



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 38 OF 2017

CHARLES MUTUKU MUSOMBA.....PLAINTIFF

VERSUS

RHODA KATUKU.....DEFENDANT

JUDGEMENT

1. The plaintiff is a farmer and a resident of Enzai in Makueni County. He has sued the defendant for acquiring title deed for plot number 1245 which plot the plaintiff occupies.

2. By his plaint dated 13th March, 2017 and filed in court on the 17th March, 2017 the plaintiff prays for judgement against the defendant for;

a. An order for cancellation for certificate of title for land parcel no. 1245 at Maiani land adjudication section and be registered in the names of the plaintiff.

b. Costs of this suit.

3. On the 13th February, 2017 the defendant was served with summons to enter appearance and to file her defence as can be seen from the affidavit of service dated 2nd May, 2017. She neither entered appearance nor did she file her defence resulting in the matter proceeding as undefended suit.

4. During the hearing of the plaintiff's case on the 19th September, 2017, he told the court that he had a land dispute with the defendant's husband in Kilungu District Court vide case number LC 72/78. He said that the District Court in its judgement fixed the boundary between him and Mathembo Mukuva and Kamolo Masai. The plaintiff produced the judgement in question as PEX no 3. He said that pursuant to the court's judgement, the adjudication officers visited the ground where they allocated the disputed two parcel numbers to him. The plaintiff says he is in possession of the two plots which are 1245 and 1726. He revealed that he was born in 1940 in the said parcel number 1245. He went on to say that he lodged his claim with the adjudication committee in 1989. He produced the determination of the committee as PEXno. 3 and pointed out the committee visited the suit land and planted sisal plants after determining that plot numbers 1245 and 1726 were his. He said that when he visited the land office in Makueni, he learnt that the defendant had acquired title deed for plot number 1245. He added that the lands officers advised him to sue the defendant and hence this suit after his advocate wrote a demand letter (PEX no.1) to her.

5. Mr. Mwema for the plaintiff in his submissions told the court that this is a declaratory suit and that this court has jurisdiction to issue declaratory orders as is envisaged in section 7(b) of the Environment and Land Court Act.

6. The counsel relies on the persuasive case of in *pyx granite Co. Ltd Vs Ministry of Housing & Local Government (1958) 1 OB 554* which authority the counsel never supplied to the court.

7. The counsel urged the court to declare the plaintiff the lawful owner of parcel number Makueni/Maiani/1245 on the basis of uncontroverted evidence.

8. I agree with the counsel that this court has jurisdiction to issue declaratory orders. I have looked at the plaint and I see no prayer for declaratory order save that the plaintiff seeks to have title deed issue to the defendant in respective of land parcel number 1245 be cancelled. Be that as it may, the evidence by the plaintiff is uncontroverted as was submitted by the plaintiff's counsel. The evidence on record is that the judgement in Kilungu District Magistrate's Court case Number L 72/78 and the proceedings of the Land Adjudication Committee held on 5th July, 1988 were never overturned on appeal. The two decisions were in favour of the plaintiff in respect of plot number 1245.

That being the case, I hold that the defendant was not justified to acquire title deed on 5th November, 2002 in her name as can be seen from the certificates of official search annexed to the plaintiff's counsel's submissions and which document ought to have been produced in evidence by the plaintiff himself. The title deed must be cancelled and/or revoked. I am satisfied that the plaintiff, has on a balance of probabilities, a cause of action against the defendant. In the circumstances, I hereby proceed to enter judgement for him and against the defendant in terms of prayers (a) and (b) of the plaint.

Signed, dated and delivered at Makueni on this 21st Day of February, 2018

MBOGO CG

JUDGE

In the presence of:

Mr. Kwemboi Court Assistant

No appearance for the plaintiff

Plaintiff present