



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 345 OF 2011

JOSEPHINE KOKI RAYMOND.....PLAINTIFF

VERSUS

PHILOMENA KANINI MAINGI (*Personal Representative of*

MAINGI MUSILA MUTAVA (*Deceased*)1ST DEFENDANT

JOYCE NJOKI MBUGUA.....2ND DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 21st November, 2011, the Plaintiff averred that he is the owner of the two (2) acres of land with title of land known as Donyo Sabuk/Komarock Block 1/13391 which he purchased from the 1st Defendant in the year 2001.
2. It has been averred in the Plaintiff that the 1st Defendant has threatened to interfere with the land by selling it to the 2nd Defendant. The Plaintiff is seeking for a permanent injunction restraining the Defendants from interfering with the two (2) acres that he purchased.
3. The Defendants filed a joint Defence and Counter-claim in which they averred that the Plaintiff is not the owner of the suit land; that the Plaintiff trespassed on the suit land and that the person who bought the suit land was Raymond Malonza Mulei who is the Plaintiff's husband.
4. The Defendants averred that in the year 2005, the said Raymond Malonza Mulei sold the suit land to the 2nd Defendant with the full knowledge of the Plaintiff; that the said Raymond and his family were supposed to vacate the suit land and that an order of eviction should issue.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that herself, together with three (3) other people purchased two (2) acres (*the suit land*) from the 1st Defendant and paid him Kshs. 48,000. It was her evidence that after making the said payment, they sub-divided the land amongst themselves and that she has been living on her portion of land since the year 2001.
6. According to PW1, after purchasing the land, the 1st Defendant signed for them the Transfer document but informed them that he had lost the Title Deed in respect to the suit land. PW1 produced in evidence

the Sale Agreement and the signed Transfer document, together with the police abstract which was purportedly handed over to her by the 1st Defendant.

7. PW1 stated that later on, the 2nd Defendant informed her that he had purchased the same land from her husband. It was the evidence of PW1 that she was not involved in the said sale and that she is the one who bought the suit land together with three people who are her brother-in-laws.

8. In cross-examination, it was the evidence of PW1 that each of the four of them had a share of ½ an acre and that the other three people are not parties to the suit.

9. According to PW1, the agreement was witnessed by her husband and that it was the 1st Defendant's son, Eric, who drew the agreement.

10. It was the evidence of PW1 that the Land Control Board gave them the consent and that when they requested for the Title Deed, the 1st Defendant informed them that it was lost.

11. PW1 informed the court that the 1st Defendant sold to him, together with his brothers and the Plaintiff the suit land; that they entered into a Sale Agreement and that they paid to the 1st Defendant Kshs. 43,000.

12. After signing the agreement, it was the evidence of PW2 that they allowed the Plaintiff to utilize the entire land.

13. PW2 informed the court that the land was bought by the four of them and that other than the Sale Agreement, the 1st Defendant did not give them any other document.

14. PW1 stated that the initial agreement was a handwritten one and that after signing it, they had it typed.

The Defence case:

15. The 2nd Defendant, DW1, informed the court that in November, 2005, he asked his uncle to look for her land; that his uncle identified the suit land and bought it from Richard Malonza and that his uncle had her mandate to transact the land on her behalf.

16. It was the evidence of DW1 that she bought the two acres, including the house, for Kshs. 300,000 and that the entire purchase price was paid. DW1 produced the agreement that she signed.

17. DW1 stated that she bought the land from the Plaintiff's husband and that it was the 1st Defendant who sold to the Plaintiff's husband the suit land.

18. It was the evidence of DW1 that the 1st Defendant agreed to transfer the land directly to her instead of transferring it to the Plaintiff's husband first.

19. DW1 stated that after being given all the documents by the 1st Defendant, her uncle found that a caution in favour of Raymond had been registered against the suit land.

20. In cross-examination, DW1 stated that she never dealt with the Plaintiff; that it is the Plaintiff's husband who sold to her the suit land and that she was given all the documents by the original owner of the land.

21. DW2 stated that the 2nd Defendant is his niece; that in the year 2005, the 2nd Defendant instructed him to get for her a piece of land and that he met the Plaintiff's husband who agreed to sell to DW1 the suit land.

22. According to DW2, the suit land had a borehole together with a temporary structure and that they assessed the borehole for Kshs. 80,000, the house for Kshs. 100,000 and the land for Kshs. 120,000.

23. After paying the Plaintiff's husband the purchase price, DW2 informed the court that the 1st Defendant gave him the transfer document and the original Title Deed whereafter they went to the Land Control Board and obtained the consent of the Board.

24. However, when they went to lodge the documents for transfer, they found the Plaintiff had registered a caution on the land.

25. In cross-examination, DW2 stated that it is the Plaintiff's husband who gave him the original Title Deed together with the Transfer document.

26. The 1st Defendant died and was substituted by his daughter, DW3. According to DW3, the Plaintiff's husband, Raymond Malonza, purchased the suit land from his late father who later on sold the same land to the 2nd Defendant.

27. The Defendants' advocate filed written submissions which I have considered.

Analysis and findings:

28. The only issue that I am supposed to consider is who between the Plaintiff and the 2nd Defendant is entitled to the suit land.

29. The Plaintiff's case is that she purchased the suit land together with her three brothers-in-law from the original 1st Defendant, who has since died.

30. On the other hand, it is the Defendants' case that it is the Plaintiff's husband, Raymond Malonza, who purchased the suit land from the 1st Defendant and later on sold it to the 2nd Defendant.

31. The Plaintiff's brother-in-law, PW2, stated that indeed it is the Plaintiff and himself, together with his two other brothers, who bought the suit land from the 1st Defendant. However, the other two brothers-in-law of the Plaintiff who purportedly bought the land jointly with the Plaintiff and PW2 did not testify in this matter.

32. To support the allegation that it was her and the three brother-in-laws who bought the suit land from the 1st Defendant, PW1 produced in evidence a Sale Agreement dated 14th May, 2001.

33. The typed agreement shows that the Plaintiff, together with Agnes Mutio Mutua, Richard Ndunda Mulei and Stephen Ndisya Mulei entered into the said agreement for the purchase of the suit land for Kshs. 48,000. The agreement shows that the four purchasers paid Kshs. 12,000 each. Eric Maingi is said to have witnessed the 1st Defendant sign the agreement while the Plaintiff's husband witnessed the Plaintiff and the other purchasers sign the document.

34. Although PW2 stated that the initial agreement was handwritten and that it was also signed, the same was not produced in court.

35. It was the evidence of PW1 and PW2 that after signing the said agreement, the 1st Defendant informed them that he had lost the original Title Deed. According to the Plaintiff, the 1st Defendant gave them an Affidavit sworn on 6th October, 2011 stating that he had lost his Title Deed around the year 2009.

36. It is not clear to this court why the 1st Defendant would depone an Affidavit in the year 2011 stating that he had lost the original Title Deed if indeed he signed the agreement of 14th May, 2001. Why was

the Title Deed not given to the Plaintiff in the year 2001 after they paid the purchase price, if at all?

37. Indeed, the Plaintiff went further to produce a copy of the police abstract which shows that the 1st Defendant lost the original Title Deed on 7th October, 2011.

38. In the absence of an explanation by PW1 and PW2 as to why they never asked for the original Title Deed from the 1st Defendant between the year 2001 when they purported to sign the Agreement of Sale and 2011 when they were informed that the Title Deed was lost, only one conclusion can be arrived at: that the agreement of 14th May, 2001 and the Affidavit sworn on 6th October, 2011 are forgeries.

39. The above conclusion is further supported by the fact that the Plaintiff did not call the other two people who purportedly bought the suit land with her to testify in the matter.

40. Moreso, the Transfer that was purportedly signed by the 1st Defendant on 8th May, 2004 shows that the suit land was to be transferred only to the Plaintiff, and not to the Plaintiff and three others.

41. The Plaintiff produced in evidence the certificate of official search dated 7th August, 2015. The said search shows that the caution of 15th April, 2009 was registered in favour of Raymond Malonza Mulei and not the Plaintiff on 15th April, 2009. It was only on 14th November, 2011, a few days before this suit was filed, that the Plaintiff registered a caution in her favour.

42. It is therefore obvious that the Plaintiff never purchased the suit land from the 1st Defendant. It is the Plaintiff's husband who purchased the said land. That is why he was the first one to register a caution on the suit land in the year 2009.

43. The evidence before the court shows that the Plaintiff's husband, Raymond Malonza Mulei, entered into an agreement to sell the suit land to the 2nd Defendant vide an agreement dated 15th November, 2005. The Plaintiff's husband was to move out of the suit land after being paid the full purchase price.

44. Even after receiving the last payment of Kshs. 50,000 from the 2nd Defendant on 31st December, 2005, the Plaintiff's husband refused to vacate the land.

45. The 2nd Defendant produced in court the consent of the Land Control Board showing that the Board consented to the transfer of the suit land to the 2nd Defendant on 20th November, 2008. The 2nd Defendant was also given the original Title Deed for the purpose of having the land transferred to her. However, she could not lodge the said documents for registration because of the caution that the Plaintiff's husband registered on the land in the year 2009.

46. The evidence before me shows that it is the Plaintiff's husband, Raymond Malonza Mulei, who purchased the suit land from the 1st Defendant and later on sold the said land to the 2nd Defendant for Kshs. 300,000. However, the Plaintiff and her husband refused to vacate the said land even after receiving the full purchase price from the 2nd Defendant.

47. Because the 1st Defendant had not transferred the land to the Plaintiff's husband, he agreed and signed the Transfer document in favour of the 2nd Defendant on 13th January, 2009, and also handed to the 2nd Defendant the original Title Deed. Consequently, the Plaintiff cannot claim that the 2nd Defendant is not entitled to the suit land.

48. Having found that the Plaintiff did not purchase the suit land, I find and hold that the Plaintiff has not proved her case on a balance of probabilities. I therefore dismiss her Plaint dated 21st November, 2011 with costs.

49. On the other hand, the 2nd Defendant has proved that she bought the suit land from the Plaintiff's

husband and paid to him the full purchase price. The 2nd Defendant was thereafter given the original Title Deed, the consent of the Board and the duly signed Transfer form by the 1st Defendant.

50. Having purchased the land, the Plaintiff should give vacant possession and allow the 2nd Defendant take possession of the land.

51. For those reasons, I allow the Defendants' Amended Defence and Counter-claim dated 29th September, 2016 in the following terms:

a. An order of eviction of the Plaintiff, her siblings, relatives, agents or employees out of parcel of land known as Donyo Sabuk/Komarock Block 1/13391 be and is hereby issued.

b. The caution registered against the suit land by the Plaintiff and Raymond Malonza Mulei be lifted and the land to be registered in favour of the 2nd Defendant forthwith.

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE