



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 189 OF 2016

FREDRICK MUROKI GRIEVE.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

JUDGMENT

1. By a Complaint dated 9th November, 2016, the Plaintiff averred that he was the owner of plot number 49 measuring 40 by 100 feet and located in Kithendu Market in Matuu after buying the land from George Mutiso Kilonzo in 1991; that he has been in possession of the said land and been paying rates to the Defendant and that the Defendant has been using the registers to record ownership of the plots in its jurisdiction.

2. The Plaintiff averred that the registers are the only available records as to the existence and ownership of plots because no Title Deeds have been issued under any registration regime; that the registers are updated when a need arises and that as regards the suit property, the Plaintiff has discovered that the suit property is not reflected in the third register which the Defendant is currently using.

3. It was averred that the Plaintiff's inquiries have only been met with hostility from the Defendant's officers and that no explanation has been given why his plot is missing from the register. According to the Plaintiff, by failing to update its register to reflect the existence and ownership of the suit property, the Defendant is unjustly and unlawfully depriving the Plaintiff the right to property. The Plaintiff is seeking for the following orders:

a. An order that the Defendant updates its registers to reflect existence of Plot No. 49 Kithendu Market and that the Plaintiff is the owner of the said Plot No. 49 (hereinafter referred to as the 'suit property').

b. Damages for violation of the Plaintiff's right to property and to a fair administrative action.

c. Costs of this suit.

d. Interest on (b) and (c) at court rates (14%) until payment in full.

4. The Defendant filed a Defence in which it averred that as per the records, the person who has been in possession of the suit property for the past twenty (20) years is a different person from the Plaintiff; that the Plaintiff's claim is time barred and that the suit should be dismissed with costs.

The Plaintiff's case:

5. PW1 informed the court that he bought Plot No. 49 located in Kithendu Market from George Mutiso Kilonzo in 1991; that the plot was transferred to his name in 1991 and that the Defendant's register indicated as much.

6. According to PW1, since he purchased the suit property, he has been in possession of the same and has been paying rates; that the Defendant maintains registers which shows the plot numbers; that the register is the only available record; that over time, the Defendant has held three (3) registers and that in the first two registers, his plot is indicated as at the year 2007.

7. It was the evidence of PW1 that after the year 2007, a new register (the third one) which is currently in use was opened; that Plot No. 49 is not reflected in the said register neither is his name and that he has paid the rates for the said plot upto the year 2016. However, it was the evidence of the Plaintiff that the Defendant's employees have been unable to explain to him why his plot does not appear in the third register.

8. PW1 informed the court that he has never received any communication from the Defendant notifying him of the decision to remove his name from the register since 1991 when he purchased the suit property and that the Defendant is the custodian of the plots in its jurisdiction.

9. In cross-examination, PW1 stated that he has never sold the plot; that he is still on the plot but has never developed it and that he pays land rent. PW1 produced a receipt dated 22nd March, 2016. According to PW1, the other receipts for rent were stolen in his office.

10. PW1 produced in evidence the three (3) registers for 2007, 1997 and another one which was undated and informed the court that Plot No. 49 does not appear in the subsequent registers that he saw. According to PW1, he should be reinstated in the register.

The Defendant's case:

11. DW1 testified that he was employed by the Matuu Town Council in 1995 as a surveyor but has since retired. He stated that while at Matuu Town council, he used to measure and mark the location of plots in Matuu; that he knows about Plot No. 49 (*the suit property*) which exists and that the suit property has been developed by one Benedict Mutua Kithumbi (*deceased*).

12. It was the evidence of DW1 that by the time he went to Matuu Town Council in 1995, Benedict Mutua Kithumbi had developed Plot No. 49; that in 2005, the Machakos County updated every market plot to ascertain the payable rates and that the exercise was conducted by a physical planner who assisted the County officials to identify all plots.

13. DW1 informed the court that Plot No. 49 changed to a number he could not recall; that all plots changed their numbers including the former Plot No. 49; that it is the wife of the late Benedict Mutua, Victoria Mutua, who identified Plot No. 49 during the exercise and that people were notified of the said changes during the re-allocation of plots. According to DW1, the Plaintiff was represented during the exercise in respect to his other plots except Plot No. 49.

14. According to the witness, the Plaintiff sold the plot to the late Benedict Mutua and had no issue when the said Benedict developed the plot between 1993 to 2016 and that the Plaintiff started demanding for the plot when he realised that he had not signed the transfer document and upon learning about the death of Mr. Mutua.

15. It was the testimony of DW1 that in the year 2016, he saw an Agreement between the Plaintiff and the late Benedict together with the building plan. DW1 stated that Machakos County Government gave notices to all land owners although he did not produce the said notices. DW1 stated that he does not have records to show that Plot No. 49 changed to Plot No. 136 or 132, neither did he produce any documents or minutes to show that Victoria Mutua identified Plot No. 49 as hers.

16. DW1 stated that the registers of 2007 and 1997 show that PW1 was the owner of Plot No.49; that Benedict died in 1997 and that although Benedict bought the suit property, the transfer was not officially entered in the register.

17. DW2 stated that he was the Defendant's Deputy Sub-County Administrator, Yatta Sub County, Machakos County. According to DW2, he is the one in charge of devolved functions at the sub-county and the chair of the Physical Planning Committee. It was his evidence that in the year 2016 to 2018, he was the Deputy Sub-County Administrator and that is when the Plaintiff went to his office to inquire about Plot No. 49.

18. DW2 testified that investigations were commenced; that they realized that Plot No. 49 was occupied by Victoria Mulanda Mutua; that he also learnt that vide a Sale Agreement dated 11th January, 1993, the Plaintiff had sold the said plot to the late Benedict Mutua and that this information was confirmed by Victoria, the wife of Benedict.

19. According to the evidence of DW2, Victoria was in possession of all the documents in respect of Plot No. 49 including the building plan; that Victoria informed them that she has been in occupation of the said plot since 1997 and that the neighbours and the market Chairman stated that it is Victoria who has been in possession of the suit property.

20. In his statement, which was adopted as his evidence, DW2 stated that the suit property is less than 100m from the Plaintiff's other properties; that the serialisation of the plots was done in the year 2005 and that Plot No. 49 changed to Plot No. 132 and is currently being occupied by Victoria Mwendu.

21. DW2 testified that even after Benedict purchased the plot, a proper transfer was not done which explains why the name of the Plaintiff continued appearing in the register and that the Plaintiff's name was removed from the register after the serialisation exercise was completed in the year 2005.

22. DW2 stated in his statement that it is Victoria who has been making the payments for rent for Plot No. 132; that the last payment of Kshs. 7,000 was made in May, 2016 and that the Plaintiff made payments via mpsa on 5th August, 2015 without consulting his office.

23. In cross-examination, DW2, stated that variations do occur during payment of rent and that the system does not generate a plot number on its own but generates information given by the client.

The Plaintiff's Submissions:

24. Counsel for the Plaintiff submitted that the Defendant's pleadings and witnesses clearly support and confirms the claim by the Plaintiff that his name was removed from the register and that the ownership of Plot No. 49 has been proved by the production of the Sale Agreement dated 4th August,1991 and the payment receipt for plot rent dated 22nd March, 2016 and an extract of the register between 1996-2007, together with the demand letter dated 29th September, 2016.

25. It was submitted that the Defendant and its witnesses failed to tender any document showing how the plot was removed from the name of

the Plaintiff in the register to a third party; that the purported change/digitization and renumbering of Plot 132 or 136, the purported Sale Agreement dated 11th January, 1993 signed by a proxy or any document whatsoever from the Sub-County offices to justify the claims is a scheme by the Defendant's officers to grab and re-allocate the plot to a Third Party without the due process of the law.

26. According to the Plaintiff, developing the plots within the market have been futile since they have not been surveyed or issued with leases; that there are no beacons hence the County Government cannot approve any building plans and that it is questionable how the Defendant was able to developed the plot without any survey or beacons.

The Defendant's submissions:

27. In response, counsel for the Defendant submitted that Plot No. 49 changed to Plot No. 132 because it didn't have a number initially; that it is interesting that the Plaintiff would go to the Defendant's office in 2016, after twenty five (25) years, to inquire about Plot No. 49; that the Plaintiff only paid land rent for 2016 and that the said payment was accepted because the system generated a receipt whose particulars are recited by the person paying.

Analysis and findings:

28. The Plaintiff's case is that he bought Plot No. 49 located in Kithendu Market from George Mutiso Kilonzo in 1991. The Plaintiff produced in evidence the Sale Agreement that he entered into with Mr. George Mutiso in respect to the said land.

29. According to the Plaintiff, the plot was transferred to his name in 1991 and that the Defendant's register indicated as much. The Plaintiff produced in evidence copies of the register prepared by the Defendant in respect of the suit property for the years 1997 and 2007. The Plaintiff also produced in evidence a copy of an electronically generated receipt dated 22nd March, 2016 by the Defendant.

30. It is the Plaintiff's case that having purchased the suit property, and having been in possession and paid rates, his name should have reflected in the current register showing that he is the registered owner of Plot No. 49.

31. The Defendant's case is that Plot No. 49 is occupied by Victoria Mulanda Mutua; that vide a Sale Agreement dated 11th January, 1993, the Plaintiff sold the said plot to the late Benedict Mutua and that this information was confirmed by Victoria, the wife of Benedict.

32. According to the Defendant, Victoria is in possession of all the documents in respect of Plot No. 49, including the building plan; that Victoria informed them that she has been in occupation of the said plot since 1997 and that the neighbours and the market Chairman stated that it is Victoria who has been in possession of the suit property.

33. The Defendant's witnesses admitted that until 2005, the Plaintiff was reflected in its registries as the owner of Plot No. 49. Although it was the testimony of the said witnesses that the suit property was purchased by Benedict from the Plaintiff, no evidence was adduced to show the said purchase.

34. The Defendant did not also adduce evidence to show that the said land changed the number from Plot No. 49 to 132 or at all, or that the wife of Benedict was in occupation of the land. Even if it is true that Plot No. 49 changed the plot number during the serialisation exercise, there is no evidence to show why and when the ownership of the said land changed from the Plaintiff to Benedict or his wife Victoria, or if the Plaintiff was heard before the said change was effected.

35. The Defendant's witnesses did not produce records neither did they explain why the Extract from the 2007 register still had the name of the Plaintiff, or how the plot was registered in the name of a third party, if at all.

36. Article 40 of the Constitution protects the right to property and prohibits any deprivation of property unless as provided for under Article 40(3) of the Constitution. Article 47 guarantees every person the right to Fair Administrative Action in case any decision is made which is likely to adversely affect an individual. These two provisions were breached by the Defendant when they purported to remove the Plaintiff's name from its register.

37. That being the case, it is my finding that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's suit is allowed as follows:

a) An order be and is hereby issued that the Defendant updates its register to reflect the existence of Plot No. 49 Kithendu Market and the Plaintiff's name as the owner of the said Plot No. 49.

b) The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE