



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
HCCC NO. 22 OF 2010

SYLIVESTER OKUMU PLAINTIFF

VERSUS

ZACHARY OMUKALA 1ST DEFENDANT
JONAYO OJIAMBO WANDERA 2ND DEFENDANT

JUDGEMENT

The Plaintiff, by a plaint dated 16.11.2007, sought for:-

- a) A declaration that the 1st and 2nd Defendants, their servants and agents are trespassers on Plaintiff's land known as Samia/Budongo/1744.
- b) A declaration that the 2nd Defendant, his servants and agents have no capacity to deal in and/or transfer the Plaintiff's parcel No. Samia/Budongo/1744.
- c) And that the defendants, their families, servants and agents, be evicted from the parcel of land known as Samia/Budongo/1743.
- d) An order restraining the defendants, their families' servants and agents from re-entering into the land parcel No. Samia/Budongo/1743.
- e) Costs.

In his pleadings and evidence, the plaintiff asserted that the High Court at Nairobi in HCC Case No. 6695 of 1992, made a finding that the plaintiff was the owner of and had acquired all interests in L.R. No Samia/Budongo/244, among other parcels of land so declared in the said case. That despite the said court's findings, the 1st Defendant went a head and irregularly, unlawfully and fraudulently subdivided the said piece of land into L.R. No. Samia/Budongo/1743 and 1744. That he then transferred and registered L.R.No. 1744 in the name of 1st Defendant Zachary Omukala before charging it to Barclays Bank Ltd for a loan of Kshs. 65,000/=. It is the Plaintiff's further evidence that the 1st Defendant continues to unlawfully occupy the said piece of land.

As to the parcel known as L.R. No. Samia/Budongo/1743, the Plaintiff testified that on making an official search, during the pendency of this suit he discovered that the 2nd defendant had subdivided it into two new parcels L.R. No. Samia/Budongo/1885 and 1886. He further noticed that both parcels are in the plaintiff's name but No. 1885 is occupied by the 2nd Defendant while No. 1886 was sold to one Apuoyo

Juma Ombere who is in occupation. The plaintiff, in support of his above evidence produced titles to parcels No. 1885 and 1886 as exhibits Nos 3 and 4. He also produced proceedings in the Nairobi HCCC No. 6695 of 1992 as exhibit 1 and the judgement as exhibit 2.

I have carefully perused the evidence produced by the Plaintiff which evidenced was not challenged or contradicted by the defendants since the latter did not file any defences nor appear in court to defend the suit. In my view, there is adequate evidence that the Plaintiff obtained a judgment in his favour in Nairobi HCCC No. 6695 of 1992. In that suit to the extent I can understand it from his pleadings and evidence and as based on the proceedings and judgement produced in this case as exhibit No. 1 and 2, the court found among others, that L.R. No. Samia/Budongo/244 belonged to the Plaintiff through a trust although registered in the name of the 2nd Defendant.

In this case before me the plaintiff produced adequate evidence to the effect that L.R.No. Samia/Budongo/244 was much later after the judgement, illegally registered in the name of the 2nd Defendant into two subdivisions i.e. L.R. No. Samia/Budongo/1743 and 1744 with parcel No. 1744 being registered in the name of the 2nd Defendant, Zachary Obukala.

There is evidence also that parcel No. 1743 which was in the physical possession of Jonayo Ojiambo Wandera, the 2nd Defendant, was subdivided further into parcels No. 1885 and 1886 with parcel No. 1885 being occupied by the said Jonayo Ojiambo Wandera, while parcel No. 1886 was sold to Apuoyo Juma Ombere. However both titles remained in the names of the Plaintiff and he produced them as exhibits 3 and 4.

Upon the above evidence I have come to the finding that the Defendants clearly did not bother, and actually disregarded the judgement in Nairobi HCCC No. 6695 of 1992. The court's judgement therein having found that the parcel of land known as Samia/Budongo/244 blonged to the Plaintiff, the judgement was a declaration against the whole world to the said end.

That is to say, on the face of judgement, the defendants had no right or authority to do anything to alienate the rights and interest in the title. That also applies to the subdivisions, L.R No. 1743 and 1744 that came out of L.R NO. 1743 i.e Nos. 1885 and 1886.

It is this court's findings accordingly that since titles to L.R. No. Samia/Budongo/1885 and 1886 are both in names of the Plaintiff, all that needs to be done is to return physical possession to the Plaintiff from both Defendants or the defendant's agents or those who received physical possession from them.

As to L.R No. Samia/Budongo/1744, the property is presently mortgaged to Barclays Bank of Kenya Ltd by the 2nd Defendant against the interest of the Plaintiff as established by the judgement of the High Court in Nairobi HCCC No. 6695 of 1992. The mortgage in my findings was taken fraudulently, clearly without the knowledge and/or consent of the Plaintiff. Since however the original title No. Budongo/1744 must have been in the name of the 2nd Defendant it is unlikely that the Bank had full information that the land had been declared by court to belong to the Plaintiff. It seems to me therefore that to redem the title, the Plaintiff will need to persuade the 2nd defendant to pay in full payment to the bank and look to the defendant for recoupment. Otherwise the plaintiff will have to sue the 2nd defendant for the full value of the said piece of land.

Unfortunately he failed to do so in this proceedings and will have to do so independently if he so wishes.

The plaintiff in his evidence claimed that the Defendants have all along utilized the pieces of land to produce to themselves benefits and/or profits. He therefore belatedly sought in his court evidence to be awarded general damages.

I have considered such claim for general damages but find that it cannot succeed in view of the fact that it was not pleaded at all and was clearly a second thought during plaintiff's court testimony.

The court's findings therefore are summarized as follows:-

ORDERS:

1. The 1st and 2nd Defendants, their servants and agents are hereby declared to be trespassers on L.R No. Samia/Budongo/1743.
2. The 2nd Defendant, his servants and agents have no legal capacity to deal in or transfer any third party.
3. The 1st and 2nd Defendants, or their servants and/or including Jonayo Ojiambo and Apuoyo Juma Ombere or those claiming through them, are hereby declared to be trespassers on L.R. No. Samia/Budongo/1885 and 1886 (original No. 1743).
4. There shall issue an eviction from the above pieces of land of the 1st and 2nd defendants together with their agents and servants, including Jonayo Ojiambo Opouyo Juma Ombere, from L.R No. Samia/Budongo/1885 and 1886 (original 1973), at the expiry of 6 months from the date hereof.
5. Costs are to the Plaintiff as against both defendants jointly and severally.

Dated and delivered at Busia this 25th Day of August 2011.

D.A. ONYANCHA
JUDGE.