



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 461 OF 2012

MUKULU MBAVUPLAINTIFF

VERSUS

HASTINGS KIALA NGAVE.....1ST DEFENDANT

MUSYOKA WAMBUA MBUNGO.....2ND DEFENDANT

JUDGMENT

1. In the Complaint dated 11th November, 2012, the Plaintiff averred that on 22nd December, 1992, Lukenya Ranching and Farming Co-operative Society Limited (*the Society*) issued her with a Letter of Allotment for a piece of land known as plot number 91 measuring approximately 20 acres.
2. The Plaintiff averred that while awaiting for the issuance of the Title Deed in respect of plot number 91, she learnt that the Defendants had been fraudulently been issued with a Title Deed for the said land; that the Title Deed that was issued to the Defendants was for land known as Mavoko Town Block 3/3333 and that a declaration should issue that she is the lawful owner of the said land.
3. In their joint Defence, the Defendants averred that they are not aware of the existence of plot number 91 as alleged by the Plaintiff; that they bought land known as Mavoko Town Block 3/3333 (*the suit property*) from one Benson Mwanza Mbavu and that the Plaintiff's suit does not disclose a reasonable cause of action and should be dismissed.
4. The Plaintiff, PW1, informed the court that on 22nd December, 1992, a piece of land known as plot number 91 was transferred to him in the offices of Lukenya Ranching and Farming Co-operative Society Limited (*the Society*).
5. It was the evidence of PW1 that he took possession of plot number 91 and that unknown to him, the same land had a title prepared and allocated a parcel number Mavoko Town Block 3/3333 in the names of the Defendants; that he has never sold the land to the Defendants and that the Defendants conspired to fraudulently acquire the suit property.
6. In cross-examination, PW1 stated that he sold to a third party the suit property; that the land was allocated to her together with her late husband, Joseph Mbavu, and that the land was allocated to her late husband and one Benson Mwanza Ngusu.
7. PW1 denied that her late husband, Joseph Mbavu, transferred the suit property to Benson Mwanza Ngusu and that she did not know if it is the said Benson Mwanza Ngusu who sold the land to the Defendants.
8. The 2nd Defendant, DW1, informed the court that they are the registered proprietors of land known as Mavoko Town Block 3/3333, having bought it from Benson Mwanza Mbavu, the then registered proprietor.
9. According to DW1, they conducted a search on the suit property before they purchased it and that they never dealt with Lukenya Ranching and Farming Co-operative Society Limited neither are they aware of the existence of plot number 91 Lukenya Ranching and Farming Co-operative Society Limited.
10. In cross-examination, DW1 stated that they bought the suit property from Benson Mwanza and that he did not know if the said Benson Mwanza is related with the Plaintiff.
11. According to DW1, he did not have an Agreement of Sale with Benson Mwanza; that they bought the land in March, 2010 and that Joseph Mbavu transferred the suit property to Benson Mwanza.

12. In his submissions, the Plaintiff's advocate submitted that parcel of land known as Mavoko Town Block 3/3333 has its roots in plot number 91 at Lukenya Ranching and Farming Co-operative Society Limited; that plot number 91 was allocated to the Plaintiff vide the Letter of Allotment number 4331 by the Society and that the Plaintiff discovered that the said land had been registered in favour of the Defendants.

13. Although the Defendants claimed to have bought land from Benson Mwanza Mbavu, it was submitted that the said Benson Mwanza was not called by the Defendants to testify; that the Defendants did not produce an Agreement of Sale in respect of the suit property, neither was there as consent of the Board to transfer the land to the Defendants.

14. Counsel submitted that the mere fact that a person holds a title to land does not mean that such title cannot be challenged; that the issuance of a title to land is a process, not an event and that the Defendants have not discharged their evidential burden of proof. The Defendants' advocate did not file submissions.

15. The Plaintiff's case is that on 22nd December, 1992, Lukenya Ranching and Farming Co-operative Society (*the Society*) allocated her together with her late husband land known as plot number 91. The Plaintiff produced in evidence the original Letter of Allotment number 4331 issued by the Society on 22nd December, 1992.

16. The Letter of Allotment for plot number 91 shows that the same was issued to E. Mukulu J. Mbavu. The Letter of Allotment further shows the names of Benson Mwanza Ngusu and Joseph Mbavu which were erased.

17. The erasure of the names on the Letter of Allotment are informed by the transactions which seems to have happened on 8th January, 2003, which reads as follows:

“Joseph Mbavu – Transferred to Benson Mwanza Ngusu then transferred to E. Mukulu Mbavu.”

18. Although the 2nd Defendant denied that plot number 91 is not one and the same land as Mavoko Town Block 3/3333, he informed the court that Mavoko Town Block 3/3333 was initially registered in favour of Benson Mwanza Ngusu, who transferred the land to them.

19. The 2nd Defendant produced in evidence an official search showing that Benson Mwanza Mbavu was registered as the proprietor of Mavoko Town Block 3/3333 on 29th December, 2006 and a Title Deed was issued to him on 9th March, 2007. According to the Title Deed produced by the Defendants, they were registered as the proprietors of the said land on 28th October, 2010.

20. The Plaintiff informed the court that the Title Deed that the Defendants exhibited is in respect of the same land that was allocated to her late husband, then to her, by the Society.

21. Although the 2nd Defendant informed the court that they bought the suit property from the registered proprietor of the suit property, Benson Mwanza, he did not produce the Sale Agreement or the Transfer document that was duly signed and witnessed. Indeed, the 2nd Defendant did not adduce any document to show how the said Benson Mwanza got registered as the owner of the land in the year 2006.

22. The Title Deed exhibited by the 2nd Defendant was issued under the repealed Registered Land Act. That being the case, the applicable law is the repealed Act. Section 143(1) of the Registered Land Act, Cap 300 (*repealed*) provides as follows:

“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

23. The Plaintiff is seeking for the cancellation of the Title Deed that was issued to the Defendants on the ground that the same was fraudulently acquired. The Plaintiff having alleged that the suit property refers to Plot No. 91, and that Benson Mwanza Mbavu never owned the land, it was incumbent on the Defendants to produce in evidence the Sale Agreement that they entered into with the said Benson Mwanza Mbavu, or the duly signed Transfer document in conformity with Section 3(3) of the Law of Contract Act which 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.”

24. Having not produced in evidence a duly signed Sale Agreement or Transfer document, it follows that the purported sale between the

Defendants and Benson Mwanza Mbavu was a nullity, if at all it existed.

25. Indeed, as was held by the Court of Appeal in *Munyu Maina vs. Hiram Gathiha Maina (2013) eKLR*, when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.

26. The Defendants were under a legal obligation to show that indeed they entered into a formal Agreement with the previous owner of the land to purchase the same, and that the land lawfully belonged to the said previous owner.

27. The Plaintiff is in possession of an original Letter of Allotment which is in her name. There is no evidence to show that the said land ever belonged to Benson Mwanza Ngusu in the year 2010 when he purported to transfer it to the Plaintiff. Indeed, there is no evidence to show that the said Benson Mwanza sold the suit property to the Defendants.

28. That being the case, it is my finding that the Plaintiff has proved her case on the required standards. The Plaintiff's Complaint dated 11th December, 2012 is allowed as follows:

a. A declaration be and is hereby issued that the Plaintiff is the lawful owner of land known as Mavoko Town Block 3/3333 previously known as plot number 91 at Lukenya Ranching and Farming Co-operative Society Limited.

b. An order cancelling the Title Deed issued to the Defendants in respect of land known as Mavoko Town Block 3/3333 be and is hereby granted.

c. The Defendants to pay the costs of the suit.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 13TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE