



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 22 OF 2014

TERESIA WAMBURA MUTIEPLAINTIFF

VERSUS

MACKENZIE SILA MUTISO.....DEFENDANT

JUDGMENT

1. In the Plaint dated 27th February, 2014, the Plaintiff has averred that she is the owner of a parcel of land known as Machakos/Kiandani/243 measuring 0.47Ha (*the suit land*); that the Defendant has trespassed on the said suit land and that an order of eviction should issue.
2. The Defendant filed a Defence and Counter-claim in which he stated that the suit land was sold to him by the Plaintiff's late husband in 1977; that he has been residing on the land since then and that there is a pending suit being HCCC No.65 of 1986 between the Plaintiff's husband and himself over the suit land. In the Counter-claim, the Defendant has prayed for a declaration that he is the *bona fide* owner of the suit land and for an order directing the Plaintiff to transfer the suit land to him.
3. The Plaintiff, PW1, informed the court that pursuant to Succession Cause Number 853 of 1998, she obtained the Grant of Letters of Administration Intestate of all the Estate of her late husband, Bernard Mutie; that a parcel of land known as Machakos/Kiandani/243 (*the suit land*) devolved to her and that the Defendant has trespassed on the suit land.
4. According to PW1, the Defendant bought from her late husband a portion of land measuring 250feet x 100feet which was approved by the Land Control Board and that he has developed the land that he bought. It was the evidence of PW1 that the Defendant has however fenced the entire land. It was the evidence of PW1 that her late husband sued the Defendant when he discovered that the Defendant had fenced the entire land.
5. PW1 produced in evidence the Certificate of Confirmation of a Grant dated 6th June, 2012, the Title Deed for Machakos/Kiandani/243 which was issued on 15th March, 2013 in her favour and the consent of the Land Control Board to sub-divide the land into two portions. It was the evidence of PW1 that she was willing to transfer the portion that the Defendant bought.
6. PW2 stated that he was a close friend of the late Bernard Mutie Munyaka, the Plaintiff's husband; that the late Mutie sold to the Defendant a portion of the suit land and that when the Defendant fenced the entire suit land, the late Mutie sued him in Machakos HCCC No. 65 of 1986.
7. It was the evidence of PW2 that the late Mutie never sold to the Defendant the entire land as alleged by the Defendant.
8. On his part, the Defendant informed the court that he bought the suit land from the Plaintiff's late husband vide an Agreement dated 3rd December, 1977 for Kshs. 15,500; that the land was sold to him with an undertaking that he would sell to him the remaining portion of the land and that he bought the remaining portion in 1983 of which he paid in instalments. It was the evidence of DW1 that the Plaintiff's late husband sued him in Machakos HCCC No. 65 of 1986 for the payment of the last instalment, which he did and that he has been occupying the entire land.
9. According to DW1, the second portion of the land that he bought measured 87 feet by 100 feet for Kshs. 50,000; that he paid the initial amount of Kshs. 30,000 in 1983 and that they did not reduce the Agreement in writing because he was a close friend of the deceased.
10. The Plaintiff's advocate deponed that the Plaintiff has adduced evidence to show that she is the absolute owner of the suit land; that the Plaintiff is the registered owner of the suit land and that the orders prayed in the Plaint should be granted.
11. The Defendant's advocate submitted that the second transaction between the Plaintiff's husband and the Defendant was based on mutual trust; that PW2 testified that he was present during the exchange of money between the two and that the Plaintiff's suit is time barred.

12. It is not in dispute that the parcel of land Machakos/Kiandani/243 was registered in favour of the Plaintiff's late husband, Bernard Mutie Munyaka, who died on 3rd September, 1997. The parcel of land was later registered in favour of the Plaintiff by way of transmission on 30th November, 2012 and a Title Deed was issued to her on 15th March, 2013.

13. It is also not in dispute that the Plaintiff's late husband sold to the Defendant a portion of the suit land vide an Agreement dated 3rd December, 1977. Indeed, according to the said Agreement, the Plaintiff's late husband had sub-divided the suit land into two portions measuring 100feet by 260feet and 87 feet by 260feet. The Defendant only bought the portion measuring 100feet by 100feet on the said date.

14. The Agreement shows that the Defendant paid to the late Mutie Kshs. 10,500 leaving a balance of Kshs. 5,000 which was to be paid into two instalments of Kshs. 2,500 each. The last installment was to be paid on or before 30th May, 1977. The buyer was allowed to take possession of the purchased portion of land.

15. The Defendant has claimed that after taking possession of the first portion of the suit land, he paid for the remaining portion of the land measuring 87feet by 100feet in 1983. It was the evidence of DW1 that the agreed purchase price for the second portion was Kshs. 50,000 of which he paid Kshs. 30,000 leaving a balance of Kshs. 20,000. When he failed to pay the balance, DW1 stated that the late Mutie sued him in Machakos HCCC No. 65 of 1986.

16. The Plaintiff denied that her husband sold to the Defendant the second portion of land and stated that she is ready and willing to transfer to the Defendant the portion that he bought in 1977.

17. The evidence of the Defendant was that PW2 witnessed the payment for the second portion of land that he bought, and that PW2 admitted as much. PW2 admitted that he saw the two exchange money in respect of the portion of land measuring 250feet x 100feet and not the second portion of land.

18. It was the evidence of PW2 that the exchange of the purchase price was in 1977/78. At no particular point did PW2 state that he witnessed the exchange of money between the late Mutie and the Defendant in 1983 or thereafter.

19. Although the Defendant sought to rely on the case that was filed by Mutie in Machakos HCCC No. 65 of 1986 to show that he was sued for the balance of the purchase price, and not for eviction, he did not produce the pleadings in that suit. Indeed, it is not clear to this court what Machakos HCCC No. 65 of 1986 was all about.

20. However, what is clear to this court is that there was no Agreement of Sale in respect of the second portion of the suit land. Indeed, it is unlikely that the Defendant would have bought the said land without insisting that a formal Agreement, just like the first one, is drawn, his friendship with the Plaintiff's late husband notwithstanding.

21. In the absence of an Agreement of Sale in respect of the second portion of the suit land, or any evidence to show that indeed the Defendant paid the purported purchase price of Kshs. 50,000, I find that the Defendant has not proved his Counter-claim. Instead, it is the Plaintiff who has proved that the Defendant is only entitled to the land that he bought in 1977 measuring 100feet by 260feet.

22. Although the Defendant's advocate submitted that the suit is time barred, the evidence before the court shows that the suit land was registered in favour of the Plaintiff in the year 2013. Consequently, and in the absence of evidence to show when the Plaintiff's predecessor in title was registered, the period of twelve (12) years had not lapsed by the time this suit was filed.

23. In the circumstances, and for the reasons, I have given above, I find that the Plaintiff has proved her case on a balance of probabilities. I therefore allow the Plaintiff's Plaint dated 27th February, 2014 as follows:

a. An injunction be and is hereby issued restraining the Defendant, his servants, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the Plaintiff's use and enjoyment of a parcel of land known as Machakos/Kiandani/243 (save for a parcel of land measuring 100feet by 260feet which the Defendant bought in 1977).

b. An order of eviction of the Defendant be and is hereby issued from the said suit property (save for a parcel of land measuring 100feet by 260feet which he bought in 1977).

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 10TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE