



No. 245

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.266 OF 2002

JOYCE MORAA MAIRURAPLAINTIFF

VERSUS

SAMUEL MOTENDE NYABERE1ST DEFENDANT

FRANCIS OMARI OTUCHO2ND DEFENDANT

CHINA MOTENDE3RD DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on 9th October 2002 seeking; an order of eviction and a permanent injunction restraining the defendants from entering onto, cultivating, constructing on and/or in any manner whatsoever interfering with all that parcel of land known as LR No. Kisii Majoge/Boochi/3347 (hereinafter referred to as “**the suit property**”), general damages and costs of the suit. The plaintiff’s claim against the defendants was that the plaintiff is the registered proprietor of the suit property and that on diverse dates in the month of April, 2002 the defendants entered into the suit property unlawfully and commenced cultivation and construction of structures thereon. The plaintiff claimed that efforts made through the Provincial Administration to resolve the dispute amicably did not succeed and the defendants neglected and/or refused to stop their acts of trespass aforesaid a situation that left the plaintiff with no alternative but to file this suit against the defendants. The plaintiff claimed that she has suffered loss and damage as a result of the defendants’ said acts of trespass.
2. The defendants were served with the summons to enter appearance but only the 1st defendant entered appearance and filed a statement of defence. In his defence to the plaintiff’s claim, the 1st defendant claimed that the plaintiff got registered as the proprietor of the suit property fraudulently. The 1st defendant accused the plaintiff of misrepresentation and non-disclosure of material facts. When this suit came up for hearing on 13th November 2008, the plaintiff’s advocate notified the court that the 2nd defendant was deceased and as such the plaintiff did not wish to proceed with the claim as against him. The plaintiff gave evidence and called two (2) witnesses. In her evidence, the plaintiff testified that the defendants are in occupation of the suit property. The plaintiff testified that she is the registered proprietor of the suit property and that the defendants entered the suit property and forcefully evicted the person whom she had allowed and/or authorized to occupy the property. The defendants then commenced cultivation and also

put up a structure thereon. She stated that whereas the 1st defendant is carrying out cultivation on the property, the 3rd defendant has put up a house on the same. The plaintiff stated that she purchased the suit property from Nyangige Nyabere, Nyabuto Nyabere and Mauti Nyabere together with her husband, one Noah Mairura Kerama and that the vendors were mother and sons. The plaintiff stated that the agreements for sale of the suit property were reduced into writing and that the necessary consent of the land control board was obtained before the suit property was transferred to her. The plaintiff stated that she purchased the suit property at kshs, 270,000/= and that she purchased a portion of a larger parcel of land which was thereafter sub-divided before the suit property was transferred to her. The plaintiff produced in evidence the agreements for sale that she entered into with Alexina Nyabere, Mauti Nyabere and Nyabuto Nyabere. The plaintiff also produced in evidence, a letter of consent of the land control board dated 22nd November 2000 for the sub-division of the parcel No. Majoge/Boochi/735 (“**Plot No. 735**”) into four (4) portions, a copy of application for consent of land control board for the said sub-division dated 16th November 2000, a copy of the mutation form dated 15th December 2000 through which Plot No. 735 was subdivided into four (4) portions namely; Kisii/Majoge/Boochi/3345, 3346, 3347 (“the suit property”) and 3348, a letter of consent of the land control board dated 20th December 2000 for the transfer of the suit property to the plaintiff at a consideration of kshs. 120,000/=, a copy of application for consent of land control board dated 19th December 2000 for the transfer of the suit property to the plaintiff, a copy of the minutes of the meeting of Ogembo Urban Land Control Board that was held on 20th December 2000 at which the consent was issued for the transfer of the suit property to the plaintiff, a certified copy of the register for Plot No. 735 and a certified copy of the register for the suit property.

3. The plaintiff’s first witness was Elizaphan Mokuwa Mwagembe (PW2). PW2 testified that he witnessed the agreement for sale between the plaintiff and her husband on the one hand and Alexina Nyabere and Nyabuto Nyabere on the other hand. He testified further that one, Mauti Nyabere also sold a piece of land to the plaintiff and her husband aforesaid and that the vendors family members were aware of the transactions and did not raise any objection to the same. The plaintiff’s last witness was Joash Nyandiko Nyambuka (PW3). He testified that he was a member of Ogembo Land Control Board and that he sat at a meeting of the said board that was held on 20th December 2000 at which the transfer of the suit property by Alexina Nyangige Nyaberi to the plaintiff was approved.
4. On his part, the 1st defendant gave evidence and called one witness. The 1st defendant testified that he is the son of one, Nyambere Ombongi deceased and Alexina Nyangige Nyabere. He testified that; in the year 1996 he was residing in Trans-Mara District where he was carrying out farming activities. His father died in 1985. Plot No. 735 was registered in the name of his deceased father before it was transferred to the name of his mother, Alexina Nyangige Nyabere on 10th April 1997. When the plaintiff purported to enter into an agreement for sale with her mother Alexina Nyangige Nyabere in 1996, the said Alexina Nyangige Nyabere was not the registered proprietor of the said parcel of land. He was not a party to the said agreement for sale and that he did not apply to court for grant of letters of administration of the estate of his deceased father. His said mother, Alexina Nyangige Nyabere, Henry Nyabuto Nyabere and the plaintiff’s husband, Noah Mairura Kerama are the ones who applied to court for the grant of the said Letters of Administration in Succession Cause No. 23 of 1987. The other members of his family were not involved in that Succession Cause and that the court file for the said Succession Cause is missing. He testified further that before his death, his deceased father had shown each of his five (5) sons their respective portions of Plot No. 735 save that a formal sub-division had not taken place. He stated that out of the five sons only Henry Nyabuto and him are alive. He stated that the plaintiff has taken the entire parcel of land that he had been shown to him by his deceased father as his portion of Plot No. 735. He stated that he did not sell any land to the plaintiff neither did he authorize Henry Nyabuto to do so. He stated that although Plot No. 735 was sub-divided, he was not given any portion thereof. He stated that the suit property that was transferred to the plaintiff is the portion of Plot No. 735 that belongs to him and that although the same is registered in the name of the plaintiff he is the one in occupation of the same.
5. The 1st defendant’s witness was his mother, Alexina Nyangige Nyabere (DW2) who is said to

have sold the suit property to the plaintiff. She testified that before her husband, Lucas Nyabere Ombongi died, he divided his land (Plot No. 735) among his five (5) sons, three (3) of whom are since deceased. She testified that it was his son Henry Nyabuto who sold the suit property to the plaintiff. She testified that the suit property which Henry Nyabuto sold to the plaintiff belongs to the 1st defendant who was by then not living at home. She accused Henry Nyabuto of “stealing” the 1st defendant’s land and selling the same to the plaintiff and her husband. She stated that she did not participate in the sale of the suit property although her identity card was taken by Henry Nyabuto who also gave her some documents to thumbprint – which documents she was told were required for survey purposes. She denied receiving any purchase price from the plaintiff because she did not sell any land to the plaintiff. She stated that she cannot remember ever appearing before any land control board. After the close of the defence case, the court directed the parties to put in written submissions. The plaintiff filed her written submissions on 23rd April 2012 while the 1st defendant filed his submissions on 2nd May 2012. I have considered the pleadings filed herein by the parties, the evidence tendered by both sides and the parties respective written submissions together with the case law and statutes cited. From the pleadings on record and the evidence tendered by the parties the following in my view are the issues that present themselves for determination in this suit;-

- i. Whether the plaintiff acquired title to the suit property fraudulently.
- ii. Whether the defendants have trespassed onto the suit property.
- iii. Whether the plaintiff is entitled to the reliefs sought.
- iv. Who is liable for the costs of the suit?

6. Issue no. I

From the evidence on record, there is no dispute that the plaintiff is the registered proprietor of the suit property. The plaintiff produced in evidence a certified copy of the register for the suit property (PEXh. 1) which shows that the plaintiff was registered as the proprietor of the suit property on 27th December 2000. Before the suit property was registered in the name of the plaintiff, the same was registered in the name of Alegisina Nyangige Nyabere who was registered as the proprietor of the suit property on 18th December 2000. From the said copy of the register, the suit property is indicated as having been a portion of Plot No. 735. The plaintiff also produced in evidence a certified copy of the register for Plot No. 735 as part of PEXh. 1. The register for Plot No. 735 showed that the said parcel of land was registered in the name of one, Nyabere Ombongi on 17th May 1968 and that on 10th April 1997 the same was registered in the name of Alegisina Nyangige Nyabere through transmission pursuant under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). There was a restriction entered against the title by the land registrar on 9th February 1998 after one Jeremiah Borige Nyagaka lodged an objection to the grant that was issued in favour of Alegisina Nyangige Nyabere in Succession Cause No. 23 of 1997. The restriction aforesaid was however removed on 2nd November 2000 after the grant infavour of Alegisina Nyangige Nyabere was confirmed. The said Alegisina Nyangige Nyabere was re-registered as the proprietor of Plot No. 735 on 2nd November 2000. On 18th December 2000, the title of Plot No. 735 was closed on sub-division of the same into four (4) new parcels namely, Majoge/Boochi/3345, 3346, 3347 and 3348. This is how the suit property came into being. From the evidence on record, Alegisina Nyangige Nyabere (“Alexina”) is the widow of Nyabere Ombongi (deceased). Alexina and Nyabere Ombongi had five (5) sons namely, Samuel Motende (1st defendant), Samuel Otucho, Peter Mauti, Henry Nyabuto and Shadrack Onsare. Of the five (5) sons all except the 1st defendant and Henry Nyabuto are deceased. According to the evidence placed before the court by the plaintiff, the plaintiff purchased portions of the original Plot No. 735 from Alexina, Samuel Otucho and Henry Nyabuto in the year 1996. The plaintiff produced in evidence a series of agreements of sale of land between the plaintiff’s husband Noah Mairura and Alexina, Samuel Otucho and Henry Nyabuto. These agreements were made between 1996 and 1998. It is clear from some of the agreements that the land that was sold to the plaintiff’s husband was a portion of Plot No. 735. The plaintiff testified that although the agreements for sale were in the name of her husband, she purchased the suit property together with her husband. No evidence was led as to the point when the plaintiff and her husband agreed that the parcel of land that was sold to her husband be

transferred to the name of the plaintiff alone.

7. This issue was not taken up either in examination in chief or in cross-examination. The evidence on record shows however that following these agreements, Alexina applied for a grant of letters of administration of the estate of her deceased husband Nyabere Ombongi in whose name Plot No. 735 was registered in Succession Cause No. 23 of 1997. The grant of letters of administration was issued in her favour and after the same was confirmed, Plot No. 735 was registered in her name by transmission. Alexina thereafter sub-divided Plot No. 735 into four (4) portions which sub-division gave rise to among others the suit property which was transferred to the plaintiff. The consent of the land control board was obtained both for the subdivision of Plot No. 735 and the transfer of the suit property to the plaintiff. The 1st defendant contended in his submission that since the plaintiff was not indicated in the agreements for sale that were submitted to court as one of the purchasers of the suit property, the registration of the suit property in the name of the plaintiff could only be but fraudulent. I am not convinced by this submission. It is not a must that the land must be transferred into the name of the person who was indicated as having purchased the same. It is normal for the land to be purchased by an agent and then transferred into the name of the principal. In this instance, the plaintiff led evidence that she purchased the suit property together with her husband, Noah Mairura Kerama. This evidence was not challenged by the defendants.
8. It was not even contested that Noah Mairura Kerama is the plaintiff's husband. In fact in their evidence, the 1st defendant and his witness DW2 testified that the plaintiff and her husband Noah Mairura Kerama were known to them. The application to the land control board and the consent of the land control board for the transfer of the suit property to the plaintiff showed that the plaintiff was the purchaser of the suit property. There is no dispute between the plaintiff and her husband Noah Mairura Kerama over the suit property. The 1st defendant had submitted further that when the suit property was purportedly sold to the plaintiff and her husband, the same was not registered in the name of the vendors. The transaction according to the 1st defendant was illegal and fraudulent. Again, I find no merit in this submission. The evidence on record shows that Plot No. 735 was transferred to the name of Alexina after she obtained grant of letters of administration. She thereafter sub-divided the said parcel of land and transferred the suit property which was one of the four (4) portions of Plot No. 735 to the plaintiff. It is clear from the evidence on record that as at the time the suit property was transferred to the plaintiff, Alexina who transferred the same to the plaintiff had the power to do so and could not be said to have intermeddled in the estate of Nyabere Ombongi as submitted by the 1st defendant.
9. The other ground raised by the 1st defendant to support his contention that the suit property was fraudulently transferred to the plaintiff relates to his contention that he was disinherited of his deceased father's property. To this submission, my view is that this is an issue which the 1st defendant should have taken up in Kisii High Court Succession Cause No. 23 of 1997 and not in these proceedings. The evidence on record shows that the suit property was transferred to the plaintiff by the administrator of the estate of Nyabere Ombongi. If for any reason she did this in contravention of her powers as an administrator that is an issue which can only be resolved by the Succession Court. The alleged loss of the court file relating to Kisii High Court Succession Cause No. 23 of 1997 is not an excuse for raising the issue herein. Those are issues that do not concern third parties dealing with the administrator in good faith. In any event, that court file can be reconstituted. From the totality of the evidence on record, I am persuaded that the plaintiff has proved on a balance of probabilities that she acquired the suit property lawfully. The defendants have not placed any evidence in support of their contention that the plaintiff acquired title to the suit property through acts of fraud and misrepresentation.

10. Issue No. II

The plaintiff has proved that she is the registered owner of the suit property. The plaintiff has proved that the defendants have entered and occupied the suit property without the plaintiff's consent or authority. The defendants have not given any lawful or reasonable excuse for their continued occupation of the suit property. It is my finding therefore that the defendants are trespassers in the suit property.

11.Issue No. 3

The plaintiff having proved that the defendants are trespassers on the suit property, the plaintiff is entitled to the reliefs sought against the defendants save for general damages. The plaintiff did not lay any basis on which this court can assess general damages claimed. General damages like special damages are compensatory. It is not awarded as a matter of course. A proper basis must be laid for the award of the same. It is my finding that in this case no such basis was laid and as such the plaintiff is not entitled to any award for general damages.

12.Issue No. 4

Costs are at the discretion of the court. Generally however, the costs would follow the outcome of the suit save in exceptional cases. In this case there is no reason why I should deny the plaintiff the costs of this suit.

13.Conclusion

In conclusion, I hereby enter judgment for the plaintiff against the 1st and 3rd defendants for the orders of eviction and injunction prayed for in paragraph (a) of the plaint. The 1st and 3rd defendants shall vacate and handover possession of the suit property namely, **LR. No. Kisii Majoge/ Boochi/ 3347** to the plaintiff within one hundred and eighty (180) days from the date hereof, failure to which the plaintiff shall be at liberty to have the 1st and 3rd defendants evicted therefrom. The plaintiff shall have the costs of the suit.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Soire h/b for Mrs. Asati for the Plaintiff

N/A for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE