



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 22 OF 2013.

NOBERT MAKWARA OPIYO.....PLAINTIFF

=VERSUS=

- 1. THE CHAIRMAN, ESEGERO ROMAN CATHOLIC CHURCH..... 1ST DEFENDANT
- 2. THE SECRETARY ESEGERO ROMAN CATHOLIC CHURCH.....2ND DEFENDANT
- 3. ESEGERO ROMAN CATHOLIC CHURCH.....3RD DEFENDANT.

J U D G M E N T.

The Plaintiff, Nobert Makwara Opiyo, filed this suit against the Chairman, Esegero Roman Catholic Church, the Secretary, Esegero Roman Catholic Church and Esegero Roman Catholic Church, hereinafter referred to as 1st to 3rd Defendant for;

- “ a) an order of injunction and eviction against Defendants, their agent, their servants and or any other person (claiming) under them from LR. NO.Bukhayo/Kisoko/2593.
- b) Costs of this suit.
- c) Any other relief this honourable court deems fit to grant.”

The Plaintiff avers that he is the registered owner of the suit land and that the Defendants entered onto the land and constructed a building without authority.

The Plaintiff’s claim is denied by the Defendants through their filed statement of defence. The Defendants disputes that the plaintiff is the registered owner of Bukhayo/Kisoko/2693. They further aver that if the Plaintiff is the registered owner of the suit land, then he obtained the registration through fraud and set out the particulars of fraud in paragraph 3 of the defence summarized as follows:

- 1. Registering the land into his names while he knew the Defendant had bought it and have been using it for 30 years.
- 2. Filing a Succession Cause for his father’s estate without notifying the Defendants.
- 3. Taking advantage of the surveyor’s mistake who transferred to the Defendants parcel Bukhayo/Kisoko/2394 instead of the suit land.

The Defendants further avers that the Plaintiff’s title to the suit land, if any, has been extinguished

by dint of their uninterrupted occupation of the suit land for over 30 years. Further, that the Plaintiff claim is statute barred.

The Plaintiff testified as PW 1 and adopted his evidence affidavit of 6th May, 2013 to which is annexed a copy of the title deed for Bukhayo/Kisoko/2693 and certificate of official search for the same land showing that the Plaintiff got registered as proprietor of the land on 21st July, 2011. In cross-examination by the Defendants' counsel, the Plaintiff said he was born in 1977 and that his father, Makoli Yoyo, died in 1992. He said his father was the owner of land parcels Bukhayo/Kisoko/2387 and 2389. That his family lives on parcel Bukhayo/Kisoko/2387 which is separated from Esegero Primary School by one parcel of land. He added that parcel Bukhayo/Kisoko/2389 was subdivided into parcels 2693 and 2694 with the latter being registered in the names of the 3rd Defendant and the former remaining in his father's names until after he inherited it through a Succession cause. He said the Defendants built a church house on land parcel 2693 instead of parcel 2694 which is their land after the death of his father. He confirmed that the subdivision of Bukhayo/Kisoko/2389 and the transfer of parcel 2694 to the 3rd Defendant was done when his father was alive. He also stated that the church house was built in 1992. He said he followed the due process in filing the Succession Cause in respect of his father's estate. He said his father had told him he had sold 1 ½ acres of land to the 3rd Defendant which was parcel 2694. He said he could not have claimed the land earlier as he was young but in 1999 the 3rd Defendant had offered to buy parcel 2693 from him but the negotiations did not materialize.

In support of the defence case, the Defendants called four witnesses. The first was Inyasi Onditi Hasakii who testified as DW 1. He said he is the Chairman of Esegero Catholic Church and was aware that in 1981 the church bought land from Plaintiff's father from parcel Bukhayo/Kisoko/2389 for Kshs.17,000/= . That the land parcel 2389 was subsequently subdivided in 1991 and the church issued with its title deed in 1992. That the portion that was to be transferred to the church was parcel 2693, but due to a mistake by the surveyor, parcel 2694 was transferred instead. That parcel 2694 had been donated to Esegero Primary school by the Plaintiff's father. He added that Plaintiff and the church members had attempted to discuss a settlement but could not agree to the Plaintiff's demand of Kshs.1,300,000/=. Answering a question DW 1 stated that the church had bought only one acre of land which was supposed to be parcel 2693 but got registered with parcel 2694 which was 1 ½ acres in size. He added that he had no documentary evidence to confirm that Plaintiff's father had given Esegero Primary school parcel 2694. He also said Esegero Primary school has never asked that parcel 2694 be transferred to it.

The second witness was Desterio Wanzala who testified as DW 2. He said he was among the church members who signed the agreement between the church and Plaintiff's father under which the church bought one acre on 16.3.1981. He identified a copy of the agreement as the first one in the list of documents filed by the Defendants. He said after paying for the land, they put up a church house on it when the plaintiff's father was alive. The land was also surveyed during the life time of the seller of the land. He added that, he is aware people from the area had donated land to build Esegero Primary school in the 1970's and that the school land is different from that of the church land and is marked with a physical boundary. During cross-examination, DW 2 said that the land that was to be transferred to the church was parcel 2693 but parcel 2694 was transferred to it erroneously. He said he did not know of the error until 2011 when plaintiff claimed parcel 2693. He added that Esegero Primary school has never asked the church to transfer parcel 2694 to it.

The third witness was Alois Angulo Oroni who said he is the Catechist at Esegero Catholic church since 1988 and previously a choir member. He said the church bought land from Plaintiff's father in 1981 and constructed a church house in 1987. He said the Plaintiff's father subdivided the land from which the church was buying a portion but erroneously transferred parcel 2694 instead of parcel 2693 to the church. He said the church house had been built on the parcel 2693 and not parcel 2694 which is used as a playground by Esegero primary school. He said they had not known of the error until plaintiff claimed he was the owner of parcel 2693.

The last witness for the Defendants was Gilbert Ondari Ondigo, the Land Registrar, Busia who told the court that record held in his office indicates parcel Bukhayo/Kisoko/548 belonging to Opiyo Makoli was on 27.11.1990 closed upon subdivision to parcels 2387, 2388 and 2389. He added that parcel 2389 was subsequently subdivided into parcel 2693 and 2694 and the register closed on 23.11.1992. He also informed the court that parcel Bukhayo/Kisoko/2693 was on 21st June, 2011 registered in the names of Nobert Makwara Opiyo (the Plaintiff) after inheriting it vide succession Cause number 89 of 2010 and that parcel 2694 was registered in the names of Esegero Roman Catholic church on 24.11.1992.

The Plaintiff filed written submission restating the evidence adduced and asking the court to order that he be paid Kshs.1,300,000/= by the Defendants as mesne damages for the period they have used land parcel Bukhayo/Kisoko/2693 and costs.

The Defendants' counsel also filed written submissions pointing out that the Plaintiff did not in pleadings and evidence disclose the date the defendants invaded his land. Counsel further submitted that the portion of land the 3rd Defendant bought was 0.4 hectares and was meant to be Bukhayo/Kisoko/2693 but parcel Bukhayo/Kisoko/2694 was transferred to the church erroneously. He prays that the Plaintiff be ordered to transfer land parcel Bukhayo/Kisoko/2693 to the church and that each party be ordered to bear its/his own costs.

The court finds that the following issues need to be determined in this case.

- a. Whether or not the Defendants unlawfully and without authority entered onto land parcel Bukhayo/Kisoko/2693 and if so, when?
- b. Whether or not there was a land sale agreement between the 3rd Defendant and the Plaintiff's father.
- c. If the answer to (b) above is in the affirmative, what parcel of land the 3rd Defendant was entitled to between Bukhayo/Kisoko/2693 and 2694.
- d. Whether or not there was an error in the process of transferring the portion 3rd Defendant bought from Plaintiff's father and if so the party to blame.
- e. If the answer to (d) above is in the affirmative, whether this court has the power to issue orders to correct the error.
- f. Whether Plaintiff is entitled to the orders sought.

The court has carefully considered the pleadings herein, the evidence adduced by both the Plaintiff and Defendants and submissions filed by the parties and find as follows:

1. That the evidence adduced by the Defendants, including the sale agreement of 16.3.1981 and the confirmation by the plaintiff in his testimony shows that the 3rd Defendant bought one acre of land from parcel number 2389 at Kshs.17,000/=. The seller of the land was Opiyo Mokoli Yoyo who is the father of the Plaintiff.
2. That the 3rd Defendant took possession of the portion of land they bought and constructed a church house during the lifetime of the Plaintiff's father. Though the Plaintiff's claim the church house was built in 1992, the Defendants offered overwhelming evidence that the church house was constructed in 1987.
3. That the Plaintiff's father had land parcel Bukhayo/Kisoko/2389, from which 3rd Defendant had bought one acre, subdivided into two parcels being 2693 and 2694 measuring 0.4 and 0.6 hectares respectively in 1992. The copies of the mutation form attached to the Defendants list of documents shows the subdivision was registered on 23.11.1992 and that the surveyor had picked the already demarcated boundary confirming Defendants claim that they had taken possession of the portion 3rd Defendant had bought long before the subdivision.
4. That the 3rd Defendant's church house was in the portion registered as Bukhayo/Kisoko/2693 which was one acre in size.
5. That by mistake or error attributed to the surveyor, the Plaintiff's father transferred to the 3rd

Defendant parcel Bukhayo/Kisoko/2694 instead of parcel Bukhayo/Kisoko/2693 where the church house was situated on 23.11.1992.

6. That the Defendants did not know of the mistake in (5) above until in the year 2011 when the Plaintiff lodged a claim for parcel Bukhayo/Kisoko/2693 after inheriting the land through a Succession Cause.
7. That the Defendants did not avail evidence to prove that the Plaintiff engaged in fraudulent process in filing the Succession Cause in respect of his father's estate through which he inherited land parcel Bukhayo/Kisoko/2693.
8. That none of the parties herein has taken any steps to correct the error or mistake that led to the 3rd Defendant being registered with parcel Bukhayo/Kisoko/2694 instead of Bukhayo/Kisoko/2693 where the church house was built. Had this been done when the Plaintiff's father was alive, then the Plaintiff would have filed a Succession Cause in respect of parcel Bukhayo/Kisoko/2694 and not 2693.
9. That the 3rd Defendant took possession of the one acre from Bukhayo/Kisoko/2389 which they bought from Plaintiff father and built a church house on it with the consent of the seller. By that time the Plaintiff, who had been born in 1977 was a minor. The 3rd Defendant has continued to use the one acre to date and until year 2011 believed the title transferred to its name was for that portion. The Defendants therefore never needed the Plaintiff's consent to enter into the land as they had the consent and authority of his father to take possession under the sale agreement of 16.3.1981.

10. That the prayer sought by Plaintiff against Defendants in paragraph 10 (a) of the plaint cannot be issued against the Defendants under the circumstances of this case.

11. That even though the plaintiff has not prayed for parcel Bukhayo/Kisoko/2694 to be transferred to him in exchange of parcel Bukhayo/Kisoko/2693, I am of the considered view that this court is under Article 159 of the Constitution, Section 19 (1) of the Environment and Land Court Act and Section 1B (i) of the Civil Procedure Act under duty to ensure;

- a. That justice is administered without undue regard to procedural technicalities.
- b. That justice shall not be delayed but expedited.
- c. That the proceedings are disposed at affordable costs.

12. That in view of the court's duty as set out in (11) above and so as to ensure both parties in this matter gets justice without undue delay and without subjecting them to additional costs, it is desirable that the court issues orders that will enable the 3rd Defendant to be registered with the parcel they bought and where the church house is situated. Likewise, it is also necessary to issue orders to ensure the Plaintiff, as the heir of the Opiyo Makoli Yoyo, gets registered with the parcel that was erroneously registered in the names of the 3rd Defendant.

From the foregoing, the court finds that the Plaintiff has failed to prove that the Defendants are unlawfully occupying Land parcel Bukhayo/Kisoko/2693 and therefore prayer 10(a) in the plaint cannot issue. However so as to correct the mistake, and or error that was occasioned on 23.11.1992 and so as to ensure that the parties are registered with the correct parcels of the land subdivided from Bukhayo/Kisoko/2389, the court orders as follows;

- a. That the Plaintiff herein transfers land parcel Bukhayo/Kisoko/2693 to the 3rd Defendant.
- b. That the 3rd Defendant transfer land parcel Bukhayo/Kisoko/2694 to the plaintiff.
- c. That each party bears his/it's own costs.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED IN OPEN COURT ON 21ST DAY OF MAY, 2014.

IN THE PRESENCE OF;

JUDGE.