



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 61 of 2006

RAPHAEL NDUNDA MUSYOKI PLAINTIFF

VERSUS

MARY NDUKU KIMANTHI DEFENDANT

JUDGMENT

1. In his Complaint dated 22/6/2006, the Plaintiff, Raphael Ndunda Musyoka averred that in 1996, he purchased title No. Machakos/Matuu/5031 from one Loise Kalondu Mueke (since deceased) and he paid kshs.25,000/= as purchase price. Having done so, he took possession and was aware that the said parcel of land was a sub-division of parcel No. Machakos/Matuu/4731.

2. The Plaintiff further averred that the Defendant, Mary Nduku Kimanthi had purchased title No. Machakos/Matuu/5033 another sub-division of title No.4731 but was surprised when on 26/10/2000 he discovered that the Defendant had fraudulently transferred title No.5031 to herself. The particulars of fraud are given at paragraph 6 of the Complaint as that:-

“6. In or about 26th October 2000 before the Machakos/Matuu/5031 could be transferred to the plaintiff, the defendant without the plaintiff’s knowledge and authority wrongfully and unlawfully and/or fraudulently caused the plaintiff’s land Machakos/Matuu/5031 to be transferred into the defendant’s name depriving the plaintiff of his lawful land and the plaintiff has suffered loss and damage due to the defendant’s fraudulent acts.

PARTICULARS OF FRAUD

- a. The proprietor did not sell Machakos/Matuu/5031 to the defendant.
- b. The defendant caused and/or obtained transfer by misrepresentation, misleading and cheating the land Registrar that the documents for the application of transfer were valid.
- c. The defendant knew and knows Machakos/Matuu/5031 is property of the plaintiff.
- d. The defendant knew and knows the plaintiff is in occupation and has extensively developed plot Machakos/Matuu/5031.

- e. The defendant wrongfully and unlawfully and through deceit caused the transfer documents to be forged in the defendant's favour.
 - f. The application forms for consent had wrongfully and unlawfully been altered and land Machakos/Matuu/5033 deleted and substituted with Machakos/Matuu/5031 and the alterations were not initialed or stamped with valid official stamp.
 - g. That the defendant knows that her plot is about 1 kilometre from plot Machakos/Matuu/5031.
 - h. The defendant has wrongfully and illegally acquired title Machakos/Matuu/5031 to which the defendant has no legal claim."
3. When the Plaintiff attempted to prod the Defendant to acknowledge the effect of her actions and transfer the suit plot, she agreed to do so but later neglected or refused to do so.
4. The Plaintiff now prays for orders that:-
- a. "The plaintiff is owner and entitled to sole possession of Machakos/Matuu/5031.
 - b. An order that the defendant is wrongfully and unlawfully through fraud registered as proprietor of Machakos/matuu/5031.
 - c. An order for rectification of the register by directing the Machakos Land Registrar that registration of Machakos/Matuu/5031 in favour of the defendant be cancelled as it is obtained or made by fraud or through a mistake and the cancellation be substituted by registering the plaintiff as the sole proprietor of Machakos/Matuu/5031 instead of the defendant herein and the defendant be caused to refund costs for cancellation and registration.
 - d. That the defendant do execute all relevant transfer documents and effect transfer in favour of the plaintiff at the defendants costs in default the executive officer of this court do execute relevant documents and costs to be met by to the plaintiff.
 - e. Costs of the suit to the plaintiff.
 - f. Interest on (e) to the plaintiff.
 - g. Any other relief that this court may deem fit and just do grant to the plaintiff."
5. The Defendant was served but declined to enter appearance nor did she file any defence in the suit.
6. The suit was heard by Sitati J who took the evidence of the Plaintiff and his witnesses, Harrison Kyengo Mueke, a son to Loise Kalondu, who sold the suit land to the Plaintiff and it was their cumulative evidence that the plot known as Machakos/Matuu/5031 was indeed sold to the Plaintiff and that the Defendant only acquired title to it by means of fraud.
7. One Fidelia Munyenze Muthui, Assistant Land Registrar, Machakos produced documents showing that the land in issue was registered in the names of the Defendant and that the documents presented including the transfer and consent to transfer were all authentic but she also saw documents lodged by the Plaintiff but the same were rejected in view of the prior registration in the names of the Defendant.
8. I have read the submissions by Mr Makau, Advocate for the Plaintiff and since the claim is not denied, I can only but hold that the Plaintiff has established that he is the one lawfully entitled to the suit land. The evidence of Harrison Kyengo Mueke who was present at all times when his late mother Loise Kalondu transacted the sale of the land to the Plaintiff corroborated that clear and uncontested evidence.
9. The Defendant has chosen not to reply to the suit and I therefore deem that action as an admission

of the claim.

10. I will enter judgment without further ado for orders in terms of prayers (c) and (d) of the Plaint.

11. Since the suit is undefended I shall make no order as to costs.

12. Orders accordingly.

Dated and delivered at Machakos this 25th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mutua Makau for Plaintiff**

ISAAC LENAOLA

JUDGE