



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 69 OF 2008 (O.S)

PRABHAGAURI SHASHIKANT MARU.....PLAINTIFF

VERSUS

MARTHA KALOVA NZIVO.....DEFENDANT

JUDGMENT

1. In the Amended Originating Summons dated 16th June, 2008, the Plaintiff is seeking for the following orders:

a. That an injunction do issue against the Defendant herein restraining her from selling, dealing, disposing or interfering whatsoever with plot L.R. No. Machakos Municipality Block 1/458 either by herself, her agents, representatives, servants or otherwise with the suit property pending the hearing and determination of the suit hereof.

b. That this Honourable Court be pleased to order that the Defendant herein do execute the Transfer and or any document to effectuate the transfer in respect of plot L.R. No. Machakos Municipality Block 1/458 in favour of the Plaintiff and or her nominee within a reasonable time and in default, the Deputy Registrar of this Honourable Court be authorized and or be mandated to execute such transfer and or document in order to complete the transfer.

c. That this Honourable Court be pleased to declare the Plaintiff as a bona fide purchaser for both consideration and value in respect of plot L.R. No. Machakos Municipality Block 1/458.

d. That in any event the costs of this suit be awarded to the Plaintiff.

2. The Originating Summons is supported by the Plaintiff's Affidavit in which she has deponed that she purchased parcel of land known as Machakos Municipality Block 1/458 (*the suit land*) from the Defendant; that she has erected two bed-roomed houses on the suit land and that while HCCC No. 85 of 2005 in which she had sued the tenants was pending, the Defendant collected the Certificate of Lease from the Ministry of Lands. It is the Plaintiff's case that she paid the Defendant the full purchase price.

3. In response, the Defendant deponed that she has never been aware of HCCC Nos. 167 of 1997 and 85 of 2005; that she has all along been the owner of the suit land; that the Plaintiff has been dealing with imposters and that they are so many other parties claiming that they own the suit property who should be enjoined in the suit.

4. The Plaintiff, PW1, informed the court that she purchased the suit land from the Defendant in 1981 whereafter she put up two residential houses. According to PW1, she had a dispute with a tenant over the rent arrears and sued her in Machakos HCCC No. 167 of 1997. It was the evidence of PW1 that the court allowed her claim in that matter. It was the evidence of PW1 that although she purchased the suit land from the Defendant in 1981 and developed it in 1986, it was not until the year 2004 that the Title Deed for the suit land was issued to the Defendant.

5. In cross-examination, PW1 stated that she paid the Defendant Kshs. 17,000 in 1981 for the suit land and that she saw the Defendant sign the undated Agreement of Sale.

6. The advocate who acted for the Plaintiff in the Sale Agreement, PW2, informed the court that he prepared the Assignment dated 30th September, 1981 which was signed by the parties and whose signatures he witnessed. According to PW1, the Assignor was taken to his office by the Assignee and that the Assignment instrument was to be taken to the then Mayor of the Machakos Municipal Council for sealing.

7. The Defendant, DW1, informed the court that she does not know the Plaintiff; that she used to work for the then Municipal Council of Machakos and that it is the Council that allocated her the suit land. DW1 informed the court that she never sold the suit land to the Plaintiff and that she has never been in the office of PW2 to sign the Assignment as alleged.

8. It was the evidence of DW1 that she was requested by the then Mayor of the Machakos Municipal Council to allow a Mr. Maru to occupy the incomplete house that she had put up on the suit land which request she acceded to. It was the evidence of DW1 that she agreed with Mr. Maru that he was to live in the house for fifteen (15) years and that he refused to vacate the house.
9. In cross-examination, DW1 stated that although she signed the Assignment of 30th September, 1981, she never sold the suit land and that when Mr. Maru moved out of the house, she found he had rented it out.
10. DW1 finally stated that she was paid Kshs. 17,000 by Mr. Maru so that she could allow him to live in the house. It was the evidence of DW1 that although it is the Plaintiff who is in possession of the house, she grabbed it and that the house and the suit land are hers.
11. The Plaintiff's advocate submitted that the Defendant admitted having signed the Assignment of 30th September, 1981; that the Defendant further admitted that she had allowed the Plaintiff to live in the suit land for fifteen (15) years and that the Plaintiff proved that she is the lawful owner of the suit land.
12. The Defendant's advocate submitted that being the first registered owner, the Defendant has an indefeasible title to the suit land; that the Defendant never sold to the Plaintiff the suit land but entered into a lease with her and that the law provides that such instruments should be registered.
13. Counsel submitted that because the Assignment was not registered and was not stamped pursuant to the provision of Section 19 of the Stamp Duty Act, then the same was not admissible.
14. The Plaintiff's claim in this matter is that she purchased the suit land from the Defendant vide an Assignment dated 30th September, 1981. The Assignment was signed by both parties before an advocate, PW2.
15. Although the Defendant agreed in cross-examination that she signed the Assignment, it was her evidence that she only allowed a Mr. Maru to occupy the house that was on the suit land for fifteen (15) years. According to DW1, Mr. Maru paid her Kshs. 17,000 to stay in the house for the said period.
16. It is therefore not in dispute that the parties herein signed an Assignment dated 30th September, 1981. The said Assignment was however neither registered nor stamped.
17. Although the Defendant's advocate has argued that the said Assignment document should not be relied on by the court because it is neither registered nor stamped, he did not object to the production of the document as an exhibit. Having being produced as an exhibit, the court is under an obligation to rely on the document. The issue of whether the document is admissible or not is therefore water under the bridge.
18. In any case, document which ought to be registered by the law but is not registered is still binding on the parties who signed it *inter se*. Indeed, an unregistered document affecting immovable property under any law may be received as evidence of a contract in a suit or as evidence of any collateral transaction. Such a document can be relied upon to ascertain the nature of the transaction as between the parties, without binding third parties.
19. In the case of ***Souza Figueiredo vs. Moorings Hotel Co. Ltd (1960) E.A 926***, the Court of Appeal held that "*unregistered document operates as a contract inter-partes and can confer on the party in the position of intending lessee a right to enforce a contract...*"
20. This decision was followed in ***Clarke vs. Sodhoni (1963) E.A 107*** where the court held that the proviso of Section 40 of the Kenya Registration of Titles Ordinance that no lease for a period exceeding one (1) year shall be valid unless registered does not exclude the use of unregistered lease to show the terms of the contract between the parties. (*See also Gos Venor vs. Rogan-Kemper (1974) and Bachelor's Bakery Ltd vs. Westlands Securities Ltd (1982) KLR 366 and Chon Jeuk Suk & Another vs. E.J. Austin & Another (2013) eKLR.*)
21. If one has an interest in a property and this interest is registered pursuant to the law, the registered instrument will always have a legal effect on third parties, because the third party will have been notified of the interest. However, that does not mean that the terms of an unregistered instrument, which ought to be registered, cannot be enforced as against the parties, *inter se*, unless it is shown that a third party would be prejudiced if the terms of such a document are enforced by the court. That is not the scenario in this matter because the Defendant is still the registered proprietor of the suit land.
22. As I have stated above, the Defendant did not object to the production of the Assignment as an exhibit on account of the document having not been stamped. Even if she had objected to the production of the document, the court, guided by the principle of delivery of substantive justice to parties, would have taken the position that a party should be allowed to have the document stamped upon paying the requisite penalties, and then produce the document. A valid document signed by the parties cannot and should not be outrightly rejected by the court on the basis that the same does not comply with Section 19 of the Stamp Duty Act without giving a party an opportunity to submit the document for stamping, and then producing it in evidence.
23. The Assignment document dated 30th September, 1981, although not stamped and registered, is therefore properly before me. The Assignment that was entered into by the Plaintiff and the Defendant clearly stipulated that in consideration of the Kshs. 17,000 that the Plaintiff paid the Defendant, the Defendant had assigned all her interests and benefits to the Plaintiff.
24. Indeed, the Defendant admitted that she received Kshs. 17,000 in 1981 from a Mr. Maru, who, in my view was either the Plaintiff or the Plaintiff's husband. It is inconceivable that the Defendant only rented to the Plaintiff the suit land for fifteen (15) years and was paid Kshs. 17,000, without reducing such a lease into writing.

25. Having signed the Assignment of 30th September, 1981 and receiving Kshs. 17,000 from the Plaintiff, the Defendant's interest in the suit land passed to the Plaintiff. Indeed pursuant to the provisions of Section 3(3) of the Law of Contract Act, a valid binding contract was entered into between the parties in respect of the suit land, more so after the Defendant put the Plaintiff in possession of the land, and paid Kshs. 17,000.

26. For those reasons, I find and hold that the Plaintiff has proved on a balance of probabilities that she is the one who is entitled to the suit land. In the circumstances, I allow the Amended Originating Summons dated 16th June, 2008 in the following terms:

a. The Plaintiff be and is hereby declared as the bona fide purchaser for value of land known as Machakos Municipality Block 1/458.

b. The Defendant be and is hereby ordered to execute the Transfer and any other document to effectuate the transfer of parcel of land known as Machakos Municipality Block 1/458 to the Plaintiff within thirty (30) days and in default the Deputy Registrar of this court is authorized to execute such documents in order to complete the transfer of the land in favour of the Plaintiff.

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

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

O.A. ANGOTE

JUDGE