



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 151 OF 2016

HARRISON MUTUA KYENDO.....PLAINTIFF

VERSUS

FRANK MUANGE.....1ST DEFENDANT

MR. KILONZO2ND DEFENDANT

JUDGMENT

1. In his Complaint dated 11th October, 2016, the Plaintiff has averred that he is a member of Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the Society*); that as a member of the Society, he is the registered owner of plot number 704; that the Defendants who are claiming to be the owners of Plot No. 705X have entered on his land and put up permanent structures and that a permanent injunction should issue.
2. In their Statement of Defence, the Defendants averred that they own plot number 705X and 706X and not plot number 704.
3. The matter proceeded for hearing on 6th February, 2018 on which date the Plaintiff, PW1, informed the court that he is member number 454 of Katelembo Society; that as a member, he was allocated plot number 704 and that the Defendants have trespassed on that land. According to PW1, he is not aware of plot number 705X which the Defendants allegedly own. The Plaintiff produced in evidence the letter from Katelembo Society dated 29th August, 2016 and his Membership card number 454.
4. The Director and Secretary of Katelembo Society, PW2, informed the court that he is the one who authored the letter dated 29th August, 2016; that according to the records of the Society, Plot No. 704 measuring half an acre belongs to the Society's member No. 454, who is the Plaintiff and that the letter of 29th August, 2016 was also signed by the Chairman and Treasurer of the Society.
5. The 1st Defendant, DW1, stated that he purchased plot number 705X from Stephen Mutaiti Kasuna; that the land had a permanent building on it and that he paid the purchase price of Kshs. 3 million for the land.
6. According to DW1, the Vendor took him to Katelembo Society where they effected the changes in the register and that after effecting the transfer, he became a member of the Society. DW1 produced several documents in support of his case which I shall refer to later.
7. In cross-examination, DW1 stated that the Vendor was not a member of the Society and that he (*the Vendor*) had also bought the land from another person who was a member of the Society.
8. DW2 informed that court that he purchased plot number 706X from Stephen Mutaiti Kasuna; that he paid Kshs. 400,000 for the plot and that he later on put up a permanent house on the land. According to DW2, the transfer of the land has not been effected in his favour and that he has lived on the land since the year 2012 without any interference.
9. DW3 stated that he is a resident of Katelembo location within Machakos county; that she purchased plot numbers 705X and 706X in 1998 from the Society and that each plot cost him Kshs. 30,000. According to DW3, after buying the two plots, he was taken to the field to see the plots by a surveyor known as Nyamasyo and that he took possession of the plots and started cultivating them.
10. DW3 informed the court that he sold the two plots to one Stephen Mutaiti Kasuna in the year 2008 and that the two plots were transferred to Stephen after paying Kshs 3000 to the Society being the transfer fees.
11. According to DW3, it is Katelembo Society which changed the numbers from plot 705 and 706 to 705X and 706X during the transfer and

that the two plots do not belong to the Plaintiff.

12. Stephen Mutaiti, DW4, stated that he purchased plot numbers 705X and 706X from DW3; that he paid Kshs. 300,000 to DW3 and that the transfer was effected by the Society after paying Kshs. 3,000. It was his evidence that he sold Plot No. 706 to the 2nd Defendant for Kshs. 400,000 and plot 705X to the 1st Defendant.

13. The Plaintiff's advocate submitted that plot numbers 705X and 706X do not exist on the ground as confirmed by the survey map; that plot numbers 705 and 706 exist in the map and are owned by different parties and that the Defendants did not produce any document of ownership of the land they allege to be theirs. Counsel submitted that the Plaintiff has proved his case on a balance of probabilities.

14. The Defendants' counsel submitted that the Plaintiff did not produce any documents of ownership; that there are no documents from the Society to show that plot numbers 705X and 706X do not exist and that the surveyor did not state so in his letter of 26th April, 2016.

15. According to the Defendants' advocate, the Plaintiff did not produce evidence to show that the Defendants had trespassed on plot number 704 and that the Defendants' plots are plot numbers 705X and 706X and not Plot No. 704.

16. The evidence placed before this court by the Plaintiff shows that he is member number 454 of Katelembo Athiani Muputi Farming and Ranching Society Limited (*the Society*). According to the Plaintiff's membership card which was produced in evidence, and which was signed by the Chairman and Secretary of the Society, the Plaintiff held two (2) shares in the Society. It was the evidence of PW1 that by virtue of being a member, the Society allocated to him plot number 704 on which the Defendants have encroached.

17. In addition to the membership card, the Plaintiff produced in evidence a letter dated 29th August, 2016 which was signed by the three officials of the Society, including PW2. In the letter, the officials of the Society confirmed that Plot Number 704 measuring half ($\frac{1}{2}$) an acre belongs to the Plaintiff. This information by the officials of the Society is supported by the Society's Surveyor's letter dated 26th October, 2016.

18. In the letter dated 26th October, 2016, the Society's Surveyor confirmed that plot number 704, within Central Farm measuring 0.5 acres was allocated to the Plaintiff. The Surveyor provided the coordinates of the said plot and also drew a sketch map which shows the location of plot number 704 in relation to other plots.

19. Other than the Surveyor's letter and the sketch map, the Secretary of the Society informed the court that indeed, their records indicate that the suit land belongs to the Plaintiff.

20. On the other hand, DW3 informed the court that she purchased the plot numbers 705X and 706X from the Society in 1998 for Kshs. 60,000 and that she was shown the two plots that she bought. DW3 produced a receipt dated 14th April, 1998 which has a stamp of Katelembo Society. The said receipt shows that she paid Kshs. 60,000 for plot numbers 705 and 706. DW3 also produced a Transfer Form purportedly signed on 7th December, 2009 by the Society's officials. The said Transfer Forms shows that DW3 transferred Plot No. 705X measuring $\frac{1}{2}$ an acre to Stephen Mutaiti (DW4).

21. Although DW3 informed the court that she bought the two plots from the Society, she did not exhibit any Agreement of Sale of the said plots. Considering that DW3 was not a member of the Society, which owned the suit land, it is inconceivable that she could buy the two plots without reducing the purchase in writing.

22. In the absence of the purchase of plot numbers 705 and 706, which numbers were purportedly changed to read plot numbers 705X and 706X, I find that DW3 did not have any land to pass to DW4. In fact, other than the absence of any agreement to show that she purchased the two properties, DW3 did not explain to this court how the numbers of the two plots mutated from 705 and 706 to 705X and 706X respectively.

23. If indeed DW3 purchased the two plots from the Society, and then transferred the plots to DW4 vide the Transfer document which was purportedly signed by the officials of the Society, the court would have expected the Defence to summon the officials of the Society who signed the Transfer Form of 7th December, 2009. They never did that.

24. The totality of the evidence before me shows that plot numbers 705X and 706X do not exist in the records of the Society. Indeed, the Defendants did not call any evidence, either of the surveyor or otherwise to show that those plots exist on the ground. To the contrary, the Plaintiff has shown the location of plot number 704 by using the sketch map that was drawn by the Society's Surveyor. The sketch map shows the existence of plot number 704, which is distinct from plot numbers 705 and 706 which are in existence. It however does not show the existence of plot numbers 705X and 706X.

25. Consequently, this court finds that the land that DW3 purported to sell to DW4, who eventually sold to the Defendants do not exist. Instead, it is the Plaintiff's plot number 704 that exists on the ground, which plot he was allocated by virtue of being a member of the Society.

26. For those reasons, I find that the Plaintiff has proved his case on a balance of probability. I therefore allow the Plaintiff's claim dated 11th October, 2016 as follows:

a. A declaration be and is hereby issued that Plot No. 704 Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited as shown in the sketch map annexed on the Report of 26th October, 2016 belongs to the Plaintiff.

b. An order of permanent injunction be and is hereby issued restraining the Defendants, their servants, agents, workers or anybody whatsoever claiming under them from trespassing into or putting up any structures or committing acts of trespass on Plot No. 704 Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited.

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE