



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 141 OF 2016**

**BENJAMIN MUTINDA KITUA.....PLAINTIFF**

**VERSUS**

**RUTH NDINDA MWANZIA.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 29<sup>th</sup> September, 2016, the Plaintiff has averred that he is the legal owner of land known as plot number 1360 within Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited (*the suit land*); that the Defendant's land within the same Society is plot number 2718 and that the two plots are not adjacent to each other.

2. The Plaintiff has averred that in breach of his rights of ownership of the suit land, the Defendant deliberately and maliciously encroached on the suit land and constructed structures thereon; that the Defendant should be restrained from trespassing on plot number 1360 and that the Defendant should be ordered to pay to him general damages for trespass and *mesne* profits.

3. In his Defence, the Defendant averred that the Plaintiff is not the registered proprietor of plot number 1360 as alleged; that she owns plot number 2718X which she purchased from one Isaac Muthama Kimilu on 3<sup>rd</sup> April, 2012 and that plot number 2718X and 1360 are adjacent to each other. According to the Defendant, she has been in possession of plot number 2718X since the year 2012 to date.

4. In his evidence, the Plaintiff, PW1, informed the court that he purchased plot number 1360 at Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited from one Mary Ndunge Kiilu in the year 2006; that he does not know the Defendant and that the Plaintiff should be allowed.

5. It was the evidence of PW1 that the Vendor, Mary Ndunge Kiilu, was member number 2215 of Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited and that she showed him the land that she sold to him. However, after purchasing the land, PW1 stated that he found the Defendant had fenced it. PW1 stated that although the Defendant was summoned by the Katelembo Task Force to explain how she acquired the suit land, she declined to honour the said Summons.

6. It was the evidence of PW1 that after she purchased the land, the same was transferred to her. PW1 stated that the land belonged to Kamene Mundi who was the wife of Mary Ndunge Kiilu (*deceased*); that Kamene and Mary were married in a woman to woman marriage, otherwise known as "*Iwote*" in Kamba and that she had the authority of the deceased to sell the land to her.

7. The Plaintiff produced in evidence several documents in support of his case including the allotment card number 2215 in the name of Kamene Muindi for plot number 1360; the letter from Katelembo Athiani Muputi Farming & Ranching Co-operative Limited Task Force dated 10<sup>th</sup> March, 2016 and the Transfer form.

8. On her part, the Defendant, DW1, stated that she is the legal owner of a plot known as 2718X measuring 0.5 acres at Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited (*the Society*); that she bought the land for Kshs. 500,000 from Isaac Muthama and that on 29<sup>th</sup> October, 2002, the said Isaac Muthama executed a Transfer in his favour at the Society's office.

9. It was the evidence of DW1 that she paid to the Society the Transfer fee of Kshs. 6,000. According to DW1, Isaac Muthama had purchased the said land from one Thomas Ombati Oire and a Transfer was executed in his favour on 26<sup>th</sup> September, 2011.

10. DW1 stated that she has been in occupation of the suit land since the year 2012; that her plot is adjacent to plot number 1360 and that the Plaintiff's intention is to grab her plot.

11. In his submissions, the Plaintiff's advocate submitted that the Defendant did not establish who sold to her the land she is claiming to be hers and that it is the Plaintiff who has proved that Plot No. 1360, which is the same plot fenced by the Defendant, belongs to him.

12. The Defendant's advocate submitted that the Plaintiff did not produce the Letters of Administration in respect of the Estate of the late Mary Ndunge Kiilu who purportedly sold to him the suit land; that the Defendant has been in possession of the suit land since 2012 and that there is no evidence to show that plot number 2718X owned by the Defendant is also plot number 1360.

13. The Defendant's advocate finally submitted that the Plaintiff's suit should fail for want of a Sale Agreement and that the suit contravenes the provisions of Section 3(3) of the Law of Contract Act.

14. The documents produced by the Plaintiff shows that Kamene Muindi was a member of Katelembo Society number 2215 and owned a plot known as plot number 1360. According to PW1, he purchased Plot No. 1360 from one Mary Ndunge Kiilu who is deceased. It was the evidence of PW1 that the said Mary Ndunge was in an Iwote marriage (*woman to woman marriage*) with Kamene Muindi.

15. Although the Plaintiff produced in evidence a transfer document for plot number 1360, which shows that Mary Ndunge Kiilu transferred to him plot number 1360 on 25<sup>th</sup> September, 2006, he did not call any official of Katelembo Society to collaborate his evidence. Indeed, the Plaintiff did not produce any evidence to show that he entered into an Agreement of Sale with the late Mary or that it is Mary who legally inherited the land from one Kamene Muindi.

16. In the absence of a valid Agreement of Sale between himself and the said Mary, I find that the Plaintiff has not proved his case on a balance of probabilities. Indeed, the Plaintiff did not produce any records from Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited to support his case. Of course, the same reasoning applies to the claim by the Defendant who did not produce any records from the Society to show that she is the one who is entitled to the suit land.

17. However, the burden of proving the ownership of the suit land always lies with the Plaintiff. Having failed to establish that he is the legal owner of the suit land, the Plaintiff dated 24<sup>th</sup> September, 2016 fails. For those reasons, I dismiss the Plaintiff's suit with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018.**

**O.A. ANGOTE**

**JUDGE**