



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 236 OF 2010**

**KINGORA ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**VICTOR KING MBITHI.....DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 8<sup>th</sup> November, 2010, the Plaintiff has averred that it is the *bona fide*, equitable, beneficial and legal owner of land known as L.R. No. 12715/502 situate in Syokimau within Machakos County; that on 5<sup>th</sup> November, 2010, the Defendant unlawfully invaded the suit property and brought down the Plaintiff's fence and that the Defendant's actions constitute trespass.
2. The Plaintiff has prayed for a declaration that it is the legal proprietor of the suit property and for a permanent injunction to restrain the Defendant from interfering with its quiet possession of the suit premises. The Plaintiff has also prayed for a mandatory injunction to compel the Defendant to deliver vacant possession of the suit property.
3. The Defendant filed a Defence and Counter-claim in which she averred that on 24<sup>th</sup> February, 2005, she purchased the suit property from the Plaintiff for Kshs. 350,000; that having bought the land, the Plaintiff should transfer to her the land and that a declaration to that effect should issue.
4. Although the Plaintiff's advocate was served with a hearing notice, neither the Plaintiff nor its advocate turned up in court on 13<sup>th</sup> February, 2020. Consequently, the Plaintiff's suit was dismissed with costs. The Defendant prosecuted her Counter-claim.
5. The Defendant, DW1, informed the court that she purchased a sub-division of land known as 12715/502/10 (*the suit property*) from the Plaintiff on 24<sup>th</sup> February, 2005; that she paid the full purchase price and that the Plaintiff has refused to transfer the said land to her.
6. DW1 informed the court that she has been in occupation of the suit property since 24<sup>th</sup> February, 2005 and that on 30<sup>th</sup> October, 2010, the Plaintiff's Director, through his employees and agents, pulled down the fence she had erected on the suit property.
7. The Defendant produced in evidence the Agreement between the Plaintiff and Mwanzo Properties Limited dated 22<sup>nd</sup> November, 2004; the acknowledgement receipt of Kshs. 1,790,000 by the Plaintiff's Director dated 27<sup>th</sup> April, 2005 and the Property Rates Payment request issued by the Mavoko Municipal Council. The Defendant's advocate did not file submissions.
8. As I have stated above, the Plaintiff's claim was dismissed by this court for non-attendance. This Judgment is therefore in respect to the Defendant's Counter-claim. In her Counter-claim, the Defendant stated that having bought land known as L.R No. 12715/502/10 from the Plaintiff, the said land should be transferred to her. To prove her claim, the Defendant produced in evidence the copy of the Agreement dated 22<sup>nd</sup> November, 2004.
9. I have perused the Agreement dated 22<sup>nd</sup> November, 2004. The Agreement is between the Plaintiff and Mwanzo Properties Limited, who has been referred to as the "*agent*". The Agreement provided that the Plaintiff is the owner of land known as 12715/502 and that the owner has sub-divided the said land into seven (7) plots.
10. The said Agreement further states that the owner has appointed "*the agent*" to be the sole selling Agent of the seven (7) plots whose commission is 5% of the actual selling price of each plot.
11. Although the Defendant has annexed a copy of the receipt of Kshs. 350,000 from Mwanzo Properties Limited and a copy of a cheque dated 24<sup>th</sup> February, 2005 in the name of Mwanzo Properties Limited, she has not exhibited the Sale Agreement she entered into, either with the said Mwanzo Properties Limited or the Plaintiff.

12. Indeed, there is no evidence before me to show that the Plaintiff signed an Agreement agreeing to sell the suit property to the Defendant. Even after agreeing to allow Mwanzo Properties Limited to sell the sub-divisions of L.R. No. 12715/502, the law provides that the Defendant should have entered into an Agreement either with the Plaintiff or the Agent, for an order of specific performance to issue. Section 3(3) of the Law of Contract provides as follows:

***“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”***

13. In the absence of a Sale Agreement, and an official search to show if indeed the Plaintiff is the registered proprietor of the suit property, I find and hold that the Defendant did not prove her claim on a balance of probabilities.

14. For those reasons, I dismiss the Defendant’s Counter-claim dated 21<sup>st</sup> December, 2010 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**