



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 362 OF 2015**

**JUSTUS MONDA MORABA.....PLAINTIFF/APPLICANT**

**VERSUS**

**VINCENT NYANGAU.....DEFENDANT/RESPONDENT**

**JUDGMENT**

1. By a plaint (fast Track) dated 21st July, 2015 , the plaintiff namely JUSTUS MONDA MORABA has sued the defendant namely VINCENT NYANGAU for the following orders:

**a) An eviction order do issue against the defendant, his agents, servants, employees, or anybody claiming under him from the parcel of land WANJARE/BOGIKUMU/52244.**

**b) Costs and interest of this suit be provided for.**

**c) Any other alternative relief that Hon. Court may deem fit to grant.**

2. The plaintiff (hereinafter referred to as PW1) is represented by Mr. Moracha Advocate. On record for the defendant (hereinafter referred to as DW1) is Mr Bigogo Onderi Advocate.

3. The plaintiff's claim in brief is that in 1992, one YUVINALIS NYANGARO ATIMA (PW2) demarcated portions of land to all his sons including the late Richard Moraba Nyangaro who was father to PW1. On 15/8/2006, the father to PW1 passed on. Immediately, one William Nyangaro Atima, an uncle to PW1, fenced off land parcel No. Wanjare/Bogiakumu/52244 ( the suit land) which PW2 had demarcated and transferred to and solely registered it in the name of PW1. One William Nyangaro Atima, a brother to father to PW1 had sold him the suit land then forcefully sold the same to the Defendant who unlawfully and without any colour of right, occupies, cultivates and has put up a structure on it. He tampered with its boundary features and cut down trees thereon prompting the filing of the instant suit.

4. In a statement of defence and counter claim dated 26/8/2015, the defendant denied the claim by PW1 and put him to struck proof thereof. He called a witness, Ben Siro Nyangaro (DW2).

5. In the counterclaim, the Defendant (DW1) claims that on 10/4/2009, he entered into a land sale agreement (DExh1) with William Atima Nyangaro (1st defendant) to sell land parcel No. Wanjare/Bogiakumu/1433 approximately 45ft (upper width) by 112ft and 50ft (lower width) belonging to YUVINALIS NYANGARO OYUNGE (2nd defendant) who consented to the sale of a price of Ksh.43,000. He paid Ksh. 23,000 /= to him on 10/4/2009. On unknown dates the defendants in the counterclaim secretly conspired to transfer the land to PW1.

6. On 5/6/2009, by sale of land agreement dated 5th June, 2009 (DExh2), DW1 paid the entire consideration to the 1st and 2nd defendants in the counter claim. Due to the conspiracy between PW1 and the defendants, DW1 has been subjected to loss of Ksh.43,000/=.

7. In that regard, DW1 seeks against the 1st and 2nd defendants namely **WILLIAN ATIMA NYANGARO** and **YUVINALIS NYANGARO OYUNGE** respectively in the counter claim, orders as hereunder:

**a) The defendant in the counter-claim be ordered to refund the plaintiff's Kshs. 43,000/= Plus interest from 10th April 2009 up to the date of Judgment herein.**

**b) Costs of the counter-claim be awarded also.**

8. In a reply to defence dated 5/10//2015, PW1 answered that the defendants counter claim must fail as they do not have locus standi to sell land of the late Richard Moraba Nyangau, who was father to PW1. He also answers that he was not privy to the purported sale (DExh 2).

9. Parties were given an opportunity by the court to file written submissions on 24/5/17, pursuant to **Order 51 Rule 16 Civil Procedure Rules, 2010**. None of them filed submissions or at all. On 29.6.2017 the matter was before V. Karanja (Deputy Registrar, Kisii) and she noted that;

**...”submissions are yet to be filed. This matter is forwarded to the Hon. Judge to prepare Judgments which will be delivered on notice.”**

10. I have considered the plaint, defence and counterclaim, a reply to defence and evidence of PW1, PW2, DW1 and DW2. Going by the decision in **Blay –v–Pollard& Morris (1930) IKB & KLR (2009) 720**, the points that emerge therefrom for determination are:

- a) Eviction of DW 1 from the suit land.
- b) Refund of Kshs. 43,000/= to DW 1 by the Defendants in the counter claim.
- c) Who is to bear costs of the suit and the counter claim?

11. PW1 testified that the defendant trespassed into the suit land since the death of father to PW1. The suit land is registered in name of PW1 who obtained the land from PW2. The father to PW1 died in year 2006. He Identified and produced in evidence, the following documents;

- a) Certificate of official search dated 15th January, 2015 (PEXh 1),
- b) title deed issued on 31st October, 2013 (PEXhibit 2),
- c) cash bail receipt of Ksh. 4,000/= (PEXhibit 3),
- d) death certificate (PEXhibit 4) and
- e) photos of cut down trees (PEXh5 a to m)

12. During cross examination, PW1 told the court that he has no mutation and transfer form relating to the suit land. He also stated that he did not obtain PEXhibit 2 by fraud but he only holds it in trust for his mother and siblings.

13. PW2, YUVINALIS NYANGARO ATIMA, was grand-father to PW1. He testified that he was the registered proprietor to the suit land and he demarcated it to his sons. He gave the suit land to the late Richard Moraba Nyangaro, father to PW1. PW1 also testified that upon the death of his father, he transferred the suit land and registered it in his (PW1) name. PW2 did not transfer it to his sons. It is only PW1 who holds it in trust to subdivide it to his mother and siblings.

14. DW1, told the court that 10/4/2009, he bought the suit land from William Atima Nyangaro as shown on the sale of land agreement dated 10/4/2001 (DEXh 1) and another sale of land agreement dated 5/6/2009 (DEXh 2) and photocopies of IDs (DEXhibit 3) and waiting card of William Atima Nyangaro (DEXhibit 4), a letter dated 15th July, 2015 by Assistant County Commissioner, GESONSO (DEXhibit5). He claims a refund of Ksh.43,000/= and 100,000 cost of construction of a house and a pit latrine on the suit land.

15. DW2, BEN SIRO NYANGAU a neighbor to PW1, confirmed that DW1 bought the suit land from PW2. He witnessed DEXh2. He testified that DW1 possess the land until he gets his purchase price refund and costs from PW1. He stated that no succession was done and DW1 has no title to the land.

16. The suit land is registered in the name of PW1. I am conscious of **Sections 24 and 25 of the Land Registration Act, 2012** on interest conferred by registration and rights of a proprietor respectively. A certificate of title shall be subjected to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired illegally, un- procedurally or through a corrupt scheme under **Section 26 of the Land Registration Act, 2012**. In the instant suit, the testimonies of PW1 and PW2 reveal that PW1 acquired the title from PW2 who confirmed the same hence the he acquired it legally.

17. PW1 testified that he holds the land in trust for his mother and siblings. He stated that he had no had no mutation and transfer form with him, but there was no much dispute over that portion of the claim. In **Mwangi and Another-vs-Mwangi (1986) KLR 328**, it was held that trust over agricultural land is not subject to Section 6 (1) (a) of the Land Control Act (Cap 302 Laws of Kenya for which the consent of the Local Land Control Board may be required. Therefore, the claim is not subject to Section 6 (1) (a) of the Land Control Act (Cap 302). Since the suit land appears to be held in trust by PW1 for his mother and his siblings, he is required to move with speed to have it's registration reflect that it is held in trust for them and in their interest.

18. On eviction, **Section 152 A to I of the Land Act, 2016 (2012)** is relevant. DW1 admitted that he caused damage to the fence of PW1. DW 2 testified, inter alia:

**“ DW 1 tills the land. He is in possession of it.....” (Emphasis added)**

19. As regards refund of Ksh.43,000, the evidence of DW 1, PW 2 and DW 2 come in very handy. DW 2 and PW2 confirmed that DW 1 paid Kshs. 43,000/= to the 1st Defendant in the counter claim with the consent of the 2nd Defendant in the counter claim for the land. I consider DEXh 1, 2, 3, and 5 thereof. I find that DW 1 is entitled to the refund of the purchase price.

20. I find that PW1 has proved his claim against DW1 on a balance of probability. DW1 has also proved his counter-claim against the 1st and 2nd defendants in the counter claim on a balance of probability.

21. Consequently and for the foregoing reasons, I make orders as follows;

a) I enter judgment for the Plaintiff against the Defendant in the suit for an eviction order from the suit land. The eviction to be undertaken in accordance with **Sections 152 B, 152E, 152F, 152 G and 152 I of the Land Act, 2016 (2012).**

b) I enter Judgment for the defendant/DW1 against the 1st and 2nd defendants in the counter claim in terms of prayer A in the counter-claim for refund of Ksh 43,000/= together with interest at court rates from the date of payment.

c) DW1 to bear costs of the suit.

d) The 1st and 2nd defendants in the counter claim to bear costs of the counter claim.

**Judgment signed, dated and delivered at Kisii this 20th day of December, 2017**

**G M A ONGONDO**

**JUDGE**

**In the presence of:**

1. Mr. Mainga counsel holding brief for Bigogo counsel for the Defendant

2. Edwin Mongare and Ruth Moraa, court assistants

**G M A ONGONDO**

**JUDGE**