



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MAKUENI
ELC CASE NO. 3 OF 2018

THERESIA KATUKU VULUPLAINTIFF

VERSUS

KAVATA MUENDO NDOLO.....1ST DEFENDANT
MUENI MUTUNDU 2ND DEFENDANT
MUTUKU MUENDO.....3RD DEFENDANT
KANINI MUENDO.....4TH DEFENDANT
NDANU MUENDO 5TH DEFENDANT
NDAMBUKI MUENDO 6TH DEFENDANT

JUDGEMENT

1. By her plaint dated 18th January, 2018 and filed in court on even date, Teresia Katuku Vulu, (hereinafter referred to as the Plaintiff) prays for judgement against the six (6) defendants for: -

(a) Issuance of an eviction order compelling the Defendant/Respondent herein to vacate the suit premises with immediate effect.

(b) Issuance of a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, transferring/disposing, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Title No. Makueni/Kimundi/3986 with immediate effect.

(c) Costs of this suit.

(d) Any other relief that this court may deem fit and just to grant.

2. The Plaintiff has averred in paragraphs 4, 5 and 6 of her plaint that at all material times to this suit she has been the legal and bona fide owner of the suit land namely Makueni/Kimundi/3986, that the Defendants have been and still are in full possession, user and occupation of the suit land after selling the same on the basis of a "willing seller willing buyer" and the necessary documents presented during the transaction and the transfer effectively registered and in so doing the Plaintiff has suffered loss in which the Defendant is solely liable for and that the Plaintiff bought the parcel of land on or about the 27th July, 2017 from the Defendants.

3. The Plaintiff's claim is denied by the Defendants in their joint statement of defence dated 28th February, 2018 and filed in court on 02nd March, 2018.

4. In paragraphs 3 and 4 of their defence, the Defendants have averred that the Plaintiff is not the legal owner of the suit land and that they have never been in full possession, use and occupation of the suit land nor did they sell any land to her.

5. The Defendants pray that the Plaintiff's suit to be dismissed with costs.

6. On the 15th May, 2019, the Counsel for the Defendants informed the court that the 1st Defendant herein is deceased to which the Plaintiff's Counsel replied that the suit could proceed against the other Defendants. For the purpose of this judgement, it is deemed that the suit by the Plaintiff is against the 2nd to the 6th Defendants.

7. During the hearing of the Plaintiff's suit on 07th October, 2019, she adopted her statement that she filed in court on 18th January, 2018 as her evidence.

8. Her evidence was that in the month of July, 2017 she commenced plans to purchase land parcel number Makueni/Kimundi/3986 at a price of Kshs.560,000/=. She said that the size of the land in question was 8 acres and that the transaction was witnessed by the District Surveyor. That she was thereafter issued with a title deed for the suit land, the same being dated 21st September, 2017. That when she sought to take vacant possession of the suitland, the Defendants turned hostile against her. It was her evidence that she is yet to take vacant possession of the suit land due to the hostility from the Defendants.

The Plaintiff produced copies of the sale agreement, title deed, charge sheet, complaint note and sale agreements dated 27/07/2015, 27/07/2017, 12/10/2017 and 29/10/2017 in Kamba language and their translations thereof as P.Exhibit Nos.1, 2, 3, 4 and 5 respectively.

10.The Plaintiff called Ann Nzambali Mutie Kilonzo (PW1) as her witness. Ann (PW1) adopted her statement filed in court on 18th June, 2019 as her evidence.

11. Briefly her evidence was that she witnessed the land sale agreement for 8 acres of land between the Plaintiff and Kavata Muendo Ndolo (the 1st deceased defendant herein). She said that the 8 acres of land were to be exercised from land parcel number Makueni/Kimundi/1201. She went on to state that after excision, the Plaintiff was allocated land parcel number Makueni/Kimundi/3986 and was subsequently issued with a title deed on 21st September, 2017. It was also her evidence that when the Plaintiff sought to take vacant possession of her property, the Defendants turned hostile to her.

12. The Defendants though served with a hearing notice on 06th September, 2019 as can be seen from the affidavit of service sworn at Machakos on 04th October, 2019 and filed in court on 07th October, 2019 did not turn up in court for hearing. As it were, the Defendants and more particularly the 2nd to the 6th Defendants did not adduce evidence in support of their defence nor did they controvert the Plaintiff's evidence.

13. In his written submissions filed in court on 06th November, 2019, the Plaintiff's Counsel urged the court to grant the prayers sought by the Plaintiff in her plaint. The Counsel cited **Section 24 of the Land Registration Act** which provides as follows: -

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

He also cited **Section 25** of the same Act which provides that;
“for the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

He further cited **Section 26** which provides that;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The Counsel relied on the case of **Kinango Kitonyo vs. Horst Diether Thomase Ida Thomaser [2018] eKLR** where M. K. Ibrahim, J (as he then was) held thus: -

“.....I do find that the Defendant’s Defence has no merits. They have admitted being on a portion of the suit premises. This is against the will of the registered owner. They were served with a demand letter and have defied it including the Plaintiff’s ownership.”

14. Having read the evidence on record and the submissions filed, my finding is that the only issues for determination are whether or not the Plaintiff is the registered owner of land parcel number Makueni/Kimundi/3986 and whether or not the Defendants should be enjoined from interfering with the Plaintiffs quiet possession of the same.

15. From the evidence on record, there is no doubt that the Plaintiff is indeed the registered proprietor of land parcel number Makueni/Kimundi 3986 as can be seen from the title deed (P.Exhibit No.2) that she produced in evidence. The sale agreements (P.Exhibit No.1 and 5) clearly shows that she bought the suit land from the deceased 1st Defendant. I do note that the 2nd to the 6th Defendants have averred in their defence that they have never been in full possession, use and occupation of the suit land at the same time deny having ever sold any land to the Plaintiff. In effect the Defendants are approbating and reprobating at the same time and this cannot stand in light of the evidence adduced by the Plaintiff which clearly shows that they have barred her from taking vacant possession of the land that is rightfully hers. The Plaintiff’s title to the suit land remains unchallenged and in my view the defence has no merits. I am satisfied that the Plaintiff has on a balance of probabilities satisfied this Court that she has a cause of action against the 2nd to the 6th Defendants. I, therefore, enter judgement for her and against the 2nd to the 6th Defendants as follows: -

a. An eviction order is hereby issued compelling the Defendant/Respondent herein to vacate the suit premises with immediate effect.

b. A temporary injunction is hereby issued restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, transferring/disposing, constructing on, alienating or otherwise interfering or dealing with the Plaintiff’s property being Title No. Makueni/Kimundi/3986 with immediate effect.

c. Costs of this suit.

Signed, dated and delivered at Makueni via email this 29th day of April, 2020.

**MBOGO C.G.,
JUDGE.**

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.