



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 153 OF 2007

MARY WANJIRA KARIUKI PLAINTIFF

- V E R S U S -

1. SHABAN KALUGO KALUME KITSAUMBI

2. PASTOR JAMES MUGALLA

3. RAPHAEL M. MBITHI DEFENDANTS

JUDGEMENT

[1] The plaintiffs case is that she lives in Mtwapa on her land. That she has sued the defendant as a person who sold the suit plot to her and the 2nd and 3rd defendants who claim to have bought the same plot. She produced a sale agreement between her and the 1st defendant. The land had been inherited by the 1st defendant from his father Kalume. She paid Kshs. 400,000, she stated that she was taken to the site and shown the plot which was to be excised from Plot No. 742 M/N. She stated that after paying the purchase price she went to a Surveyor who prepared a deed plan and paid Kshs. 24000. She produced receipt for payment No. 3901.

She states that she fenced the plot in 2006. She later found the fence was destroyed and reported to the police. She said that when she bought the land there was a 'kibanda' thereon for the 2nd and 3rd defendants roofed with iron sheets but the walls were made of poles. She said it was the 2nd defendant who was using the same as a prayer house. She asked the court to assist her to to get her plot and that the two defendants be ordered to move out of her plot. On cross examination she said she asked the owner of the plot about the two defendants, he said that it was a prayer house and that he would give the two defendants notice to move out and vacate from the premises. She said that a notice was duly given. She said her plot was 48 'x 80' and is number 4981. She denied that the 1st defendant was cheating her. On further cross-examination the plaintiff said that the agreement was very clear as to what she was buying and that the whole family had agreed to sell the plot to her. The plot belonged to Mwaka Shaban's mother. Shaban was supposed to inherit that plot from his mother and that the mother had agreed.

She told the court that the 'Kibanda' is constructed on 48 'x 80' plot and is in the middle of the plot and measures about 10 ' x 10'.

[2] PW2 Edward Marenye Kiguru said that he was a practicing surveyor in Mombasa. He said he remembers dealing with Plot 742/III/MN. That it has now been transferred to various widows and heirs.

That the same was owned by Kalume Kitsami now deceased. He said among the plots into which 742 was divided was Plot No. 3837 which was registered in the name Mwaka Kalume Kitsaumbi. That the plot in the sale agreement was a 2nd plot within plot no. 3837 measuring 38' x 40'. He said he was asked by the purchaser to survey the plot and the purchaser paid his fees. He visited the plot after being shown by Mr. Shaban in the presence of Mary Waithera and her husband Mr. Kariuki and surveyed it. He said he understood Mr. Shaban to be the son of Mwaka Kalume, the registered owner. That he is one of the sons and the beneficial owner of the plot measuring 48' x 80'. He said when he went on the land the plot was vacant and he did not see a structure thereon. That at the time of survey there was a sale agreement, a transfer was subsequently made and documents were lodged with the Registrar for registration. He gave the number of the deed plan as 4981 and is part of plot no. 3847. He said that they lodged the document in the Land office and hoped that the title would be issued in the name of the plaintiff. He confirmed that he was fully paid by the plaintiff. On cross-examination he said that he surveyed the plot on instructions of Shaban on behalf of Mwaka and the plaintiff was one of the interested parties.

[3] PW3 Mwaka Kalume said that she was the wife of Kalume Kitsaume. She said they were 6 wives. She had 3 children, one of them was Kabugo Kalume Kitsaumbi the 1st defendant. She said upon her husband's death she got a piece of land. She said that she knows it physically and that she has given subdivisions to each of her children. She said that she knows the plaintiff, that the plaintiff is a resident on the plot having bought a portion thereof from her. She further said that she heard that the plaintiff was buying the plot from her son Shaban. That she gave the go ahead because he was the one with the title. She signed all relevant documents to enable the plaintiff obtain her own title. She said the plot was then surveyed by PW2. She said she would like the plaintiff to get her title. That the plaintiff paid the purchase price. She said she does not know the other defendants. That they did not buy any land from her. She said that if her son the 1st defendant had sold the land to anyone else he should have gone to her to sign the documents.

[4] PW4 Stephen Fondo Matho said that he is a property agent. He said that the 1st defendant was his client who had appointed him to collect ground rent on his behalf. This was a 2 year contract from 2005. The plot was at Mtwapa. That 1st defendant came one day and told the witness that there was an empty plot for sale. They went to the plot and agreed that the plot be advertised. That after a week the 1st defendant came and told him that as they looked for buyers, that there was somebody who wished to use the plot temporarily. That person was Pastor Mugalla the 2nd defendant. Thereafter they got a buyer in the name of the plaintiff. He said he notified the 2nd defendant to move and vacate out of the premises as the plot had an owner. He did not respond. The 1st defendant came to him to ask him to issue a reminder to the 2nd defendant to move and vacate as plaintiff was disturbing the 1st defendant on the issue. That he issued a second notice. The notice was produced in court as Exh. 5. There was no response. He told the court that the second defendant was a tenant. He said the plaintiff bought the land and paid the purchase price. That the relationship between the 1st defendant and 2nd defendant was rental and that the plaintiff was a buyer.

[5] The third defendant Raphael M. Mbithi gave evidence. He said that Shaban Kalugo Kalume is the owner of the plot. He said he knows the 2nd defendant as the pastor of the church built on the plot. He said the plot is his that he bought it from Anna Njoki Njau. That he bought it on February 28, 1993. That it is 80'x45'. That he bought it for Kshs. 35000. He produced an agreement between himself and Anna Njoki as Exh. D1. He said the plot was initially owned by Daniel Mbogo Kalume who sold it to Anna Njoki Njau. That Daniel is the younger brother of the 1st defendant. He produced receipts which he paid the said Daniel Mbogo Kalume. He said there is a big church there. On cross-examination the witness said that the title belongs to Mwaka Kalume. That he has never had any negotiations with her. He agreed that now he pays to Shaban (defendant no. 1) and the receipt reads "rent".

[6] DW2 Javies Mugalla Mujimba gave evidence and said he is a pastor of Victory Covenant Church. He said he knows the plaintiff. He knew her after she sued him. He said he was allowed to be on the land by Mr. Raphael Mbithi just to carry out prayers. He said that this was 2003. He said he put up a church structure of 20'x35'. He said Raphael Mbithi is the owner. He said they have no tenancy agreement. That they are licencees of Mbithi.

[7] That being the evidence adduced by the parties, the issue for determination is who owns the disputed land as between the plaintiff and the 2nd defendant. The plaintiff states that he bought the plot from the first defendant. The first defendant was the beneficial owner of the plot which was owned by his mother. There was an agreement for sale in writing. It was produced in court. The purchase price of Kshs. 400,000 was paid. The land was unsurveyed and the plaintiff engaged a professional surveyor to prepare the deed plans, which were eventually lodged in the land Registry for eventual registration and issuance of title. Further that the 2nd defendant was a temporary tenant who was allowed by the 1st defendant to put a church in the premises. That he gave two notices to the 2nd defendant to move and vacate from the premises. They were not headed. The fact that the 2nd defendant was a tenant is confirmed by himself in his evidence when he said he was permitted to stay on the premises by Raphael Mbithi. He admitted that there was no tenancy agreement and that they are licencees of Mbithi. All this was done with the consent of the plaintiffs mother who gave evidence in court. There was no dispute between the parties that this land belonged to the 1st defendant's mother Mwaka Kalume being her inheritance from her late husband. She indeed confirmed that the plaintiff bought the land from her and she gave a go ahead and eventually signed all the documents.

[8] PW4 Stephen Fondo Matho an estate agent of 1st defendant confirmed that the plot was bought by the plaintiff. That she paid the purchase price. He confirmed as false what Mbithi said he bought the land from Anna Njoki Njau who bought it from Daniel Mbogo Kalume son of Mwaka Kalume, He stated that the undisputed owner of the land had said the land was properly sold to the plaintiff and no one else.

[10] The said Anna Njoki Njau and Daniel Mbogo Kalume were never called to testify at all. There is no dispute that the plaintiff is in the suit premises and has taken possession save for the place occupied by the church. I have perused all the documents produced in this case by the parties to the suit. After a thorough evaluation of the evidence, I am convinced on a balance of probabilities that the plaintiff in this case has proved her case. I grant her the prayers she seeks in her plaint with costs and interest.

Dated and delivered in open court at Mombasa this 26th day of June, 2014.

S. MUKUNYA

JUDGE

26.6.2014

In the presence of:

Gachiri Kariuki Advocate for the plaintiff