



REPUBLIC OF KENYA

High Court at Bungoma

Environmental & Land Case 47 of 2012

EVERLYNE ACHIENG OTIENO PLAINTIFF

VERSUS

WILDGRIDA AWINO MBANDA DEFENDANT

JUDGEMENT

The plaintiff filed this suit vide a plaint dated 7th august 2012. It seeks orders as per paragraph 21 of the plaint which reads;

“That the plaintiff’s claim against the defendant is therefore for an order for the removal of the unlawful and illegal caution lodged over in land parcel No. E. Bukusu/S. Kanduyi/2806 and a permanent injunction restraining the defendant by herself her authorized servants and/or agents or any person claiming through her from interfering with the plaintiffs land or in any way interfering with land parcel No. E. Bukusu/S. Kanduyi/2806.”

She also prayed for costs of the suit. It is the plaintiff’s case that she was given the suit parcel by Sulumena Achieng Opondo – deceased who is her grandmother. She was given the land in 1997 and transfer done during the lifetime of her grandmother in 1999. Her grandmother passed on in 2004. It is her case that she was born and brought up within the suit premises and helped her grandmother take care of the premises to the exclusion of the defendant who is her mother.

She avers further that she has had uninterrupted use and possession of the land together with her siblings for a period in excess of 12 years. She claims she has carried substantial development on the land.

She produced a copy of title deed and transfer documents to demonstrate she is the registered owner. According to her, her mother was given a plot in Siaya. Her brothers were to inherit their fathers land. That the defendant has never stopped her from collecting rent. On realization of a caution lodged by the defendant, she did a letter to the land registrar who informed her he could not remove the caution. The letter is produced as plaintiff exh. 6. This is what necessitated her in filing this suit to urge the court to remove the caution.

The defendant’s case is that the plaintiff transferred the title deed into her names fraudulently. She avers that she helped her mother develop this land while she was working with Kenya National Chamber of Commerce.

When she asked Evelyn for rent, the plaintiff replied that she used the money to do renovations on the plot. The plaintiff did not give the defendant any rent again according to the defendant that she used the

money to secure a loan which she used to purchase a parcel of land elsewhere. It is at this point she went to the lands office and on conducting a search she discovered the plaintiff had registered herself as owner.

She therefore placed a caution on it. She did not indicate when she used to collect rent and at what point the plaintiff started.

She subsequently reported the matter to Bungoma CID to investigate the manner in which the plaintiff acquired title into her names. There was no result from the C.I.D. investigations therefore she went to FIDA offices. The FIDA wrote a letter to the Land Registrar Bungoma who on receipt of this letter supplied the defendant with L.C.B minutes, green card and application for L.C.B consent forms on 17th September 2012.

She avers that some people came to the suit land and said they had bought the suit land. And immediately thereafter she was served with the court documents. The defendants evidence is that her mother did not know how to write yet the forms transferring land to the plaintiff bear a signature. Her further evidence is that she had a will written by the deceased, Sulumena Achieng Opondo where she only thumb printed. The will is produced as defence exh. 1. That the electricity bill is in her name. She therefore urged this court to order the plaintiff to deposit the rent in court as it is the rents which made her arrogant. She also prayed for the plaintiff's title to be cancelled; that she remains on the suit land and costs of this suit be awarded to her.

She called a witness, **Mr. Musa Bakari Mkumba** who was married to the deceased some time. It is his evidence that he is the one who brought up the defendant and paid her school fees. That he also took care of the plaintiff. He later moved from Bungoma to Busia. As per his evidence, the suit plot was bought between him and his wife – deceased. They gave the land to Wilfrida – the defendant. He further confirmed the defendant's evidence that the deceased did not know how to write.

This court finds that it is not disputed that the suit property initially belonged to Sulumena Achieng Opondo – deceased. It is also not in dispute that both plaintiff and defendant lived on this plot. The plaintiff admitted that defendant currently lives on this plot and she does not intend to evict her.

This court is asked to order the removal of the caution lodged by the defendant. The defendant is contesting this removal on the basis that the plaintiff acquired the title fraudulently. The question the court seeks to determine is whether the allegation of fraud has been proved. The defendant's allegation on fraud from the evidence adduced before this court was based on the fact that the deceased did not know how to write and yet allegedly signed forms of transfer by writing on the transfer forms in favour of the plaintiff.

In the cases of Mulewa Mulinge VS. Philes Mutisi Musyimi (high court civil suit NO. 181 of 1998 e KLR at Machakos, Justice Mwera (as he then was) held that the defendant alleged fraud but did not prove any and proceeded to dismiss the defendants counter – claim. According to the plaintiff's claim, In it, the plaintiff prayed that the caution lodged be removed as the suit parcel in question belonged to her having been given by her mother – in law. The defendant on her part laid claim to the suit parcel urging that the plaintiff had fraudulently registered herself as the owner of the suit land parcel in place of their mother – in – law. The defendant refused to move away from the disputed land and also to remove the caution. The defendant in that suit had an alternative land.

In the present suit, it is not disputed that the defendant had also an alternative land in Siaya. It is her evidence that she sold the land to offset a hospital bill she incurred after being hospitalized. She did not disclose to this court the details of this land or how much she sold it for; or the outstanding bill that was being settled.

The plaintiff in the present suit got title in 1999. It is over 10 years and the defendant had not realized this position. If it were true that the plaintiff got herself registered fraudulently, she ought to have discovered this at least soon after the passing on of her mother in 2004. If she had a will which she produced before this court then she ought to have filed letters of administration in which case the court could then

determine order of rank of priority in benefiting from the land. Lack of money cannot be an excuse since the property is developed and attracts rental income which she could have used to file the case in court.

Her story of not knowing when the transfer was effected into the plaintiff's name is therefore unbelievable.

The plaintiff has stated in evidence under oath and in the submissions filed on her behalf by her advocates on record that she has no intentions of evicting the defendant from the suit plot. In her submissions she states that this was a gift given to her to pass on to her children to sustain the legacy of the late Sulumena Achieng Opondo and is not interested in selling the plot. The defendant's interest is thus catered for even if the caution lodged is removed.

The defendant filed a counter-claim and at paragraph 13 she pleads that the plaintiff has frustrated the instrument executed on 26th November 1984 between her and Sulumena Achieng Opondo – deceased.

She pleaded further particulars of fraud. The instrument referred to is a will. It is not within this court's jurisdiction to implement the provisions of a will or even question its authenticity. This is a matter the defendant ought to take up in a succession cause and this court steers clear on determination of the issue. On the issue of particulars of fraud alluded to, there was no report of investigation presented to this court as documentary proof of fraud. The defendant is still at liberty to pursue the matter with criminal investigation department (CID) and should she receive such document, she will be at liberty to file for review of judgment on the basis of new issues. In the absence of such proof, this court cannot hold otherwise. In conclusion, her counter-claim fails.

The upshot of this judgment is that the plaintiffs claim succeeds. The caution placed on land title No. E. Bukusu/S. Kanduyi/2806 be removed forthwith and a permanent injunction be and is hereby issued restraining the defendant by herself, her agents or any persons claiming through her from interfering with the plaintiffs use of the suit land. If the defendant has any assault claims as was in her evidence in court, again she is at liberty to pursue the same with the police, since the plaintiff has not demanded costs given her relationship with the defendant, I make an order that each party shall bear their own costs.

JUDGMENT DATED, SIGNED, READ and DELIVERED in open court this 11th day of March 2013.

A.OMOLLO
JUDGE.