



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 176 OF 2010

ROBERT MBUI.....PLAINTIFF

VERSUS

KENNEDY MWANZIA MUSEMBIDEFENDANT

JUDGMENT

1. The Plaintiff has sued the Defendant claiming that although he bought a parcel of land known as Mavoko Town Block 3/7084 and 7085, (*the suit properties*) the Defendant, who is the Vendor's son, has refused to vacate the land.

2. In the Plaint, the Plaintiff is seeking for a declaratory order that having been registered as the owner of the suit properties, he is entitled to possession, quiet use and enjoyment of the same. The Plaintiff has also prayed for an order of vacant possession of the suit land and for *mesne profits*.

3. In his amended Defence, the Defendant averred that he has been living on the suit properties, not as a licensee, but as a son of the original owner of the land; that the suit land is matrimonial property and that the Plaintiff colluded with his father to buy the suit properties.

4. The Defendant averred that there exists Machakos High Court Civil Case No. 161 of 2010(O.S) where his mother has sued his father claiming for a declaration that the suit properties are matrimonial properties.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that he purchased the suit land from the Defendant's father vide an agreement dated 20th May, 2010 and that he paid the Defendant's father Kshs. 4,000,000 for the said parcels of land.

6. It was the evidence of PW1 that the two parcels of land were transferred to him and that he was issued with Title Deeds; that he thereafter requested the Defendant to vacate the land and that the Defendant is still cultivating and grazing on the land.

7. PW1 informed the court that he has build a school on the disputed parcels of land; that he conducted an official search before he bought the land whereafter he obtained the consent of the Land Control Board.

8. PW1 stated that the Defendant was heard on his objection by the Land Control Board and that the Board allowed his Application.

9. According to PW1, the Defendant's father has offered him an alternative parcel of land but the

Defendant has declined to move out of the suit land.

10. PW2 stated that he sold to the Plaintiff the two suit properties and that he was paid Kshs. 4,000,000.

11. According to PW2, he discussed the issue of selling the land with his wife who agreed that he should sell the land to enable him raise school fees for his children. However, when his wife died, the Defendant, who is his son, refused to vacate the suit land.

12. It was the evidence of PW2 that he is the one who built the house in which the Defendant is now occupying and that he bought the suit land without the assistance of the Defendant.

13. PW2 stated that other than the Defendant, all the other children had no objection to the sale of the two suit properties and that the Defendant has refused to move on another piece of land measuring 60 acres.

The Defence case:

14. The Defendant, DW1, informed the court that the two suit properties were allocated to his father and that his parents decided that he should settle on the land.

15. It was the evidence of DW1 that the Plaintiff acquired a neighbouring piece of land which belonged to his cousin and that while knowing that he had settled on the land, the Plaintiff approached his father to buy the land; that neither him nor his mother were notified about the meetings at the Land Control Board and that it was after securing an order of the court lifting the caution that he had registered that his father proceeded to sell and transfer the suit properties to the Plaintiff.

16. DW1 stated that he has been on the land since the year 1991 and that the Plaintiff obtained the title to the suit land fraudulently.

17. DW1 stated in cross-examination that he has connected electricity and water on the land and that he has a different plot which he was allocated by Mavoko Land Development Company Limited.

18. It was the evidence of DW1 that the suit land belonged to his father and that he did not assist him to buy it; that his mother filed Case No. 161 of 2010 (O.S) seeking the division of the matrimonial property and that he is entitled to the land.

19. The Defendant's brother, DW2, informed the court that in September,1991, his brother accompanied his father in his car and drove to the suit property; that his brother was taken to the suit land and that the suit land has been his brother's home since then.

20. It was the evidence of DW2 that it was his brother who put up the house on the land although he did not see him build the house.

21. I did not see the Plaintiff's advocates submissions on record.

22. The Defendant's advocate submitted that the Defendant was not a mere licensee on the suit land; that the moment his parents moved him on the land, a constructive trust was created against the title in his favour and that Section 28(b) of the Land Registration Act recognizes trusts including customary trust.

23. The Defendant's advocate relied on the case of *NWK vs JKM & Another (2013) eKLR* where the court held that a person does not need to have contributed to purchasing a property for a constructive trust to arise. Counsel also relied on the cases of *Mbui Mukangu vs. Gerald Mutwiri Mbui (2004) eKLR and Cyprian Kirika & Another vs. Mary Ciokabogo Njuki & 2 others*.

Analysis and findings:

24. It is not in dispute that the Defendant was the registered proprietor of parcels of land known as

Mavoko Town block 3/7085 and 7086. According to the evidence of DW1, the land was initially known as Mavoko Town Block 3/1388 which was subsequently sub-divided.

25. The Plaintiff in the matter has a piece of land neighbouring the suit land. On the said land, he has constructed a school. The Plaintiff decided to increase the acreage of his land and thus purchased the suit properties from the Defendant vide an agreement of 20th May, 2010. The Title Deeds in respect to the two parcels of land were issued to the Plaintiff on 3rd June, 2010.

26. The Plaintiff has not denied that by the time he was purchasing the suit land, the Defendant was living on the suit properties with his family.

27. According to the Plaintiff, the Defendant is still using the suit land by cultivating and grazing on the land.

28. Although the Defendant's father, PW2, informed the court that his wife agreed to the sale of the land, the evidence before me shows that his wife filed a suit in court being Machakos HCCC No. 161 of 2010(O.S) in which she sought for the sharing of the properties registered in the name of PW2, including the suit properties, equally. That suit was filed three months after the Plaintiff entered into the two agreements with PW1.

29. Other than HCCC No. 161 of 2010 (O.S), the wife of PW2 also filed a suit in the lower court seeking for an order of divorce. Unfortunately, the Defendant's mother died before the two matters could be decided by the courts.

30. In view of the two suits that were filed by the Defendant's mother against his father, it is unlikely that the suit land was sold with the consent of the Defendant's mother.

31. Indeed, the evidence before me shows that the Defendant and his late mother raised objections for the grant of the consent of the Land Control Board to sub-divide the land. The objection is captured in the letter dated 29th July, 2010 addressed to the Permanent Secretary, Ministry of Lands which was received on 6th August, 2010 and another letter dated 12th July, 2010 also addressed to the Permanent Secretary, Ministry of Lands.

32. To show his resolve that he was not agreeable to the sell of the suit land, the Defendant lodged a caution on the original title being Mavoko Town Block 3/1388 which was lifted by the court on 25th September, 2008.

33. The above chronology of events supports the Defendant's assertion that he objected to the sale of the land. It cannot therefore be true that the Defendant appeared before the Land Control Board and agreed to the sale of the land to the Plaintiff.

34. Indeed, by way of a letter dated 28th October, 2008, the Defendant's advocate informed the Chairman, Athi River Division Land Control Board, of the pending civil case in respect of the suit land. The advocate requested the Board not grant to the registered owner the consent to sub-divide the land.

35. PW2 was however determined to sub-divide the land, despite the protests from his family. On 4th January, 2008, he filed a claim in the Land Disputes Tribunal in which he stated that he wants to sub-divide his land amongst his two wives, namely Monica Mutio Musembi and Dorothy Ngenyi Musembi.

36. In its Award, the Tribunal directed that the Land Registrar "*do rectify land No. Mavoko Town Block 3/1388 and the same be transferred to Dorothy Ngenyi Musembi 2.5 acres and another 2.5 acres be transferred to sons of late Monica Mutio Musembi, Mr. Muloo Musembi and Muli Musembi.*"

37. PW2 did not inform this court why he did not comply with the order of the Tribunal, but instead sold the entire land to the Plaintiff.

38. The evidence before this court shows that it is the Defendant, who is the son of PW2, who has been on the land since 1991. Indeed, it is PW2 who allowed the Defendant to occupy and use the land. He has been on the land since then.

39. It is true that a father can deal with his land, subject to his wife's consent, in any manner he wishes. Indeed, there is no law that requires a father to allocate his children land during his life time.

40. However, in a situation where a parent, without duress, coercion or fraud allows his children to live on his portion of land, and by implication or expressly makes them believe that he has bequeathed them with the land, he cannot purport to sale the land without their consent.

41. Actual occupation of land is capable of being an overriding interest over the land. Section 28 of the Land Registration Act provides that all registered land shall be subject to trusts, including customary trusts.

42. Before the enactment of the Land Registration Act which commenced on 2nd May, 2012, the Registered Land Act, Cap 300 provided at Section 30(g) that actual occupation of land was one of the recognized overriding interests over land that need not to be registered. The section was interpreted by Madam J.A in *Alan Kiema vs. Ndia Mathunya & others, Civil Appeal No. 42 of 1978* as follows:

“Overriding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under Section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case the Respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the Appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the Respondents for a time and knew that they cultivated it.”

43. Of course, the issue of “actual occupation” of land being an overriding interest over land has caused untold confusion on its applicability vis-a- vis the sanctity of title. On numerous occasions, the courts have either declined to enforce the doctrine or simply ignored it with a view of enforcing the rights of a registered proprietor of land.

44. It is because of the confusion that Section 30(g) of the Registered Land Act had introduced in the land tenure system that when the Land Registration Act, 2012 was enacted, it was done away with and was replaced with the concept of trusts, including customary trusts, being an overriding interest on the land.

45. PW2 allowed the Defendant on the suit properties for more than twenty (20) years. He made the Defendant to believe that he had bequeathed him the suit land and the Defendant exercised the rights of the owner on the land in that believe. A constructive trust is recognized both under the common law and Section 28 of the Land Registration Act.

46. The requirements that should be met for a constructive trust to arise were explained by the authors of Halsbury's Laws of England, 4th Edition, Volume 48 at paragraph 690 as follows:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest.”

47. The Defendant in this matter reasonably understood that his father had bequeathed the suit land either to him or his mother, and acted on that belief by developing and utilizing the land for more than twenty years. Having by his conduct made the Defendant and his mother believe that they are entitled to the suit

land, PW2 cannot be allowed by this court to render the Defendant homeless just because of his differences with the Defendant or his mother. The dictates of justice frowns on such a conduct.

48. The above position was reiterated by the Court of Appeal in the case of *Mbui Mukangu vs. Gerald Mutwiri Mbui (2004) eKLR* where the court held as follows:

“It is also significant that unlike the Esiroyo case, where the sons invaded the land occupied by the father, Gerald in this case was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956.”

49. PW2 allowed the Defendant to occupy the suit land since 1991. Indeed, the Plaintiff, who is a Member of Parliament, and who has been a neighbour of the Defendant, knew that the Defendant has been occupying and utilizing the suit properties.

50. Having known that the Defendant has always been in occupation of the land, and that he had objected to the division and sale of the land, the Plaintiff should not have purchased the land from PW2.

51. Consequently, and notwithstanding that the suit properties are registered in favour of the Plaintiff, I find and hold that it is the Defendant who is entitled to the land by virtue of the doctrine of constructive trust.

52. For those reasons, I dismiss the Plaintiff’s Plaint dated 26th August, 2010 with costs.

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

O.A. ANGOTE

JUDGE