



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 192 OF 2012

PIUS KINOI MAINGIPLAINTIFF

VERSUS

WILSON KIVUVA MBITHI.....DEFENDANT

JUDGMENT

By a Plaint dated 5th June, 2012 which was amended on 20th July, 2017, the Plaintiff prays for judgement against the Defendants jointly and severally for:

- a. A declaration that the Plaintiff is the rightful owner and/or purchaser for value of all that land known as Mavoko Town/Block 3/10913, Mavoko Town/Block 3/10914, Mavoko Town/Block 3/10915, Mavoko Town/Block 3/10916, Mavoko Town/Block 3/10917 and Mavoko Town/Block 3/5522.***
- b. An order that the Defendant do sign and/or execute all necessary documents for transfer including consents, in default the Executive Officer to execute all the necessary documents to facilitate transfer of all that property known as Mavoko Town/Block 3/10913, Mavoko Town/Block 3/10914, Mavoko Town/Block 3/10915, Mavoko Town/Block 3/10916, Mavoko Town/Block 3/10917 and Mavoko Town/Block 3/5522 in favour of the Plaintiff.***
- c. Costs of suit with interest.***

The Defendant filed an Amended Defence dated the 11th August, 2017 where he denied the averments in the Amended Plaint except the descriptive. He confirmed that the only transaction between the Plaintiff and himself was for sale of four (4) acres with the terms that two (2) acres was to be paid in cash while the rest of the two (2) acres was to be exchanged with the Plaintiff's land located at Kaewa Land Adjudication Section Number 2889. Further, that the Plaintiff has never paid the full consideration to him. He denied selling any other parcel of land to the Plaintiff and insists there was no time he ever excised an extra two (2) acres of land to him. He contended that the Plaintiff only settled on the four (4) acres he acquired vide the purchase and he was ready to transfer the same to him on condition that he settled the balance of Kshs. 50,000/= with interest and withdrew the caution. He averred that he had subdivided his parcel of land with the intention of transferring to the respective purchasers including the Plaintiff but on condition they discharged all their obligations as per the respective contracts and paid transfer fees. He denied being the owner of Land parcel number MAVOKO BLOCK 3/5522. He filed a Counterclaim where he prayed for the Plaintiff's suit to be dismissed with costs and judgement entered for him as per the Counterclaim as against the Plaintiff for:

- 1. An order by this Honourable Court compelling the Plaintiff to remove cautions placed on the parcels of land known as MAVOKO BLOCK 3/10913, MAVOKO BLOCK 3/10914, MAVOKO BLOCK 3/10915, MAVOKO BLOCK 3/10916 and MAVOKO BLOCK 3/10917.***
- 2. A declaration that the Defendant is the rightful owners of the properties known as MAVOKO BLOCK 3/10913, MAVOKO BLOCK 3/10914, MAVOKO BLOCK 3/10915, MAVOKO BLOCK 3/10916 and MAVOKO BLOCK 3/10917.***
- 3. Costs of this suit.***
- 4. Any other or further relief that this Honourable Court may deem fit and just to grant under the circumstances.***

The matter proceeded for hearing wherein the Plaintiff called six (6) witnesses while the Defence case was closed by the Honourable Court after the Defendant failed to appear to tender his evidence.

Evidence of the Plaintiff

The Plaintiff claimed to have entered into an Agreement of Sale dated 28th June, 2005, with the Defendant for the sale of land measuring four (4) acres to be excised from all that land known as Mavoko Town/Block 3/2087 at an agreed purchase price of Kenya Shillings one hundred and twenty thousand only (Kshs. 120,000/=), which sum the Plaintiff paid in full. It was the Plaintiff's testimony that vide another Sale Agreement dated 17th March, 2006, he sold to the Defendant land which was to be excised from Kaewa Land Adjudication Section Number 2889 for the consideration of Kshs. 110,000/=, which the Defendant paid by giving him a further two (2) acres from all that land known as Mavoko Town/Block 3/2087, with the portion valued at Kshs. 60,000. Further, the balance was to be set-off as against the old balance and the accounts between the parties herein was settled at a total of Kshs 180,000/= which payment the Defendant acknowledged.

The Plaintiff thereafter produced the following documents as his exhibits: Demand Letter; Agreement dated 28th June, 2005 in Kikamba Language; Translation to Agreement dated 28th June, 2005; Agreement dated 17th March, 2006 in Kikamba Language; Translation to Agreement dated 17th March, 2006; Certificates of Official Search for Mavoko Town Block 3/10913, 10914, 10915, and 10916 respectively; Chief Summons and Verdict; Area Scale Map and Photographs of Suit property.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Witnesses Testimonies, Exhibits and Plaintiff's submissions, the following are the issues for determination:

- ***Whether the Plaintiff is entitled to the Orders Sought in the Plaintiff.***
- ***Whether the Defendant is entitled to the Orders Sought in the Counterclaim.***
- ***Who should bear the costs of the suit.***

I will proceed to handle these issues jointly.

The Plaintiff in his submissions contended that he has proved ownership of his portion of land. He referred to Section 7(b) of the Land Act and the Sale Agreements which he had produced as exhibits to confirm how he acquired the suit land. He contended that the Defendant never testified nor called any witnesses to challenge his evidence. He insisted that the Defendant admitted in his Amended Defence that he had purchased the said six (6) acres from him. The Plaintiff reiterated that the orders sought in the Plaintiff were capable of being granted by the Honourable Court as he had proven purchase of the said six (6) acres from the Defendant. To buttress his averments, he relied on the following decisions: *Munyu Maina vs. Hiram Gathiha Maina, Civil Appeal No. 239 of 2009*; *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007*, where Ali-Aroni, J. favourable cited the decision in *Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*; *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*; *Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996*; *Linus Nganga Kiongo & 3 Others v. Town Council of Kikuyu (2012) eKLR*; *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR* which cited with approval the decision of the *Supreme Court at Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLV SC 91/2002 and Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR*.

In this instance, the Plaintiff claims to have entered into an Agreement of Sale dated 28th June, 2005, with the Defendant where he purchased four (4) acres of land which was to be excised from Mavoko Town/Block 3/2087. Further, that the agreed purchase price was Kenya Shillings one hundred and twenty thousand only (Kshs. 120,000/=), which sum he paid in full. The Plaintiff testified that he entered into another Sale Agreement dated 17th March, 2006, where he sold to the Defendant, land which was to be excised from Kaewa Land Adjudication Section Number 2889 for the consideration of Kshs. 110,000/=, that the Defendant paid through giving him a further two (2) acres from land parcel number Mavoko Town/Block 3/2087, which portion was valued at Kshs. 60,000. Further, they had agreed that the balance was to be set-off as against the old balance and the accounts between the parties herein was settled at a total of Kshs 180,000/= which payment the Defendant acknowledged.

The Defendant in his amended Defence admitted that he had indeed sold to the Plaintiff four (4) acres of land and he was ready to transfer the same on condition that the Plaintiff finalized his obligations. The Plaintiff called witnesses who confirmed the transactions between the Defendant and himself. PW5 Remus Wambua Kioko in his testimony confirmed that on 17th March, 2006, he witnessed the Plaintiff selling a portion of land to the Defendant which land was part of Kaewa Land Adjudication 2889 at a cost of Kshs. 110,000 with the transfer being effected immediately. It was his testimony that both parties had agreed that the purchase price was to be deducted from Lukenya 2087 where there was a balance of Kshs. 50,000. Further, the Defendant who was the buyer offered to give the Plaintiff two (2) acres of land for the balance of Kshs. 60,000 he owed. He confirmed that the Defendant did not honour the promise of the two (2) acres of land. PW1, PW2, PW3 and PW4 all confirmed that the Plaintiff indeed paid the full purchase price for the initial four acres and the Defendant demarcated to him his portion of land. The Plaintiff produced the written sale agreements dated 28th June, 2005 and 17th March, 2006 respectively showing that he had indeed bought the said six (6) acres of land from the Defendant. The Plaintiff further produced a letter dated 5th January, 2011 from the Chief Lukenya Location wherein the local administration confirmed that the Plaintiff was entitled to the six (6) acres from the Defendant.

The Defendant despite filing an Amended Defence to deny the Plaintiff's averments, failed to call any witnesses to testify to challenge the evidence of the Plaintiff and his witnesses as well as confirm his assertions. In the case of *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007*, Ali-Aroni, J. favourable cited with approval the decision in *Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*, where it was held that even if a party filed a Defence but failed to adduce evidence to support the assertions made therein, the evidence of the Plaintiff hence remained uncontroverted. See also the cases of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*; *Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996* and *Linus Nganga Kiongo & 3 Others v. Town Council of Kikuyu (2012) eKLR*. In the circumstances while associating myself with the three decisions, I find that since the Defendant failed to tender evidence to confirm his assertions and rebut the Plaintiff's averments, the Plaintiff's evidence as well as testimonies of his witnesses remain

uncontroverted.

I note the Defendant in his amended Defence at paragraph 6 actually admitted having sold four (4) acres of land to the Plaintiff and that he had settled thereon. In associating myself with the decision of ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR*** which cited with approval the decision of the ***Supreme Court at Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLV SC 91/2002***, I find that the Defendant is indeed bound by his Defence where he admitted that the Plaintiff purchased four (4) acres of land from him.

From the evidence presented, the Defendant did not controvert that the Plaintiff is entitled to six (6) acres of land from the original parcel Mavoko Town/Block 3/2087 which he had proceeded to subdivide. The Plaintiff was categorical in his evidence that no one had sought the portion he occupied despite the fact that he was aware the Defendant had sold some of the resultant subdivisions. Further, that a Surveyor with the consent of the Defendant demarcated the six (6) acres of land and on 12th September, 2006, he was issued with a receipt by the said Surveyor. He was emphatic that the Defendant was present during the demarcation exercise and confirmed the portion he purchased.

The Plaintiff enumerated that the position he occupies is now Mavoko Town/Block 3/10913, Mavoko Town/Block 3/10914, Mavoko Town/Block 3/10915, Mavoko Town/Block 3/10916, Mavoko Town/Block 3/10917 and Mavoko Town/Block 3/5522 which are resultant subdivisions of Mavoko Town/Block 3/2087. It is my considered view that the Defendant's actions of refusing to register the six (6) acres to the Plaintiff was actually an illegality and amounted to unjust enrichment.

Based on the evidence before me, I find that the Plaintiff is indeed entitled to the orders sought in the Plaintiff.

As to whether the Defendant is entitled to the orders sought in the Counterclaim. Since the Defendant failed to tender any evidence to confirm his assertions and rebut the Plaintiff's averments, I find that he is not entitled to the orders sought in the Counterclaim.

On the issue of costs, since the Plaintiff is the inconvenienced party, I find that he is indeed entitled to the costs of the suit.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probabilities and will proceed to enter judgement in his favour and dismiss the counterclaim. I will make the following final orders:

i. A declaration be and is hereby issued that the Plaintiff is the rightful owner and/or purchaser for value of all that land known as Mavoko Town/Block 3/10913, Mavoko Town/Block 3/10914, Mavoko Town/Block 3/10915, Mavoko Town/Block 3/10916, Mavoko Town/Block 3/10917 and Mavoko Town/Block 3/5522 which are resultant subdivisions from Mavoko Town/Block 3/2087.

ii. An order be and is hereby issued directing the Defendant to sign and/or execute all necessary documents for transfer including consents, in default the Executive Officer to execute all the necessary documents to facilitate transfer of all that property known as Mavoko Town/Block 3/10913, Mavoko Town/Block 3/10914, Mavoko Town/Block 3/10915, Mavoko Town/Block 3/10916, Mavoko Town/Block 3/10917 and Mavoko Town/Block 3/5522 in favour of the Plaintiff.

iii. Costs of the suit is awarded to the Plaintiff

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE