



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 8 OF 2018

STEPHEN NGUMBI MAITHYA.....PLAINTIFF

VERSUS

PAUL MULINGE MUTILI.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of plaint dated 31st January, 2018 and filed in court on 5th February, 2018.

2. In the plaint, the Plaintiff seeks the following orders:-

- a) An order directing the Defendant to effect transfer of the 2.2. Acres to the Plaintiff for purposes of issuance of a title deed.**
- b) General damage for breach of contract of sale of land.**
- c) A declaration that there exists contract of sale of land between the Plaintiff and the Defendant.**
- d) Costs and interest of the suit.**
- e) Any other order and/or relief that this court deems fit to grant.**

3. The Plaintiff's claim is denied by the Defendant vide his amended defence dated 14th June, 2018 and filed in court on even date. The Defendant has averred in paragraph 5 of his amended defence that when he requested for Kshs. 20,000/= from Plaintiff for the sole purpose of survey, transfer and issuance of title in favour of the Plaintiff, the latter only remitted Kshs. 16,000/=, an issue the Plaintiff has denied in his reply to the amended defence.

4. When the matter came up for hearing on the 26th July, 2018 the parties recorded a consent in the following terms;

- 1) That the County Surveyor Makueni do visit the land parcel Musini/Kathonzweni/365 to confirm the acreage in respect of the Plaintiff who is currently in occupation as well as the portion which was added by the private surveyor for the benefit of the Plaintiff.**
- 2) That the costs of the County Surveyor be shared on 50%:50% basis.**
- 3) That the County Surveyor do file report in court within 45 days from the date of entry.**
- 4) Mention on the 25th September, to confirm the filing of the surveyor's report.**

5. The above mentioned consent was recorded after both parties confirmed that the land which was subject matter of sale was 2.2 acres.

6. The matter was not mentioned on the 25th September, 2018 since the court did not sit on that day. Mention was fixed for 18th October, 2018 when MS Kyalo, Advocate for the Defendant informed the court that after the survey of the two portions was carried out, the total acreage was 2.23 meaning that there was an excess of 0.03 acres which the Defendant wished it be returned to him upon which he will undertake to transfer 2.2 acres to the Plaintiff. On the other hand, Mr. Muthiani submitted that what was added by the private surveyor was 0.49 acres totaling to 2.23 acres. He went on to submit that the Plaintiff bought 2.2. acres from the Defendant. That the issue in contention is 0.03 acres. He went on to say that acreage is in approximation and that is why the title deed indicates that the area is approximated. He was of the view that 0.03 acres is insignificant and urgent the court to enter judgement in terms of the surveyor's report.

7. I have read the Makueni County Surveyor's report dated 11th September, 2018. It shows that the Plaintiff is currently in occupation of 0.7057 hectares which is equivalent to 1.74 acres. That a portion whose size is 0.2012 hectares equivalent to 0.49 acres was added by the private surveyor to the Plaintiff's land. That ought not to have occurred despite the fact that acreage is approximation.

8. As earlier on observed in my judgement, both parties are in agreement that the land which was the subject matter of sale was Kshs. 2.2. acres. Indeed that is the first prayer in the plaint. Given those circumstances, it is only fair that the Plaintiff is entitled to his 2.2 acres while the excess of 0.03 acres be surrendered to the Defendant. In the circumstances, therefore, I will adopt the Makueni surveyor's report and compromise this suit as follows:-

- a) **The Defendant do effect transfer of 2.2 acres to the Plaintiff for the purpose of issuance of a title deed.**
- b) **The Plaintiff do surrender and/or code 0.03 acres of land being the excess land that was added to his parcel of land by the private surveyor.**
- c) **Each party to bear their costs.**

Signed, Dated and Delivered at Makueni this 26th Day of October, 2018

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

1. Mr. Muthiani for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

26/10/2018