



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 73 OF 2009

NTHENYA MUIA MUTIOPLAINTIFF

VERSUS

NDETO KYALODEFENDANT

JUDGMENT

1. In the Complaint dated 24th March, 2009, the Plaintiff has averred that she is the registered proprietor of land known as Okia/Nzuuni/11 (*the suit land*); that in November, 2007, the Defendant with his agents trespassed on the suit land and that having illegally entered on the land, he damaged her crops.
2. The Plaintiff wants the Defendant evicted from the suit land.
3. This matter proceeded for hearing on 27th January, 2017.
4. The Plaintiff relied on her statement filed in court on 13th December, 2016. According to the Plaintiff, her initial parcel of land before it was surveyed measured 2.54Ha; that the title document shows that her land measures 1.15Ha instead of 2.54Ha and that the Defendant fraudulently caused her land to be surveyed and a Title Deed issued in her favour.
5. According to PW1, the Defendant fraudulently forged the Sale Agreement showing that she knows how to write and submitted the said Agreement to court and that she has never sold the suit land to the Defendant.
6. In cross-examination, PW1 stated that the Defendant is known to her and that he comes from a different location and that Mr. Kiema (DW2) is his son-in-law and that he had killed her daughter.
7. PW1 denied that Mr. Kiema ever witnessed her sign Agreement of Sale and that in any event, Mr. Kiema is her enemy.
8. PW1 also denied that her daughter (*deceased*) witnessed her sign the Agreement.
9. The Plaintiff's daughter, PW2, informed the court that her mother's land initially measured 2.54Ha and that recently, they discovered that the Defendant had fraudulently caused the suit land surveyed and a Title Deed issued in his name.
10. It was the evidence of PW2 that the Plaintiff is illiterate and could not have signed the purported agreement; that she sold a portion of her land to a third party and that she used her thumb print to sign the agreement.

11. PW2 stated that she is the one who lives with the Plaintiff and that she did not know one Mulunje Mwivya although she was aware that Mr. Mwivya works for the Defendant.
12. It was the evidence of PW2 that Mr. Kiamba Ngao had married her sister and that she did not know Mr. Mulei.
13. Although the Plaintiff did not have a Title Deed, PW2 stated that the land had been adjudicated and that they only saw the Title Deed for the land for the first time when they sued the Defendant.
14. According to PW2, they are not satisfied with the acreage that has been shown on their Title Deed and that it is not true that her late sister witnessed the Plaintiff sign the Agreement of Sale.
15. The Defendant, DW1, informed the court that he has known the Plaintiff for many years; that she is from his village; that in 1980, she sent his elder brother to inform him that she intended to sell her land and that she sold to him the land for Kshs. 118,000.
16. According to DW1, by the time he entered into the Agreement of Sale with the Plaintiff, the land did not have a Title Deed; that the whole measured 3½ acres and that he paid the purchase price between 1980-1999.
17. It was the evidence of DW1 that the last installment he paid to the Plaintiff was in the form of a bull which was valued at Kshs. 9000; that the Agreement was witnessed by three people, the Plaintiff's son-in-law, Mr. Mulunje and the Plaintiff's late daughter, Wanza.
18. DW1 stated that PW1 used to sign the Agreements by writing her name; that she has subsequently sold the remaining portion of her land to other buyers and that he is the one who pursued the two titles – his and the Plaintiff's.
19. When he started cultivating the land, DW1 informed the court that the Plaintiff resisted and the matter was referred to the District Officer who ruled in his favour.
20. The Plaintiff's son-in-law, DW2, stated that he married the Plaintiff's late daughter in the year 1970 and that he knew the Defendant in 1980 when he purchased a portion of the Plaintiff's land.
21. According to DW2, him, together with Mr. Mulunje witnessed the Sale Agreement and that his late wife witnessed the subsequent Agreements; that it was not true that he killed his wife; that he was jailed in 1988 for a different offence and that he was jailed for four years for killing someone.
22. DW3 informed the court that the Defendant purchased the suit land from the Plaintiff in the 1980's; that he witnessed agreements twice and that every time the Plaintiff received payments for the land, she used to acknowledge the said payments.
23. It was the evidence of DW3 that during the transaction, the Plaintiff's other daughter, PW2, was married and that she only returned to her mother's home much later.
24. It was the evidence of DW3 that he was over 80 years old and that his home is not very far from the Plaintiff's home; that the Defendant involved the Plaintiff and the neighbours during the survey of the land and that the land in dispute belongs to the Defendant.
25. The Plaintiff submitted that the subject matter before the court is Okia/Nzuuni/11; that the Defendant used a forged Sale Agreement to resurvey the Plaintiff's land parcel No. Okia/Nzuuni/11 and that the Defendant did not produce evidence to show that he obtained the consent of the Land Control Board to sub-divide and transfer the land in his favour.
26. It was the Plaintiff's submissions that her signatures on the Sale Agreements were forged; that the Plaintiff's purported signature is not witnessed; that the purported witnesses of the buyer have not

identified themselves by their identity card numbers and that the Plaintiff can neither read nor write.

27. The Plaintiff finally submitted that if indeed parcel of land number Ukia/Nzuuni/1327 was excised from the mother title, then the mother Title Deed ought to have been extinguished and a new number issued.

28. The Defendant's counsel submitted that the Plaintiff failed to challenge the existence of Sale Agreements; that the Defendant produced another Sale Agreement between the Plaintiff and another buyer, Joseph Mbithi, which shows the Plaintiff's signature and that the Plaintiff is a person fond of selling and reselling land to different people.

29. In the Further submissions, the Defendant's advocate submitted that the Plaintiff did not plead in her pleadings that the land is an agricultural piece of land falling within a land control area.

30. The Plaintiff herein is a lady who is over 90 years old. The Plaintiff, other than being very old, represented herself when the matter came up for hearing.

31. The Plaintiff's claim is that she is the registered proprietor of land known as Okia/Nzuuni/11 measuring approximately 2.54Ha; that she discovered that the Defendant fraudulently hived from her land 1.5Ha and generated a Title Deed for land known as Okia/Nzuuni/1327 measuring 1.39Ha.

32. The Defendant has not denied that he indeed hived from the original parcel of land of the Plaintiff the said 1.39Ha to create Plot No. 1327.

33. According to the Defendant, the said land was sold to him by the Plaintiff vide an Agreement dated 4th December, 1980. That Agreement, according to the Plaintiff, is a forgery.

34. In his evidence, the Defendant informed the court that after entering into an Agreement of Sale with the Plaintiff, he paid her the purchase price by installments, with the last installment being made in the form of a bull worthy Kshs. 9000

35. Both the Plaintiff and the Defendant are agreeable that by 1980, the Title Deed for the land belonging to the Plaintiff had not been issued.

36. From the evidence produced in this court, the title documents in respect to Okia/Nzuuni/11 and Okia/Nzuuni/1327 were issued on 6th May, 2002, the registers having being opened on the same day.

37. The Agreement of 4th December, 1980 shows that the Defendant purchased land from the Plaintiff for Kshs. 27,300 and paid a deposit of Kshs. 5000 leaving a balance of Kshs. 22,300 which was to be paid on 19th April, 1981, 5th July, 1982, 7th April, 1984 and 13th October, 1985.

38. Although the agreement is said to have been witnessed by eight (8) individuals, only two individuals; Kiamba Ngao and Mulunje wa Mwiva testified on behalf of the Defendant. The Plaintiff is said to have signed the Agreement by writing her name which she denied.

39. The Agreement of 4th December, 1980 does not state the acreage of the land that the Defendant was purchasing from the Plaintiff.

40. The parties are said to have entered into another agreement of 30th April, 1987 in which the Plaintiff purportedly added the Defendant "*another portion from her land in order to make boundary take proper shape.*" The Agreement was purportedly witnessed by DW2 and DW3.

41. Again, the Agreement of 30th April, 1987 does not state the acreage that the Plaintiff had agreed to sell to the Defendant in addition to the initial land.

42. According to the agreement of 30th April, 1987, the additional land was to cost 5,200, out of which the Defendant paid a deposit of Kshs. 2,200 leaving a balance of Kshs. 3,000.
43. It is not clear from the Agreement of April, 1987 if the Defendant had paid the balance of Kshs. 22,300 from the first agreement.
44. Several other pieces of purported agreements and acknowledgements which are so convoluted in nature were purportedly entered into between the Plaintiff and the Defendant.
45. The confusion on what the Defendant was buying from the Plaintiff and for how much continued with further agreements which stated as follow:

“7th April, 1984 – I have bought at a price of Kshs. 4,500 that large portion from Kiseeleni, Deposit 2,050, Balance 1,950” and many other small pieces of agreements.”

46. Some of the purported agreements include the agreement of 19th April, 1981 stating that the Defendant has paid for “*the above piece of land whose price was Kshs. 5,000.*”
47. Other purported acknowledgements show that the Defendant paid the purchase price by giving the Plaintiff a bag of maize in March, 1989, cash of Kshs. 100 on 14th April, 1989 etc.
48. The convoluted nature of the several pieces of papers which the Defendant produced purporting to be agreements departed completely from the purported agreement of 4th December, 1980 which was clear that the Defendant was to make a final settlement of Kshs. 9000 on 13th October, 1985.
49. Having not defined or described the land that he was buying from the Plaintiff, it is not surprising that the Defendant went ahead to re-survey the original parcel of land belonging to the Plaintiff and having two Title Deeds issued on the same day in respect of parcel of land number Okia/Nzuuni/11 and Okia/Nzuuni/1327 in the Plaintiff’s name and his name respectively.
50. Having not denied that parcel of land known as Okia/Nzuuni/1327 originally belonged to the Plaintiff, and that the said land measures 1.39Ha (*approximately 3.47 acres*), the Defendant did not inform the court how he arrived at those acreages while re-surveying the Plaintiff’s land.
51. The numerous pieces of unclear and ambiguous agreements produced by the Defendant are said to have been signed by the Plaintiff, who is illiterate and old, by way of writing her name.
52. However, the copies of the agreements between the Plaintiff and the other parties shows that the Plaintiff always signed documents using her thumb print, and not by writing her name.
53. Having gone through the purported agreements between the Plaintiff and the Defendant, I am convinced that the Defendant took advantage of the Plaintiff’s illiteracy and old age to carve out of the original land parcel of land number Okia/Nzuuni/1327 measuring 1.39Ha.
54. Indeed, there is no evidence before me to show that there was a valid Sale Agreement between the Plaintiff and the Defendant in respect of Plot No. 1327.
55. For those reasons, I am convinced that the Title Deed for parcel of land known as Okia/Nzuuni/1327 was fraudulently created from parcel of land number Okia/Nzuuni/11.
56. Having arrived at the above conclusion, I allow the Plaintiff’s claim in the following terms;

a. An order be and is hereby issued cancelling the register and the Title Deed in respect of parcel of land number Okia/Nzuuni/1327.

b. The Land Registrar to rectify the register and the Title Deed in respect of parcel of land number Okia/Nzuuni/11 by consolidating parcel of land Okia/Nzuuni/1327 and Okia/Nzuuni/11 and issuing to the Plaintiff one Title Deed for the consolidated parcels of land.

c. Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE