



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 109 OF 2019**

**ANDREW KIPBIWOT SAWE.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH KIBUCHI WANGOMBE.....DEFENDANT/RESPONDENT**

**JUDGMENT.**

(1) Andrew Kipbiwot Sawe (the Plaintiff) seeks the following reliefs against Joseph Kibuchi Wangombe (the Defendant).

(a) A permanent injunction restraining the Defendant, his agents, servants, contractors and workmen from trespassing, wasting, transferring, damaging, constructing, erecting any house, structure or building of any description, or in any other way interfering with the Plaintiff's property known as Title Number KAJIADO/OLEKASASI/561.

(b) Any other relief the Court may deem fit to grant.

(2) The Plaintiff's case is as follows; He is the registered owner of the L.R. KAJIADO/OLEKASASI/561 which he purchased from Ishmael Kokayia Pasha in the year 1993. Soon after paying the purchase price to the seller, the land was transferred into the Plaintiff's name.

In 2016, the Plaintiff received information from his caretaker that some people were visiting the land and posing as owners. On 22/11/2016, he wrote a letter to the District Land Registrar complaining about the intruders. In February 2019, he did a search and found that there was no interference with the land in the Land Registry.

In March, 2019, a potential purchaser sent by the Plaintiff to the Land Registry found the Green Card for the suit land missing. Eventually, the Land Registrar reconstructed the records after the Plaintiff proved to be the genuine owner after presenting his title deed to the suit land.

The Registrar issued a gazette notice in the Kenya Gazette and advertised in the Local Dailies before reconstructing the records. The Plaintiff also made a report to the police that there was a trespasser on his land. That trespasser is the Defendant. Since the Defendant is a stranger, the Plaintiff wants him out of his land hence this suit.

(3) In support of his case, the Plaintiff filed the following evidence;

(a) A copy of witness statement dated 13/12/2019.

(b) A copy of agreement dated 22/6/1993.

(c) A copy of acknowledgement of payment and payment cheques.

(d) A copy of original title deed dated 15/7/1993.

(e) A copy of letter dated 22/11/2016 written by the Plaintiff to the Land Registrar complaining of tampering with his land.

(f) Copy of search certificate dated 25/2/2019.

(g) Copy of letter by Geomatics Services dated 15<sup>th</sup> March, 2019.

- (h) Surveyors report with no date
- (i) Indemnity to reconstruction of Green Card dated 27/3/2019.
- (j) Copy of Land Registrar's letter dated 28/3/2019 forwarding money order for gazettelement.
- (k) Draft Gazette Notice for opening of a new register from Land Registrar dated 28/3/2019.
- (l) Gazette Notice No. 1307 of 5<sup>th</sup> April, 2019.
- (m) Daily Nation and Standard Newspaper Notices of 9<sup>th</sup> April, 2019.
- (n) Copies of Search Certificate dated 1/7/2019, 10/9/2019, 5/11/2019 and 4/11/2019.
- (o) 2 black and white photographs showing materials on suit property.

(4) In his written statement of defence dated 9/1/2020, the Defendant avers that he is the legitimate owner of L.R. NO. KAJIADO/OLEKASASI/561 having purchased it from the previous owner Ishmael Pasha in August, 1993.

The Defendant adds that prior to the transfer of the suit land to him, he complied with all legal procedures necessary for transfer including the consent of the Land Control Board for the area in which the land is situated.

Further, the Defendant avers that he enjoyed quiet possession of the suit land until the year 2016 when his caretaker, Mr. Wangai informed him that some people were trying to sell his land. He then proceeded to the Land Registry and learnt that some fraud had occurred by alterations to the Green Card.

The Defendant had also misplaced his original Title Deed. He reported the loss to the police and with the assistance of the Land Registrar, the records were reconstructed after the usual procedures of Gazette Notice. He was issued with a new Title Deed on 10/1/2017.

In November 2019, the Defendant received fresh reports of people trying to sell his property. When he visited the Land Registry, he found that the Plaintiff had been registered as the new owner of the suit land through a reconstructed Green Card.

The Defendant lodged a complaint and the Land Registrar eventually confirmed him as the genuine owner of the suit land. He was issued with a certified copy of the Green Card on the 9<sup>th</sup> December, 2019.

The Defendant says that his case is corroborated by the widow of Mr. Pasha, one Mrs. Perpetua Nyaguthii Pasha who has even sworn an affidavit to confirm that he bought the land from her husband in 1993.

The Defendant concludes by saying that the Plaintiff has not come to Court with clean hands, that he has no letter of consent from the Land Control Board authorizing the transfer of the suit land to himself, that he has not met the threshold for the grant of the reliefs that he seeks and that it is surprising that the Plaintiff has the courage and audacity to seek validation of criminal acts from this Court.

(5) In support of his case, the Defendant filed the following evidence;

- (i) Copy of Title Deed for the suit land dated 10/1/2017.
- (ii) Copy of Transfer Form for the suit land dated 11/8/1993
- (iii) Correspondence between him and his advocate dated 30/10/1993.
- (iv) Application for consent dated 25/6/1993.
- (v) Copy of letter of consent dated 5/7/1993.
- (vi) Copy of Green Card dated 7/1/2020.
- (vii) Copy of letter by Land Registrar Kajiado North dated 7/1/2020 confirming the Defendant as the rightful owner of the suit land.
- (viii) Copy of previous Title Deed issued on 17/8/1993.
- (ix) gazette Notice No. 8858 of 281/10/2016
- (x) Letter to Land Registrar dated 26/11/2019.
- (xi) Copy of Official Search dated 9<sup>th</sup> December, 2019.

- (xii) Copy of Green Card dated 9/12/2019.
- (xiii) Copy of Gazette Notice No. 11803 dated 13/12/2019.
- (xiv) Copy of letter dated 31/5/2014.
- (xv) Copy of letter dated 3/6/2014
- (xvi) Copy of letter dated 4/6/2014.
- (xvii) Copy of Green Card dated 5/6/2014.
- (xviii) Copy of Official Search dated 5/6/2014.
- (xix) Copy of letter dated 12/6/2014.
- (xx) Copy of letter dated 23/6/2014.
- (xxi) Copy of letter DATED 25/6/2014.
- (xxii) Copy of draft agreement.
- (xxiii) Copy of letter dated 24/7/2014.
- (xxiv) Copy of letter dated 4/8/2014.

In addition to the above evidence, the Defendant filed a Witness Statement dated 9/1/2020.

(6) At the trial on 14/6/2021 both parties gave viva voce evidence and they were cross examined.

The Court made an order that the reports by the Land Registrar and the DCI Kajiado North be filed in Court. The report by the DCIO Kajiado North was filed in Court on 6/8/2021. It says that the Plaintiff's Title Deed is forgery. The report by the Land Registrar Kajiado North was filed in Court on 20/8/2021. It says that the Defendant is the rightful owner of the suit land.

(7) Counsels for the parties filed written submissions on 26/1/2022 in the case of the Plaintiff and 14/2/2022 for the Defendant's Counsel.

Counsel for the Plaintiff urges that there is a discrepancy on the date of the Green Card with two different dates of 18/8/1993 and 17/8/1993. Secondly, Counsel says that the Plaintiff's Green Card was cancelled without giving him a chance to give his explanation.

Third Counsel says that the Defendant did not surrender his title for scrutiny and finally that the Defendant filed three (3) different Green Cards which makes it difficult to determine the authentic one.

(8) On the other hand the Defendant's counsel has identified only one issue for determination namely "Who between the Plaintiff and the Defendant is the legitimate owner of the suit land?"

(9) I have carefully considered all the evidence adduced in this case by both sides including their witness statements, their documents, their oral evidence in Court and the submissions by their learned counsel.

I agree with the Defendant's Counsel that the one issue identified above will determine the dispute.

I make the following findings.

Firstly, the burden is on the Plaintiff to prove his case on a balance of probabilities since he is the one who filed this suit.

Secondly, the relief in the main prayer is an equitable one as the Plaintiff seeks a permanent injunction. He must come to Court with clean hands.

(10) I find that it is the Defendant who is the legitimate owner of the suit land for the following reasons;

Firstly, the Land Registrar has spoken authoritatively and said that the genuine records are those of the Defendant. The Land Registrar is the authority as to who is the registered owner. The evidence of the Land Registrar is uncontroverted by any other credible evidence.

Secondly, the evidence from the DCI is also clear that the Plaintiffs Title Deed is a forgery. This conclusion was arrived at after a forensic analysis of the said document.

Thirdly, the Plaintiff does not have the mandatory documents that must support a Title Deed namely a consent of the Land Control Board authorizing the transfer and the transfer instrument duly executed by the transferor.

In contradistinction, the Defendant has all those mandatory instruments yet it is the Plaintiff, not him, who has the burden of proof.

For the above reasons, I find that the Plaintiff's suit has no merit at all and I dismiss it with costs to the Defendant.

**Dated signed and delivered virtually at Kajiado this 20<sup>th</sup> day of April, 2022.**

**M.N. GICHERU**

**JUDGE**