



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI

ELC NO. 85 OF 2017

RICHARD KIENDI MULANDI.....PLAINTIFF

VERSUS

SAMUEL NDIVO KIMEU.....1ST DEFENDANT

JAMES MUTWOTA MUTHAMA.....2ND DEFENDANT

JUDGMENT

1) By his plaint dated the 26th November, 2007 and filed in court on even date, the plaintiff prays for judgment against the defendants jointly and severally for;

i. Declaration that the plaintiff is the rightful owner of land parcel number 2032 Ikalyoni Adjudication Section.

ii. An order for injunction against the defendants jointly and severally from alienating , transferring or trespassing thereto on land parcel number 2032 Ikalyoni Adjudication Section.

iii. Cost and interest of the suit

2) The plaintiff's claim is denied by the defendants in their joint statement of defence and counterclaim dated 22nd April, 2008 and filed in court on 23rd April, 2008.

3) In their counterclaim, the defendants pray for judgment to be entered in favour of the second defendant for;

i. Mesne profits for loss of use from 2006 up to date vacating land parcel number 2031 Ikalyoni Adjudication Section, Makueni District

ii. Costs of the suit.

4) On the 28th April 2008, the plaintiff filed a reply to defence and counterclaim dated the same date. In paragraph 6 of his reply to defence and defence to counter claim, the plaintiff has averred that the counterclaim is bad in law, incompetent as it does not comply with the mandatory provisions of the law and reserved the right to apply for its striking out at an opportune time.

5) When the matter came up for hearing on 21st November, 2017, the court, with the consent of the parties herein, directed that the matter proceeds from where it had reached based on the fact that one

witness did testify before Lenaola, J as he then was, on the 6th October, 2009.

6) During the hearing the plaintiff, Richard Kiendi Mulandi (PW2), adopted his undated statement filed in court on the 3rd November, 2014. His case was that parcel number 205 Ikalyoni belongs to his grandfather. He said that he has sued the first defendant who is his cousin in order to recover ownership of the said land parcel number 205. He disclosed that the first defendant's parents moved into his father's compound when their home became infested with flees and jiggers and pointed out that his grandfather allowed the first defendant's parents to live on the land out of good will. He went on to say that demarcation process began in 1994. He added that when they appeared before the Land Adjudication Committee, the committee erroneously held that the defendants were the owners of the land in dispute on the basis of the developments they had made on the ground.

7) He said that he did not appear before the arbitration board because they wanted permission to do a traditional oath against the defendants. He also said that permission could only be granted to perform the traditional oath during the objection proceedings. It was also his evidence that he and others sued over land parcels number 204 and 205 Ikalyoni and that during the objection proceedings No. 391 in Makueni District, they found out that the first defendant had alienated part of land parcel number 205 to extract land parcel number 2032 Ikalyoni Adjudication Section which he then sold to the second defendant. According to him, the outcome of the objection proceedings was that the Tribunal held that he was the rightful owner of both land parcels number 204 and 205. He said that the Tribunal directed that the defendant's name should be deleted from the register of both land parcel numbers 204 and 205.

8) The plaintiff's evidence in cross-examination was that the suit land was his. He said that he was the one who filed objection proceedings number 390. He agreed that there were proceedings initiated by his father before the Adjudication Officer and that the latter did not rule in his father's favour. He said that land parcel number 2032 is occupied by the second defendant who purchased the same from the first defendant in or around the year 2003. It was also his evidence that the Adjudication Officer surveyed parcels number 204 and 205.

9) In his evidence in re-examination, the plaintiff told the court that the two parcels are in his name.

10) The plaintiff called three (3) witnesses in support of his case. These were Godwin Mutembei Njoki (PW1), Peter Ndivo Kilonzo (PW3) and Mukeko Mutungi(PW4). This is what the three had to say regarding the subject matter of this suit.

11) Godwin's (PW1) evidence in chief was that he is from the Land Adjudication office in Makueni. He went on to say the records for plot number 2032 show that the registered proprietor is James Mutwota and that the plot was extracted from plot number 205 through an objection on 28th October, 2003. He pointed out that Samuel Ndivo Kimeu was the owner of plot number 205. He said that subdivision was done before the determination of the objection. He added that the dispute is about ownership of plot number 2032 and that he gave consent to refer the dispute in court vide the letter dated 9th October, 2007 (PEX no.1). He also said that he had a letter dated 28th August, 2007 that confirms that plot number 2032 belongs to the plaintiff.

12) Godwin's(PW1) evidence in cross-examination was that the plaintiff was not a party during the proceedings before the Arbitration Officer. He revealed that objection proceedings number 391 of 2003 was with regard to plot numbers 204 and 205 where the parties were the two defendants. Godwin (PW1) added that the plaintiff always insisted that he was entitled to plot number 2032 which was a subdivision of plot number 205. He said that in the proceedings before the Adjudication Board, plot number 205 was given to the first defendant and pointed out that it was a mistake to subdivide the said land before the objection was determined. He said that a surveyor was meant to go and map out plot number 2032 in favour of the first defendant. He accepted that the Land Adjudication Officer may have made a mistake regarding the dispute herein. He said that he disagrees with letter dated 10th May, 2007 (DEX 4) that indicates that the plaintiff should appeal against the decision that was arrived at in the dispute resolution.

13) Godwin's (PW1) evidence in re-examination was that plot number 205 still exists. He also said that plot number 2032 exists in their records.

14) Peter Ndivo Kilonzo (PW3) told the court that Samuel Ndivo (first defendant) sold land to James Mutwota (the second defendant) before the issue of its ownership could be determined. He revealed that the adjudication process erred when it transferred the land in question to the defendants.

15) Peter's (PW3) evidence in cross-examination was that parcel number 205 Ikalyoni is family land which the plaintiff inherited since his parents are deceased. He said that the Adjudication Officer registered plot number 204 in the name of Samuel's brother while plot number 205 was registered in the first defendant's name. He said that the Adjudication Officer decided that plots number 204 and 205 Ikalyoni belonged to the first defendant and his brother.

16) He said that the plaintiff was in possession of part of plot number 205 while the second defendant was in occupation of plot number 2032. He revealed that no one was residing in plots numbers 204 and 205 since the first defendant were ordered to move out of the parcels in question and they did so.

17) Mukeku Mutungi's (PW4) evidence in chief was that when the first defendant moved into land parcels known as 204 and 205 Ikalyoni which were then unregistered, it was purely on humanitarian basis. That when the surveyors went to the witness's home area in 1994 they registered the family of the first defendant as the owners of the suit land since they had planted coffee and fruit trees on the parcels of land in question. He said that when the plaintiff appeared before the Land Adjudication Committee, the latter erroneously held that the defendants were the owners of the land because they had been farming on the land in dispute. He pointed out that the defendants had however moved out of the land.

18) It was also Mukeko's (PW4) evidence that the plaintiff filed objection proceedings number 391 in respect of parcels number 204 and 205 where it was held that the first defendant had alienated part of parcel number 205 to extract parcel number 2032 Ikalyoni Adjudication which he proceeded to sell to the second defendant.

19) His evidence in cross-examination was that the land initially belonged to the plaintiff's grandfather. He added that he only learnt of sale of the suit land which the plaintiff still uses when they made enquires at the lands office.

20) The case for the second defendant was that he knew the history of plot number 205 as belonging to the first defendant who had been in occupation of it ever since he was born. He said that he purchased a portion of plot 205 from the first defendant who had offered it for sale. He said that he had a sale agreement dated 10th August, 2003 (Dex No. 1). That after acquiring the land, he started developing it. He said that he reported to the adjudication officer so that his portion could be extracted from plot number 205. He went on to say the objection committee in its finding held that plot 205 had no dispute and as such, he was given number 2032 which was extracted from the said plot number 205. He said that he continued developing his plot number 2032 when the plaintiff raised a complaint and proceeded to destroy his crops and plants such as beans, banana plants, mango and guava trees. It was his evidence that he reported the matter to Kilome Police Station from where the matter was referred to the Land Adjudication and Settlement Department Makueni.

21) His evidence in cross-examination was that the first defendant did not show him that he owned the land that he had offered for sale. Regarding the letter dated 7th April, 2008 (Dex No. 7) the second defendant told the court that it shows that plot number 205 belongs to the first defendant. The second defendant went on to say that the plaintiff's name was not in the records when he purchased the land and pointed out that the plaintiff's name came up after the adjudication proceedings by which time he (the second defendant) had already purchased the land. He revealed that the plaintiff's name was registered after he won the adjudication proceedings.

22) It was also his evidence that previously plot numbers 204 and 205 were in the name of the first defendant.

- 23) His evidence in re-examination was that Dex No. 7 came up 5 years after he purchased the land.
- 24) The case for the first defendant was that he is the rightful owner of plot number 205 from which plot number 2032 was excised and given to the second defendant. He said that he was the one who sold the portion of 205 i.e plot number 2032 to the second defendant.
- 25) According to the first defendant, plot number 205 belonged to his late father, Kimeu Mbatha, who lived in the land in the early 1890s. He pointed out that his late father was buried on the land in question.
- 26) The first defendant told the court that during the demarcation of the adjudication section in 1994, the parcel belonging to his late father was divided into two (2) portions namely plot number 205 which was registered in his name and plot number 204 which was registered in the name of David Kimeu Mbatha. He went on to say that the plaintiff's father, Mulandi Nzioka, filed a case with the Land Adjudication Committee the same being number IKA/1/94P/NOS 205 and 204. He said that Adjudication Committee concluded that plot number 205 was his while plot number 204 belonged to David Kimeu Mbatha.
- 27) The first defendant told the court that he continued to develop his plot number 205 after the conclusion of the case until the year 2003 when he decided to sell a portion of it to second defendant.
- 28) He said that the objection that the plaintiff later filed concerning plot number 205 was determined in his absence. He added that the plaintiff was awarded plot number 205 after plot number 2032 had already been extracted. According to him, the appeal before the Minister is pending hearing and determination.
- 29) His evidence in cross examination was that there were no objection proceedings when he sold the land to the second defendant. He said that he appealed after the board ruled in favour of the plaintiff after failing to grant him a chance to be heard .
- 30) Jackson Mwanthi Ndetis (DW1) evidence in chief was that plot number 205 belongs to the first defendant. He said that he witnessed the sale of a portion of plot number 205 by the plaintiff to the second defendant.
- 31) His evidence in cross-examination was that he knows that there is an appeal pending before the Minister.
- 32) David Kimeu Kimeu Mbatha's (DW2) evidence in chief was that he is a brother of the first defendant and that plot numbers 204 and 205 belonged to his father. He went on to say plot number 2032 was excised from plot number 205 and later sold to the second defendant by the first defendant. He was not cross-examined.
- 33) By the time of writing this judgement , only the plaintiff's counsel had filed her submissions.
- 34) The plaintiff's counsel was of the opinion that there are five (5) issues for determination. The five issues according to her were;

i. Whether or not the plaintiff was the registered proprietor of land parcel No. 204 and 205 Ikalyoni Adjudication section.

ii. Whether or not the 1st defendant, without the plaintiff's father's knowledge caused Land Parcel No. 205 Ikalyoni Adjudication section to be subdivided and plot no. 2032 carved out.

iii. Whether or not the sale of plot No. 2032 carved out of Land Parcel 205 Ikalyoni Adjudication section was legally sold to the 2nd defendant.

iv. Whether or not the plaintiff did not appeal in Objection Proceedings No. 390 on 22/4/2006

and whether failure to appeal meant accepting the Adjudication Committee's decision.

v. Whether or not the 2nd defendant is entitled to mesne profits for loss of use from 2006 to date of vacating land parcel no. 2032.

35) On the issue of whether or not the plaintiff is the registered owner of parcel number 204 and 205 Ikalyoni adjudication section, the plaintiff's counsel submitted that the letter dated 7th April, 2008 from the Ministry of Lands which is document number 6 in the defendant's list of documents indicate that parcels number 204 and 205 Ikalyoni adjudication section are registered in the plaintiff's name. The counsel pointed out the letter dated 7th May, 2007 and listed as document number 4 in the defendants' list of documents shows that even though it warns the plaintiff to desist from encroaching on land parcel 2032, the objection proceedings reveal that the land was awarded to him.

36) On the issue of whether or not the first defendant without the plaintiff's father's knowledge caused land parcel number 205 Ikalyoni adjudication section to be subdivided and plot number 2032 curved out, the counsel submitted that the evidence of the plaintiff shows that the first defendant's family was allowed to settle on the land since their own land was infested with fleas and jiggers.

37) Regarding the issue of whether or not the sale of plot number 2032 that was curved out of land parcel number 205 Ikalyoni adjudication section was legally sold to the second defendant, the plaintiff's counsel submitted that since the first defendant was and still is not the owner of land parcel number 2032, he could not pass a better title.

38) On the issue of whether or not the plaintiff appealed in objection proceedings 390 and whether his failure to appeal meant that he had accepted the adjudication committee's decision, the counsel submitted that the plaintiff stated that he was advised that the taking of oath could only be granted during the objection stage and hence he opted not to appeal.

39) On the issue of whether or not the second defendant is entitled to mesne profits, the counsel submitted that the latter had admitted that he was in occupation and use of the suit land and hence he was the one who ought to compensate the plaintiff.

40) Having read the evidence on record and the submissions filed by the plaintiff's counsel, I am of the view that the issues for determination can be reduced to the following;

i. Who is the registered proprietor of plot number 204 and 205

ii. Whether the extraction of plot number 2032 from plot number 205 and its subsequent sale to the second defendant by the first defendant was valid.

iii. Whether the second defendant is entitled to mesne profits.

41) From the evidence on record the plaintiff was the one who filed the objection proceedings number 391 in Makueni as can be seen from the plaintiff's evidence and that of the two defendants in cross-examination. There is evidence to show that the determination of the objection proceedings was that the plaintiff was found to be the owner of land parcels number 204 and 205.

42) The determination ordered that the names of the defendant to be deleted from the register. Even though the first defendant informed the court that he appealed to the minister after the determination of the objection proceedings, he did not tell the court the steps, if any, that he has put in place to have the appeal heard. The onus was upon him to have the appeal heard and determined.

43) Based on the determination in the objection proceedings number 391, the extraction of plot number 2032 from parcel number 205 is not valid. It therefore follows that the sale to the second defendant by the first defendant cannot hold. In the circumstances, I hold that the proprietor of plot number 204 and 205 is the plaintiff herein. I have already stated that the extraction of plot number 2032 from plot

number 205 and subsequent sale to the second defendant by the first defendant is not valid and as such, the second defendant cannot be entitled to mesne profits.

44) In a nutshell, my finding is that the counterclaim by the second defendant has no merits and same must fail. I am also satisfied that the plaintiff has demonstrated that he has a cause of action against the two defendants on a balance of probabilities. In the circumstances, I will dismiss the second defendant's counterclaim with costs to the plaintiff. I will also proceed to enter judgement for the plaintiff and against the two defendants jointly and severally in terms of prayers (i) and (ii) of his plaint. It is so ordered.

Signed, dated and delivered at Makueni this 30th day of April, 2018

MBOGO C.G

JUDGE

In the presence of ;

Mr. Muthiani holding brief for Mr. Makundi for the 1st and 2nd defendant.

Mr. Mwangangi holding brief Mrs.Mutua for the plaintiff.

Mr. Kwemboi Court Assistant.

MBOGO C.G, JUDGE

30/4/2018