



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.17 OF 2004

ANTHONY MBEVI MAINGI AS REPRESENTED BY

RUCINA MUMBUA MBEVI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST DEFENDANT

SALIM SAID KITHUKU.....2ND DEFENDANT

JUDGMENT

1. In the Plaintiff dated 28th January, 2004, the Plaintiff averred that by written agreements dated 8th January, 1982 and 2nd June, 1982, he purchased land known as plot numbers 909/316(B)/11/357 and 909/317/XXII from one Pius Musyoka Uvyu; that he paid all the dues that were owing to the Defendants and that he took possession of the land and started developing them.
2. It is the Plaintiff's case that the 2nd Defendant encroached on the two parcels of land and when he contacted a search, he found that plot number 909/318(B)/11/359 was registered in the name of Said Kithuku while plot number 909/316(B)/11/257 was in the name of Bahadurali Gulam Hussein Alibhai.
3. The Plaintiff is seeking for an injunction to restrain the Defendants from interfering with the suit properties and for *mesne profits*.
4. The 2nd Defendant filed a Defence in which he averred that he is the one in possession of the titles to the suit properties; that Gulam Hussein sold plot number 909/316(B)/11/R57) to his father and that the Plaintiff filed another suit being SPMCC No. 609 of 2002 relating to the same suit properties.
5. The 1st Defendant averred in his Defence that it is the 2nd Defendant who is the lawful owner of the suit land.
6. Although the Defendants were served with a hearing notice, they did not attend court when the matter came up for hearing.
7. The Plaintiff, PW1, informed the court that she is the wife of the Plaintiff, who died on 24th September, 2006; that Pius Musyoka Uvyu was allocated the suit land and that her late husband purchased plot number 909/317/XXII whereafter a letter of allotment was issued to him.
8. PW1 stated that her late husband later on bought plot number 909/316 from Alexander Muoka who had been allocated the land by the 1st Defendant. It was her evidence that in 1992, they constructed houses on L.R. No. 909/317 without any interference and that when they delivered building materials on plot numbers L.R. 909/316 and 318, they were stopped by the 2nd Defendant. That is when they filed CMCC No. 43 of 1986, PMCC No. 631 of 1992 and SPMCC No. 609 of 2002.
9. It was the evidence of PW1 that the 2nd Defendant sold plot numbers L.R. 909/318 and 316. PW1 informed the court that the Land Registrar should be directed by this court to rectify the register to reflect her husband as the proprietor of the two parcels of land or in the alternative, she should be awarded damages as prayed in the Plaintiff.
10. The Plaintiff's advocate submitted that the Sale Agreements that the Plaintiff's wife produced stand unchallenged; that the documents in support of the Plaintiff's claim in respect of plot numbers 909/316,317 and 318 are uncontested and that the Plaintiff should be allowed.
11. The Plaintiff's counsel submitted that the Plaintiff's claim for *mesne profits* is for rental income based on the neighbouring plot which already has rented houses.

12. The Plaintiff's claim is for a declaration that he is the owner of plot number 909/316 and 909/318. In the alternative, the Plaintiff is seeking for an order directing the 1st Defendant to pay him the current market of the two plots, general damages and *mesne profits*.

13. Although PW1 produced an agreement showing that her late husband purchased L.R Nos. 909/316 and 318, and even paid rates for them, PW1 informed the court that the 2nd Defendant has already sold the said plots to other third parties.

14. It is not clear who bought the two plots from the 2nd Defendant and when the said transaction happened. Having admitted that the suit properties have already been sold, the Plaintiff should have sought to join in these proceedings the said parties to enable the court ascertain the circumstances under which the suit properties were sold. The failure to join the current registered proprietors of the suit land renders the suit incompetent.

15. Although the Plaintiff has prayed for damages as an alternative prayer, she did not call a qualified valuer to inform the court the prevailing market rates of the suit land.

16. Consequently, I find that the Plaintiff did not prove her case on the required standards. The Plaintiff suit is therefore dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE