



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO 152 OF 2017**

**ELIZABETH NDULU MATHUVA.....PLAINTIFF**

**VERSUS**

**JOSEPH MBIU MUTHIANI.....DEFENDANT**

**JUDGMENT**

1. By Plaintiff dated 8<sup>th</sup> December 2016, the Plaintiff is seeking for the following orders against the Defendant: -

**a) An order of eviction of the Defendant from Land Parcel No Makueni/Kalongo/2099 situated at Thomeandu, Kiboko Makueni.**

**b) Costs of the suit.**

2. The Defendant denied the Plaintiff's claim vide his Statement of Defence filed on 21<sup>st</sup> December 2016.

3. The matter proceeded for hearing on 11<sup>th</sup> of November 2021. The Plaintiff adopted her statement as her evidence in chief and produced the documents in her list of documents dated 8<sup>th</sup> December 2016 as exhibit 1 to 5 respectively. It is her evidence that since the death of her husband, the Defendant had been trespassing on her land and that efforts to have him vacate peacefully had failed. She further testified that she neither sold nor signed the sale agreement with regards to the suit land.

4. On cross examination she stated that the suit land which was initially part of the Estate of her late husband, was registered in her name pursuant to a succession cause. It is her further evidence that her late husband did not sell the suit land to Mbiu Muthiani nor did she or her children Maitha Mathuva and Mutiso Mathuva sign or witness the sale agreement.

5. She stated that the disagreement between her late husband and Mbiu Muthiani with regards to the suit land was settled by the village elders who ordered Mbiu Muthiani to vacate the suit land. It is her testimony that she was not aware of a decision by the village elders that directed her husband to compensate the Defendant with Kshs. 10,000/- and construct a house for him.

6. On re- examination she testified that her late husband was not mentioned in the resolution made by the elders.

7. The Defendant Joseph Mbiu Muthiani adopted his statement as his evidence in chief and stated that the Plaintiff's late husband sold the suit land to him vide the sale agreement dated 18/09/1993(defence exhibit 1). It is his evidence that the sale agreement was witnessed by the Plaintiff and her two sons Maitha Mathuva and Mutiso Mathuva. It is his further evidence that the witnesses did not sign the agreement as he had not paid the full purchase price. He stated that on the date of the execution of the agreement, he paid Kshs. 10,000/- leaving a balance of Kshs. 15,000/-. He stated that he immediately took possession of the suit land and constructed a permanent house. That after he purchased the suit land, Kyalo Mathuva a son to the late Mathuva Wambua raised a complaint that the land was sold without his consent. He further testified that the dispute was referred to a panel of elders, who in their decision made on 17/02/1996, resolved that the seller refunds back Kshs. 10,000/- and constructs a house for him since the late Mathuva Wambua's son had demolished the house that he had constructed on the suit land. It is his evidence that the late Mathuva Wambua's family had refused to receive the outstanding balance of Kshs.15,000/- which he was willing to pay.

8. On cross examination he stated that the dispute before the elders was between Kyalo Mathuva and himself was resolved and the family of Mathuva ordered to refund back to him Kshs. 10,000/- and to construct a house for him. It I his evidence that there was no house on the ground and that by the time he took possession of the suit land there were no trees.

9. He further testified that as at the time that he purchased the suit land, the Plaintiff was not the registered owner and was only registered vide succession cause number 502 of 2006.

10. In cross examination, he stated that the sale agreement was recorded by his son and further confirmed that the witnesses did not sign the sale agreement as he had paid the full purchase price for the land. He stated that the purchase price for the suit land whose size was not indicated was Kshs. 25,000/- out of which he had paid Kshs. 10,000/-. He contends that the sale agreement is incomplete because the witnesses had not signed it.

11. The Plaintiff's submissions were filed on 15<sup>th</sup> November 2021. The Plaintiff submitted that the sale agreement dated 18<sup>th</sup> September 1993 was unenforceable as it contravened Section 3(3) of the Law of Contract.

12. Through his written submissions filed on 3<sup>rd</sup> December 2021, submitted that the parties to the sale agreement had satisfied the elements of a valid contract. The Defendant asserts that there was no evidence challenging the validity of the sale agreement.

13. I have considered the evidence on record, the rival submissions and I find that the issues for determination are;

*i. Whether there is a valid sale agreement;*

*ii. Whether the plaintiff has proved that she is the owner of the suit property;*

*iii. Whether the orders of eviction should be issue.*

#### **WHETHER THE SALE AGREEMENT IS VALID**

14. In answer to the first issue for determination, The Plaintiff testified that her late husband did not sell the suit land to the Defendant nor did she witness the sale agreement. The Defendant on the other hand testified that the Plaintiff's late husband sold the suit land to him and that the sale agreement was witnessed by the Plaintiff and her two sons. He produced a sale agreement dated 18/09/1993 defence exhibit 1 in support his evidence. I have looked at the sale agreement dated 18/09/1993 between Mathuva Wambua and the Defendant and I find that it is for sale of Plot No 2099. The agreement states that the vendor was selling his land in Mutulani though it does not state the size or acreage. The purchase price is Kshs. 25,000/-. Kshs.10,000/- was paid leaving a balance of Kshs. 15,000/-. The agreement does not indicate the time frame within which the balance was to be paid. The agreement is not by the vendor and purchaser nor is it attested by the witnesses.

15. It is trite law that a contract over land that does not satisfy the requirements of Section 3(3) of the Law of Contract is unenforceable. Section 3(3) of the Law of Contract provides that **no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit founded is;**

**a) In writing;**

**b) It is signed by all the parties thereto; and**

**c) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.**

16. The Court of Appeal in the case of **Jane Catherine Karani Vs Daniel Mureithi Wachira** held/observed that;

***“It is clear from the reading of section 3(3) of the Law of Contract act that the signature of each party is required to be attested by a witness who was present during the execution of the agreement. We have perused the agreement and we find that it is only the appellants signature that was attested by her husband. This was clearly contrary to section 3(3) of the law of contract.”***

17. The wording of the above provisions is mandatory. The Defendant stated that the agreement was not signed because he had not paid the full purchase price. There is no such requirement in the law that an agreement can only be signed once the full purchase price has been paid. The agreement was not signed or witnessed as is required. it is therefore untenable as it offends the provisions of Section 3(3) of the Law of Contract. In relying on the legal provisions above, I find that there was no valid contract between the parties.

#### **WHETHER THE PLAINTIFF IS THE OWNER OF THE SUIT PROPERTY**

18. In answer to the second issue for determination, it is not in dispute that the suit land was registered in the name of the Plaintiff vide a succession cause. The Plaintiff produced a copy of the certificate of title as exhibit 1. I have carefully looked at the certificate of title for Makueni/Kalongo/2099 and I find that the Plaintiff was registered as the owner on 19/01/2015. The certificate of tile was issued on 15/04/2015.

19. Section 24 of the Land Registration Act provides for the interest conferred by registration. It provides as follows;

**The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

20. Section 25(1) of the Land Registration Act provides for the rights of a proprietor stipulates as follows: -

***The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the***

*privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever, but subject...*

21. These provisions vest on the registered owner of land the rights and privileges and provide for instance when the rights can be taken away.

22. It is trite law that the registration of a person as the owner of the land and the certificate of title held by such person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However the registration of such a title is not absolute as the same may be impeached under certain circumstances as provided by Section 26(1) of the Land Registration Act which provides **that the certificate issued by the registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and condition contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-**

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

23. There was no evidence that the Plaintiff obtained the title by fraud or misrepresentation, illegally unprocedurally or through a corrupt scheme. I am satisfied that the Plaintiff has proved that she is the registered owner of the land. From the legal provisions cited above, I hold that the Plaintiff is the absolute registered proprietor of the suit land, the certificate of title having not been challenged. The Plaintiff is therefore entitled to all rights and privileges appurtenant thereto and to the protection of the law.

#### **WHETHER EVICTION ORDERS CAN BE ISSUED**

24. The Plaintiff stated that the Defendant had trespassed on her land and that he had refused to vacate. Having found that the Plaintiff is the registered owner of the suit land, and having found that she is entitled to the rights and privileges appurtenant thereto, I hold that she is entitled to exclusive possession. The Defendant has not demonstrated any right over the suit land. I therefore hold that the Defendant should be evicted from the suit property.

25. The Defendant in his evidence alleged that he had paid Kshs 10000 towards the purchase of the suit land. He produced the unsigned sale agreement to corroborate his evidence. The Defendant further stated that the clan of elders had resolved that vendor refunds back the Kshs 10,000/- or give him a portion of land worth Kshs 10,000/-. He produced the decision by the elders' as defence exhibit 2 to support his evidence. As earlier stated, this court has found that the sale agreement is inadmissible for failing to comply with the provisions of Section 3(3) of the Law of Contract. If indeed the Defendant had made such a payment, he should have filed a counter claim to the Plaintiff's claim. This was not done.

26. In the end, I find that the Plaintiff has proved her case on a balance of probabilities as required. Consequently, I enter Judgment for the Plaintiff against the Defendant as prayed in the Plaintiff.

**JUDGEMENT SIGNED, DATED AND DELIVERED VIRTUALLY THIS 16TH DAY FEBRUARY OF 2022.**

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**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF: -**

**Kithuka for the Plaintiff.**

**Tamata for the Defendant**

**Kwemboi court assistant**