



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND HIGH COURT AT NYAMIRA

ELC CASE NO. 64 OF 2021

{Formerly Kisii ELC Case No. 99 of 2014}

MATIUS BWANA MUGA.....PLAINTIFF

=VRS=

1. PETER OJWANG AGOLA.....1ST DEFENDANT

2. JAMES ODHIAMBO NDEGE.....2ND DEFENDANT

JUDGMENT

The Plaintiff's claim is that he is the registered proprietor of NORTH MUGIRANGO/MAGWAGWA II /1089 measuring 3.08 Hectares having been registered as such on 6th April 2011. But in September 2005 the 1st Defendant trespassed onto the suit land and started building structures thereon besides cultivating a substantial portion of the land. Then on 20th February 2014 the 2nd Defendant also followed suit. The consequence of the above trespass was loss and the Plaintiff claims for Damages and mesne profits against the Defendant. The Plaintiff also prays for an eviction order and a permanent injunction against trespass. The averments above were repeated in his statement dated 11th March 2014. The Plaintiff adopted the said witness statement as his evidence in chief and added that after the trespass, he reported the matter to the elders and that the Defendant overlooked the fence around his land, entered therein and built their house on the suit land. He stated that the Defendant's father's land is not far from the suit land.

On cross examination by Ms. Gogi he said that he inherited the suit land from his father who died in 1979 and was then registered as the owner. His late father had been given the suit land by Chore and Bwana who were his father's uncles. The suit land No. 1089 still exists and that his Title Deed was issued in 2011 and that the Defendants are still staying on the suit land occupying 4 acres and cultivating a portion thereof. The Plaintiff said that after sub-dividing land Parcel No. NORTH MUGIRANGO/MAGWAGWA II/1089 into 3 portions he gave his 2 brothers their respective portions and he was left with Title No. NORTH MUGIRANGO/MAGWAGWA II/1393. He denied that the Defendants were his cousins. Parcel No. with Title No. NORTH MUGIRANGO/ MAGWAGWA II/1089 was initially Title No. NORTH MUGIRANGO/ MAGWAGWA II/373 before it was sub-divided and after his father died in 1979 no Grant was ever applied for.

Pw2, Hellen Aoko Muya testified that she is the mother of the Plaintiff and that she is the one who gave the land to him. The land was initially hers. The Defendants forcibly entered the suit land and refused to vacate despite them having their own land. She also said that the land was inherited from the Plaintiff's father one Joseph Muya Chore who is now deceased.

On cross examination, Hellena said that the Plaintiff was his second born and that one Magdalene moved to her land 6 years ago. She was the wife of Bwana Ojwang but could not remember whether Bwana Ojwang was buried on the parcel he occupied with Magdalene. She further admitted that the 1st Defendant's father was her father-in-law and the Plaintiff was his nephew. The suit property was ancestral and which originally belonged to Muya Chore who had got it from Bwana Ojwang.

Pw3 Monica Akoth testified that she was the Plaintiff's wife and that the Defendants were their neighbours. The latter sold their land to one Isaiah Omwenga which land originally belonged to Magdalene but she could not recall the parcel number. On cross examination, she said that Magdalene together with the 1st and 2nd Defendants have been staying on the suit land and that Magdalene moved there after she sold her land.

On the part of the Defendants, Magdalene Bwana testified and produced the proceedings in Land Disputes Tribunal Reference No. L & B 17/5/111da/144 dated 9/2/1988 and a copy of the Green Card in respect of land parcel Number Magwagwa II/373. She claimed to have lived on the suit land since she got married but cannot tell the year she got married and that the Plaintiff found her on the suit land. She further said that her husband gave the Plaintiff's father a portion of land on the upper side while she and her husband remained on the lower side. She said that her husband was the elder brother to the Plaintiff's father. Finally, she said that the second Defendant is her son born out of a woman to woman marriage and she lived on the said property with the five children born by the woman she married. On cross examination, Dw1 denied having ever sold any portion of her land. She married one Sabina Nyaboke who died 3 years ago and was buried on the suit property. She was Bwana Ojwang's 3rd wife.

Elizabeth Akinyi Abok testified as Dw2 and said the land belonged to one Bwana Ojwang who is her late father. He gave a portion of the land to Joseph Muya, the Plaintiff's father who now wants the entire land. But she didn't know the acreage of her father's land. On re-examination, Elizabeth said that there were purchasers on the suit property since the Plaintiff had sold the land to four people and all the purchasers were occupying their respective portions. But he could not tell the acreage of the land. He only knows the boundaries.

The final witness Peter Ojwang Agola testified by adopting his statement of 13/8/2018 to the effect that he is the son of Agola, a brother to Bwana Ojwang who was the original owner of NORTH MUGIRANGO/MAGWAGWA II/373. The same was sub-divided to create NORTH MUGIRANGO/MAGWAGWA II/1089 now being occupied by the Plaintiff, himself and Magdalene Bwana. The Plaintiff was Joseph Muya's eldest son who was given a portion of the land by Bwana Ojwang. He concluded by saying that the land is registered in the Plaintiff's name in trust for all of them and that in Kisii High Court Civil Suit No. 131 of 1989 the Court ordered that the land be sub-divided in the aforesaid manner.

The Plaintiff relied on the following documents: -

- 1. Certificate of Official Search in respect to NORTH MUGIRANGO/ MAGWAGWA II/1089.**
- 2. A copy of the Title Deed in respect to the same.**

The Defendant on the other hand relied on copies of: -

- 1. Pleadings in Civil Case No. 131 of 1989 in Kisii High Court.**
- 2. Land Dispute Reference Number L & O 17/5/111 A/144.**
- 3. Copy of Green Card in respect of LR No. NORTH MUGIRANGO/MAGWAGWA II/373.**
- 4. Chief's letter.**

I must admit that I do not see the relevance of the documents produced by the Defendants since the parties therein are strangers to this suit. It is also apparent that Land Disputes Tribunal did not have jurisdiction to determine Title to land..

As to Kisii High Court Civil Case No. 131 of 1989, the parties are different and there is no Decree or judgment of the court produced to show the outcome of the case save a copy of the Plaintiff.

From the facts of the case, it is not in dispute that the parcel of land in question LR NO. NORTH MUGIRANGO/MAGWAGWA II/1089 is registered in the name of the Plaintiff. The same measures 3.08 hectares. Both parties admit that the Plaintiff inherited the same from his father, Joseph Muya Chore, now deceased. The same was carved out of NORTH MUGIRANGO/MAGWAGWA II/373 belonging to Bwana Ojwang.

The Defendants are relying on customary Trust.

In *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR it was held that the legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust and that person must prove that the suit properties were ancestral land and that one family member was designated to hold the properties on behalf of the family.

In *Patrick Mbaso v Meshack Odhiambo Mbaso & another* [2020] eKLR Kisumu ELC Appeal NO. 50 of 2019, Justice Antony Ombwayo had this to say:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- 1. The land in question was before registration, family, clan or group land;**
- 2. The claimant belongs to such family, clan, or group;**
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;**
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”**

The Defendants did not satisfy me that they have discharged that burden. The Defendants did not tender convincing evidence to demonstrate

that the suit parcel was ancestral land.

Having failed to demonstrate that the Plaintiff was registered as the proprietor of the suit land in trust for them and the Defendants also failed to demonstrate that the Plaintiff had acquired the title as a Trustee this Court cannot infer customary trust.

The Defendants have not proved that Parcel LR NO. NORTH MUGIRANGO/ MAGWAGWA II/1089 was not owned by the Plaintiff, and that he was not entitled to the property. The evidence tendered indicated that Parcel N0. LR NO. NORTH MUGIRANGO/MAGWAGWA II/1089 belongs to the Plaintiff.

Section 26 (1) of the Land Registration Act, No. 3 of 2012, provides that:

The certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the Title of that proprietor shall not be subject to challenge, except—
(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate Title has been acquired illegally, or through a corrupt scheme.

No illegality in the acquisition of the Title by the Plaintiff has been proved in respect to LR NO. NORTH MUGIRANGO/MAGWAGWA II/1089 nor has registration been demonstrated to have been in Trust for the family and/or Defendants and the counter-claim therefore fails. On the part of the Plaintiff there is nothing to warrant the impeachment of his Title and his claim is consequently sustainable. I grant Judgment for the Plaintiff in terms of prayers (a), (b) and (c) of the Plaint dated 11/3/2014 together with costs. The prayer for General Damages is disallowed for want of proof. In the same breath I dismiss the Defendants' counterclaim with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF MARCH, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff 's Counsel: In person

Defendants' Counsel: Ms. Gogi