



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 155 OF 2011**

**JUSTUS MAKEKE MUUMBI.....PLAINTIFF**

**VERSUS**

**DORCUS NDUKU KIMEU .....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 28<sup>th</sup> June, 2011, the Plaintiff is seeking for a declaration that the Title Deed that was issued to the Defendant in respect of a parcel of land known as Machakos Town Block 3/252 is null and void.
2. The Plaintiff's prayers are premised on the assertion that he used to cohabit with the Defendant as man and wife until the year 1999 when they separated; that the suit property belonged to him and that the Defendant had the suit land fraudulently registered in her name.
3. According to the Plaintiff, the Defendant had promised to have the suit land re-transferred to him but has since reneged on that promise.
4. The Defendant filed a Defence in which she averred that she has never been married to the Plaintiff; that she is the registered proprietor of the suit land and that the suit should be dismissed with costs.
5. The Plaintiff, PW1, informed the court that he married the Defendant on 3<sup>rd</sup> October, 1989 in Machakos Town; that in 1990, they moved to Katelembo where he had a parcel of land and constructed a house and that while living in Katelembo, he purchased share number 945 and plot number 1981 (*which converted into Machakos Town Block 3/252*) and that the society transferred the suit land to him.
6. According to PW1, he separated with the Defendant when she became unfaithful to him and that he later on discovered that the documents in respect of the suit land were missing from the house. PW1 stated that he referred the matter to the Chief where the Defendant agreed to transfer the suit land to him. PW1 produced in evidence the documents in support of his claim.
7. In cross-examination, PW1 stated that he did not have an Agreement of Sale in respect to the suit land; that his marriage to the Defendant was informal and that they were blessed with two children from the said marriage. According to PW1, he bought the suit land from one Kioko who has since died and that he broke the windows to his house when he found the Defendant with another man in their house.
8. The Defendant on the other hand stated that she became a member of Katelembo Athiani Farmers Co-operative Society in the year 1991; that she was given a certificate dated 12<sup>th</sup> December, 1992 and became member number 945 and that she was eventually allotted the suit land by the Society.
9. According to DW1, she was never married to the Plaintiff and that she is a single mother of two children aged 17 years and 15 years. It was the evidence of DW1 that she is the registered proprietor of the suit land.
10. In his submissions, the Plaintiff's advocate submitted that the Plaintiff and the Defendant were married under the Kamba customary law; that the Plaintiff is the lawful owner of the suit land and that under Article 45(3) of the Constitution, parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
11. Counsel submitted that the suit land was purchased by the Plaintiff after the parties had entered into the marriage and that by dint of the provisions of the Constitution, the suit land should be shared equally.
12. The Defendant's advocate submitted that the Plaintiff did not prove the alleged marriage between himself and the Defendant; that although the Plaintiff alleged that he bought the suit land from one Kilonzo Kioko, the share certificate produced by the Defendant shows

that the original owner of the land was one Paul Kilonzo and that the suit should fail.

13. The evidence of PW1 was that he married the Defendant in the year 1989 under the Kamba customary law and that during the pendency of the said marriage, he purchased the suit land from one Kilonzo Kioko. After purchasing the suit land, he was allocated membership number 945 by the Co-operative Society. PW1 stated that the Defendant destroyed the agreement that he entered into with Mr. Kilonzo Kioko.

14. PW1 produced in evidence the photograph that he took with the Defendant in 2001, a letter dated 16<sup>th</sup> January, 2014 by the Secretary of Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited and a copy of the letter of the Chief which is not dated.

15. The letter of the Chief shows that the marital dispute between the Plaintiff and Defendant that was referred to him by the police was never resolved by his office. According to the said letter, the Defendant was the complainant after alleging that the Plaintiff had damaged her house but failed to attend any further proceedings before the Chief.

16. In the absence of any independent evidence, this court is not in a position to establish if indeed the Plaintiff married the Defendant under customary law. The burden of proving that the Plaintiff entered into a recognizable marriage was on the Plaintiff, which burden he did not discharge.

17. The only document that the Plaintiff produced to show that he purchased the suit land is the letter by the Secretary of the Society dated 16<sup>th</sup> January, 2014. According to the said letter, membership number 945 belongs to the Plaintiff. However, there is no evidence to show that indeed the owner of membership member 945 is also the owner of the suit land.

18. If indeed the Plaintiff purchased the suit land from one Kilonzo Kioko, then he should have called for the register of Katelembo Athiani Muputi Society to show that the said Kilonzo Kioko was a member of the society. Having failed to do so, the court cannot ascertain if indeed Kilonzo Kioko was once the proprietor of the land.

19. On the other hand, the Defendant produced a copy of a certificate of membership number 945 dated 7<sup>th</sup> July, 1983 and which was issued to Paul Kilonzo. The Defendant also produced in evidence the official search showing that the suit land was registered in her favour on 19<sup>th</sup> January, 1998.

20. A title to land registered under the Registered Land Act (*repealed*) can only be cancelled by this court if the court is satisfied that the same was procured fraudulently or by mistake (*See Section 143(1) of the Act*). The burden of proving that the said title was issued fraudulently or by mistake was on the Plaintiff. The Plaintiff did not discharge that burden.

21. In the absence of evidence to show that the Plaintiff was ever married to the Defendant and that the suit land was acquired by the Plaintiff during the subsistence of the said marriage, and the Plaintiff having failed to prove that the title to the suit land was obtained fraudulently or by mistake, I find and hold that the Plaintiff has not proved his case on a balance of probabilities.

22. For those reasons, I dismiss the Plaintiff's suit but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**