



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 412 OF 2012**

**KIMITI OLE NKAANGI .....PLAINTIFF**

**VERSUS**

**DAVID MUTUKU KILONZI .....1<sup>ST</sup> DEFENDANT**

**PRISCILLA K. MUTUKU .....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR .....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Plaintiff dated 31<sup>st</sup> October, 2012, the Plaintiff averred that he is the registered proprietor of land known as L.R. No. 14776 situated in Mavoko Township (*the suit land*); that in the year 2009, he learnt that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had excised a portion of land measuring 12.51Ha from the suit land and that the title in respect of L.R. No. 14776/1 was fraudulently acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence and Counter-claim in which they averred that they lawfully acquired L.R. No. 14776/1 after purchasing the same from the Plaintiff; that the Plaintiff signed all the requisite documents and that the Plaintiff was charged in Criminal Case No. 242 of 2012 for giving false information to the police in respect of the suit land. The Defendants are praying for the eviction of the Plaintiff from the suit.

**The Plaintiff's case:**

3. The Plaintiff, PW1, informed the court that he is a peasant farmer; that land known as L.R. No. 14776 situated in Machakos County is his and that when he went to Nairobi to collect his title document, he left it with Mr. Chege who was supposed to give it to his neighbour Mr. Waweru.
4. When Mr. Chege did not bring back the title document, PW1 stated that it transpired that he had hived from his land 12 Ha; that it was strange because the original title was never surrendered to lands after sub-division and that he still has his original title document.
5. It was the evidence of PW1 that when he reported the issue of the two titles to the police, the investigating officer retained both titles and that he was given back his title document in the year 2007.
6. In his statement, PW1 stated that he met the 1<sup>st</sup> Defendant in the year 1987; that Mr. Musyoki promised to assist him in processing of the title document and that he received a total of Kshs. 75,000 from the 1<sup>st</sup> Defendant installments.
7. PW1 denied ever selling the suit land to the 1<sup>st</sup> Defendant and that he was surprised to learn that the 1<sup>st</sup> Defendant was in possession of the title document.
8. PW1 denied ever entering into a Sale Agreement with the 1<sup>st</sup> Defendant in respect of the suit land. He also denied ever attending the Board meeting and stated that he never signed the Transfer document and that he only discovered that the 1<sup>st</sup> Defendant was in possession of the suit land in 2009.

9. PW1 stated that he received Kshs. 75,000 from the 1<sup>st</sup> Defendant and that he was willing to refund the said amount to the 1<sup>st</sup> Defendant; that he never signed the Transfer documents and that he does not agree with the opinion of the document officer.

10. PW1 finally stated that he has never had the original title document after giving it to Mr. Chege and that the last time he spoke to the 1<sup>st</sup> Defendant was in 1990.

11. PW2 informed the court that he knew the 1<sup>st</sup> Defendant in the year 2005 when the issue of registration of the suit land in favour of the 1<sup>st</sup> Defendant arose; that on inquiry, the 1<sup>st</sup> Defendant informed him that he obtained the title to the suit land from the police and that they agreed to give to the 1<sup>st</sup> Defendant either  $\frac{1}{4}$  or  $\frac{1}{2}$  acre of land or refund his money.

12. PW3 stated that he is a neighbour of the Plaintiff; that the Plaintiff informed them that he had sold the suit land to the 1<sup>st</sup> Defendant and that after deliberating on the issue, they agreed that the Plaintiff should refund the 1<sup>st</sup> Defendant Kshs. 75,000.

#### **The Defence case:**

13. The forensic document examiner, DW1, stated that he prepared a report dated 13<sup>th</sup> October, 2011 in respect of the dispute herein; that he examined and compared the questioned signatures in the Sale Agreement that was given to him together with the standard signatures of the Plaintiff and found that the signatures belonged to the Plaintiff.

14. The 1<sup>st</sup> Defendant, DW2, informed the court that he met the Plaintiff in 1987 and that he informed him that he wanted to sell his land; that he agreed to buy the land for Kshs. 2,500 per acre totaling to Kshs. 75,000 and that they signed an agreement of sale on 23<sup>rd</sup> December, 1987.

15. After the land was surveyed, DW2 informed the court that it was allocated L.R. No. 14776 and that the Land Control Board gave its consent for the sub-division of the land on 30<sup>th</sup> October, 1988 and that a formal transfer was done on 25<sup>th</sup> September, 1995.

16. According to DW2, it was not until 25<sup>th</sup> May, 2011 that the police called him and informed him that the Plaintiff had filed a complaint in respect of the suit land. DW2 stated after investigations, the police discovered that DW2 had given them false information. They charged him in court for giving false information.

17. The Plaintiff's advocate submitted that the Sale Agreement was not drawn by an advocate; that the agreement has alterations which are not counter signed nor explained and that the Transfer document was never produced in evidence.

18. Counsel submitted that the dates when the Land Control Board purportedly held its meetings is different from the dates on the consent that the Board issued and that the Plaintiff only borrowed Kshs. 75,000 from the 1<sup>st</sup> Defendant.

19. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's advocate submitted that the Sale Agreement was signed by the Plaintiff and that the same was witnessed by his wife; that the Defendants also executed the Sale Agreement and that the agreement meets the requirements of Section 3(3) of the Law of Contract Act.

20. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's title is absolute and indefeasible in terms of Section 24 of the Land Registration Act and that the said title was validly issued to the Defendants.

#### **Analysis and findings:**

21. The Plaintiff's case in this matter is that he has always been the registered proprietor of land known as L.R. No. 14776 situated in Mavoko Township. It was the evidence of PW1 that he is in possession of the title document for the said land and that he has never transferred the land.

22. According to the Plaintiff, the purported transfer of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is a fraud and that the said registration should be cancelled.

23. Although the court granted the Plaintiff an opportunity to produce the original grant that was issued to him dated 17<sup>th</sup> January, 1991, he did not do so. Indeed, the Plaintiff did not serve the investigating officer the witness summons that was issued by the court after claiming that the original title was being held by the said investigating officer.

24. The Plaintiff stated that he met the Defendants in 1987. According to the Plaintiff's statement, the 1<sup>st</sup> Defendant informed him that he wanted to buy ten (10) acres of L.R. No. 14776 and when he told him that he had not processed the Title document, he received a total of Kshs. 75,000 from him. However, it was the evidence of the Plaintiff that he never entered into a formal agreement for the sale of the land with the Defendants although, according to him, the identity card number on the agreement was his.

25. The document examiner, DW1 was categorical that when he examined the signature on the agreements that the Plaintiff is said to have signed and compared it with his known signature, he found that the two were authored by the same hand. Indeed, it is on the basis of the document examiner's report that the Plaintiff was charged in a criminal case for giving to the police false information.

26. The Plaintiff did not inform this court on which basis he received Kshs. 75,000 in 1987. Indeed, I am convinced that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could not have given the Plaintiff Kshs. 75,000, which was a colossal amount of money in 1987, if they were not buying the suit land, which by then did not have a title document. The Plaintiff acknowledged having received the entire purchase price of land known as L.R. No. 10029/54 Kitengela/Embakasi measuring 12.5 hectares on 27<sup>th</sup> November, 1989.

27. The acknowledgement of receipt of Kshs. 75,000 for the sale of the suit land was preceded by the agreement dated 23<sup>rd</sup> December, 1987 which was signed by the Plaintiff and witnessed by his wife. In the agreement, the Plaintiff agreed to sale the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for Kshs. 2,500 per acre.

28. From the letter of allotment that was issued to the Plaintiff on 23<sup>rd</sup> February, 1987, L.R. No. 10029/54- Kitengela Farm measured 24 Ha. It would appear that after surveying the land, the same increased in acreage to 27.67Ha and a grant was issued to the Plaintiff.

29. The evidence of the Plaintiff was that a Mr. Chege went away with his title document after he picked it from Ardhi house, and that later on, he discovered that 12.00Ha was registered in favour of Mr. Chege while 12.51Ha was in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

30. The grant that was produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shows that 12.00Ha was transferred to Elija Kimani Chege on 15<sup>th</sup> April, 1991 while 12.51Ha was transferred to the Defendants on 21<sup>st</sup> November, 1995.

31. The issue of whether 12.51Ha was transferred to Mr. Chege fraudulently is not before me. Indeed, the court is not aware of the current status of the land that was purportedly registered in favour of Mr. Chege. That is an issue that the Plaintiff can pursue separately.

32. However, I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were lawfully registered as proprietors of L.R. No. 14776/1 having purchased 12.51Ha from the Plaintiff. The Certificate of Title that was issued to the Defendants after the sub-division of the Plaintiff's land is a valid document.

33. For those reasons, I dismiss the Plaintiff's Plaint dated 31<sup>st</sup> October, 2012 with costs and allow the Defendants' Counter-claim dated 28<sup>th</sup> January, 2013 in the following terms:

*a. The Plaintiff to give vacant possession of land known as L.R. No. 14776/1 measuring 12.51Ha.*

*b. The Plaintiff be and is hereby restrained from interfering, encroaching, entering or in any other way interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants possession of L.R. No. 14776/1 measuring 12.51Ha.*

*c. The Plaintiff to pay to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the costs of the suit.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**