



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 58 OF 2014

FRIDAH NELIMA NASIUMA.....PLAINTIFF

VERSUS

JACKSON W. WETOSI.....DEFENDANT

J U D G M E N T

This Judgment should serve as a reminder, if any is needed, that parties and their legal advisers must always draw proper pleadings. Such pleadings not only inform the other party of the case that he has to meet but most importantly, they enable the Court to know what precisely the parties want it to determine. If a pleading is imprecise, an otherwise deserving party may end up leaving the Court empty handed unless there is other evidence upon which a claim can be salvaged. It is worth reminding litigants of what the Court of Appeal stated in **GALAXY PAINTS COMPANY LTD .V. FALCON GUARDS LTD C.A CIVIL APPEAL No 219 of 1998 [200 eKLR]**: -

“It is trite law, and the provisions of O.XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial Court by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce Judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court’s determination.” Emphasis added

A Court may of course also base its decision on an unpleaded issue if during the trial, parties lead evidence on it and leave it to the Court to decide – **ODD JOBS .V. MUBIA 1970 EA 476**. Generally, however pleadings are the foundation upon which the Court will be guided in making a decision on the dispute before it because that is what the parties have placed before it for interrogation. As will be clear in the course of this Judgment, the plaintiff fell short of this cardinal requirement.

By her plaint dated 14th March 2014 and filed herein on 20th March 2014, **FRIDAH NELIMA NASIUMA** (the plaintiff herein) sought Judgment against **JACKSON W. WETOSI** (the defendant herein) in the following terms: -

(a) An order of injunction restraining the defendant, his servants, agents or anybody else acting through him permanently restraining them from encroaching, tiling, planting any crops or doing anything on the land parcel NO KIMILILI/KIBINGEI/1755 or any other resulting titles NO KIMILILI/KIMILILI/4581 pending the hearing and determination of BUNGOMA HIGH COURT ENVIRONMENT CASE No 11 of 2013.

(b) Costs of the suit.

(c) Interest at Court rates.

(d) Any orders as the Court deems fit and appropriate to grant.

The basis of the plaintiff’s claim is that at all material time, she has been in open possession of the land parcel **NO KIMILILI/KIBINGEI/1755** registered in the names of one **SIMON MUSOKHE WECHULI (WECHULI)**. That in the year 2013, the plaintiff filed against **WECHULI, BUNGOMA HIGH COURT ENVIRONMENT CASE No 11 of 2013** seeking orders that she has acquired by adverse possession the land parcel **NO KIMILILI/KIBINGEI/1755** having resided on the same for over 12 years. However, during the pendency of that case, **WECHULI** colluded with the defendant herein and secretly and fraudulently transferred the land parcel **NO KIMILILI/KIBINGEI/1755** to the defendant. Particulars of fraud against the defendant are pleaded in paragraph 5 of the plaint as follows: -

1. Colluding with WECHULI, now deceased, to have the land parcel NO KIMILILI/KIBINGEI/1755 transferred to him while knowing that there was a case pending in Court.

2. Forcibly and secretly having the land sub – divided without the knowledge of the plaintiff who was in occupation of the said land.

3. Mis – representing to the Lands Officer false and improper information about the land and without the consent from the Land Control Board.

4. Falsifying and invading the plaintiff's land parcel without any notice with intention to evict her from the land to defeat the existing Court case.

The plaintiff pleaded further that the defendant had without any colour of right and without notice or a Court order unlawfully invaded the plaintiff's land and ploughed the same with a view to planting crops to the exclusion of the plaintiff hence this suit.

Together with the plaint, the plaintiff filed her list of exhibits dated 14th March 2014, a further list of documents dated 8th August 2019, her two un – dated statements one filed on 20th March 2014 and the other on 20th August 2019 and the statement of her witness **MICHAEL WAMATUBA** also un – dated and filed on 20th August 2019.

The gist of her evidence as contained in her two un – dated statements is that in 1979, she purchased from **MICHAEL WAMATUBA (PW 2)** 5 acres out of the land parcel **NO KIMILILI/KIBINGEI/1755** which she occupied as at the time of filing this suit. That at the time of the transaction, the land parcel **NO KIMILILI/ KIBINGEI/1755** was registered in the names of **WECHULI** who had however sold it to **MICHAEL WAMATUBA**. That in 2010, **WECHULI** agreed to transfer the land directly to the plaintiff without involving **MICHAEL WAMATUBA**. The land was subsequently sub – divided to create parcels **NO KIMILILI/KIBINGEI/4581 – 4589** and **WECHULI** sold to the defendant, the portion which the plaintiff was occupying. In 2014, the defendant and his goons invaded the plaintiff's land and started ploughing it.

In his statement, **MICHAEL WAMATUBA (PW 2)** confirmed that in 1979 he sold to the plaintiff a portion of land measuring 5 acres at a consideration of Kshs. 20,000/= out of the land parcel **NO KIMILILI/KIBINGEI/1755** which he had initially purchased from **WECHULI** in 1965 at a consideration of Kshs. 700/=. At the time of the sale, the land was registered in the name of **WECHULI** who had promised to transfer it to him but had delayed and so he sold it to the plaintiff and moved to Trans – Nzoia.

By his defence and Counter – Claim dated 30th February 2015, the defendant pleaded that as at the time that he purchased the land parcel **NO KIMILILI/ KIBINGEI/4581**, the plaintiff was not in possession and has never been in possession of the same. That there were no restrictions or encumbrances on the land parcel **NO KIMILILI/KIBINGEI/4581** and the defendant further denied the allegations of fraud levelled against him in paragraph 5 of the plaint adding that he took possession of the said parcel of land after purchasing it from **WECHULI**.

In his Counter – Claim, the defendant pleaded that on 22nd November 2012 he purchased the land parcel **NO KIMILILI/KIBINGEI/4581** from **WECHULI** at a consideration of Kshs. 250,000/- per acre, obtained title and took possession. Only then did the plaintiff surface claiming the same portion. The defendant therefore sought an order for the eviction of the plaintiff and an injunction restraining him from interfering with the defendant's peaceful use of the land parcel **NO KIMILILI/KIBINGEI/4581**. He also sought the dismissal of the plaintiff's suit together with costs of both the plaintiff's suit and his Counter – Claim.

Together with his defence and Counter – Claim, the defendant filed his list of documents dated 2nd July 2019, his statement dated 20th February 2015 and the statements of his witnesses **DANIEL SIMIYU MUSOKHE (DW 2)** and **MOSES WANYONYI WAMALWA (DW 3)** also dated 20th February 2014.

In summary, his evidence as contained in the statement is that he purchased 5 acres of land out of the parcel **NO KIMILILI/KIBINGEI/4581** from **WECHULI** on 22nd November 2012 at a consideration of Kshs. 250,000/= per acre. That there were no restrictions on the land and that part of the consideration was in form of an exchange of his land parcel **NO EAST BUKUSU/NORTH NALONDO/3246** measuring 0.71 Ha. That the land was vacant with only a small hut which belonged to the vendor's care – taker. That the plaintiff has no house on the land and does not stay there and there is no evidence that she bought it from **WECHULI**.

In his statement, **DANIEL SIMIYU MUSOKHE (DW 2)** who is the defendant's eldest son states that he witnessed the defendant purchase the land parcel **NO KIMILILI/KIBINGEI/4581** from **WECHULI** on 22nd November 2012. That part of the purchase price of Kshs. 750,000/= was in exchange with the defendant's land parcel **NO EAST BUKUSU/NORTH NALONGO/3246** measuring 0.71 Ha.

Similar evidence was contained in the statement of **MOSES WANYONYI WAMALWA (DW 3)** who is the defendant's farm manager.

The trial commenced on 10th December 2019 when the plaintiff testified and adopted his witness statement and also produced as his documentary evidence, the list of documents dated 14th March 2014 and 8th August 2019. He also called as his witness **MICHAEL WAMATUBA (PW 2)** who also adopted his statement filed herein on 20th August 2019 as his evidence.

The defendant similarly adopted as his evidence his statement dated 20th February 2015 and produced as his documentary evidence his list of documents dated 2nd July 2019.

He called as his witnesses **DANIEL SIMIYY MUSOKHE (DW 2)** and **MOSES WANYONYI WAMALWA (DW 3)**.

Submissions were thereafter filed both by **MR KITUYI** instructed by the firm of **A. W. KITUYI & COMPANY ADVOCATES** for the plaintiff and by **MR BULIMO** instructed by the firm of **BULIMO & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties and their witnesses as contained in their statements which I have summarized above as well as their respective documentary evidence and the submissions by Counsel.

As I stated at the commencement of this Judgment, it is the parties' pleadings or such issues that they may frame, that determine what remedies a Court may grant. The remedy that the plaintiff sought from this Court as against the defendant is in paragraph 7 of his plaint dated 14th March 2014. It is worded as follows: -

“The plaintiff therefore prays that the defendant/servant, agent or anybody else acting through him be permanently restrained from encroaching, tilling, planting any crops or doing anything on land parcel NO KIMILILI/KIBINGEI/1755 or any other resulting titles NO KIMILILI/KIMILILI/4581 pending the hearing, and determination of BUNGOMA H.C ENVIRONMENT CASE No 11 of 2013.” Emphasis added.

This Court would therefore have expected that **BUNGOMA ENVIRONMENT CASE FILE No 11 of 2013** would have been part of the plaintiff's evidence in this case. However, only the Originating Summons in that case was filed as part of the plaintiff's documents. That alone cannot adequately inform the Court of the position in **BUNGOMA ENVIRONMENT CASE No 11 of 2013**. This Court nonetheless called for the file in the course of drafting this Judgment. Upon perusal of that file, it transpired that infact **BUNGOMA ENVIRONMENT CASE FILE No 11 of 2013** which was by way of an Originating Summons filed by the plaintiff herein against **WECHULI** seeking 5 acres out of the land parcel **NO KIMILILI/KIBINGEI/1755** was dismissed by **MUKUNYA J** under **Order 17 Rule 2 of the Civil Procedure Rules** on 9th October 2016. It is therefore no longer pending for determination. Court orders are not issued in vain and it is difficult to see how this Court, no matter how magnanimous it would wish to be, can grant a remedy that will not be efficacious.

A plain reading of the order sought by the plaintiff in this case clearly shows that it is in the nature of an injunction pending trial. Such an order could only be obtained in **BUNGOMA ENVIRONMENT CASE No 11 of 2013, Order 40 Rule 1 of the Civil Procedure Rules** which donates the power to grant such an injunction makes that clear by stating thus: -

***“Where in any suit it is proved by affidavit or otherwise*”**

Therefore, even assuming that there was a proper application for injunction pending trial before this Court, it cannot be issued in this case to apply to another case.

It is also instructive to note that by a ruling delivered by **A. OMOLLO J** on 26th June 2014 pursuant to the plaintiff's Notice of Motion dated 14th March 2014, the plaintiff was granted a temporary injunction in this case restraining the defendant, his servants, agents or anyone acting through him from tilling or planting crops on the land parcels **NO KIMILILI/KIBINGEI/1755** and **4581**. The injunction was to remain in force upto 18th December 2014 and was subject to the following conditions: -

- 1. Plaintiff was to ensure the finalization of substitution of WECHULI in BUNGOMA ENVIRONMENT CASE No 11 of 2013 so as to allow that case to be fixed for hearing or,**
- 2. To conclude the preliminaries in this suit so that the same is set down for hearing within the same period.**

The plaintiff did not abide by any of the above conditions. As I have already stated above, **BUNGOMA ENVIRONMENT CASE No 11 of 2013** was dismissed on 9th October 2016 for want of prosecution and it was not until 10th December 2019 (5 years later), that this trial commenced. Not only has the plaintiff been complacent in this suit by failing to abide by the directions of the Court but further, her pleadings have not been of any assistance to her case. It would appear that she went to sleep upon obtaining the orders of injunction on 26th June 2014. However, in accordance with the provisions of **Order 40 Rule 6 of the Civil Procedure Rules**, that order lapsed after 12 months.

The plaintiff may have had a good claim in adverse possession in **BUNGOMA ENVIRONMENT LAND CASE No 11 of 2013** against **WECHULI**. However, she did not pursue it and it was dismissed for want of prosecution. In this case, as is clear from her plaint and her two statements filed on 20th March 2014 and 20th August 2019, her pursuit is an order of injunction pending the determination of the claim in **BUNGOMA ENVIRONMENT CASE No 11 of 2013**. In paragraph 6 of her statement filed on 20th March 2014, she states as follows: -

6: “That the said encroachment is unlawful hence he should be stopped from doing anything pending the outcome of the case filed earlier of adverse possession and cancellation of title.”

And in paragraph 17 of her statement filed on 20th August 2019, the plaintiff says:-

“That the Court should issue orders of injunction against the defendant and cancel his titles as the same was obtained fraudulently.”

For as long as the plaintiff sought an order of injunction in this suit pending determination of **BUNGOMA ENVIRONMENT CASE No 11 of 2013**, her claim was founded on quick sand and was bound to collapse. Even her claim that the defendant obtained title to the land parcel **NO KIMILILI/KIBINGEI/1755** fraudulently could only have been half – hearted and made without conviction bearing in mind that the

agreement dated 24th November 1979 does not even identify the parcel of land that she purchased from **MICHAEL WAMATUBA**. Most significantly, she has stated in paragraph 2 of her statement filed herein on 20th August 2019 that at the time of the sale agreement, the land was registered in the names of **WECHULI**. The question that begs for answers therefore is whether she in fact obtained any good title to the land parcel **NO KIMILILI/KIBINGEI /1755** or any sub – division thereof which could then have been fraudulently obtained by the defendant.

The plaintiff's claim is clearly unsustainable and is for dismissal.

The defendant on the other hand has sought by his Counter – Claim, the eviction of the plaintiff and an order injunctioning her from interfering with his peaceful use of the land parcel **NO KIMILILI/KIBINGEI/4581**. It is his evidence that he bought the said parcel of land from **WECHULI** on 22nd November 2012 with no restrictions nor encumbrances and all that was on it was a small hut allegedly for use by **WECHULI**'s care – taker. The defendant pleaded further in his Counter – Claim that it was only after he had taken possession of the land parcel **NO KIMILILI/KIBINGEI/4581** and obtained title thereto in 2013 that the plaintiff rushed to Court and obtained injunction orders but never prosecuted the suit. Indeed, the record shows that by a Notice of Motion dated 14th June 2016, the defendant sought the dismissal of the plaintiff's suit for want of prosecution and for orders that his Counter – Claim be set down for hearing. That application was however withdrawn by consent on 1st July 2019 subject to costs in order to give way to the hearing of this suit.

It is clear from the register to the land parcel **NO KIMILILI/KIBINGEI /4581** that the same has since 8th January 2013 been registered in the names of the defendant. The register also shows that the said parcel being a sub – divisions of the land parcel **NO KIMILILI/KIBINGEI/1755** was first registered in the names of **WECHULI** on 17th May 2012. Among the documents produced by the defendant in support of his Counter – Claim is a sale agreement dated 22nd November 2012 by which he purchased the said parcel of land from the registered proprietor **WECHULI** for a consideration of Kshs. 750,000/= part of which was paid by way of exchange with the defendant's parcel of land known as **EAST BUKUSU/NORTH NALONDO/3246**. A copy of the title deed to the land parcel **NO EAST BUKUSU/NORTH NALONDO/3246** in the names of the defendant was also among the documents produced by the defendant.

There can be no doubt that the defendant obtained a good title to the land parcel **NO KIMILILI/KIBINGEI/4581**. He purchased it from the registered proprietor through a process that cannot be faulted. In her plaint, the plaintiff has alleged, among the particulars of fraud against the defendant, that the defendant purchased the land parcel **NO KIMILILI/KIBINGEI/4581** from **WECHULI** knowing very well that there was a pending case in Court. That cannot be true because the sale agreement between the defendant and **WECHULI** was executed on 22nd November 2012 while this case was filed on 20th March 2014 and **BUNGOMA ENVIRONMENT CASE No 11 of 2013** was filed on 11th February 2013. Therefore, there can be no truth in the plaintiff's allegation that the sale agreement between the defendant and **WECHULI** dated 22nd November 2012 was meant to defeat any pending Court case or that there was false misrepresentation. **DANIEL SIMIYU MUSOKHE (DW 2)** who is son to **WECHULI** has vouched for that agreement. Clearly therefore the defendant obtained a good title to the land parcel **NO KIMILILI/KIBINGEI/4581**. In any event, this Court has not been asked to cancel that title.

As the registered proprietor of the land parcel **NO KIMILILI/ KIBINGEI /4581**, the defendant is entitled to all the privileges and appurtenances that go with such registration and as are protected by **Sections 25 and 26 of the Land Registration Act**. He is therefore within his right to evict trespassers from the said land. That is the remedy which the defendant seeks by his Counter – Claim and as is already clear from the plaintiff's own pleadings, she has not made any claim to the land parcel **NO KIMILILI/KIBINGEI/4581** nor sought any impeachment of the title thereto. The moment that the plaintiff failed to prosecute her claim in **BUNGOMA ENVIRONMENT CASE No 11 of 2013** or seek any remedy in the case with respect to the land parcel **NO KIMILILI/KIBINGEI/4581**, it was going to be difficult for this Court to decide otherwise other than to allow the defendant's Counter – Claim.

Ultimately therefore and having considered all the evidence herein, there shall be Judgment in favour of the plaintiff as follows: -

- 1. The plaintiff's suit is dismissed.**
- 2. Judgment is entered for the defendant as per his Counter – Claim.**
- 3. The plaintiff shall vacate from the land parcel NO KIMILILI/ KIBINGEI/4581 within three (3) months from the date of this Judgment.**
- 4. In default of 3 above, the plaintiff shall be evicted from the said parcel of land in accordance with the relevant provisions of the Land Act.**
- 5. The defendant is awarded costs of the Counter – Claim and the dismissed suit.**

Boaz N. Olao.

J U D G E

21st January 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 21st day of January 2021 by way of electronic mail in accordance with the guidelines following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

21st January 2021.