



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 65 OF 2014**

**ALEX MULINGE OPATI.....PLAINTIFF**

**VERSUS**

**ROSE NZISA MUNG'ALU.....1<sup>ST</sup> DEFENDANT**

**ARON KIOKO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In the Complaint dated 23<sup>rd</sup> July, 2014, the Plaintiff has averred that in October, 2005, he purchased a parcel of land known as Athi River/Athi River Block 1/1832 (*the suit property*); that the said land was transferred to him and that when he attempted to take possession of the land, he encountered the Defendants who were already in possession of the land.
2. The Plaintiff averred that the Defendants are trespassers on the suit land. The Plaintiff is seeking for a declaration that he is the absolute owner of the suit land and for an eviction order to issue as against the Defendants.
3. In their Defence and Counter-claim, the Defendants averred that the Plaintiff fraudulently obtained the Title Deed in his favour and that the Plaintiff misled the Land Registrar to issue him a Title Deed for the suit land while knowing that the land belongs to the 1<sup>st</sup> Defendant.
4. In the Counter-claim, the Defendants averred that the suit land belongs to Rose Nzisa Kioko; that the 2<sup>nd</sup> Defendant is the son of the 1<sup>st</sup> Defendant that the 1<sup>st</sup> Defendant's mother (*deceased*) purchased the suit land from Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the Society*) as Plot No. 804 measuring approximately 0.8256 Ha and that the 1<sup>st</sup> Defendant's mother transferred the said land to the 1<sup>st</sup> Defendant in 1998.
5. According to the Defendants, it was not until December, 2011 that they learnt that Plot No. 804 had now been registered as Athi River/Athi River Block 1/1832 in the name of Alex Mulinge Opati. The Defendants are seeking for a declaration that the 1<sup>st</sup> Defendant is the legal owner of the suit land and for the cancellation of the Title Deed that was issued to the Plaintiff.
6. In his testimony, the Plaintiff, PW1, informed the court that he purchased the suit land in October, 2005; that he was thereafter issued with a Title Deed and that his attempt to take possession of the suit land was thwarted by the Defendants who were already in possession of the land.
7. It was the evidence of PW1 that he purchased the suit land vide an Agreement of 5<sup>th</sup> October, 2005 and paid Kshs. 315, 000 for the land. In cross-examination, PW1 stated that he did not interrogate the buyer on how he acquired the suit land from the Society. The Plaintiff produced in evidence the Sale Agreement of 5<sup>th</sup> October, 2005 and the Title Deed for Athi River/Athi River Block 1/1832 that was issued to him on 25<sup>th</sup> October, 2005.
8. On her part, the 1<sup>st</sup> Defendant, DW1, informed the court that her late mother, Ruth Ernest Musembi, purchased land in the Katelembo Athiani Muputi Farming and Ranching Co-operation Society Limited (*the Society*); that the land she purchased was known as Plot No. 804 and that before she died in 1998, she introduced her to the Society.
9. It was the evidence of DW1 that she took possession of the suit land where she put up a house and planted crops. According to DW1, she leased the suit land to one Philip Kakula in the year 2005; that in the same year, the Plaintiff threatened to evict the said Philip Kakula and that the management of the Society called for a meeting in the year 2005 to resolve the dispute. However, the Plaintiff did not attend the meeting.
10. DW1 informed the court that by way of a letter dated 20<sup>th</sup> February, 2005, the Society advised Philip to continue tilling the land. DW1

produced in evidence the Death Certificate of her late mother; the Transfer form from the Society; several letters by the Society and the plot allocation schedule of the Society.

11. The Plaintiff's advocate submitted that a Certificate of Title issued by a Land Registrar to an individual is conclusive evidence of proprietorship; that Article 40 of the Constitution guarantees the protection of the right to property and that the Plaintiff having produced a Title Deed, he has established rightful proprietorship over the suit property.

12. The Plaintiff's counsel finally submitted that the Defendants have failed to place any material before the court to demonstrate fraud or misrepresentation and that although the 1<sup>st</sup> Defendant's mother died on 2<sup>nd</sup> January, 1998, she purportedly signed the Transfer document on 26<sup>th</sup> April, 2010. Counsel relied on numerous authorities which I have considered. The Defendants' advocate did not file submissions.

13. Both the Plaintiff and the 1<sup>st</sup> Defendant have averred that they own the suit property. In his evidence, the Plaintiff informed the court that he purchased the suit land from one Mr. Makau Ndonge. The Plaintiff produced in evidence the Sale Agreement dated 5<sup>th</sup> October, 2005 which was executed and attested.

14. From the said Agreement, it would appear that the suit land had already been surveyed as at the time of sale but a Title Deed had not been issued to Mr. Ndonge. Indeed, the Title Deed that was issued to the Plaintiff on 25<sup>th</sup> October, 2005 was registered in favour of the Plaintiff as the first proprietor of the land on 19<sup>th</sup> October, 2005. The register for the said land was however opened on 24<sup>th</sup> February, 1997.

15. On the other hand, the 1<sup>st</sup> Defendant's case was that the suit land was initially known as Plot No. 804 and that the land belonged to her late mother, who before she died on 2<sup>nd</sup> January, 1998, bequeathed her with the land. The Defendants produced in evidence the copy of the Death Certificate, the transfer form dated 26<sup>th</sup> April, 2010 and the copy of the plot allocation register belonging to Katelembo Athiani Co-operative Society.

16. The copy of the register of the Society shows that Plot No. 804 was allocated to Ruth E. Kioko who is indicated as member No. 2674. Other than the said uncertified copy of the register, there is no other document to show that Plot No. 804 was owned by the late Ruth E. Kioko and that the said plot is the same as the suit land.

17. Although the 1<sup>st</sup> Defendant stated that she was given the said land by her mother before she died in 1998, the Transfer form was only signed on 26<sup>th</sup> April, 2010 way after her mother had died. The 1<sup>st</sup> Defendant did not inform the court why the said Transfer form was not signed by her mother before she died.

18. Although the Defendant stated that her mother owned Plot No. 804 measuring 2.04 acres, the Transfer form that she is relying on does not indicate the plot that was purportedly being transferred to the 1<sup>st</sup> Defendant or the acreage. The Transfer form therefore does not have any evidential value to support the 1<sup>st</sup> Defendant's case that the land was transferred to her by her late mother.

19. The Plaintiff is in possession of a Title Deed for land known as Athi River/Athi River Block 1/1832. The said Title Deed was issued to the Plaintiff on 25<sup>th</sup> October, 2005. The law applicable to that Title Deed is therefore the Registered Land Act (*repealed*) and not the Land Registration Act.

20. Section 27 of the Registered Land Act (*repealed*) provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land. Section 143 (1) of the Act provides that the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake. In the case of *Peter Kamau Njau vs. Emmanuel Charo Tinga (2016) eKLR*, the Court of Appeal held as follows:

***“The learned Judge was clearly misled by the statement of this court sitting at Nyeri in Munyua Maina (supra) in the passage reproduced earlier, which in effect erroneously suggest that a document of title is worthless without further supporting evidence. Due diligence expected of a purchaser does not extend beyond the title of the Vendor and, so long as the Vendor's name is contained in the Certificate of Title, Section 26 of the Land Registration Act enjoins “all courts” to take that Certificate of Title as prima facie evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate.”***

21. The Defendants have not shown by way of evidence that the Plaintiff obtained the Title Deed for Athi River/Athi River Block 1/1832 by fraud or mistake. Indeed, there is no evidence to show that Plot No. 804 which purportedly belonged to the 1<sup>st</sup> Defendant is the suit land. In the circumstances, I find that the Plaintiff has proved his case on a balance of probabilities. On the other hand, the Defendants have been unable to prove that the suit land was owned by the 1<sup>st</sup> Defendant's mother who then transferred it to the 1<sup>st</sup> Defendant.

22. For those reasons, I allow the Plaintiff's Complaint dated 23<sup>rd</sup> July, 2014 as prayed and dismiss the Defendants' Counter-claim with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**