



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO.245 OF 1990

DISHON MUDEMBEI1ST PLAINTIFF
REUBEN S. MUDEMBEI2ND PLAINTIFF
JOHN ASAMBU SABATIA3RD PLAINTIFF

LEAH USIDE SABATIA4TH PLAINTIFF

V E R S U S

MUSANGI ASABWA SABATIA 1ST DEFENDANT
DISMAS WAFULA2ND DEFENDANT
JACK SOITA WAMBUSHA 3RD DEFENDANT
ZAKAYO KAKAI 4TH DEFENDANT
DAVID JANDI5TH DEFENDANT
CHRISTOPHER WABWIRE6TH DEFENDANT
ISAACK MWAKWE 7TH DEFENDANT
FESTUS KHASIANI 8TH DEFENDANT
ANDREW KESENWA9TH DEFENDANT
PETER VWAMU10TH DEFENDANT
ZADOCK SENERWA 11TH DEFENDANT
JOHN KADI12TH DEFENDANT
GEORGE COSMA KAGHALI 13TH DEFENDANT
NORAH SAMMY L. ANGANA 14TH DEFENDANT
KEPHA IMBUSI15TH DEFENDANT
HESBONE NGANYI16TH DEFENDANT
CHARLES SUDI 17TH DEFENDANT
HELLESN JAHENDA LIVAI18TH DEFENDANT

J U D G M E N T

1. This suit pits members of the Sabatia family against each other as well as other persons and the dispute relates to ownership of plot no.113, Soy Settlement Scheme. In their Plaintiff dated 23.7.1990, the Plaintiff's claim that Plot no.113 measured 46 acres and that sometime in 1966, one Musangi Asambwa

Sabatia, was allotted the land by the Settlement Fund Trustees and the allotment was allegedly done to ensure that he holds it in trust for himself and all family members then in occupation of the land.

2. That Sabatia, being unable to pay the monies due to the Settlement Fund Trustees, allowed the Plaintiffs to raise the money in the agreement that once the land was free, it would be transferred to them. Although they paid the requisite sum of money, the land was never transferred to them but that the 1st Defendant secretly entered into sale agreement with other persons with intent to deny the Plaintiffs their entitlement to the land. Some of the persons who purportedly purchased the land on that basis were the 2nd – 6th Defendants and it was alleged that the said persons entered the land and committed acts of waste thereon to the detriment of the Plaintiffs who were stopped from using the land and/or constructing any structures thereon. The specific prayers sought in the suit are;

“(a) A declaration that the first Defendant holds land parcel No.113 SOY Settlement Scheme on trust for the Defendants and all his children.

(b) An order of injunction restraining the Defendants from selling, alienating or in any other manner from parting with the suit premises or part thereof.

(c) An order compelling the Plaintiffs to transfer a portion of the suit premises to the Plaintiffs.

(d) An order of eviction of the second to sixth defendants from the suit premises.

(e) An order that the second to sixth defendants do remove any rubbish or materials, or huts they have placed on the suit land forthwith and that they do pay the Plaintiffs mesne profits till the date vacant possession is delivered.

(f) General damages

(g) Costs of the suit”

3. Subsequently to the filing of the Plaint, I note that the 6th – 18th Defendants were enjoined in the suit and the Plaint Amended on 25.5.2001 to indicate that fact. The reason for the joinder is important because it is the Plaintiffs’ claim upon the suit being filed that inspite of orders of injunction issued against the initial Defendants they proceeded to sell and transfer parts of the disputed land to the other Defendants.

4. The defendants’ answer to the claims made in the Plaint can be summarized thus;

5. In a Statement of Defence dated 6.2.1995, the 1st – 6th Defendants denied all the averments in the Plaint and specifically denied that the 1st Defendant held the land in trust for any member of his family and he denied that any of the Plaintiffs paid the monies due to the Settlement Fund Trustee and he never agreed to transfer any of his land to the Plaintiffs as alleged. Further that his registration being the first in time, it is incapable of being defeated by the Plaintiffs’ claim.

6. The other Defendants save the 1st Defendant, denied that they were trespassers on the suit land and denied committing any acts of waste therein and all denied forcefully denying the Plaintiffs access to the land as alleged.

7. In an Amended Defence dated 28.8.2001, the 1st Defendant made various amendments to the original joint Statement of Defence, including that *“the 2nd, 3rd, 5th and 6th Defendants took advantage of [his] advanced age, sickness and illiteracy to change ownership of the suit premises to themselves”*; that indeed as pleaded in Plaint, the Plaintiffs live on the land and have done so since allotment; that the Plaintiffs also paid the loan to the Settlement Fund Trustees and that they *“are entitled to the transfer and registration as claimed in the Plaint. Further that the 2nd – 18th Defendants unlawfully acquired ownership of the suit premises to the financial and material detriment of the Plaintiffs.”*

8. The 6th – 18th Defendants on their part filed a joint Statement of Defence on 6.7.2001 and in it they stated that the suit land was originally “owned” by one Misiani Asambwa (deceased) who was the father of the 1st, 9th and 10 Defendants and the grandfather of the 1st, 2nd and 3rd Plaintiffs and father-in-law of the 4th Plaintiff. That the said person then sub-divided the plot and created plots nos. Kakamega/Soy/337, 338, 339, 340 and 341 and transferred them as follows;

i) no. 338 to the 10th Defendant

ii) no. 339 to the 9th Defendant

iii) no. 340 to the 1st Defendant

iv) no.337 was sub-divided by the said Miasiani and titles nos. 800, 801, 802, 803, 1823 and 1824 were created there-from. He retained titles nos. 800, 803, 1823 and 1824 but transferred titles nos. 801 to the 18th Defendant and no. 802 to Reuben Bulimu who is not a party to the present proceedings.

9. Further, that the 10th Defendant sub-divided title no.338 and created titles nos. 792, 793, 794, 795, 1819, 1820, 1821 and 1822. He then transferred title no. 793 to the 15th Defendant, title no.794 to the 1st Defendant, title no. 795 to one Jack Soita Wambulushu who is not a party to the proceedings and title no.1820 to the 16th Defendant while title no.1821 was transferred to one Samuel Isaya Angana who is not a party to the proceedings.

10. All the above parties deny having any dealings with the 1st Defendant and deny that the Plaintiffs have even been in possession of the suit land and contend that the suit is frivolous, vexatious and an abuse of the court process.

11. I have read the evidence of PW1, Dishon Mubende Sabatia, PW2, Reuben Mudembei Sabatia, PW3, David Odhiambo Oloo (District Land Adjudication Settlement Officer, Lugari District) and the evidence of James Siguma Onari of the same office and I wish to note the evidence of the latter that;

(a) land parcel no.113 aforesaid was initially registered in the names of the Settlement Fund Trustees and on 3.8.1994, it was transferred to Musiani Asambwa and on the same day, the register was closed on sub-division to create parcels nos. 337, 338, 339, 340 and 341. He further stated that;

(b) parcel no. 337 was sub-divided on 12.8.1999 and parcels nos. 800, 801, 802, 803, 1823 and 1824 were created on 12.8.1999

(c) parcel no.338 was transferred to Peter Wemu Lusiani on 8.2.1995. He sub-divided it on 10.12.1997 and parcels nos. 792, 793, 794 and 795 were created.

(d) parcel no.339 was transferred to Andrew Musiani Kesenwe on 25.8.1994. A caution was registered on 19.5.1995 by one Mwangire who claimed a purchaser's interest and on the same day another caution was registered in favour of;

(e) Dishon Mudembei who claimed a licensee's interest.

(f) plot no.340 was retained in the names of Musiani Asabwa.

(g) plot no. 341 was transferred to Zakayo Kakai on 3.8.1994.

12. In cross-examination he said that he was unaware of any court order stopping any dealings in the land.

13. Returning to the evidence of PW3, when he was recalled, he stated that the allotment of the land was done on 24.3.1966 but when shown a Exh.2 he stated that it was different in that the allottee was Sabatia Musambwa and not Mushangi Asambwa or Musiani Asambwa who ultimately obtained title. He could not explain how Musiani Asambwa obtained registration in 1994 as per Exh.10 – extract of register.

14. I have also read the evidence of DW1, Christopher Wawire Wanjala, and DW2, Isaac Mwakwe, who both alleged that they purchased parts of land parcel no.339 and both denied that the Plaintiffs either occupy the land or are in any way entitled to it.

15. I have also read the evidence of DW3, Charles Mbalani Sudi who said that he purchased part of title no. 338 from one Peter Bwamu Misiani but he never obtained title neither did DW1 nor DW2.

16. **DW4, Zakayo Muhanyi Kakai** for his part purchased part of the suit land and obtained title on 3.8.1994 and the seller was Musiani Asambwa.

17. **DW5, Festo Khasiani** said that he purchased part of title no. 339 from Andrew Khasiani but he never obtained title to it.

18. **DW6, John Kati Musambi** who claimed to have purchased part of title no.339 from Peter Viamu,

the 10th Defendant in 1994 but he never obtained title thereto.

19. DW7, Hezron Imbwaga Nanyi allegedly purchased part of title no. 339 from Peter Viamu aforesaid but he was unable to obtain title as a caution had been placed on the same.

20. I have also read the submissions for the parties and would like to address one issue on the outset;

21. On 16.7.1992, an order of injunction was issued by Osiemo J. The orders were predicated on a Chamber Summons dated 13.9.1990 and the orders were as follows;

“1. That the defendants be restrained by way of an injunction from interfering with the plaintiff’s use, occupation and enjoyment of the property known as pending the hearing and determination of the suit.

2. That the defendants/respondents by themselves their servants or agents be restrained by an order of injunction from harassing or in any other manner preventing the plaintiffs in their use, enjoyment and occupation of the suit premises pending the hearing and determination of the suit.

That the suit herein be heard on a priority basis and as a matter of urgency.

That costs of this application be provided for.”

22. Those orders were clear and need no repeating. The 1st Plaintiff in his submissions has however made the point that *“the defendant defied the said orders and changed ownership of the suit land from the 1st defendant Mr. Sabatia Musyani Asambwa to Misiani Asambwa ... as a gift.”* Sadly, I cannot delve into that question on the basis of the orders above because although it is generally wrong for a party to transfer contested land in the pendency of a suit, there were no specific orders of injunction directed at the 1st Defendant in that regard but I will revisit his conduct in doing, so later in the judgment.

23. What is the issue to be addressed substantively in this suit? It is whether the 1st Defendant obtained the original land parcel number 113 Soy Settlement Scheme to hold in trust for the Plaintiffs and whether the Plaintiffs paid off the monies due to the original owner, the Settlement Fund Trustees, with the understanding that they would get their respective shares of the land upon transfer to the 1st Defendant.

24. I have seen Exh.2 – a letter dated 26.2.1991 by the District Land Adjudication Officer, Kakamega addressed to the Deputy Registrar of this court. In it, he confirmed that plot no.113 was allocated to *“Sabatia Musyani Asambwa”* on 24.3.1966. The said evidence was confirmed in court by the Plaintiff.

25. I have also seen receipts for loan repayments to the Settlement Fund Trustees dated 20.3.1989, 10.4.1989, 25.4.1988, 4.5.1987, 6.2.1981, and 29.5.1989 (Exh 5(a)–f) respectively). The payments were made by;

i) John Asambwa Sabatia

ii) John Sabatia Asambwa

iii) Mushingi Asambwa

iv) Mushiangi Asabwa

(It is not in doubt that (i) and (ii) refer to the same person and (iii) and (iv) refer to the same person).

26. I have also seen a consent to transfer dated 17.11.1993 where Sabatia Musyani Asmbwa transferred the whole parcel of land to Msiani Asambwa as a gift absolutely.

27. I have noted the contents of P.Exh.1, a letter dated 4.1.1981 by Musiani Sabatia Asambwa where he allowed John Sabatia Asambwa, his son, to pay the loan outstanding on account of the suit land and it was his wish that he does so “*kwa niaba ya jamii yangu*” translated as “*on behalf of my family.*” All the plaintiffs signed that document which was addressed to the Land and Settlement Officer, Lugari Division.

28. If all the above facts are taken together and read with the Amended Statement of Defence filed by the 1st Defendant, there is little to say but to find that since the 1st Defendant expressly admitted the claim in the Amended Defence and the Plaintiffs went ahead to prove their claim inspite of the admission, there is no defence to the claims set out in the Plaint and it must be upheld.

29. However, having so said, I must say this regarding the defences of the 6th – 18th Defendants; they said that they obtained the land from one, Misiani Asambwa (deceased), who was the father of the 1st Defendant. That may well be so but I have shown above that the original owner, Sabatia, intended and accepted the fact that the transfer to Msiani was only done to facilitate transfer to the larger Sabatia family and any actions by Msiani should have been seen with that fact in mind. There is no evidence in any event, that Sabatia ever transferred any land to any of the Defendants directly, and their claim to the contrary, is neither borne by the evidence of the Land Adjudication Officer nor the Land Registrar. No evidence was tendered by anyone who received the land directly from Sabatia, as alleged, and all the defence witnesses were alleged purchasers from persons whose titles are in question and it is instructive that save for one, none of the defence witnesses have title to the land parcels that they occupy.

30. I should now return to the issue raised earlier; clearly all the alleged purchasers were brought into the land after 1990 when this suit was filed. It was an act in bad faith for any of the Defendants to sell and/or purchase land which they knew, or ought to have known was the subject of contest in this court. It is instructive that some of the Defendants were committed to civil jail on 2.6.1994 for disobeying the orders issued by Osiemo J. and referred to earlier. Such a party or parties who abuse the court process merely because they want to advance their interests are acting in bad faith and should be so told. In any event, having failed to file a counter-claim to the Plaintiffs’ claim and there being no evidence in their favour, their defences are a sham and cannot be upheld.

31. In the event, the prayers in the Plaint as set out above are allowed in their entirety. All the Defendants save the 1st Defendant shall pay the costs of the suit, jointly and severally.

32. Orders accordingly

Delivered, dated and signed at Kakamega this 22nd day of February, 2011

ISAAC LENAOLA

J U D G E