



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC SUIT NO. 6 OF 2020**

**WAMBUA NGILU.....PLAINTIFF**

**VERSUS**

**ELIZABETH MWENDE KOECH.....DEFENDANT**

**JUDGMENT**

1. The plaintiff has sued the defendant vide plaint dated 13<sup>th</sup> February, 2020 filed on 14<sup>th</sup> February, 2020 seeking the following reliefs: -

*a. An order directing the defendant to transfer land parcel MAKUENI/MASONGALENI/1872 to the plaintiff and in default the deputy registrar of this honourable court to sign all the relevant documents to effectively transfer land parcel MAKUENI/MASONGALENI/1872 to the plaintiff.*

*b. cost of this suit and interest*

*c. Any other relief this honourable court deems fit to grant.*

2. The defendant was duly served on 21<sup>st</sup> February, 2020 as per affidavit of service sworn on 12<sup>th</sup> August 2020. She failed to enter appearance, and file statement of defence.

3. On 10<sup>th</sup> November, 2020 this court gave directions that this suit does proceed as undefended for the defendant was satisfactorily served but failed to enter appearance and or file her defence.

4. On 19<sup>th</sup> April, 2021 the plaintiff adopted his statement dated 15<sup>th</sup> January, 2021 and filed in court on even date. He produced the documents listed in the plaintiff's list of documents as **P Exh 1- 10**. The plaintiff's list of documents is dated 13<sup>th</sup> February, 2020 and filed in court on 14<sup>th</sup> February, 2020.

5. It was the plaintiff's testimony that he bought 6 ¼ acres of land parcel **MAKUENI/MASONGALENI/1628** from the defendant at Kshs. 506,250/=. The said parcel was later sub divided into two parcels; **MAKUENI/MASONGALENI/1872** and **MAKUENI/MASONGALENI/1873**. The plaintiff was allocated **MAKUENI/MASONGALENI/1872**. He then proceeded to obtain all the necessary consents to transfer and paid stamp duty to have the said land transferred to him. The defendant failed to execute the transfer documents and demanded more money from the plaintiff.

6. The plaintiff further stated that he has built a permanent house and cultivates on the land parcel **MAKUENI/MASONGALENI/1872**. He has no other land besides the suit land. He urged this court to order the defendant to transfer the land unto him and in default the court to transfer the same to him. He further prayed that the defendant be condemned to pay costs and interest of the suit.

7. The plaintiff filed submission dated 26<sup>th</sup> April 2021 whereby he stated that the suit land is in the name of the defendant who failed to file defence hence the suit is not challenged. He submitted on the reliefs, sought and urged the court to grant them accordingly. He relied in the case of **Robert Osike Ageri Vs Kenneth Mulongo Ojwang [2020] eKLR.**

8. Having looked at the plaint, the evidence of the plaintiff as well as his submissions, I find that the following issues emerge for determination:

*a) Whether the plaintiff purchased the suit land from the defendant?*

**b) Whether the plaintiff is entitled to the reliefs sought in the plaint?**

9. The plaintiff testified that he bought 6¼ acres of land parcel **MAKUENI/MASONGALENI/1628** from the defendant at Kshs. 506,250/=. The suit land is registered in the name of the defendant. The same is revealed in **P Exh1** to 7. I am aware of the definition of the term “**Proprietor**” at Section 2 of the **Land Registration Act, 2012** as read with **Sections 24, 25, 26 and 30 of the same Act**.

10. There is no contention within this suit that there was a sale agreement (P Exh 1) between the parties herein. The agreement speaks for itself and it was for sale of the suit property through which **Elizabeth Mwende Koech (defendant)** sold 6 ¼ acres of the suit property to **Wambua Ngilu (plaintiff)**. The documented evidence shows full payment of the purchase price of Kshs. 506,250/=. The plaintiff paid stamp duty for the land to be transferred to him. It is noted that the plaintiff vide **P Exh 6** received the consent of the Land Control Board of the area. My finding is that the purchaser fully performed his obligation to the seller. That disposes of the first issue of whether or not the plaintiff purchased the suit land from the defendant.

11. Can the plaintiff now claim the land? Now, if there is evidence of a documented sale agreement, and evidence of full payment of the purchase price, I wonder what issue the defendant has with the plaintiff. She sold her land and she got full compensation/payment for the sale. She also parted with possession of the suit property after the sale agreement was entered into.

12. I am of the considered view that since the plaintiff paid the consideration to the defendant, a constructive trust was created in his favour. This is informed by the overriding objective of this court at **Section 3 of the Environment and Land Court Act, 2015 (2011)** and the need to render substantive justice to all parties to the suit.

13. In the case of ***Macharia Mwangi Maina & 87 others –v- Davidson Mwangi Kagiri (2014) eKLR***, the Court of Appeal held, thus:-

***“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive and not technical justice”.***

14. In the instant suit, I find that the sale agreement (P Exh 1) and the consent from the area Land Control Board (P Exh 6) created a constructive trust in favour of the plaintiff.

15. I really do not see the basis upon which the defendant is refusing to transfer the suit land to the plaintiff. The only thing that has not been formalized is the transfer, but once she sold the property, received payment, and handed over possession, her rights to the land got extinguished. I find that the defendant is bound by the sale agreement and has no residual interest in the suit land. I have no reason to refuse a transfer to the plaintiff.

16. Given the above, I find that the plaintiff is entitled to have the suit property transferred to him. And being satisfied that the plaintiff has on a balance of probabilities, a cause of action against the defendant, I hereby proceed to enter judgement in his favour and against the defendant as hereunder: -

***a) An order directing the defendant to transfer land parcel MAKUENI/MASONGALENI/1872 to the plaintiff and in default the deputy registrar of this Honourable Court to sign all the relevant documents to effectively transfer land parcel MAKUENI/MASONGALENI/1872 to the plaintiff.***

***b) cost of this suit and interest***

**DATED, SIGNED and DELIVERED** via email at Narok on this 28<sup>th</sup> day of October, 2021.

**Mbogo C.G**

**Judge**

**28/10/2021**

In the presence of: -

Mr. Timothy Chuma – Court Assistant