



Okondo v Bonareri (Legal Representative of the Estate of Sabastiano Nyandwaro Ondima) (Environment & Land Case 128 of 2009) [2023] KEELC 20247 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 128 OF 2009**

**M SILA, J
SEPTEMBER 28, 2023**

BETWEEN

JEMIMA GEHEMBA OKONDO PLAINTIFF

AND

NAOMI ROBINA BONARERI (LEGAL REPRESENTATIVE OF THE ESTATE OF SABASTIANO NYANDWARO ONDIMA) DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to *inter alia* have the defendant restrained from interfering with her land; plaintiff having purchased the land from the defendant; defendant contending that the plaintiff is holding a title which is bigger than the land sold; evidence of minutes of the Land Control Board showing that the land the defendant sold matches the size noted in her title; judgment entered for the plaintiff).

A. Introduction and Pleadings

1. This suit was commenced through a plaint filed on 7 July 2009 against Sabastiano Nyandwaro Ondima. In the plaint, the plaintiff avers to be the proprietor of the land parcel West Kitutu/Bogeka/2879 (the suit land) measuring 0.27 Ha, since 14 June 2001. She pleaded that on 5 July 2009, the defendant entered the suit land without her permission and started erecting structures. In the suit, the plaintiff seeks orders to have the defendant evicted from the suit land and a permanent injunction to restrain him from the land.
2. The defendant filed defence and counterclaim. It was not explicitly pleaded, but he seemed to suggest that the plaintiff's land was carved out of land that he owned, and that the plaintiff obtained her title through fraud, as he had never subdivided, nor sold his land to the plaintiff. He pleaded that the



- plaintiff forged a mutation form and a forged Land Control Board consent. He pleaded to have always been in possession of his land. In the counterclaim, he asked for nullification of the plaintiff's title.
3. A reply to defence and defence to counterclaim was filed vide which the plaintiff pleaded that the defendant subdivided his land and transferred the suit land to him (the plaintiff).
 4. On 8 October 2009, Sabastiano, the original defendant, died and he was substituted by one Naom Robina Bonareri who continued the suit as his legal representative.
 5. Also in the course of time, the plaintiff went to live outside the country and donated a power of attorney to one George Okondo Maeri.

B. Evidence of The Parties

6. PW-1 was George Okondo Maeri. He testified that the plaintiff is his mother and that he donated to him a power of attorney in respect of this suit. He testified that Sabastiano (the deceased original defendant) sold to his mother the suit land after obtaining consent to subdivide and transfer the land to the plaintiff at the Mosochi Land Control Board. He produced the minutes of the Board as exhibits. He testified that a surveyor proceeded to the ground and subdivided the land parcel West Kitutu/Bogeka/2568 into two portions and the plaintiff was subsequently issued with title to the suit land i.e West Kitutu/Bogeka/2879. He exhibited the mutation form and the plaintiff's title deed issued on 14 June 2001. He stated that in 2009, the original defendant trespassed into the plaintiff's land and started cultivating it which is what prompted this suit.
7. He was cross-examined on the minutes of the Land Control Board, and he testified that there could be an error in the minute No. 013/2001 related to the subdivision, for the land parcel therein is typed as West Kitutu/Bogeka/256. The mutation form he produced showed that the land being subdivided was West Kitutu/Bogeka/2568 and the subdivision resulted in the land parcels West Kitutu/Bogeka/2878 and 2879. Minute No. 0058/2001 was the consent to transfer the suit land. He was cross-examined on the signatures in the mutation form but he could not verify if they were signed by Sabastiano. There was another mutation form put to him, for the land parcel No. 1783, which bore the names of the plaintiff and Sabastiano, but he testified that he was not aware of it. He was cross-examined on whether there was a sale agreement and his evidence was that one was written by the Chief, who is now deceased. He did not have a copy of it. He stated that the purchase price was Kshs. 400,000/=. He did not have evidence of payment of the money and did not know if stamp duty was paid. He did not have the documents related to the transfer of the land. He testified that Sabastiano sued the plaintiff before the Land Disputes Tribunal in the years 2006-2008 because he wanted a road created through the suit land so that he could access the Nyakoe – Nyagisari road via the suit land. He was not aware what the decision of the tribunal was. He refuted that the case related to encroachment.
8. Re-examined, he pointed out that minute 058/2001, the minute on the consent to transfer, shows that what was to be transferred was 0.27 Ha which was the suit land. He observed that the title to the suit land is also 0.27 Ha.
9. With the above evidence, the plaintiff closed her case.
10. DW-1 was Robina Naomi Bonareri the daughter of Sebastiano the original defendant. Her evidence was that her late father owned the land parcel No. 2568 which was subdivided into the parcels No. 2878 and 2879. She testified that the dispute started in 2006; that she was fencing the land and PW-1 came claiming that what she was fencing was actually his land. The plaintiff and Sabastiano emerged and the plaintiff pronounced that Sabastiano had sold to her the land. She (Robina) demanded to know how the land was sold and the matter was reported to the Chief. She narrated that while before



the Chief, the plaintiff claimed that she paid Sabastiano when he was ill and put the money under his pillow but Sabastiano denied ever being paid. The Chief, one Maiko, could not resolve the matter and referred it to the tribunal. She contended that there was no written agreement and that her father was never paid. She stated that her father was then 98 years old. She also alleged that what was sold was land measuring 50 X 100 feet and not 0.27Ha (about 100 X 100 feet). She claimed that her father used to sign documents and not place a thumbprint and she doubted the documents alleged to have been thumb printed by Sabastiano. She further alleged that the thumbprint in her father's ID is not the same as the thumbprint in the mutation forms. She produced another mutation form which she claimed to be the genuine one.

11. Cross-examined, she acknowledged that she was not there when Sabastiano and the plaintiff agreed to the sale of land. She came into the picture in 2006 when she wished to fence the land. She had been living in Nairobi before that time. She wanted to fence what she considered to be her father's land which was parcel No. 2568. It was then that she came to learn that there may have been a transaction between the plaintiff and Sabastiano. She was cross-examined on what she contended to be the genuine mutation form and she conceded that the only difference between it and what PW-1 produced as an exhibit was that the plaintiff's name is in the mutation form that PW-1 produced. She had not seen the minutes of the Land Control Board. She was aware that the dispute went to the tribunal and the tribunal found that there was a sale.
12. DW-2 was Francis Ongoto. He was a member of the Land Disputes Tribunal at Bogeka. He testified that the dispute over the suit land was referred to the tribunal and he was among those who sat over the case. He claimed that the person who complained was the plaintiff and that she sued to have title to the land.
13. DW-3 was Fredrick Maiko. He testified that he was previously the Chief of Bogeka Location. His evidence was that in 2006, the plaintiff came to him and complained that Sabastiano had placed a road on her land. He asked the parties to attend his office with their documents. The plaintiff came with her title deed showing 0.27 Ha. He alleged that he asked her what size of land she had purchased and she said it was a portion measuring 50 X 100 feet. He asked for the mutation forms to be brought on a future date but no party came with the same. He then proceeded to write letters to the effect that the title of the plaintiff was defective because it showed land which was more than 50 X 100 feet. Subsequently, the plaintiff brought to him mutation forms showing land that is more than 50 X 100 feet.
14. With the above evidence, the defence closed its case.

C. Disposition

15. I invited counsel to file submissions and I have taken note of the submissions filed by Mr. Soire, learned counsel for the plaintiff, and Mr. Mose Nyambega, learned counsel for the defendant before arriving at my decision.
16. In a nutshell, the plaintiff's case is that the original defendant, Sabastiano, sold to her the suit land, which is West Kitutu/Bogeka/2879. She complained that despite the sale, Sabastiano had trespassed into what he sold to her. The defence of Sabastiano was that he never subdivided his land parcel West Kitutu/Bogeka/2568, and that he never sold any portion of his land to the plaintiff; it will be recalled he lodged a counterclaim to have the plaintiff's title nullified for having been procured fraudulently.
17. In his submissions, Mr. Nyambega did submit that the plaintiff failed to produce crucial documents that underpin ownership such as the sale agreement, application for Land Control Board consent, payment of stamp duty and registration fees. He opined that all that the plaintiff has done is dangle



the title. I do not agree. The plaintiff did provide evidence and documents on the root of her title. Her evidence was that Sabastiano did apply for consent to subdivide the land and the minutes of the Land Control Board were produced. Mr. Nyambega in his submissions did contend that the minutes are not certified thus their authenticity is in doubt. Well, if the defendant wished to raise objection on the lack of certification of the minutes, this ought to have been done at the hearing of the suit so that the same are not admitted in evidence. There was also no cross-examination on why the minutes are not certified. In any event, nothing stopped the defendant from calling a witness or other evidence in rebuttal, to demonstrate that the minutes are not authentic. On my part, I have no reason to doubt the said minutes, and with the minutes produced as exhibits, it cannot be argued that there was never an application for consent to subdivide and there was never issued a consent to subdivide.

18. The minutes do show that Sabastiano Nyandwaro Ondima was given consent to subdivide his land into two portions. The minutes also show that Sabastiano was given consent to transfer a portion of 0.27 Ha of his land to the plaintiff. The plaintiff's title deed is for land measuring 0.27 Ha in line with the minutes of the Land Control Board. Pursuant to Section 32 (2) of the Registered Land Act (repealed) the issue of title deed is *prima facie* evidence that the person noted therein properly acquired the title. With that in mind, the burden of proving that the plaintiff's title was not properly acquired shifted to the defendant. The defendant thus needed to provide evidence to vitiate the minutes of the Land Control Board, provide evidence to dispute the mutation forms, and provide evidence that the plaintiff's title ought not to have been issued.
19. I am afraid to inform that defendant that she never availed any such evidence. All that the defendant produced as exhibits were mutation forms, similar in content to what the plaintiff produced, the award of the Land Disputes Tribunal and the letters of the Chief. The allegation by the defendant that Sabastiano never signed the mutation forms was never proved. In any event, as I have pointed out, the minutes of the Land Control Board do demonstrate that Sabastiano wished to subdivide his land into two portions and he was allowed to do so.
20. I have also gone through the award of the Land Disputes Tribunal. Despite what DW-2 stated, the complainant at the tribunal was not the plaintiff herein (Jemimah) but it was actually Sabastiano. Neither was the dispute that Jemimah wished to have a title deed. The complaint that Sabastiano presented was that Jemimah purchased land measuring 50 X 100 feet but she was now in occupation of land measuring 66 X 100 feet. I am aware that the tribunal's decision was that Jemimah ought to have title to land measuring 0.18 Ha. I am not sure whether this award was adopted for I have seen that the application seeking to adopt the award was withdrawn. But whatever the case, the tribunal could not have had jurisdiction to entertain such a dispute and its award is null and void.
21. As far as I can see, the evidence is overwhelming, and this is clear from the minutes of the Land Control Board, that Sabastiano was selling to the plaintiff land measuring 0.27 Ha and not land measuring 0.18 Ha. In any case, the credibility of Sabastiano and the defendant are in serious doubt. At the tribunal, Sabastiano conceded to have sold land to the plaintiff, yet in the pleadings herein, he categorically denied having had any transaction with the plaintiff. The other evidence presented by the defendant, that of the Chief together with his numerous letters, has no probative value. Whatever the Chief thought of the transaction of the parties does not really matter. So what if he thought that what was sold was not 0.27 Ha ? So what if he thought that the mutation forms are not showing the actual land being sold ? The evidence that matters, and that is the evidence in the minutes of the Land Control Board, shows otherwise, and I will repeat for the umpteenth time, and will not tire repeating, that this evidence reveals that what was being sold was land measuring 0.27 Ha. The defendant has not presented to this court any disparate application to the Land Control Board, or disparate minutes and consent of the Land Control Board.



22. Given the above, I am not persuaded that the defendant has provided any cogent evidence, on a balance of probabilities, that the plaintiff's title to the land parcel West Kitutu/Bogeka/2879 measuring 0.27 Ha, was not properly acquired. The plaintiff's case must thus succeed and the defendant's counterclaim fails. I will order any servant, agent or person being on the suit land curtesy of the defendant to give immediate vacant possession to the plaintiff or be evicted. I will also issue a permanent injunction to restrain any servant, agent or person claiming under the defendant, from entering, being upon, or interfering in any way with the land parcel West Kitutu/Bogeka/2879.
23. The plaintiff will have costs of the main suit and of the counterclaim.
24. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 28 DAY OF SEPTEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

