



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 120 of 2004

1. JEMIMAH BITUTU GAI

2. ELIJAH NYAGAMI GAI..... PLAINTIFFS/APPLICANTS

VERSUS

1. GECHURE NYABANDO

2. ONGUBO OSINDI

3. CHRISTOPHER MAUBI OKINDO NYABANDO.....DEFENDANTS/RESPONDENTS

RULING

The Plaintiffs/Applicants **Jemimah Bitutu Gai** and **Elijah Nyagami Gai** are the registered owners of land parcel number Central Kitutu/Mwamanwa/558 which measures 21 acres. On 29/7/04 they filed this suit against the Defendants/Respondents **Gechure Nyabando, Ongubo Osindi** and **Christopher Maubi Okindo Nyabando** claiming that sometimes in July 2004 the Respondents had by their agents and/or servants entered into the portion of land without consent or authority and had begun to cultivate, cut down trees and dispossess them of the same. They prayed that the Respondents be evicted and that a permanent injunction does issue against them.

1st and 3rd Respondents did not enter Appearance or file Defence. 2nd Respondent filed a Defence in which he denied trespassing on the disputed land beginning July 2004, or at all. He stated this was ancestral land he has lived on and tilled since birth. He stated he inherited it from his father who inherited it from his father. After land adjudication, he stated, the land was registered as parcel No. Central Kitutu/Mwamanwa/557. He was shocked when served with Summons to Enter Appearance in this case to find the land was being referred to as No. Central Kitutu/Mwamanwa/558. He claimed the Applicants land unlawfully and fraudulently caused his land 557 to be included in 558 and thereby deprived him of the same.

He particularized the fraud as follows:-

- i) causing the land in parcel 557 to be included into 558;
- ii) causing parcel 557 to disappear from the records;
- iii) taking advantage of 2nd Respondent's illiteracy and poverty to cause the records to be changed;
- iv) creating for themselves a portion of land measuring 21 acres which is abnormally huge in the locality where it is situated, while knowing part of what is supposed to be parcel 557 belonged to the 2nd Respondent;
- v) purporting that the whole land in what is now 558 belonged to them while they know part of it is what is supposed to be 557 which has always been in the occupation of said Respondent; and

vi) doing all the aforementioned acts without the knowledge and/or consent of the 2nd Respondent.

The 2nd Respondent sought that the suit by the Respondents be dismissed with costs.

The Applicants filed a Reply to Defence and denied the Respondent's claims.

The Applicants have filed an application under **0.XXXV rule 1(b)** and **2** of the **Civil Procedure Rules, O.V1 rules 13(1) (b), (c) and (d)** of the **Civil Procedure Rules, sections 3A and 63(e)** of the **Civil Procedure Act, sections 27, 28 and 143(1)** of the **Registered Land Act, Cap, 300** of the **Laws of Kenya** and **sections 4 and 7** of the **Limitation of Actions of Act Cap 22** of the **Laws of Kenya** for summary judgment and, in the alternative, that the Statement of Defence be struck out and judgment be entered in terms of the Plaintiff. Grounds on which the application is based were stated. The 2nd Applicant swore a Supporting Affidavit.

The 2nd Respondent filed a Replying Affidavit and opposed the application.

Applicants were represented by **Mr. Oguttu** and the 2nd Respondent by **M/S. Asati**. I carefully followed their arguments during the hearing of the application.

Parcel 558 is registered land in the names of Applicants. The title of a registered owner under **sections 27, 28 and 30** of the **Registered Land Act** is free from all interests and claims except all those shown in the register together with such overriding interests that exist and ones not required to be noted in the register (**Kanyi v. Muthiora [1984 KLR 712]**). If the 2nd Respondent is saying this is his ancestral land, it is notable that rights under customary law are not among the overriding interests under **section 30** of the **Registered Land Act**.

Regarding the alleged fraud, it was pleaded that it was perpetrated by Applicants in a conspiracy with land officials. There was no request to bring those officials, and indeed the Honourable The Attorney General, into the suit. In matters of interference with records at the land registry, the Applicants would not act alone. However, hearing has not begun and there is still time for the 2nd Respondent to seek joinder of parties.

Mr. Oguttu relied on the decision in **Javed Iqbal Abdul Rahman and another v. Bernard Alfred Wekesa Sambu and Another, Civil Appeal No.11 of 2001 at Nairobi** to say that the 2nd Respondent should not rely on the tort of fraud in his Defence because it is statutorily time-barred. The 2nd Respondent alleged he became aware of the fraud when he was served with Summons to Enter Appearance. Time would begin to run from then, according to him. **M/S Asati** submitted that whether or not the 2nd Respondent can rely on fraud as a defence, consequently, becomes a triable issue.

Mr. Oguttu relied on **section 143** of the **Registered Land Act** to argue that this being a first registration it is immune from any attack, even if it was obtained by fraud or mistake. The 2nd Respondent, on the other hand, is saying that his land was initially registered as 557. He does not know at what point it became 558 and went to the Applicants. **M/S. Asati's** position, therefore, is that whether or not this is a first registration is a triable issue.

The law is that unless a matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case determined by way of trial in which evidence is tendered and the parties subjected to cross examination (**Industrial and Commercial Development Corporation v. Daber Enterprises Ltd [2000] 1 EA 75 (CAK)**).

I have considered the issues that were raised in the pleadings by the Applicants and 2nd Respondent and the submissions made thereon by counsel. I determine that the Defence by 2nd Respondent raises serious issues that should go to trial. The result is that this application shall stand dismissed with costs.

Dated, signed and delivered at Kisii this 22nd Day of June 2009

A. O. MUCHELULE

JUDGE

22/6/2009

Before A. O. Muchelule Judge

Mongare cc.

Mrs. Asati for 2nd Defendant

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE