



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND CASE NO. 68 OF 2012

JOSEPH NYAMU.....PLAINTIFF

VERSUS

SAMWEL M'RWANDA.....1ST DEFENDANT

M'MUKIRI IKOTHA.....2ND DEFENDANT

THE D.L.A.O. IGEMBE DISTRICT.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

J U D G E M E N T

1. In his plaint dated 24th day of August, 2012 the plaintiff prays for entry of judgment against the defendants jointly and severally for:

(a) A permanent order of injunction restraining the Defendants whether by themselves, their agents and/or any person working under their instructions from interfering, demolishing the plaintiff (sic) houses, evicting, plucking the plaintiff (sic) miraa, cutting trees and or in any way interfering with plaintiff (sic) proprietary rights over Parcel Nos.6044,10411 and 225 Athiru/Ndoleli Adjudication Section.

(b) Declaration that Parcel Nos. 6044, 10411 and 225 Athiru/Ndoleli Adjudication Section belongs (sic) to the plaintiff excluding the 1st and 2nd Defendants and an Order cancelling all the sub-divisions/allocations to the defendants thereof.

(c) Costs of the suit.

2. The suit was canvassed by way of written submissions. The 3rd and 4th defendants despite having been given many opportunities failed or elected not to file any submissions.

THE PLAINTIFF'S SUBMISSIONS

3. The plaintiff says that he is the proprietor of land parcel No.225 Ndoleli/Athiru Ruujine Adjudication Section upon which parcel he has lived with his family for over 45 years. He says that the 1st and 2nd Defendants fraudulently caused subdivision of parcel No. 225 Ndoleli/Athiru Ruujine Adjudication Section which subdivision spawned Parcel

Nos 644 and 10411 Athiru Ruujine Adjudication Section.

4. The plaintiff claims that the 1st defendant bought from him ½ acre but with the collusion of the 3rd and 4th defendants got one acre instead, without even clearing the balance of the purchase price for the intended ½ acre.

5. Similarly he says that the 2nd defendant with the help of the 3rd and 4th defendants also fraudulently got his land.

6. The plaintiff frames the issues for determination as:

(a) Whether the plaintiff is the bona fide owner of Parcel No. 225 Ndoleli/Athiru Adjudication Section.

(b) Whether the plaintiff's suit is res judicata.

(c) Whether the plaintiff is entitled to the relief sought.

7. The Plaintiff says that under section 23 (1) of the Registered Land Act, the plaintiff has an indefeasible title to the ownership of his property.

8. Even though the plaintiff in a notice dated 14th day of August, 2012 withdrew Civil Suit No. Maua CMCC No. 127 of 2012 unconditionally and which suit had been filed against the 1st and 2nd defendants, this suit can not be said to be Res Judicata the withdrawn suit as the Constitution allows him to file a suit before the Environment and Land Court. He also argues that Parcel Nos 6044, 10411 and 225 were worth more than what a Chief Magistrate had jurisdiction to handle. I note that no valuation or any other evidence has been proffered by the plaintiff to support his assertion. I will, therefore, not attach any weight to this claim which very weakly attempts to impeach the jurisdiction of the C.M.'s Court at Maua. I will, therefore, not allude to this issue again except to add that the plaintiff has proffered the case of **Mary Biyaki Basweti Versus Saulo Ondieki another** (unreferenced) and the case of **Desai Versus Warsama (1967) EA 351** as his authority that no Court should confer jurisdiction upon itself. The cases are good law in the right circumstances, but as I have already said I do not find that the C.M's Court at Maua lacked jurisdiction on account of the pecuniary nature of the suit land.

9. The plaintiff reiterates that he had withdrawn the suit at Maua Law Courts before filing this suit.

10. The plaintiff concludes by saying that he had permanent houses on the claimed land and had trees thereon, without specifying on which of the 3 claimed parcels of land these developments were. He further says that the 0.5. acres transferred to the defendant illegally should be returned to him. He further says that he should be regarded as the owner of the claimed lands not only through the merits of the doctrine of adverse possession but also as a matter of right.

DEFENDANTS' SUBMISSIONS

11. The defendants have told this Court that the plaintiff had originally filed a suit against the 1st and 2nd defendants at Maua where he had prayed for orders of permanent injunction against the defendants. They proffer that the Maua Suit was concluded at Maua by Consent of all parties wherein it was agreed that the Land Adjudication officer was to visit the different parcels of land in dispute and pick boundaries and plant beacons. This was done and the apposite report was filed in Court.

12. The defendants have submitted that by rushing to this court and filing a case against the similar parties to those in the court at Maua and with a similar cause of action, the plaintiff was abusing the Court process when the suit was res judicata the Maua Suit. The defendants urge the Court to find that the parties are bound by their action at Maua and dismiss the suit.

13. The defendants submit that each of the parties had a distinct parcel of land registered against each owner. They say that the 1st defendant has only 4 acres (parcel 6044) and the 2nd defendant had one acre (Parcel 10411) In contrast the plaintiff owned parcel No.225 comprising over 13.5 acres but

bordering the defendants. The defendants assert that all the parcels of land were demarcated both on the map and on the ground and each party was in occupation of his parcel of land.

14. The defendants describe the plaintiff as a busy body who sought permanent injunctions against the defendants while knowing that they were owners of their land by registration, occupation, possession and development. They submitted that a court can not injunct the owner from his own land. They opine that the plaintiff **“is greedy.”** They also say that the plaintiff and defendants have no contractual or any other form of relationships apart from being neighbours and the attempt by the plaintiff to grab their small portions of land.

15. The defendants attack the validity of the plaintiffs pleadings regarding any developments on the land by saying that the owner of the soil owns any properties planted on the soil by invoking the doctrine **“Quic Quid Plantatur Solo Solo Cedit.”** They postulate that any properties on parcels **ATHIRU RUUJINE NDOLELI ADJUDICATION SECTION NOS.6044 and 10411** belonged to the registered owners, the defendants, and for that reason, the plaintiff had no legal right over them. He, a priori, lacked capacity to seek an injunction against the defendants.

16. The defendants have taken issue with the inclusion of the Attorney General in the suit and said that the plaintiff has not particularized his claim against the Attorney General or shown cause why the Attorney General should have been enjoined. They opine that the plaintiff must respect the law and know that when land is under adjudication, he can not take the defendants' parcels of land by force.

DETERMINATION

17. I agree with the plaintiff that the determination of the suit revolves on if or not he owns the disputed parcels of land. The issue regarding if or not the suit is res judicata Maua Suit No. CMCC 127 of 2012 is also important. Whether or not the plaintiff is entitled to the reliefs he is seeking will be predicated upon how the Court determines the issues of ownership and Res Judicata.

18. I will start with the issue of res judicata. I find as a fact that the parties in Maua CMCC No. 127 of 2012 had by consent on 17.7.2012 agreed to have the issues in dispute resolved by the District Lands Adjudication and Settlement Officer. The Hon. L. N. Sarapai, R.M. recorded as follows:

“COURT

District Land Adjudication and Settlement Officer to visit scene and demarcate Land Parcel NO.6044 Athiru Ruujine Ndoleli Adjudication Section, Parcel No. Athiru Ruujine Ndoleli 225 and Parcel No. 10411 Athiru Ruujine Ndoleli Adjudication as per parties Consent. Mention on 24.7.2012.”

19. The order of the Court was observed and a report was filed in Court. It is clear to me that at this point in time, the parties were in agreement that what was in issue was demarcation of the disputed parcels of land.

20. It is instructive that the plaintiff unconditionally withdrew his suit against the 1st and 2nd defendants on 14th August, 2012. To me this action was meant to pre-empt the definitive determination of the suit in accordance with the parties' consent and the report filed in Maua CMCC No. 127 of 2012 by the District Lands and Settlement Officer, Igembe District. Although I am unable to find that this suit was *Res Judicata* Maua Suit No. 127 of 2012, I find that, in bad faith, the plaintiff had withdrawn the Maua suit to obviate its final determination which would not have been in his favour. I find that by withdrawing his suit at Maua and quickly filing a suit in this Court, the plaintiff was embarking on high level forum shopping. I decry his moves to this effect. I do not accept the garbled explanations the plaintiff has proffered.

21. I agree with the plaintiff that Section 23 (1) of the Registered Land Act gives the registered owner of a property absolute and indefeasible title to his property. This assertion is, however, not relevant to the

circumstances of the present case as the disputed parcels of land are under adjudication and thus under the regimes provided by the Land Adjudication Act and the Land Consolidation Act. In any case Parcel No. Athiru Ruujine Ndoleli Adjudication Section 6044 is registered in the name of the 1st defendant. Parcel No. 10411 is registered in the name of the 2nd Defendant. There are, therefore, 3 parcels of land registered under separate names. It can not, by any stretch of imagination, be argued that the 3 parcels of land in dispute are all registered in the name of the plaintiff.

22. I have carefully examined the pleadings and the submissions made by the parties. I do find that the submissions by the 1st and 2nd defendants have merit. I find that the 1st defendant owns Parcel No. **ATHIRU RUUJINE NDOLELI ADJUDICATION SECTION 6044** and that the 2nd defendant owns Parcel No. **ATHIRU RUNJINE NDOLELI ADJUDICATION SECTION 10411**. I also find that the plaintiff only owns Parcel **NO.ATHIRU RUUJINE NDOLELI ADJUDICATION SECTON 225**.

23. From the foregoing, I find it necessary to dismiss this suit. I award costs to the 1st and 2nd Defendants. No costs will be awarded to the 3rd and 4th defendants as they had minimal participation in the proceedings herein. They also have contributed to delay in the determination of this suit.

It is so ordered.

Delivered in Open Court at Meru this 23rd day of July, 2015 in the presence of:

Cc. Lilian/Daniel

Otieno holding brief Otieno for Plaintiff

Kirima for Defendants

P. M. NJOROGE

JUDGE