



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 236 OF 2016

MATHEKA NZALU.....PLAINTIFF

VERSUS

MARY NTHENYA MATHEKA.....1ST DEFENDANT

NYAMBURA KARIUKI2ND DEFENDANT

JUDGMENT

1. In the Complaint dated 3rd August 2016, the Plaintiff is seeking for a declaration that he is the rightful and legitimate owner of land known as Plot Number 21 situated in Donyo Sabuk and measuring 55 feet by 60 feet (*the suit property*).
2. According to the Complaint, the Plaintiff purchased the suit property from the 1st Defendant; that he immediately took possession of the land and that he has been in possession of the suit property since the year 2008 until July, 2016 when the 1st Defendant fraudulently sold it to the 2nd Defendant.
3. In her Defence, the 2nd Defendant averred that she is the owner of land measuring 50 feet by 100 feet which was excised from plot number 21 held by the 1st Defendant; that she purchased the suit land vide an Agreement dated 9th July, 2007 and that a declaration should issue that she is the rightful and legitimate owner of the said land.
4. The Plaintiff, PW1, informed the court that he purchased a parcel of land measuring 55 feet by 60 feet which was excised from plot number 21, situated in Donyo Sabuk, Machakos County, from the 1st Defendant.
5. According to PW1, he, together with the 1st Defendant, took the Surveyor to the suit property on 11th April, 2008; that the Surveyor confirmed the boundaries of the suit property and that the land was surveyed and beacons fixed in the presence of the area Assistant Chief.
6. PW1 informed the court that he took possession of the suit property after signing the Sale Agreement in the presence of the Assistant Chief and that he remained in possession of the suit property until July, 2016 when the 1st Defendant fraudulently sold the same land to the 2nd Defendant. The Plaintiff produced in evidence the Sale Agreement dated 2nd February, 2008 that he entered into with the 1st Defendant in respect of the suit property.
7. In cross-examination, PW1 stated that the 1st Defendant and her son signed the Agreement of Sale dated 2nd February, 2008; that the area Chief also witnessed the signing of the Agreement; that he paid to the 1st Defendant Kshs. 17,000 for the land and that the District Officer (D.O) forced him to take the money back.
8. PW2 informed the court that on 2nd February, 2008, he witnessed the signing of the Agreement dated 2nd February, 2008 as an elder; that the seller received the full purchase price from the Plaintiff and that on 11th April, 2008, the seller, himself and two other witnesses appeared before the area Assistant Chief who witnessed the Agreement and the beaconing of the suit property.
9. PW3 also confirmed that he witnessed the signing of the Agreement on 2nd February, 2008 and 11th April, 2008; that after the signing of the Sale Agreement, the Plaintiff was put in possession of the suit property by the 1st Defendant and that the 1st Defendant received the full purchase price. The evidence of PW3 was that the 1st Defendant's son, Mwanja, was present when the Agreement was signed and that five people signed the Agreement.
10. The 1st Defendant, DW1, informed the court that her son, Mwanja Mutiso, approached the Plaintiff when she was very sick and asked him for money for her treatment and that the Plaintiff gave her son Kshs. 17,000.

11. According to the 1st Defendant, she did not sign the Agreement dated 2nd February, 2008 and that the signature on the Agreement purporting to be hers is a forgery.
12. DW1 informed the court that prior to falling sick, she had sold the suit land to the 2nd Defendant; that the Plaintiff built a temporary mud house on the suit land illegally and that the Plaintiff is a trespasser.
13. According to the 1st Defendant, she repaid to the Plaintiff the Kshs. 17,000 that the Plaintiff gave to her son and that the Plaintiff demanded for a further sum of Kshs. 10,000 from the 2nd Defendant as compensation for the structure which was standing on the suit property, which the 2nd Defendant gave him.
14. In cross-examination, DW1 stated that she sold to the 2nd Defendant the suit property in the year 2016; that the money that the Plaintiff gave to her son was a loan and that she never entered into a Sale Agreement dated 2nd February, 2008 with the 1st Defendant in respect to the suit property or at all.
15. DW1 admitted that the Plaintiff had constructed a toilet and a timber house on the suit property; that the structures have since collapsed and that the land that she sold to the 2nd Defendant is the same land that the Plaintiff had developed.
16. The 2nd Defendant, DW2, informed the court that vide an Agreement dated 9th July, 2007, she purchased a piece of land measuring 50 feet x 100 feet, which was to be excised from plot number 21 under Muka -Mukuu Farmers Co-operative Society Limited for Kshs. 95,000; that she paid the said purchase price in two installments of Kshs. 45,000 and that she paid up the entire purchase price.
17. DW2 informed the court that when she took building materials to the suit property in July, 2016, she found the Plaintiff had built on the land a toilet; that on inquiry, the 1st Defendant informed her that she had not sold the suit land to the Plaintiff and that the Plaintiff had only advanced to the 1st Defendant's son Kshs. 17,000.
18. DW2 stated that the Plaintiff, herself and the 1st Defendant approached the Assistant County Commissioner, Kyanzavi Division, with a view of resolving the dispute; that the Plaintiff accepted to refund the Kshs. 17,000 and that upon refund of the said Kshs. 17,000, the Plaintiff agreed to vacate the suit property. It was the evidence of DW2 that she also paid to the Plaintiff Kshs. 10,000 which was a refund of the toilet that was standing on the suit property.
19. The Plaintiff's advocate submitted that the Plaintiff is an innocent purchaser for value having purchased the suit land from the 1st Defendant in the year 2008; that the Plaintiff took possession of the suit property in the year 2008 and that it was not until the year 2016 that the 2nd Defendant forcefully gained entrance on the suit property.
20. Counsel submitted that the 1st Defendant did not adduce evidence to show that her signature was forged and that the assertion by the 1st Defendant that Kshs. 17,000 that the Plaintiff gave her was a loan was never substantiated.
21. The Defendants' counsel submitted that the Plaintiff's interest in the suit property ended when he was refunded the Kshs. 17,000; that the 2nd Defendant is a *bona fide* purchaser for value of the suit property having purchased it and that the Plaintiff alleged fraud on the part of the 1st Defendant in selling the land to the 2nd Defendant was not proved.
22. The Plaintiff, PW1, informed the court that he purchased the suit property from the 1st Defendant. According to the evidence of PW2, he witnessed the signing of the Agreement dated 2nd February, 2008 between the Plaintiff and the 1st Defendant. It was the evidence of PW1 and PW3 that indeed the 1st Defendant received the full purchase price of Kshs. 45,000.
23. The other person who witnessed the signing of the Agreement between the Plaintiff and the 1st Defendant was PW3. According to PW1, PW2 and PW3, the signing of the Agreement between the Plaintiff and the 1st Defendant was also witnessed by the 1st Defendant's son whom the 1st Defendant did not call to testify. In addition, the Area Assistant Chief also witnessed the signing of the Agreement and the beaconing of the suit land.
24. I have perused the Sale Agreement of 2nd February, 2008 between the Plaintiff and the 1st Defendant. One of the persons that witnessed the 1st Defendant sign the Agreement is her son. The 1st Defendant never availed her son to dispute the Plaintiff's assertion that his mother signed the Agreement.
25. Indeed, considering that the 1st Defendant's assertion is that she never signed the undated Agreement between herself and the Plaintiff, and that the Kshs. 17,000 that the Plaintiff paid to her son was a loan, the said son was a key witness to her case. Having failed to summon her son to testify in this matter, I am satisfied that the 1st Defendant signed the Agreement with the Plaintiff. The said Agreement was witnessed by PW2, PW3, the 1st Defendant's son and the Assistant Chief.
26. In any event, if the 1st Defendant's assertion is that she never signed the Agreement of 2nd February, 2008, which is not true, then she had the legal and evidential burden of proving that fact (*See Section 107 of the Evidence Act*). In the absence of evidence of forgery, the allegation that she never signed the Agreement between her and the Plaintiff remains just that, an allegation.
27. The purported sell of the suit land to the 2nd Defendant was not proved at all. Indeed, although the purported Agreement between the 1st

and 2nd Defendant dated 9th August, 2007 was purportedly witnessed by four individuals, none of them was called to testify.

28. Furthermore, unlike the Agreement of 2nd February, 2008 between the Plaintiff and the 1st Defendant which was witnessed by the Assistant Chief, the purported Agreement between the 1st and 2nd Defendants was not witnessed by the Assistant Chief.

29. Other than not calling any independent witness to state that he saw the 1st Defendant and the 2nd Defendant sign the Agreement of 9th August, 2007, the 2nd Defendant admitted that indeed the Plaintiff developed the suit land. If the 2nd Defendant had bought the suit land prior to the development of the same by the Plaintiff, why did he reimburse to the Plaintiff Kshs. 10,000 for the structure that was on the land?

30. The totality of the evidence before me shows that the Plaintiff validly purchased the suit property from the 1st Defendant before the 2nd Defendant purported to buy the same. Indeed, the 1st and 2nd Defendants used the area District Officer (DO) to coerce the Plaintiff into receiving the Kshs. 17,000 that he had paid the 1st Defendant and Kshs. 10,000 being the cost of the structure on the suit land.

31. The Plaintiff has therefore proved his case on a balance of probabilities. Consequently, I allow the Plaintiff's Complaint dated 3rd August, 2016 as follows:

a. A declaration be and is hereby issued that the Plaintiff is the rightful and legitimate owner of the property measuring 55 by 60 feet excised from Plot No. 21 under Muka Mukuu Farmers Co-operative Society Ltd Agreement Form No. 788 situated within Donyo Sabuk of Machakos County.

b. An order of permanent injunction be and is hereby issued restraining the Defendants either by themselves, servants, agents, and/or employees from trespassing upon, depositing building materials, cutting trees, constructing and/or in any other manner interfering with the Plaintiff's quiet and peaceful occupation and possession of the property measuring 55ft by 60ft excised from Plot No. 21 under Muka Mukuu Farmers Co-operative Society Ltd Agreement Form No. 788 situated within Donyo Sabuk of Machakos County.

c. The Plaintiff to refund to the 1st Defendant and the 2nd Defendant Kshs. 17,000 and Kshs. 10,000 respectively.

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE