



No. 170

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ENVIRONMENT AND LAND CASE NO. 231(B) OF 1995 (OS)

GODFREY OMONDI OTIENO PLAINTIFF

VERSUS

MARGARET ACHOLA LUKAS OTIENO.....DEFENDANT

RISPA ATIENO OJWANG' THIRD PARTY

JUDGMENT

1. The Plaintiff was at all material times the registered proprietor of all that parcel of land known as LR. No. Kamagambo/ Kabuoro/ 843(hereinafter known as “**the suit property**”). The Plaintiff filed this suit against the defendant on 4th July, 1995 seeking; a permanent injunction to restrain the defendant from trespassing upon the suit property, an order of eviction and general damages. The Plaintiff’s suit was brought on the grounds that, on or about the year 1990, the defendant without the Plaintiff’s consent or permission forcefully entered the suit property and commenced cultivation thereon.
2. The defendant filed a defence and counter-claim on 8th May, 1998. The defendant contended that the Plaintiff had acquired the suit property fraudulently and denied trespassing on the suit property. The defendant contended that this suit is bad in law as she had not taken out letters of administration in respect of the estate of her husband, one, **Michael Odero Otieno (deceased)** as such, and she had no capacity to be sued. The defendant contended further that if any act of trespass was committed as alleged by the Plaintiff then such trespass was committed by her said deceased husband who had been sued by the Plaintiff earlier in a case which the Plaintiff abandoned after his death.
3. In her counter-claim, the defendant contended that the suit property belonged to her said deceased husband and that the Plaintiff had obtained title thereto through fraud. The defendant counter-claimed against the Plaintiff for; a declaration that the defendant is the lawful owner of the suit property, a permanent injunction to restrain the Plaintiff from transferring and/or interfering with the suit property and general damages. The Plaintiff filed a defence to counter-claim on 5th June, 1998. On 27th April, 2000, the defendant filed an application for interlocutory injunction to restrain the Plaintiff from transferring and/or selling the suit property pending the hearing and determination of this suit. The defendant’s application was allowed on 23rd June, 2000. On 8th February, 2002, the defendant moved the court once again through a chamber summons application dated 21st January, 2001 seeking leave of the court to amend her defence and counter-claim to join one, **Rispa Atieno Ojwang’** as a third party to this suit and to seek reliefs against the Plaintiff and the said **Rispa Atieno Ojwang’**(“**3rd party**”) jointly and severally.
4. The defendant’s application for leave to amend the defence and counter-claim was brought on the

- ground that the defendant had discovered that the Plaintiff had transferred the suit property to the said Rispa Atieno Ojwang' on 5th November, 1997 and as such it was necessary to join the said Rispa Atieno Ojwang' in the suit so that orders may be sought against her as the current registered proprietor of the suit property. The defendant's application dated 21st January, 2001 come up for hearing on 28th May, 2002 when the same was adjourned to 8th July, 2002.
5. On 8th July, 2002, the said application was stood over generally and the same was not listed again for hearing. Without prosecuting the said application dated 21st January, 2001 in which she had sought the joinder of Rispa Atieno Ajwang' as a third party to this suit, the defendant filed yet another application dated 14th April, 2003. This application sought an order of inhibition to inhibit any dealing with the suit property pending the hearing and determination of this suit. The application was brought on the ground that the third party who had not even been joined in the suit had intended to charge the suit property to a bank to secure a loan with the sole purpose of defeating any judgment that may be made in favour of the defendant in this suit.
 6. This application was allowed by Wambilyangah J. on 28th July, 2003. On 17th August, 2004, the defendant brought another application of the same date this time round seeking an order to dismiss this suit for want of prosecution which application was withdrawn by the defendant on 24th November, 2004. On 19th February, 2007, the defendant filed yet another application seeking the dismissal of this suit for want of prosecution. The defendant's application was allowed by Gacheche J. on 25th June, 2007. The Plaintiff's suit was dismissed with costs to the defendant. I have noted from the record that the said application was listed for hearing for the second time on 22nd March, 2011 when the same was again allowed as prayed by Makhandia J. (as he then was).
 7. The defendant thereafter listed her counter-claim for hearing on 8th May, 2013 when the same was heard before me. Although served, the Plaintiff's advocates did not appear in court. After satisfying myself as to the mode of service, I allowed the defendant to proceed with the hearing of her counter-claim the absence of the Plaintiff notwithstanding. The defendant gave evidence and did not call any witness. The defendant testified that; she is the wife of Lucas Otieno Odero and that she was married in 1958. Her husband owned land parcel no. KamagamboKabuoro/57(hereinafter referred to as "**Plot No. 57**") on which plot she is staying to date. Her husband sold the upper portion of Plot No. 57 to one, Augustus Juma Atieno. This sale was in the year 1980. Her husband gave the said Augustus Juma the title deed for Plot No. 57. After Plot No. 57 was sub-divided, Augustus Juma was given LR. No. Kamagambo/Kabuoro/1139(Plot No. 1139) while her family remained with LR. No. Kamagambo/Kabuoro/1138(Plot No. 1138).
 8. Apart from the Plaintiff's family and the said Augustus Juma, there was no one else on what used to be Plot No. 57. The defendant stayed peacefully with the said Augustus Juma on what was formerly Plot No. 57 until 1995 when she was sued by the plaintiff herein. It is at that time that she came to know that the plaintiff was also claiming a portion of their land namely, Plot No. 1138. The Plaintiff had claimed part of her (the defendant's) husband's land which he claimed to be LR No. Kamagambo/ Kabuoro/843(the suit property). She does not know who gave the Plaintiff the suit property. The defendant's husband died in 1982. Apart from Augustus Juma, the defendant's husband did not tell her that he had sold land to anyone else. When her husband died, there was no one else occupying what was formerly Plot No. 57 apart from the defendant and the said Augustus Juma. It is after this suit was filed that she discovered that a portion of their land that had remained after they gave Augustus Juma a portion of Plot No. 57 was unlawfully curved out and given to the plaintiff. She does not know how the plaintiff got a portion of the former parcel of land Known as Plot No. 57.
 9. The Plaintiff has not been to the land which he is claiming and he is not related to the defendant. The Plaintiff is from Sakwa and he does not belong to the defendant's clan. The Plaintiff did not show the defendant any agreement that was made between the Plaintiff and the defendant's late husband over the suit property.
 10. When the plaintiff filed this suit, the defendant did a search which revealed that the plaintiff was the registered owner of the suit property and that the same was registered in the name of the Plaintiff in 1972. The defendant produced the Mutation Form through which Plot No. 57 was sub-divided to Plot No. 1138 and Plot No. 1139 as DExh. 1 and a copy of the register for the suit

- property as DExh. 2. The defendant testified that when her husband sold a portion of Plot No. 57 to Augustus Juma in 1980, he went to the Land Control Board and obtained consent to subdivide the said plot. The defendant produced a copy of the said consent as DExh. 3. The defendant did not get any information at the lands office as to how the Plaintiff acquired the suit property.
11. As far as the defendant is concerned, Plot No. 57 was only sub-divided and sold to Augustus Juma. There was no further subdivision or sale. The defendant produced as DExh. 4 a copy of the register for Plot No. 57 to show that the register was closed upon subdivision that gave rise to Plot Nos. 1138 and 1139. The defendant testified that the mutation Form (DExh.1) shows that the suit property is part of their land, namely Plot No. 1138.
 12. After the filing of this suit the defendant learnt that the suit property had been sold and transferred to the 3rd party. This transaction took place in 1997 while this suit was pending. The defendant did a search which showed that the 3rd party was registered as the proprietor of the suit property on 5th November, 1997. The defendant produced a copy of the search certificate as DExh. 5. The defendant stated that she does not know the 3rd party and that she had just seen her name in the certificate of official search aforesaid. The defendant urged the court to grant the orders sought in her counter-claim.
 13. I have considered the pleadings filed herein and the evidence tendered by the defendant in proof of her counter-claim. I have also considered the defendant's advocates written submissions. As I have mentioned earlier in this judgment, the defendant did not amend her defence and counter-claim to join the 3rd Party, Rispa Atieno Ojwang' who is the current registered owner of the suit property as a party to this suit. It follows therefore that, no judgment can be given by this court against the said Rispa Atieno Ojwang'. The defendant's counter-claim therefore remains and must be considered as between the defendant and the Plaintiff only. The issues that arise for determination in the defendant's counter-claim against the Plaintiff in my view are;

(i) **Whether the defendant is the lawful owner of the suit property, and,**

(ii) **Whether the defendant is entitled to the reliefs sought in the counter-claim.**

14. Issue No. I;

The defendant contended that the suit property arose from Plot No. 57 that was owned by her late husband Michael Odero Otieno (hereinafter referred to only as "**Odero**"). The defendant contended therefore that the suit property belonged to Odero. In paragraph 5 of her counter-claim, the defendant stated as follows "**Further and by way of counter-claim, the defendant states that land parcel Number Kamagambo/Kabworo/843 belonged to the late husband of the defendant.....**". If the defendant claims that the suit property belongs to her deceased husband Odero then she can only lay a claim to the same as legal representative of Odero and not otherwise. The court cannot declare the defendant as the lawful owner of the suit property unless she is the administrator of the estate of Odero whom she claims to be the owner of the suit property. In paragraph 7 of the defence, the defendant admitted that she has not obtained letters of administration in respect of the estate of Odero. The defendant has averred as follows in that paragraph "**The defendant will raise a preliminary objection at the hearing hereof that the Plaintiff is bad in law as it does not disclose any reasonable cause of action since the defendant has not obtained letters of administration in respect of the estate of the late Michael Odero Otieno and has no legal capacity to be sued(emphasis mine)**". The defendant having admitted that she has not obtained letters of administration with respect to the estate of Odero and that she cannot be sued over the suit property which according to her belongs to Odero, she equally has no capacity to sue over the same property. A party who cannot be sued over a particular matter cannot have capacity to sue over the same matter. Due to the foregoing, this court is unable to grant the relief sought in the defendant's counter-claim to the effect that she is the lawful owner of the suit property. The relief is inconsistent with the defendant's pleadings and the evidence tendered by the defendant. The evidence tendered by the defendant in court was to the effect that the suit property belongs to Odero. The defendant never produced any evidence to the effect that the suit property belongs to her. Even for Odero, it did not come out clearly how the suit property

could have been part of Plot No. 57 that was owned by Odero. According to DExh. 1, when Plot No. 57 was being sub-divided in 1980, the suit property was in existence. The suit property is shown in this exhibit as separate and distinct from Plot No. 57. Again, the measurement of Plot No. 57 is given in DExh. 1 and DExh. 4 as 2.6 hectares. The measurement of the suit property is also given in PExh. 2 and PExh. 5 as 2.6 hectares. In the circumstances, there is no possibility that the suit property which is 2.6 hectares would have been part of Plot No. 57 which had the same measurement or Plot No. 1138 which measured 2.2 hectares. I have also noted that Plot No. 57 and the suit property arose out of a first registration on 16th February, 1972. I am unable to see therefore how the suit property could have been carved out of Plot No. 57 or superimposed thereon as claimed by the defendant in her written submissions. The defendant did not place any evidence before the court in proof of her contention that the suit property was interposed on Plot No. 57. The defendant also submitted that the defendant has acquired the suit property through adverse possession. This submission has no basis in the defendant's pleadings and as such cannot be relied upon by the court as a basis for granting the declaration of ownership sought in the counter-claim by the defendant.

15. Issue No. II;

This issue is related to a large extent to the first issue that I have discussed above. PExh. 2 and PExh. 5 show that the suit property is registered in the name of the third party, Rispa Atieno Ojwang'. Rispa Atieno Ojwang' as I have stated above was never made a party to this suit. I don't even know how she got the title "3rd party" in these proceedings. Since, the 3rd party is the current registered owner of the suit property; I cannot declare the defendant as the lawful owner of the suit property in a suit in which the 3rd party was not made a party even if the defendant had proved that the suit property had been acquired by the Plaintiff fraudulently. A declaration sought by the defendant in her counter-claim that she is the lawful owner of the suit property cannot therefore be granted for the reasons that, the defendant has not been proved her ownership of the suit property and secondly, because of the failure of the defendant to join the 3rd party into the suit. This leaves the defendant's prayers for injunction and general damages for consideration. The prayer for injunction cannot issue because the defendant has failed to prove her title to the suit property and also because the Plaintiff against whom the order is sought is not the registered owner of the suit property and as such the injunction even if issued would not attach upon the Plaintiff. The defendant's prayer for general damages must also fail. This is because, the defendant has not established her interest on the suit property that would entitle her to general damages and furthermore, the defendant did not prove that she has suffered any damages general or special.

16. Conclusion;

The upshot of the foregoing is that the defendant's counter-claim must fail. The same is hereby struck out. Since the defendant was wrongly sued by the Plaintiff in the first place, each party shall bear its own costs of the counter-claim.

Delivered, dated and signed at KISII this 29th day of November 2013.

S. OKONG'O

JUDGE

In the presence of:

N/A for the Plaintiff

Mr. Soire h/b for Masese for the Defendant

N/A for 3rd party

Mobisa Court clerk.

S. OKONG'O

JUDGE