



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 410 OF 2017

ROSEMARY WAMBUI MWAURAPLAINTIFF

VERSUS

OKOA DEVELOPMENT CO. LTD.....1ST DEFENDANT

PCEA FOUNDATION LIMITED (*Katani Parish*)2ND DEFENDANT

AND

JAMES KAMAU MUTHEE

PETER KARANJA MBUGUA

LEONARD GICHERU NG'ANG'A *t/a*

1968 AGE GROUP ORGANIZATION.....THIRD PARTY

JUDGMENT

1. In his Complaint dated 10th April, 2013, the Plaintiff averred that she is the beneficial and equitable owner of land known as Plot Nos. 17 and 18 which are within Mavoko Town Block 2/88 having acquired it for valuable consideration from the 1st Defendant; that after purchasing the said land, she took occupation of the same and constructed a one roomed house and that while she was away in the United States, the 2nd Defendant entered the said land and took possession of the same.
2. In the Complaint, the Plaintiff has sought for an order of permanent injunction as against the 2nd Defendant and its agents and for an order of vacant possession, general damages for trespass and for the costs of the suit.
3. In his Defence, the 2nd Defendant averred that its name has been wrongly pleaded; that it purchased the suit land from an organization known as "1968 Age Group Organization" (*the Third Party*) which was the sole owner of Plot Nos. 17 and 18 and that the "1968 Age Group Organization" had Certificates of Ownership in respect of the two plots which were issued in their favour in 1997.
4. According to the 2nd Defendant's Statement of Defence, they have constructed a church and a pit latrine on the suit land which are currently in use and that the Plaintiff has never occupied the land.
5. The 2nd Defendant filed a Third Party Notice in which they sought to enjoin the officials of "1968 Age Group" organization in the suit. The court allowed the said Third Party Notice. The Third Party filed a response and averred that it is the first allottee of Plot Nos. 17 and 18, which is a sub-division of land known as Mavoko Block 2/88; that it paid for the said plots and fenced them and that it was issued with a contribution card; the beacon certificates and the ownership certificates by the 1st Defendant.
6. According to the Third Party's response, being the allottee of the suit properties, it sold the plots to the 2nd Defendant for Kshs. 850,000 and that it has since transferred the plots to the 2nd Defendant.

The Plaintiff's case:

7. The Plaintiff, PW1, informed the court that in 1995, he purchased plot numbers 17 and 18 from the 1st Defendant; that the said plots are a sub-division of land known as Mavoko Town Block 2/88 in Syokimau and that after paying the purchase price, the 1st Defendant issued her

with the Certificates of Ownership.

8. It was the evidence of PW1 that other than the Certificates of Ownership, she was also issued with a beacon certificate for each plot and that she took possession of the suit land and constructed a one roomed structure whereafter she left the country for the United States America. The Plaintiff produced in evidence the copies of the ownership certificates; the Beacon Certificates; the receipts evidencing payment of the purchase price and the photographs of the structures on the suit land.

9. PW1 testified that in October, 2012, her son spotted some strangers on the land who had put up a church on the two plots together with a toilet and that when his son approached the 1st Defendant to find out what was happening, the 1st Defendant was not of assistance.

10. In cross-examination, PW1 stated that she was given the ownership certificates in 2001 by the 1st Defendant and that she was not sure if another entity or person was given ownership certificates for the same land in 1997. It was the evidence of PW1 that the 1st Defendant informed her vide a letter that she was the one who was the owner of the suit land and that she was not aware of a letter dated 26th August, 2004 by the 1st Defendant addressed to the 2nd Defendant. It was the evidence of PW1 that by the time she finished paying for the plots in 2002, no one had fenced the land. According to PW1, she built the one roomed structure on the suit land in the year 2004.

11. The Plaintiff's son, PW2, stated that PW1 resides in the USA; that by the time she left, she had acquired the suit properties and constructed a one roomed house on the land and that they have enjoyed peaceful possession of the land until the year 2012 when he found people constructing a toilet on the land.

12. It was the evidence of PW2 that his mother had put up a fence on the land before she left for the USA and that between 2004-2012, the only structure on the land was what had been put up by her mother.

The Defence case:

13. DW1 informed the court that in the year 2011, she was involved in looking for a piece of land on behalf of the 2nd Defendant (*the church*). According to DW1, they met with the owners of Plot Nos. 17 and 18 who were known as "*1968 Age Group*" who leased to them the suit land for a year between the years 2011-2012. It was the evidence of DW1 that they paid the Lessor Kshs. 1,000 per month for using the land.

14. DW1 stated that in the year 2012, "*1968 Age Group Organization*" agreed to sell to the church the suit land and that before entering into an Agreement of Sale, they conducted a search with the 1st Defendant. It was the evidence of DW1 that the 1st Defendant confirmed to them that indeed the suit land belonged to the "*1968 Age Group Organization*".

15. It was the evidence of DW1 that the 2nd Defendant entered into an Agreement of Sale with "*1968 Age Group Organization*" on 16th June, 2002; that the agreed purchase price was Kshs. 850,000 and that they paid to the 1st Defendant Kshs. 20,000 to facilitate the transfer of the two plots from "*1968 Age Group Organization*" to the church.

16. DW1 informed the court that after purchasing the land, they put up a pit latrine on the land and that while in the process of putting up a church, this suit was filed by the Plaintiff. DW1 produced in evidence the Agreement of Sale of 16th June, 2012; the transfer documents by the 1st Defendant and the receipt for Kshs. 20,000 issued by the 1st Defendant.

17. In cross-examination, DW1 stated that they took occupation of the land in 2012; that land purchased by the church is usually registered in the name of the Church's Foundation upon issuance of a Title Deed and that the church never received a confirmation in writing from the 1st Defendant that the land is owned by "*1968 Age Group Organization*".

18. According to DW1, the purchase price for the two plots was Kshs. 850,000; that they paid the seller Kshs. 700,000 by way of a cheque and gave to the three individuals representing the seller Kshs. 50,000 each in cash. According to DW1, the Kshs. 150,000 was paid in cash at the request of the sellers and that the said payment was made the same day that the transfer fees of Kshs. 20,000 was made to the 1st Defendant.

19. DW1 stated that the transfer document was signed in the offices of the 1st Defendant on 16th June, 2012 and that they left the document behind for stamping and that the said stamping was done on 18th June, 2012. PW1 denied that part of the purchase price was paid to her and the other church elders.

20. The other elder of the 2nd Defendant, DW2, stated that the 2nd Defendant paid to the officials of "*1968 Age Group*" Kshs. 700,000 in cheque and Kshs. 150,000 in cash for the suit land and that they went to the offices of Okoa (*the 1st Defendant*) to ascertain the ownership of the land. According to DW2, they rented the land for one (1) year before purchasing the same in the year 2012 from "*1968 Age Group*".

21. DW1 stated that they met the three officials of "*1968 Age Group Organization*" and that the said officials showed them the Certificates of Ownership of the suit land.

22. The Third Party's witness, DW3, informed the court that he is a partner in "*1968 Age Group Organization*" (*the Organization*); that the organization purchased plot numbers 17 and 18 from the 1st Defendant and that he is not aware that the same plots had been sold to the Plaintiff by the 1st Defendant. It was the evidence of DW3 that the organization purchased the land in 1997.

23. DW3 informed the court that it is the Chairman of the 1st Defendant who issued them with the Certificate of Ownership dated 15th April, 1997; that they put up a pit latrine and a site house on the land and that there was no structure on the land when they purchased it in 1997. According to DW3, it is the organization that fenced the land in the year 2001 and that the Chairman of the 1st Defendant gave them a written note confirming that the organization owned the land.

24. According to DW3, the 1st Defendant heard the Plaintiff's complaint in respect of the suit land whereafter it confirmed, vide a letter dated 26th August, 2004, that the land belonged to "1968 Age Group". According to DW3, the organization sold the suit land to the 2nd Defendant on 16th June, 2012.

25. In cross-examination, DW3 stated that "1968 Age Group" organization was registered on 6th September, 1999; that they acquired the land in 1997 before registration of the organization and that they used their individual names to purchase the suit land in 1997. According to DW3, after purchasing the land from the 1st Defendant, they were issued with receipts which they returned to the 2nd Defendant and that the receipt of 4th September, 2002 shows the figure of Kshs. 20,000 which was the money they paid to the 2nd Defendant for the transfer of the land in their favour.

Submissions:

26. The Plaintiff's counsel submitted that the Certificate of Ownership held by the Third Party ("1968 Age Group") is dated 15th April, 1997 when the organization had not been registered; that the 2nd Defendant had an obligation to conduct due diligence before purchasing the suit land from the Third Party and that the suit land could not have been transferred to the 2nd Defendant on 16th June, 2012 and yet they paid the transfer fees on 18th June, 2012.

27. The Plaintiff's advocate submitted that the Plaintiff had established the root of her title; that the Third Party did not have any proprietary interest to pass to the 2nd Defendant and that the Plaintiff's claim should be allowed.

28. The 2nd Defendant's advocate submitted that it did due diligence before purchasing the suit land and that the Third Party was given the beacon and ownership certificates in 1997 and took possession of the land while the Plaintiff's beacon certificates were given to her in 2001. The 2nd Defendant's advocate submitted that the suit should be dismissed.

29. On his part, the Third Party's advocate submitted that the Third Party acquired the suit properties from the 1st Defendant in 1997; that the Third Party sold to the 2nd Defendant the suit land for Kshs. 850,000; that it is the 1st Defendant who holds the records of ownership of the suit land and that the Third Party proved that it was the genuine owner of the suit land and not the Plaintiff.

Analysis and findings:

30. It is not in dispute that the 1st Defendant, Okoa Development Company Limited, owned parcel of land known as Mavoko Town Block 2/88 in Syokimau. The said land was sub-divided into several portions, including plot numbers 17 and 18 (*the suit land*).

31. According to the Plaintiff, PW1, he purchased plot numbers 17 and 18 (*the suit land*) from the 1st Defendant between the years 1995 - 2001. It was the evidence of the Plaintiff that she paid the purchase price for the two plots by way of instalments. Upon payment of the full purchase price, it was the evidence of PW1 that she was issued with the Ownership Certificates by the 1st Defendant in the year 2001 and that she then constructed a one-roomed mabati structure on the land in the year 2004. Having done so, it was the evidence of the Plaintiff that she fenced the land and then left for the USA.

32. Having left the said land in the custody of his son, PW2, the Plaintiff informed the court that his son noticed some activities on the land by strangers in the year 2012. That is when it dawned on him, (PW2) that the 2nd Defendant had purchased the land from a Group known as "1968 Age Group", the Third Party.

33. The Third Party's case is that through its officials, it purchased the said land from the 1st Defendant in 1997; that it then sold the land to the 1st Defendant vide an Agreement dated 16th June, 2012 for Kshs. 850,000 and that the 1st Defendant recognized it as the genuine owner of the land.

34. The issue before the court for determination is who between the Plaintiff and the Third Party validly purchased the suit land from the 1st Defendant. The issue of whether the 2nd Defendant holds the suit land lawfully will depend on how the above issue will be determined by this court. Indeed, if the court finds that it is the Plaintiff who is entitled to the suit land, then the 2nd Defendant's interest in the suit land will fall by the way side.

35. To prove that she purchased the suit land from the 1st Defendant, the Plaintiff produced in evidence an original booklet of the 1st Defendant. The said booklet shows how the Plaintiff paid the purchase price for the two plots by instalments. The booklet shows the Plaintiff paid for Plot No. 17 by way of two instalments, that is Kshs. 6,000 on 30th June, 1995 and Kshs. 24,000 on 2nd August, 1996. In respect of Plot No. 18, the booklet shows the Plaintiff paid the purchase price of Kshs. 30,000 by way of two instalments, that is, Kshs. 15,000 on 2nd August, 1996 and Kshs. 15,000 on 3rd January, 1997.

36. In addition to the booklet which was issued by the 1st Defendant and purportedly signed by an official of the 1st Defendant on each occasion the Plaintiff paid the purchase price, the Plaintiff produced the original receipts that were issued by the 1st Defendant's cashier on

30th June, 1995 (for Kshs. 6,000); 24th August, 1996 (for Kshs. 24,000); 3rd January, 1997 (for Kshs. 15,000); and 2nd August, 1996 (for Kshs. 15,000). The Plaintiff also produced an original receipt by the 1st Defendant dated 14th September, 2001 for Kshs. 31,000.

37. The evidence by the Plaintiff was that after the payments of the last instalment for the two plots in the year 2001, he was issued with "Ownership Certificates". Indeed, the Plaintiff produced the Ownership Certificates for plot numbers 17 and 18 both dated 26th September, 2001. In addition to the two Ownership Certificates, the Plaintiff also produced the beacon certificate for "L.R. No. 2/88/18" dated 26th September, 2001.

38. The Plaintiff also produced in evidence a copy of letter dated 11th February, 2003 presumably written by a Mr. J.M. Kiriko, an official of the 1st Defendant. In the said letter, the said official confirmed that the disputed plots belonged to the Plaintiff.

39. The "1968 Age Group Organization" Secretary, DW3, informed the court that the organization was registered on 6th September, 1999. It was the evidence of DW3 that before the registration of the said organization, the members of the organization purchased the suit land from the 1st Defendant in 1997.

40. The top cover of a booklet similar to the Plaintiff's booklet issued by the 1st Defendant was produced by the Third Party's witness. According to the said booklet, James Kamau Muthee, Leonard Gicheru Ng'ang'a and Peter Karanja Mbugua were "allocated plots 2/88/17,18". The reference number of the booklet is shown as 578/5/1/09 and is addressed to "1968 Age Group Organization".

41. The booklet produced by the Third Party shows that they made a payment of Kshs. 50,500 to the 1st Defendant on 15th April, 1997. On the same day, another payment of 8,000 for "survey fees" was made by the Third Party. Another payment for Kshs. 35,000 was made on 14th May, 2009 being the legal and Transfer fee. However, the Third Party did not produce receipts for these amounts.

42. The Third Party produced two Ownership Certificates for Plot Nos. 17 and 18 dated 15th April, 1997 which were issued to "1968 Age Group Organization". A beacon certificate was also issued to the same group on 15th April, 1997.

43. The Third Party's Secretary informed the court that the Organization was registered on 6th September, 1999. When asked how the organization that was registered in 1999 could be issued with Ownership Certificates for the two parcels of land in 1997, DW3 stated that the members of the organization bought the land before the organization was registered in 1999.

44. The evidence by DW3 that the Third Party was registered in 1999 takes away any proprietary rights that the organization can claim in respect of the suit land. Indeed, considering that the booklet issued by the 1st Defendant in 1997 shows that the same was issued to "1968 Age Group" organization which purportedly made a payment to the 1st Defendant on 15th April, 1997, it follows that the Third Party, which was registered in 1999, could not have owned land in 1997. Consequently, the Certificates of Ownership for Plot Nos. 17 and 18 that were purportedly issued to the Third Party by the 1st Defendant on 15th April, 1997 are not only forgeries but are a nullity.

45. Indeed, DW3 did not produce in any evidence documents showing the registration status of the Third Party. Furthermore, DW3 did not produce the register of members of the said organization to enable the court ascertain if such an organization exists. The mystery surrounding the so called "1968 Age Group Organization" is further compounded by the fact that even after agreeing to sell the suit land to the 2nd Defendant for Kshs. 850,000, its officials pocketed Kshs. 150,000 in cash. It is not clear to this court how the said amount of Kshs. 150,000 was distributed amongst the members of the organization, if at all. Indeed, even the cheque of Kshs. 700,000 that was issued by the 2nd Defendant was in favour of three individuals, and not in the name of the organization.

46. The analysis of the evidence before me shows that the suit land was never registered in the name of the Third Party in the year 1997 or its officials. Indeed, the purported Transfer of the suit land dated 16th June, 2012 does not show that it is the Third Party who was transferring the land to the 2nd Defendant.

47. In fact, the evidence before me of the purported transfer of the suit land by the officials of the Third Party to the 2nd Defendant (*P.C.E.A Athi River Parish*) is full of contradictions. I say so because although the transfer was signed by the transferors and the transferees on 16th June, 2012, the transfer fee of Kshs. 20,000 to the 1st Defendant was purportedly made on 18th June, 2012, two days after the Transfer document had been signed.

48. Furthermore, considering that the Agreement of Sale between the Third Party and the 2nd Defendant was signed on 16th June, 2012, and the cheque for Kshs. 700,000 drawn on 15th June, 2012, it is not clear to this court how and why the transfer document was signed on the same day the Agreement of Sale was signed, and even before the cheque in respect of the purchase price was banked.

49. The evidence before me shows that the Plaintiff purchased the two plots from the 1st Defendant and was duly issued with official receipts and two Certificates of Ownership on 26th September, 2001 by the 1st Defendant. The purported ownership of the same land by an organization known as "1968 Age Group" in 1997 was a fraud whose sole intention was to dispossess the Plaintiff who was out of the country the suit land.

50. Having found that the Third Party's purported registration as the owner of the suit land was a fraud, it follows that it had no title or interest in land to pass to the 2nd Defendant.

51. For those reasons, I allow the Plaintiff's Complaint dated 10th April, 2013 as follows:

a. A permanent injunction be and is hereby issued restraining both Defendants either by themselves or through their agents, servants, or workmen from doing any of the following acts, that is to say, laying claim, asserting ownership, entering or trespassing, claiming by anyone related to them and/or in any other manner whatsoever interfering with the Plaintiff's right of ownership, possession, use and enjoyment of those properties known as Plot Numbers 17 and 18 within L.R. No. Mavoko Town Block 2/88.

b. The Defendants to give vacant possession of plot numbers 17 and 18 within L.R. No. Mavoko Town Block 2/88 to the Plaintiff.

c. The Defendants and the Third Party to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE