



Kangogo (Suing as Legal Representative of the Estate of the Late Wilfred Kimaiyo Mondy) v Tallem & another (Environment & Land Case 364 of 2014) [2023] KEELC 17324 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 364 OF 2014**

EO OBAGA, J

MAY 11, 2023

BETWEEN

CONSTANTINE J. KANGOGO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE WILFRED KIMAIYO MONDY) PLAINTIFF

AND

FESTUS RUTTO TALLEM 1ST DEFENDANT

EDINAH JEPKOECH 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff is a widow of Wilfred Kimaiyo Mondy. The plaintiff is also a legal representative to the Estate of her late husband (Deceased). The plaintiff filed this suit against the defendants in which she claimed the following reliefs: -
 - a. A declaratory order of perpetual injunction to issue stopping the 1st defendant from trespassing, entering, cutting trees from the plaintiffs parcel of land at Kesses Known as Megun/Ngeria Block 3/544 measuring one (1) acre and the same be registered in the name of the plaintiff.
 - b. Costs of this suit.
 - c. Any other or further relief that this honourable court may deem fit to grant.
2. The 1st defendant filed a defence and raised a counter-claim in which he sought the following reliefs: -
 - a. The plaintiff suit be dismissed with costs to the defendant.



- b. A permanent injunction restraining the plaintiff, his agents, servants and/or assigns from adversely dealing with the defendant land.
- c. Costs and interest of the suit.
- d. Any other relief that this honourable court shall deem fit to grant.

Plaintiff's case;

3. The plaintiff testified that the Deceased purchased LR. No Megun/Kesses Block 3/544 (suit property) from the 2nd defendant in the year 2006. The plaintiff together with the Deceased took possession in 2007. They cultivated the suit land until 2008 when they stopped cultivating and planted wattle trees.
4. In the year 2013, the 1st defendant started claiming that he had purchased the suit property from the 2nd defendant. The plaintiff reported the 1st defendant's claim to the area chief and the Assistant County Commissioner, Kesses Division. There were other several meetings held whereby the 2nd defendant agreed to refund the 1st defendant's money which he had paid for the land.
5. The 1st defendant later reneged on the issue of refund and said that he was going to take the land as he had all the documents. Between 19/11/2014 and 24/11/2014, the 1st defendant forcefully trespassed on to the suit property and cut down the wattle trees. She reported the incident to Kesses Police Post but she was not assisted.
6. The plaintiff testified that the Deceased died in 2009 and that he used to pay the purchase money to Maktaba Sacco Society Limited using the name of the 2nd defendant who later handed over the originals of the receipts to the deceased.

1st Defendant case;

7. The 1st defendant testified that he purchased the suit property from the 2nd defendant through a sale agreement dated 25/1/2010. The 2nd Defendant surrendered the agreement which she had entered into with Maktaba Sacco Society Ltd as well as her certificate of ownership issued to her by the sacco. He paid Kshs 120,000/= for the suit property.
8. The 1st defendant took possession of the suit property in 2010. He later cut down the trees on the land but he was not allowed to carry them away. The 1st defendant testified that he wanted to be compensated for the wattle trees which are rotting in the suit property.

Analysis and determination;

9. The parties were directed to file written submission. The plaintiff filed her submission on 13/3/2023. The 1st defendant filed his submission on 13/3/2023. I have considered the evidence adduced by the plaintiff as well as the evidence of the 1st defendant. I have also considered the submission of the parties herein.
10. The first issue which emerges for determination is who between the deceased and the 1st defendant purchased the suit property. The second issue is whether the plaintiff and the 1st defendant are entitled to the reliefs which they are seeking.
11. The plaintiff testified that the Deceased purchased the suit property for over Kshs 80,000/= which was paid in instalments which were completed in 2007. She stated that the Deceased used to pay the purchase money to Maktaba Sacco Society Limited which sold the suit property to the 2nd defendant using the name of the 2nd defendant. Her evidence was that the suit property was purchased in 2006.



12. There was no sale agreement which was entered between the Deceased and the 2nd defendant. The receipts which the plaintiff filed in court show that the 2nd defendant started paying money to Maktaba Sacco Society Ltd in 2001. She paid Kshs 1620/= on 22/1/2002, Kshs 1620/= on 22/1/2002, Kshs 1620/= on 12/7/2002, Kshs 1620/= on 5/9/2002, Kshs 2500/= on 8/10/2002 and Kshs 5000/= on 12/1/2003. All these payments were made before the purchase of the suit property by the Deceased in 2006.
13. There is a payment of Kshs 3240/= which was made on 26/3/ but the year is not clear. There is a payment of Kshs 10,000/= which was made on 2/1/2007 and another one on 20/3/2007. The payments which were made in 2007 totals to Kshs 11,620/= which is not anywhere near the purchase price of Kshs 80,000/= which the plaintiff says was paid by the Deceased. There were no any other receipts produced apart from the ones mentioned hereinabove. There is therefore no evidence that the Deceased paid Kshs 80,000/= as alleged by the plaintiff.
14. There is a letter dated 7/11/2014 which is said to have been written by the 2nd defendant in which she acknowledges that she sold the suit property to the deceased on 10/7/2006 and later re-sold the same land to the 1st defendant in 2010. The 2nd defendant never came to court to confirm the authenticity of this letter which was written shortly before this suit was filed. This letter was addressed to the District officer Kesses Division and it is not known how the Plaintiff came into possession of the same as it was not copied to her.
15. There is also another acknowledgement which was written before the Chief of Cheptiret location in which the 2nd defendant confirms that she sold her share at Maktaba Sacco Society Limited to the plaintiff. the acknowledgement was written on 8/8/2014. though there were four witnesses to this acknowledgement, including the Chief, none was called as a witness to confirm that there was such an acknowledgement.
16. There was also a letter dated 27/11/2014 from the Assistant County Commissioner Kesses Division addressed to the 1st defendant. In this letter, the Assistant County Commissioner was stating that the 1st defendant had agreed to have a refund from the 2nd defendant with interest but that he later changed his mind when they appeared before the Kesses Chief's office. The Assistant County Commissioner was never called to confirm the contents of this letter.
17. The 1st defendant on the other hand produced a sale agreement between him and the 2nd defendant. He also produced a sale agreement between 2nd defendant and Maktaba Sacco Society Limited which was given to him by 2nd defendant as well as certificate of ownership issued to the 2nd defendant by the same Sacco.

Disposition;

18. It is therefore clear that the plaintiff has failed to prove her case on a balance of probabilities. The same is dismissed with costs to the 1st defendant. On the other hand, the 1st defendant has proved his counter-claim on a balance of probabilities. I allow the 1st defendant's counter – claim in terms of prayer (b) and (c) of the counter-claim dated December 17, 2014.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF MAY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



Ms. Koech for Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

11th MAY, 2023

