



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 67 OF 2016

CHARLES MAINGI NZINI.....PLAINTIFF

VERSUS

ANGELINA MUKII MUTISO.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 28th July, 2016, the Plaintiff averred that the Defendant is the registered proprietor of land known as Machakos /Mua Hills/94 which later on mutated to Machakos/Mua Hills/648 and now known as Machakos/Mua Hills/ 902 (*the suit property*).
2. The Plaintiff averred that on diverse dates between the years 1989 and 2005, The Defendant entered into various Sale Agreements with him for the sale of various portions of the suit land measuring 21 acres; that he settled the required consideration and that the Defendant has transferred the various portions of the suit property to third parties.
3. According to the Plaintiff, when he engaged a surveyor to excise the 21 acres he had bought, it was discovered that only 11 acres of the suit land was available, with the remaining land forming part of parcel of land known as Machakos Mua Hills/180 which the Defendant had sold to one Meshack Makau Ngunia; that it was agreed that the Defendant would excise additional 10 acres from parcel of land known as Machakos/Mua Hills/902 and that the Defendant has adamantly refused to excise the said 10 acres as agreed.
4. The Plaintiff has prayed for an order directing the Defendant to excise 10 acres of land from parcel of land number Machakos/Mua Hills/902 and transfer the same to him pursuant to the agreement of 6th December, 2015 and for the costs of the suit. The Defendant did not attend court when the matter came up for hearing.
5. The Plaintiff, PW1, informed the court that he purchased land known as Machakos/Mua Hill/648 which was later known as Machakos/Mua Hill/902 measuring 21 acres. It was the evidence of PW1 that after he discovered that the Defendant had only 11 acres left of the initial parcel of land, they agreed that he will excise 10 acres from parcel number Machakos/Mua Hill/902, an agreement that the Defendant has reneged on. The Plaintiff produced in evidence the various Sale Agreements, which I shall refer to later.
6. PW2 informed the court that he witnessed the agreements that the Plaintiff entered into with the Defendant in respect to the suit land; that the agreements that the Plaintiff entered into with the Defendant commenced in 1986 and that the Plaintiff bought a total of 21 acres from the Defendant. It was the evidence of PW2 that the Defendant has declined to transfer a portion of parcel number Machakos/Mua Hill/902 to the Plaintiff.
7. The evidence of PW3 was that he witnessed the signing of the agreement dated 8th May, 1989 between the Plaintiff and the Defendant for the sale of 9 acres; that as at that time, the Plaintiff had purchased 8 acres bringing the total to 17 acres and that the Plaintiff is entitled to 21 acres.
8. In his submissions, the Plaintiff's advocate submitted that the Plaintiff bought land from the Defendant between the years 1989 and 2005; that the Plaintiff settled the consideration and that the Defendant only made available to the Plaintiff 11 acres instead of the 21 acres he had bought. Counsel submitted that although the Defendant promised to excise 10 acres from parcel number Machakos/Mua Hill/902, he has refused to do so.
9. The assertions by the Plaintiff that he purchased 21 acres from the Defendant have not been rebutted by the Defendant. The Plaintiff produced in evidence several agreements showing he purchased the 21 acres in instalments and paid for the said land. The agreements produced in evidence by the Plaintiff have also not been controverted by the Defendant.
10. The copy of the Abstract produced by the Plaintiff shows parcel of land number Machakos/Mua Hill/902 measuring 24.75 Ha (*approximately 61 acres*) was registered in favour of the Defendant on 31st January, 2013. Having not denied the Plaintiffs averments that she agreed to transfer to him 10 acres of the said land, in addition to the 11 acres that she had already transferred to him, I find that the

Plaintiff has proved his case on a balance of probabilities.

11. For those reasons, I allow the Plaintiff's Complaint dated 28th July, 2016 as follows:

a. An order be and is hereby issued directing the Defendant to allow a surveyor either appointed by her or the Plaintiff, or jointly, to excise 10 acres of land from a parcel of land known as Machakos/Mua Hill/902 in compliance with the agreement dated 6th December, 2015.

b. The Land Registrar, Machakos, to register the excised 10 acres from Machakos/Mua Hill/902 in favour of the Plaintiff.

c. The Defendant to pay the costs of this suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE