



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

Civil Suit 63 of 2007

ESTHER MUYUKA MUTONYI =====PLAINTIFF

V E R S U S

GABRIEL NJUGUNA NJOROGE ===== 1ST DEFENDANT

ANTHONY WASWA T/S SANO SURVEYORS ===== 2ND DEFENDANT

DISTRICT LAND REGISTRAR, TRANS-NZOIA===== 3RD DEFENDANT

CHIEF LAND REGISTRAR ===== 4TH DEFENDANT

ATTORNEY-GENERAL ===== 5TH DEFENDANT

R U L I N G

The plaintiff seeks an interlocutory injunction to restrain the 1st respondent from disturbing his quiet enjoyment of the suit property,

L.R TRANS-NZOIA/CHERANGANY/834 and L.R. NO. TRANS-NZOIA/CHERANGANY/953.

The plaintiff also asks the court to restrain the 1st defendant from trespassing onto the suit property; or from selling; entering into an agreement for the sale thereof; interfering with the plaintiff's possession; wasting; dealing in any manner; alienating, charging, mortgaging, or disposing, of the said property.

The plaintiff's claim is founded upon the contention that she was the registered proprietor of the suit property. Notwithstanding that fact, the plaintiff faults the defendants for obtaining another document of title, for the suit land, even though the original document of title had not been cancelled, in accordance with the law.

Given the fact that there now existed another document of title for the suit property, the plaintiff was apprehensive that the 1st defendant could deal with the said title in a manner that would be prejudicial to the plaintiff's proprietary rights.

It is common ground that the plaintiff did execute two agreements of sale, with a view to selling to the 1st defendant, a total of 12.5 acres of land. The said portions of land were to be carved out of the suit property.

It is also common ground that the 1st defendant had paid Kshs.1, 250,000/=, which was the agreed purchase price for the 12.5 acres.

Having received payment in full, the plaintiff instructed the 2nd defendant to carry out a survey, which would result in the excision of the portion sold to the 1st defendant.

It was the plaintiff's case that the 2nd defendant did not carry out his said mandate. Instead, he is said to have colluded with the 1st defendant together with the plaintiff's step sons, to allocate to the 1st defendant a portion of land which was not part of that which the parties to the sale agreement had agreed upon.

When the plaintiff instructed the 2nd defendant to prepare a mutation form which would reflect the agreement between the plaintiff and the 1st defendant, the plaintiff found out that the 2nd defendant opted to take the 1st defendant to the Land Control Board, for purposes of securing consent for the sub-division of the suit property and sale of the portion which the plaintiff had not agreed to.

When the application was being canvassed before me, Mr. Saenyi, Advocate for the plaintiff, said that his client "**went ahead to consent to the land being sub-divided and sold to the 1st defendant.**"

However, the plaintiff insists that her consent was limited to the sale of the portion which she had agreed to sell to the 1st defendant.

According to the plaintiff, the said portion could be discerned from the agreement for sale, which stipulated that the 1st defendant had purchased the undeveloped portion of land, which had no encumbrances, and which was also not subject to the rights of third parties.

It was the plaintiff's case that when she consented to the sub-division and transfer of land to the 1st defendant, she believed that it was in relation to the portion earlier agreed upon between her and the 1st defendant.

As it turned out, the mutation forms which the plaintiff had objected to, were the ones which were used, resulting in land being given to not only the 1st defendant, but also to the plaintiff's step sons. Now, because the plaintiff insists that she never signed any mutation forms, the signature appearing on the said forms were forgeries.

Because some sub-titles had been issued on the strength of the alleged forged forms, and also because the original document of title had not been recalled from the plaintiff, for cancellation thereof, the plaintiff submitted that there had been a violation of section 33(1) of the Registered Land Act.

Ultimately, however, the plaintiff reiterated that her main complaint was that the 1st defendant had been allocated a portion of land which was different from that which the plaintiff had agreed to sell to him. As a consequence of that development, the plaintiff says that the 1st defendant had taken possession of a portion of land which was developed. The plaintiff also complained that the 1st defendant had taken over a portion of land upon which the plaintiff's husband and some sons had been buried. Because it was against the traditions of her people, to sell burial sites, the plaintiff re-emphasized that she could not and did not sell to the 1st defendant, the portion which the said defendant was now laying claim to.

In answer to the application, the 1st defendant first pointed out that the plaintiff had cited two title numbers, thus making it difficult for anybody to know which of the said properties the application related

to. Those two parcels are numbered 834 and 953.

Of the said two parcels, the 1st respondent said that parcel No.834 had already been sub-divided into 24 parcels. Indeed, the 1st respondent's position was that parcel No.953 was only one of the 24 parcels which were created after the sub-division of parcel No.834.

On the other hand, the plaintiff said that parcel No.953 was nothing more than another title number for the same piece of land which bears the number 834.

If that were true, it would definitely be wrong to have two title documents, for the same piece of land.

At this juncture, I do remind myself that this ruling is on an interlocutory application. Therefore, I need to restrain myself from making conclusive remarks, which might be deemed to tie-up the hands of the trial court, when the case later comes up for trial. However, on a prima facie basis, I find that the two title documents do not appear to relate to exactly the same piece of land. I say so because whereas the title document for parcel No.834 is for 59.6 hectares, the title document for parcel No.953 is for only 5.06 hectares.

In the circumstances, it is more probable than not that parcel No.953 was but only one parcel, out of the 24 parcels which were created after the plaintiff had sub-divided parcel No.834.

It is also noted that whereas the plaintiff did concede having consented to the sub-division of parcel No.834, that concession, (which was made in her submissions), was at variance with her affidavit. In particular, it is to be noted at paragraph 7 of the plaintiff's affidavit which was sworn on 18/12/2006, that she said;

“THAT I have never appeared before the board and any consent obtained must have been through impersonation.”

In the light of those contradictory positions adopted by the plaintiff, this court is unable to ascertain what her case is. On the one hand she alleges that she did not appear before the Land Control Board, and that any consent obtained from the said Board was through impersonation. On the other hand, she says that she did appear before the Board, and that she consented to the sale of 12.5 acres to the 1st defendant; even though she then says that the 1st defendant thereafter took over a portion of land that was different from that which he had earlier accepted.

If the plaintiff is only concerned about the fact that the 1st defendant was now occupying a different portion of land different from that which the plaintiff had sold to him, that suggests that the plaintiff is not insisting that the transaction itself was null and void. Indeed, the plaintiff did conclude her submissions by saying;

“The issue is about the location of the plot which the plaintiff agreed to sell. The injunction would only relate to the 1st defendant, not others.”

If that be the plaintiff's case, this court holds the considered view that it would be imprudent to issue an order in respect of the whole parcel **L.R. NO.TRANS-NZOIA/CHERANGANY/834**, as such an order would affect not only the 1st defendant, but also all the other persons to whom the plaintiff had sold other sub-divisions.

Those other people, who purchased those other parcels which had been carved out of parcel No.834, are not parties to this suit. Therefore, it would be unfair to make orders which would impact on them, without having accorded them an opportunity to be heard.

This court also noted that parcel No.834 was already the subject matter of the dispute in the case of **ESTHER MUYUKA MUTONYI VS BENARD MANDILA & BENSON MANDILA, KITALE H.C.C.C**

NO.35/2003.

In a ruling delivered on 14/11/2006, the Hon. Karanja J. expressed herself as follows, in relation to the plaintiff herein;

“The applicant is said to have obtained consent to transfer part of the land to the Respondents herein.

She has even signed blank transfer forms following which Title Deeds have already been issued to the Respondents. Again, the applicant chose not to disclose this information to the court. That is why I am saying that she has come to court with extremely unclean hands and she should not seek equitable remedies from this court.”

If, as the learned judge held, the respondents in that case already hold title deeds for their respective portions, which were carved out of parcel No.834, that is yet more reason why this court should not issue an order which would impact on such portions, without hearing the affected persons.

It is to be noted that in the Plaint, the plaintiff has alleged that she did not consent to the transfer of parcel No.953 to the 1st defendant. She said that her signature had been forged, and that the consent purportedly obtained from the Land Control Board was illegal and a nullity.

Yet, in her further affidavit, sworn on 10/1/2007, the plaintiff stated as follows, at paragraph 16 thereof;

“THAT I would like to state and confirm here once more that I applied for consent of the Land Control Board and indeed consented for subdivision and transfer of the agreed portion of land to the 1st Defendant/Respondent and other people I had sold land to including some of family members, though my giving of consent was coincidental as on the material date I was not informed and only learned of the Board’s proceedings from the 2nd Defendant/Respondent Office.”

From that deposition, I can only conclude that the plaintiff appears to have given evidence that was wholly inconsistent with her pleadings.

In the result, I hold that the plaintiff has not established a prima facie case with a probability of success. Accordingly, she is not entitled to the interim reliefs sought.

Before concluding this ruling I feel obliged to express my concern about the fact that there are several different cases touching on the property that is the subject matter of this suit. The parties to those suits are different, in most instances, but all of them lay claim to the same property or parts thereof. Therefore, there is a real danger that the courts could end up giving orders which may be inconsistent, if the matters continued being handled separately.

In the circumstances, the parties to the various cases are invited to give serious consideration to the best way to address the issues raised in the various cases, without risking inconsistent orders.

Finally, the application herein is dismissed, with costs to the 1st defendant.

Dated and Delivered at Kitale, this 31st day of October, 2007.

FRED A. OCHIENG

JUDGE