,000. He produced in evidence the said Agreement which was witnessed by DW2.

43. Another Agreement relating to the boundaries for the land that Mr. Nzyoki bought dated 6<sup>th</sup> January,

1979 was also produced in evidence. According to the evidence of DW3, he was present when the said Agreement was prepared.

44. After Mr. Nzyoki died, his wife, DW4, informed the court that she sold the same land to the Defendant vide an Agreement dated 9<sup>th</sup> January, 1997. That agreement was produced in evidence. DW3 testified and stated that he witnessed the Agreement of 9<sup>th</sup> January, 1997.

45. On the basis of the Agreements of 6<sup>th</sup> January, 1979, 5<sup>th</sup> January, 1979 and 9<sup>th</sup> January, 1997, I am convinced that indeed the late Mbithe Kitoila sold a portion of what was then known as plot 1540 to the late Joseph Nzyoki.

46. Although the said Agreements do not state the acreage of the land that Mr. Nzyoki purchased, the evidence of DW3 and DW4 shows that he purchased land measuring 50ft by 100ft. This is the same land that the Defendant bought from Nzyoki's wife in 1977.

47. Indeed, after hearing the dispute, the District Officer of Matungulu was convinced, as I do, that Ruth was entitled to the suit land. According to the District Officer's letter of 23<sup>rd</sup> October, 2006, Ruth's husband bought the suit land in 1979.

48. It is with the realization that their mother, Mbithe Kitoila, had sold the suit land to Joseph Nzyoki in 1979, which land was sold by Ms. Ruth Nzyoki to the Defendant in 1997, that the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants side-stepped their mother and sold the same land to the Plaintiff in January, 2006.

49. I say so because although Mr. Mbithe was alive in January, 2006, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants convinced the 2<sup>nd</sup> Defendant to sign the agreement of 11<sup>th</sup> January, 2006 purporting to sale the land to the Plaintiff.

50. Indeed, the said Vendor was neither an administrator of the Estate of Kitoila nor the owner of the suit land as at 11<sup>th</sup> January, 2006 and could not have passed any good title to the Plaintiff.

51. Having passed off as the owner of the suit land, when he was not, I find and hold that the Sale Agreement of 11<sup>th</sup> January, 2006 between Peter Wambua Kaloki and the Plaintiff was null and void.

52. Consequently, the Title Deed that was issued to the Plaintiff was issued fraudulently and is a nullity *ab initio*.

53. For those reasons, I dismiss the Plaintiff's Complaint dated 4<sup>th</sup> February, 2009 with costs and allow the Defendants' Counter-claim as follows:

***a. A declaration be and is hereby issued that the sale of parcel of land known as Matungulu/Kyaume/2515 by the 2<sup>nd</sup> to 5<sup>th</sup> Defendants in the Counter-claim to the 1<sup>st</sup> Defendant in the Counter-claim and the subsequent transfer of the said land to the 1<sup>st</sup> Defendant in the Counter-claim by way of transmission was fraudulent, null and void ab initio.***

***b. An order be and is hereby issued that the Title Deed that was issued to the 1<sup>st</sup> Defendant in the Counter-claim for parcel of land known as Matungulu/Kyaume/2515 be cancelled forthwith.***

***c. The 3<sup>rd</sup> to 5<sup>th</sup> Defendants in the Counter-claim do transfer parcel of land known as Matungulu/Kyaume/2515 to the Defendant in the main suit (Plaintiff in the Counter-claim) within sixty (60) days from the date of this Judgment.***

***d. In the event that the 3<sup>rd</sup> to the 5<sup>th</sup> Defendants do not comply with prayer number (c) above, the Deputy Registrar of the court to execute the relevant transfer forms (without annexing her passport photographs or other personal details on the said forms) and the Land Registrar,***

*Machakos to thereafter issue to the Plaintiff in the main suit with the Title Deed for Matungulu/Kyaume/2515.*

*e. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in the Counter-claim to jointly and severally pay the costs of the suit and the Counter-claim.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**