



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 12 OF 2009

ALICE NJOKI WAITIKI1ST PLAINTIFF

JOSEPH NG'ANG'A WAITIKI2ND PLAINTIFF

JAMES KAHIA KAGIMBI.....3RD PLAINTIFF

FRACIA WANGARI KAHIA4TH PLAINTIFF

GEOFFREY NG'ANG'A MBATIA.....5TH PLAINTIFF

VERSUS

MOSES NDUNGU MUNGAI1ST DEFENDANT

OKOA DEVELOPMENT CO. LTD.....2ND DEFENDANT

GIDRAPH NGUGI GITUNDU3RD DEFENDANT

DANSON MWORIA NJIHIA4TH DEFENDANT

JUDGMENT

1. In the Complaint dated 23rd January, 2009, the Plaintiffs sued only the 1st and 2nd Defendants. In the said Complaint, the Plaintiffs averred that the 1st Defendant owned a parcel of land known as Mavoko Town Block 2/49 measuring approximately 8.0Ha; that the 1st Defendant incorporated the 2nd Defendant which sold to the Plaintiffs the plots within the suit land and that the Plaintiffs paid for their respective plots in installments.

2. After the said purchase, the Plaintiffs averred that the 1st and 2nd Defendants sub-divided the suit land into two portions, to wit, Mavoko Town Block 2/5459 and 5460; that parcel number 5460 was transferred to an entity known as Relisa Co-operative Society Limited; and that parcel No. 5460 was subsequently closed after sub-division and issuance of 56 sub-plots.

3. The Plaintiffs' prayers as against the 1st and 2nd Defendants is for an order of specific performance directing the Defendants to perform their part of the contract by transferring part of land known as Mavoko Town Block 2/5459 and 5460 to the Plaintiffs proportionate to the plots that they purchased.

4. The Plaintiffs filed an Amended Complaint dated 6th March, 2009 in which they corrected the name of the 1st Defendant.

5. The 3rd and 4th Defendants filed an Application dated 5th October, 2009 in which they sought to be enjoined in the suit. The Application was premised on the ground that they had acquired an interest in parcel of land known as Mavoko Town Block 2/5459 but which had since been sub-divided into parcel number 9246 and 9247. Although the Plaintiffs opposed the Application, the same was allowed by the court.

6. The joinder of the 3rd and 4th Defendants by the court culminated in the filing of the Re-Amended Complaint dated 4th October, 2012 and filed on 5th October, 2012. In the Re-Amended Complaint, the Plaintiffs have prayed for the transfer of parcels number 9246 and 9247 to them in their respective shares and an order restraining the 3rd and 4th Defendants from taking possession of land in the two portions "bigger than what was awarded to them in Milimani CMCC No. 11556 of 2003.

7. The 1st and 2nd Defendants filed a Defence to the Re-Amended Plaintiff in which they averred that the 3rd and 4th Defendants were members of Kihururu Self Help Group who bought ten (10) plots in parcel of land number 2/4297 measuring 40 by 80 feet; that parcel number 2/4297 was sub-divided in the year 1995 into 223 plots and that all the purchasers were shown their respective plots.
8. According to the Defence of the 1st and 2nd Defendants, the 3rd and 4th Defendants were entitled to plots measuring 40 x 80 feet and not 60 x 80 feet; that the Plaintiffs have not fully paid for their respective plots and that the Re-Amended Plaintiff does not disclose a reasonable cause of action as against them.
9. In their Defence, the 3rd and 4th Defendants pleaded that they sued the 1st and 2nd Defendants in Nairobi CMCC No. 11556 of 2003 and obtained Judgment in respect of ten (10) plots measuring 80 x 60 feet; that the said ten (10) plots were curved out of Plot No. 2/5459 and more specifically Plot No. 2/9247 and that the question of ownership of those plots is *Res judicata*.
10. The 1st Plaintiff, PW1, informed the court that she is related to the rest of the Plaintiffs and that she had the authority of the rest of the Plaintiffs to testify on their behalf.
11. PW1 informed the court that she was introduced to the 1st Defendant in December, 2004 who is the 2nd Defendant's Director; that the 1st Defendant showed her a piece of land which she showed to the rest of the Plaintiffs and that the 1st Defendant allowed the Plaintiffs to pay for the land in installments. After paying for the land that they had purchased, PW1 informed the court that the 1st and 2nd Defendants issued them with the certificates of ownership and beacon certificates and that the plots were allocated numbers.
12. It was the evidence of PW1 that she was allocated plot numbers 330,331 and 332; that the 2nd Plaintiff was allocated plot numbers 213, 333 and 334; that the 3rd Plaintiff was allocated plot number 336; that the 4th Plaintiff was allocated plot numbers 337 and 339 and that the 5th Plaintiff was allocated plot number 335.
13. According to PW1, the portions of land they bought were within parcel of land known as Mavoko Town Block 2/49; that when their advocate conducted a search, they discovered that parcel number 2/49 had been sub-divided on 24th June, 2003 to create parcels number 2/5459 and 5460 and that while parcel number 5460 was sold to Relisa Co-operative Society on 26th June, 2004, parcel number 5459 was sub-divided in the year 2008 and sold to several people including the 3rd and 4th Defendants.
14. According to PW1, the plots that they purchased from the 1st and 2nd Defendants are within parcels number 9246 and 9247 which are a sub-division of parcel number 5459. PW1 produced in evidence a bundle of receipts which were issued to the Plaintiffs by the 1st and 2nd Defendants, amongst other documents.
15. It was the evidence of PW1 that they bought a total of ten (10) plots which are next to each other; that each plot measures 40 x 80 feet; that they have fenced those plots and that they are in possession of the same. It was the evidence of PW1 that he is not aware about the plots that the 3rd and 4th Defendants bought and that the Plaintiffs are in possession of the plots that they are claiming.
16. The 4th Defendant, DW1, informed the court that they bought ten(10) plots from the 1st and 2nd Defendants which plots are within parcel number 9247; that Judgment was entered in their favour in Nairobi CMCC No. 11556 of 2003 and that after the said Judgment, they sub-divided parcel number 5459 to create parcel numbers 9246 and 9247. According to DW1, they purchased parcel number 9247 and that they have been unable to register the said land due to the existing caution that was registered by the Plaintiffs.
17. In cross-examination, DW1 stated that she does not know the exact boundaries of plot number 9246.
18. The Plaintiffs' advocate submitted that the Defendants have not contested that the Plaintiffs have a right to claim the suit land; that even where there is no written agreement, the law recognizes that where there is part performance of the contract and the purchaser has taken possession, the agreement is enforceable and that the Plaintiffs fully performed their contract.
19. Counsel submitted that the Plaintiffs' plots all measure 0.2973 of Mavoko Town Block 2/9246.
20. The 3rd and 4th Defendants' counsel submitted that his clients obtained a Judgment in CMCC No. 11556 of 2003 for the transfer of ten (10) plots measuring 80 x 60 feet within Mavoko Town Block 2/5459; that the 3rd and 4th Defendants' plots all translate into 0.615Ha and that his clients are entitled to parcel land number 9247 which measures 0.615Ha.
21. It is not in dispute that the Plaintiffs purchased ten (10) plots which they paid for in installments. The said plots were purchased from the 1st and 2nd Defendants, who issued to the Plaintiffs receipts showing the payments they had made. According to the 1st Plaintiff, the ten (10) plots they purchased were portions within land known as Machakos Town Block 2/49.
22. PW1 informed the court that they identified the plots they had purchased whereupon they fenced them. It was the evidence of PW1 that all along, they were waiting for the 1st and 2nd Defendants to sub-divide the land and then have the plots transferred to them. The 1st and 2nd Defendants did not deny these allegations, other than stating that the 1st and 2nd Defendants did not pay the entire purchase price. The 1st Defendant did not testify, meaning that the evidence of PW1 is uncontroverted.
23. On the other hand, the 3rd and 4th Defendants' claim is that they also purchased ten (10) plots from the 1st Defendant and that when they sued him in Milimani CMCC No. 11556 of 2003, the court entered Judgment in their favour. It was only when they tried to have the land known as parcel number 9247 that they found the Plaintiffs had registered a caution on the same. They then joined the suit.

24. The consent order that was produced by the 3rd and 4th Defendants in Milimani CMCC No. 11556 of 2003 shows that the 1st Defendant herein was ordered to transfer to the Plaintiffs (*the 3rd and 4th Defendants' herein*) ten (10) plots each measuring 80 x 60 feet out of land known as Mavoko Town Block 2/5459. The court further ordered that the Plaintiffs (*the 3rd and 4th Defendants' herein*) were to undertake the sub-division of the said land and have the title documents processed.

25. According to the copy of the register for parcel of land known as Machakos Town Block 2/5459, the register was opened on 24th June, 2003 upon the sub-division of parcel number 49. The said land measured approximately 6.186Ha. The title to parcel number 5459 was closed on 15th October, 2008 when the land was sub-divided to create parcel number 9246 and 9247 "*vide court order in Civil Case No. 11556 of 2003.*"

26. The Amended Registered Index Map shows the two portions of land, with parcel number 9246 measuring 5.4Ha (*approximately 13.5 acres*). The combined acreage that the Plaintiffs are seeking for within parcel number 9246, which they have taken possession and fenced, is 0.2973Ha. Considering that the lower court did not order that the 3rd and 4th Defendants are entitled to the entire land, they cannot use that particular order to dispossess the Plaintiffs the ten (10) plots which all measure 0.2973Ha.

27. Consequently, the Plaintiffs' entitlement in the ten (10) plots within parcel number 9246 which are identifiable on the ground succeeds. The 3rd and 4th Defendants can still enforce the order in the lower court either in respect of Plot No. 9247 or the remainder of parcel number 9246.

28. Considering that it is the 1st and 2nd Defendants who refused to transfer the suit land to the Plaintiffs, they are the ones who should bear the costs of the suit.

29. For those reasons, I allow the Plaintiffs' Re-Amended Plaint dated 4th October, 2012 as follows:

a. The Plaintiffs to engage a licensed Surveyor, or the National Government Surveyor to sub-divide parcel of land known as Mavoko Town Block 2/9246 and carve out of the said land portions of land measuring 40 by 80 feet adjoining each other.

b. The ten (10) portions of land to be created in terms of prayer number (a) above to be registered in the names of the Plaintiffs as follows:

i. 1st Plaintiff - three(3) portions

ii. 2nd Plaintiff - three (3) portions

iii. 3rd Plaintiff - one (1) portion

iv. 4th Plaintiff - two(2) portions

v. 5th Plaintiff - one (1) portion

c. The Deputy Registrar of the court to execute all the documents necessary and required to excise the above plots from Mavoko Town Block 2/9246 and have them transferred and registered in the Plaintiffs' names.

d. The 1st and 2nd Defendants to pay to the Plaintiffs the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE