



REPUBLIC OF KENYA



**Maweu v Sivalu & 2 others (Environment & Land Case 347 of 2017)  
[2024] KEELC 959 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 959 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 347 OF 2017  
TW MURIGI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**TITUS MUTUNGA MAWEU ..... PLAINTIFF**

**AND**

**ERASTUS MUALUKO SIVALU ..... 1<sup>ST</sup> DEFENDANT**

**ANN NZULA SIVALU ..... 2<sup>ND</sup> DEFENDANT**

**GIDEON NZIOKI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 4<sup>th</sup> October, 2017 the Plaintiff prays for judgment against the Defendants for: -
  - a. A declaration that the Plaintiff is the lawful owner of isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.
  - b. A permanent injunction directed against the Defendants and or their agents and or their servants and or anyone claiming through them restraining them from entering into, committing acts of waste, selling, transferring or leasing isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.
  - c. An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to restore the structure in isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei to the position it was before they interfered with it.



- d. Costs of this suit.
2. The Plaintiff and the 1<sup>st</sup> Defendant executed and filed a consent on 15<sup>th</sup> January, 2018, which duly compromised the suit against the 1<sup>st</sup> Defendant.
3. The 2<sup>nd</sup> Defendant filed a statement of defence dated 7<sup>th</sup> May, 2018 and denied the Plaintiff's claim. She urged the Court to dismiss the suit with costs.
4. The 3<sup>rd</sup> Defendant filed a Statement of defence and Counterclaim dated 7<sup>th</sup> May, 2018 and denied the Plaintiff's claim. In the counterclaim, the 3<sup>rd</sup> Defendant prays for judgment against the Plaintiff for: -
  - a. A declaration do issue that the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 8/12/2009 was illegal, null and void.
  - b. A declaration that the 3<sup>rd</sup> Defendant is the lawful owner of isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.
  - c. A permanent injunction directed against the Plaintiff, his agents, servants and or any person claiming through him restraining them from entering into, occupying, dealing or using the isolated plot in Ikuyuni Market also known as Barazani Trading Centre which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.

#### **The Plaintiff's Case**

5. At the trial, the Plaintiff called two witnesses in support of his case. The Plaintiff Titus Mutunga Maweu, testified as PW1. He adopted his witness statement filed in court on 23/07/2020 as his evidence in chief. He also produced the documents in the list of documents as PEX Nos. 1 – 4 in support of his case. The Plaintiff testified that in the month of September 2009, Erastus Sivalu informed him that he wanted to sell his plot situated at Ikuyuni Market. That the plot was isolated and had not been allocated a number. He testified that he inspected the plot and found a structure that was not roofed. That they entered into an agreement for the sale of the suit property for Kshs 215,000/=. He testified that he paid a deposit of Kshs 150,000/ and eventually paid the entire purchase price. He urged the Court to grant the prayers sought in the Plaintiff.
6. On cross-examination by the 2<sup>nd</sup> Defendant, he testified that he had sued her because she removed the doors and windows of his house which was under construction claiming that she was the owner of the suit property. He testified that the 1<sup>st</sup> Defendant was the initial owner of the suit property before he sold to him the same. It was his testimony that he did not see the 2<sup>nd</sup> Defendant removing tiles from the roof of his house.
7. On cross-examination by Counsel for the 3<sup>rd</sup> Defendant, he testified that he is the owner of the suit property having purchased the same from the 1<sup>st</sup> Defendant. He stated that he did not have a Title deed or an official letter from the County Government confirming that his ownership over the suit property. He stated that he had seen a letter by the clan indicating that the 1<sup>st</sup> Defendant sold the suit property to the 2<sup>nd</sup> Defendant.
8. In re-examination, he stated that he had not seen a sale agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in respect of the suit property.
9. PW2, Erastus Mualuko Sivalu, adopted his witness statement filed in court on 23/07/2020 as his evidence in chief. He informed the court that he sold the suit property to the Plaintiff and executed a



sale agreement dated 08/12/2009 to that effect. That after the Plaintiff paid the entire purchase price he granted him consent to utilize the suit property. He informed the court that the suit property is not ancestral land since he had purchased the same with his own money. He testified that he never sold the suit property to his sister the 2<sup>nd</sup> Defendant herein. He testified that he did not have any claim against the Plaintiff.

10. On cross-examination by the 2<sup>nd</sup> Defendant, he testified that he did not inherit the suit property from his father but purchased the same from one George Mutuku Mulandi. It was his testimony that he used to send money to the 2<sup>nd</sup> Defendant so that she could oversee the construction of the structure that stood on the suit property. He insisted that he sold the suit property together with the investment thereon to the Plaintiff and not to the 2<sup>nd</sup> Defendant.
11. On cross-examination by Counsel for the 3<sup>rd</sup> Defendant, he testified that the sale agreement between him and the Plaintiff was witnessed. That there was no structure on the suit property when he purchased the same from George Mutuku Mulandi. He insisted that he built the structure on the suit property and that the construction was supervised by the 2<sup>nd</sup> Defendant since he was away in Sultan Hamud.
12. He stated that he was not aware of the Akimii Clan meeting held on 25/09/2017 and the decision thereof. He stated that the suit property was not an inheritance and that he sold the suit property to the Plaintiff for Kshs. 215,000/=.
13. In re-examination, he reiterated that he purchased the suit property from George Mulandi, and took possession thereof without any complaint. He reiterated that he did not sell the suit property to the 2<sup>nd</sup> Defendant and that there was no agreement in court indicating otherwise.

### **The 2<sup>nd</sup> Defendant's Case**

14. The 2<sup>nd</sup> Defendant Anna Sivalu testified as the sole witness in support of her case. The 2<sup>nd</sup> Defendant testified as DW1 and adopted her witness statement dated 5/4/2019 as her evidence in chief. She informed the court that she is the owner of the suit property having purchased the same from the 1<sup>st</sup> Defendant. She testified that she purchased the suit property from the 1<sup>st</sup> Defendant in the year 2004 and executed a sale agreement to that effect. It was her testimony that they appended their signatures on the sale agreement though it was not witnessed. That after she purchased the suit property, she took possession and constructed a building but due to financial constraints, she was unable to roof it. She testified that due to financial difficulties, she informed the chief to announce to all and sundry that she was selling the suit property in order to raise school fees. It was her testimony that she sold the suit property to the 3<sup>rd</sup> Defendant. That after she sold the suit property to the 3<sup>rd</sup> Defendant, her brother sold the same to the Plaintiff herein. She went on to state that the chief advised them to settle the matter at the family level where the 1<sup>st</sup> Defendant was ordered to refund the purchase price to the Plaintiff. She urged the court to dismiss the suit with costs.
15. On cross-examination by Counsel for the Plaintiff, she testified that she purchased the suit property from her younger brother, the 1<sup>st</sup> defendant herein for Kshs. 35,000/= though she could not remember when she purchased the same. She testified that there were no witnesses to the sale agreement in respect of the suit property between her and the 1<sup>st</sup> Defendant. She further testified that the sale agreement between her and the 3<sup>rd</sup> Defendant was witnessed.
16. She informed the court that she constructed the house on the suit property and denied receiving any money from the 1<sup>st</sup> Defendant. She stated that she could not remember how much it cost her to build the house.



### **The Third Defendant's Case**

17. The 3<sup>rd</sup> Defendant, Gideon Nzioki testified as the sole witness in support of his case. The 3<sup>rd</sup> Defendant testified as DW2 and adopted his witness statement dated 16/01/2023 as his evidence in chief. He also produced the documents in the list of documents dated 5/4/2019 as DEX Nos. 1 – 2 in support of his case.
18. He informed the court that he purchased the suit property from the 2<sup>nd</sup> Defendant on 5/1/2017 and executed a sale agreement which was witnessed by Alex Muatha and the Area Chief. He stated that he constructed on the suit property and that he was not aware of any family differences between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. He urged the Court to order that the suit property be given back to him.
19. On cross-examination by Counsel for the Plaintiff, he testified that the suit property measures 20ft by 100ft. He stated that when he purchased the suit property, there was a brick-house that was under construction but was not roofed. He testified that the Plaintiff did not enter into a sale agreement for the suit property with the 2<sup>nd</sup> Defendant.
20. He went on to state that when he was purchasing the suit property, the Area Chief and the Chairman of the Market confirmed to him that the 2<sup>nd</sup> Defendant was the owner thereof. He stated that the 2<sup>nd</sup> Defendant informed him that the 1<sup>st</sup> Defendant had sold to her the suit property though she did not show him a sale agreement on how she purchased the suit property.
21. The parties agreed to file and exchange their written submissions after the close of their respective cases.

### **The Plaintiff's Submissions**

22. The Plaintiff's submissions were filed on 11/09/2023.
23. On his behalf, Counsel identified the following issues for the court's determination: -
  - i. Whether or not the Plaintiff has a good title to the suit property?
  - ii. Whether or not the 2<sup>nd</sup> Defendant had good title over the suit property capable of being sold to the 3<sup>rd</sup> Defendant?
  - iii. Whether or not the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants are entitled to the reliefs sought in the counterclaim?
  - iv. Who should bear the costs?
24. On the first issue, Counsel submitted that the Plaintiff is the lawful owner of the suit property as evidenced by the sale agreement between him and the 1<sup>st</sup> Defendant and payment/acknowledgement of the purchase price. Counsel submitted that the 1<sup>st</sup> Defendant corroborated the Plaintiff's evidence. Counsel submitted that the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant had complied with the provisions of Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya which sets out the requirements for sale of land. Counsel contended that the Plaintiff has sufficiently discharged the burden of proof in explaining the root of his title to the suit property.
25. On the second issue, Counsel submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not substantiate the claim of fraud against the Plaintiff over the manner in which he purchased the suit property. Counsel argued that the letter by the Clan produced as DEX No. 1 is of no consequence since the suit property is private and not ancestral land. Counsel argued that the 2<sup>nd</sup> Defendant is barred by the principle of nemo dat



quod non habet. Counsel submitted that the 2<sup>nd</sup> Defendant could not transfer to the 3<sup>rd</sup> Defendant a title or interest in the suit property because she did not have one.

26. Counsel argued that the parties to the suit herein acceded to the fact the suit property originally belonged to the 1<sup>st</sup> Defendant before he sold it to the Plaintiff as evidenced by the sale agreement. That the 2<sup>nd</sup> Defendant does not have any legal rights or interests in the suit property capable of being transferred to a third party.
27. On the third issue, Counsel contended that the Plaintiff has demonstrated that the 2<sup>nd</sup> Defendant does not have any legal right to sell the suit property to the 3<sup>rd</sup> Defendant and as such, the 3<sup>rd</sup> Defendant's counterclaim ought to be dismissed with costs.
28. On costs, Counsel submitted that the Defendants failed to heed the demand notice dated 22/9/2017 produced as PEX No. 4. Counsel urged the Court to enter judgment against the Defendants as sought in the Plaintiff. To buttress his submissions, Counsel relied on the following authorities: -
  - i. *Munyū Maina v Hiram Gathiba Maina* [2013] eKLR
  - ii. *Erastus Kiguta Karanja & another v Benson Ndere Mbaria & 4 others* [2021] eKLR
  - iii. *Katana Kalume & another v Municipal Council of Mombasa & another* [2019] eKLR
  - iv. *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina* [2019] eKLR
  - v. *Republic v Speaker of the Assembly of Kitui Ex parte Musee Mati; Independent Electoral and Boundaries Commission & another (Interested Party)* [2019] eKLR

### **The 2nd Defendant's SubmissionS**

29. The 2<sup>nd</sup> Defendant filed her submissions on 6/10/2023. The 2<sup>nd</sup> Defendant submitted that she purchased the suit property from the 1<sup>st</sup> Defendant sometime in the year 2004. She further submitted that the sale agreement was not reduced in writing because she trusted the 1<sup>st</sup> Defendant who happens to be her brother. She submitted that she was the one who removed the doors and windows from the structure that stood on the suit property belonging to the Plaintiff. She urged the Court to direct the parties to settle the matter out of court.
30. As at the time of writing this judgment, the 3<sup>rd</sup> Defendant had not filed his submissions.

### **Analysis And Determination**

31. Having considered the pleadings, the evidence on record and the respective submissions, the following issues arise for determination:-
  - i. Who is the bona fide owner of the suit property; and
  - ii. Whether the Plaintiff is entitled to the orders sought in the Plaintiff
  - iii. Whether the 3<sup>rd</sup> Defendant is entitled to the orders sought in the counterclaim.

### **Who is the bona fide owner of the suit property**

32. The Plaintiff testified that he is the lawful owner of the suit property having purchased the same from the 1<sup>st</sup> Defendant. The Plaintiff's claim over the suit property is anchored on the sale agreement dated 8/12/2009 between him and the 1<sup>st</sup> Defendant. In this regard, the Plaintiff produced the sale agreement dated 8/12/2009 as PEX No. 2. The sale agreement shows that it was duly signed by the Plaintiff



- and the 1<sup>st</sup> Defendant and attested by three witnesses. He also produced a banker's cheque of Kshs. 150,000/= (PEX No. 3) in favour of the 1<sup>st</sup> Defendant being the first deposit of the purchase price. The 1<sup>st</sup> Defendant acknowledged that he was paid the purchase price of Kshs. 215,000/= in full. The 1<sup>st</sup> Defendant executed a consent filed in court on 15/01/2018 and acknowledged having sold the suit property to the Plaintiff. The 1<sup>st</sup> Defendant corroborated the Plaintiff's evidence.
33. On the other hand, the 2<sup>nd</sup> Defendant's claim over the suit property is based on an alleged sale agreement between her and the 1<sup>st</sup> Defendant. It was her testimony that the alleged sale agreement was reduced into a written document which they duly signed. She informed the court that the sale agreement between her and the 1<sup>st</sup> Defendant was not witnessed. Nevertheless, she did not produce the sale agreement to support her evidence.
34. Section 3 (3) of the [Law of Contract Act](#) outlines as follows: -
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
35. In [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR, the Court of Appeal aptly held as follows: -
- “24. Section 3(3) of the [Law of Contract Act](#) provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the [Law of Contract Act](#) excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the [Law of Contract Act](#), came into effect on 1<sup>st</sup> June, 2003...”
36. Based on the above decision which is binding on this court, it is crystal clear that the 2<sup>nd</sup> Defendant was bound by the provisions of Section 3 (3) of the [Law of Contract Act](#). She did not produce the alleged sale agreement to demonstrate that she purchased the suit property from the 1<sup>st</sup> Defendant. This court finds and holds that the alleged sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant did not comply with the statutory requirements of Section 3(3) of the [Law of Contract Act](#).
37. Without a sale agreement to show that she purchased the suit property from the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant could not lawfully transfer any interest thereof to the 3<sup>rd</sup> Defendant and the latter's claim to the suit property is null and void. This finding is bolstered by the Court's observation in [Leo Investment Ltd v Estuarine Estate Ltd](#) [2017] eKLR
- “31. The legal framework in Section 3(3) of the [Law of Contract Act](#) was informed by the desire to settle the uncertainty surrounding the pre 2003 framework which hitherto permitted written memoranda and part performance as saving elements in non-compliant land disposition contracts. In my view, Section 3(3) of the [Law of Contract Act](#) makes a strict formal requirement whose legal ramification is to completely preclude the cognizance of any non-compliant



contract for disposition of interest in land. Unlike in the pre-2002 framework, written evidence by way of memoranda would not save a non-compliant contract. Similarly, the doctrine of part performance was abolished by the framework in Section 3(3) of the Law of Contract Act. The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity ab initio.”

38. On the other hand, the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant has met the requirements of Section 3(3) of the Law of Contract Act. From the evidence on record it is clear that the 1<sup>st</sup> Defendant was the original owner of the suit property before he sold the same to the Plaintiff. Accordingly, this court finds and holds that the Plaintiff is the bona fide owner of the suit property.

#### **Whether the plaintiff is entitled to the orders sought in the plaint**

39. Having found that the Plaintiff is the bona fide owner of the suit property, I find that he is entitled to prayers (a) and (b) of the Plaint.
40. As regards prayer (c) the Plaintiff did not adduce any evidence to show that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants damaged the structure on the suit property. In the circumstances, I find that the Plaintiff is not entitled to the order sought.

#### **Whether the 3<sup>rd</sup> defendant is entitled to the orders sought in the counterclaim**

41. The 3<sup>rd</sup> Defendant has sought for a declaration that the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 8/12/2009 is illegal, null and void. The 3<sup>rd</sup> Defendant did not adduce any evidence to corroborate his allegations. Moreover, this court has found that the said agreement has met the requirements under Section 3(3) of the Law of Contract Act. Having found that the Plaintiff is the lawful owner of the suit property, this court finds and holds that the 3<sup>rd</sup> Defendant is not entitled to the orders sought in the counter claim.
42. On costs, the general rule is that costs follow the event.
43. In the case of Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation.”

44. In the end I find that the Plaintiff has proved his case on a balance of probabilities as required. I also find that 3<sup>rd</sup> Defendant has not proved his counterclaim on a balance of probabilities as required. Accordingly, the counterclaim is dismissed with costs to the Plaintiff.
45. Consequently, judgment is hereby entered for the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the following in terms;



- a. A declaration be and is hereby issued that the Plaintiff is the lawful owner of isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.
- b. A permanent injunction be and is hereby issued directed against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and or their agents and or their servants and or anyone claiming through them restraining them from entering into, committing acts of waste, selling, transferring or leasing isolated plot in Ikuyuni Market also known as Barazani Trading Centre in Mutisywa Location, Mbitini Division within Makueni County which is situated between the plots belonging to Joseph M. Ndunda and Harrison M. Kalei.
- c. The Plaintiff is awarded costs of the suit and the counterclaim.

**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF FEBRUARY, 2024.**

In the presence of

Ms. Makau holding brief for Mutia for the Plaintiff

Kithuka for the 3<sup>rd</sup> Defendant

2<sup>nd</sup> Defendant in person

