



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 280 OF 2014**

**THE CHAIRMAN SCHOOL MANAGEMENT COMMITTEE**

**BONYAIGUBA D.O.K PRIMARY SCHOOL.....PLAINTIFF**

**VERSUS**

**YOAKIM MOGONDO MANYARA ALIAS**

**YUVINALIS MANYARA MOGONDO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff instituted this suit against the Defendant seeking the following reliefs:

- a) A declaration that the Plaintiff is the lawful, *bona fide* and registered owner of L.R NO. WESTMUGIRANGO/NYAMAIYA/363.
- b) An order of eviction against the Defendant, his agents and/or servants from L.R NO. WESTMUGIRANGO/NYAMAIYA/363.
- c) A permanent injunction restraining the Defendant by himself, his agents, servants and/or anyone claiming under the Defendant from entering into, re-entering, trespassing onto, building structures, cultivating, converting the suit land, abusing the Plaintiff's rights, interfering with and/or in any other manner dealing with the suit property that is, L.R NO. WEST MUGIRANGO/NYAMAIYA/363 and or any portion thereof.
- d) General damages for trespass and/or conversion
- e) Interest on (iv) above at court rates
- f) Costs of this suit
- g) Such further and/or other relief that that the Honourable court may deem fit and expedient so to grant

2. The Defendant filed a Statement of Defence and Counterclaim dated 14<sup>th</sup> September 2014 in which he denied the Plaintiff's claim and urged the court to dismiss it. In his Counter claim he contended that the Plaintiff had acquired the suit property fraudulently and sought the following reliefs:

- a) A declaration that he is the rightful owner of L.R NO. WEST MUGIRANGO/NYAMAIYA/363 that originally belonged to his father.
- b) An order for reversion and cancellation of the transfer and registration of part of land parcel No. WEST MUGIRANGO/NYAMAIYA/363 that was originally in the Defendant's father's name.
- c) A permanent injunction do issue restraining the Defendant (sic) either by himself, his agents and/or servants from entering upon, trespassing onto and/or otherwise interfering or dealing with part of title No. WEST MUGIRANGO/NYAMAIYA/363 in which the counter claimer has been in possession of in trust of the counter claimer (sic).
- d) A declaration that the Defendant's holding (sic) land title No. WEST MUGIRANGO/NYAMAIYA/363 in which the counter

claimer has been in possession of in trust of the counter claimer (sic).

e) Such further or other relief that the Honourable Court may deem fit and expedient to grant.

3. The suit was set down for hearing and both parties testified although none of them called any witnesses.

#### **PLAINTIFF'S CASE**

4. The Plaintiff called Charles Onkare who testified as PW1 stated that he was the Chairman of Bonyaiguba Primary School which was the registered owner of land parcel No. WEST MUGIRANGO/NYAMAIYA/363. It was his testimony that sometime in the year 2008, the Defendant trespassed onto a portion of the suit property and constructed two houses where he has been living. He told the court that that Defendant's father one Kemuma Nyambego together with six other persons had donated portions of their land to the Plaintiff in 1970 before the Land Adjudication process. During the process of Land Adjudication, the said parcels were amalgamated and registered as parcel No. WEST MUGIRANGO/NYAMAIYA/363 in the Plaintiff's name.

5. After his father died, the Defendant lodged a complaint against the school at the Nyamira Land Disputes Tribunal vide Land Claim No. 13 of 2008 claiming that he was entitled to a portion of the suit property measuring one acre. The suit was heard and determined in the Defendant's favour.

6. The Plaintiff subsequently filed Kisii HC Misc Civil Application No. 145 of 2009 (J.R) No. which was heard and by a ruling delivered on 12<sup>th</sup> September 2012, the court quashed the decision of the Land Tribunal.

7. Despite the decision of the court quashing the award of the Tribunal, the Defendant continued to occupy the suit property thus necessitating the filing of this suit.

8. On 25.5.2017, the court directed the Land Registrar and the County Surveyor Nyamira to visit the suit property for purposes of establishing the boundary between Land parcel No. WEST MUGIRANGO/NYAMAIYA/363 and parcel No. WEST MUGIRANGO/NYAMAIYA. WEST MUGIRANGO/NYAMAIYA/426 which is owned by the Defendant.

9. The Land Registrar and County Surveyor filed their reports in which they stated that the Defendant had encroached on a portion on the Plaintiff's land. The report noted that the Plaintiff has constructed a school, Catholic Church and dispensary on the suit property. However, the court declined to adopt the reports as the judgment of the court as they did not address the issues of fraud raised in the Defendant's Counterclaim.

#### **DEFENDANT'S CASE**

10. The Defendant testified that suit property initially belonged to his late father one Kemuma Nyambego. His father and other members of his community donated portions of their land to the Plaintiff school in 1970 before adjudication was undertaken. The various donations of land were later consolidated and registered in the Plaintiff's name as parcel number WEST MUGIRANGO/NYAMAIYA/363. He was categorical that his late father did not donate his entire parcel of land and he wondered how the school had the entire parcel registered in its name. It was his testimony that he is in occupation of one acre of the suit property. He stated that a dispute arose when he wanted to bury his wife on the suit property and there was an objection by the school which claimed to be the registered owners thereof. He clarified that he is only claiming one acre of the suit property.

11. After the close of the Defendant's case, both parties filed their submissions in which they articulated their positions. On his part the Plaintiff raised the following salient issues:

- i. Whether the Defendant was properly enjoined in the suit;
- ii. Whether the Plaintiff has proved his case on a balance of probabilities.
- iii. Whether the Defendant has *locus standi* to bring the counterclaim.

#### **ISSUES FOR DETERMINATION**

12. Having considered the pleadings, evidence and submissions of both parties, the issues that arise for determination are:

- (i) Whether the Defendant was properly enjoined in the suit.
- (ii) Whether the Plaintiff has proved his case on a balance of probabilities.
- (iii) Whether the Defendant has the *Locus standi* to bring the Counterclaim.
- (iv) Assuming that the Counter claim was lodged with in the statutory timelines, whether the Defendant has proved his case on a balance of probabilities.

#### **ANALYSIS AND DETERMINATION**

13. With regard to issue No. 1, it is the Plaintiff's submission that the Defendant is properly sued as he is the one who has trespassed onto a portion of the Plaintiff's parcel no. **WEST MUGIRANGO/NYAMAIYA/363** which was curved out of parcel No. **WEST MUGIRANGO/NYAMAIYA/426** which was registered in the name of the Defendant's father one Kemuma Mogaka-deceased.

14. It is the Plaintiff's contention that it has no claim against the estate of Kemuma Mogaka-deceased as this is purely a case of trespass by the Defendant. Learned Counsel for the Plaintiff referred the court to order 1 Rule 3 of the Civil Procedure Rule which provides that:

***"All persons may be joined as defendants against whom any relief of or arising out of the same act or transactions or series of acts or transactions alleged to exist, whether jointly or severally or in the alternative, whether if separate suits were brought against such persons any common question of law or fact would arise".***

15. Moving on to the second issue, Counsel submitted that the Plaintiff had proved its case on a balance of probabilities. She submitted that the Plaintiff had adduced evidence that it was the registered owner of the suit property which was donated to the school by various individuals including the Defendant's father, Kemuma Mogaka-deceased.

16. The Plaintiff lodged a complaint with the Land Registrar who visited the suit property and filed a report indicating that the Defendant had encroached on the suit property. Rather than vacate the suit property, the Defendant lodged a complaint at Nyamira Land Disputes Tribunal, where he obtained an award in his favour.

17. The Plaintiff subsequently filed Kisii HC Misc. Civil Application No. 145/2009 (J.R) to challenge the Tribunal's award and quash the decision of the court adopting the said award as a judgment of the court.

18. In her judgment dated 12<sup>th</sup> September 2012, Hon. Sitati J set aside and quashed the decision of the Tribunal. She further prohibited the Nyamira Senior Resident Magistrate's Court from adopting the award of the Tribunal as a judgment of the court.

It is therefore my finding that the Plaintiff proved that the Defendant has trespassed on her land.

19. The third issue is whether the Defendant has *locus standi* to bring the Counterclaim.

In his Counterclaim the Defendant seeks *inter alia* a declaration that he is the rightful owner of Land Parcel No. **WEST MUGIRANGO/NYAMAIYA/363** that originally belonged to his father. In effect the Defendant is claiming the said parcel in his capacity as beneficiary of the estate of his late father. However, he did not file the Counterclaim in his capacity as the administrator of his late father's estate nor did he produce any Grant of Letters of Administration.

20. In **Charles Ratemo Nyambati Vs Jakton Ocharo & 4 Others, Kisii HCELC Petition No. 33 of 2013** the court held that:

***"the law is that the Grant is what clothes a person with locus standi to sue on behalf of the estate of the deceased."***

In the absence of a Grant of Letters of Administration, the Defendant had no *locus standi* to bring the Counter claim.

21. Having found that the Defendant had no *locus standi*, it is not necessary to consider the 4<sup>th</sup> issue as to whether the Counterclaim is statute barred. But even if I was to consider the Counterclaim which is based on fraud, the same ought to have been filed within a period of 3 years in accordance with Section 4(2) of the Limitation of Actions Act. See the case of **Mwangi Kanyingi V Francis Kariuki Kanyingi & Another (2008) eKLR**.

22. Lastly, the claim of fraud was not proved to the required standard which is higher than on a balance of probabilities.

23. In the final analysis, the Defendant has failed to prove his Counterclaim on a balance of probabilities. Additionally, he had no *locus standi* to bring the Counterclaim. The same is therefore dismissed with costs to the Plaintiff.

24. On the other hand, the Plaintiff has proved her case and I enter judgment in her favour and make the following final orders:

(a) A declaration is hereby issued that the Plaintiff is the *lawful bona fide* and registered owner of **LR. NO. WEST MUGIRANGO/NYAMAIYA/363**

(b) The Defendant shall vacate the suit property within 90 days failing which an eviction order shall issue upon application.

(c) A permanent injunction is hereby issued restraining the Defendant by himself, his agents, servants and/or anyone claiming under him from entering into, re-entering, trespassing onto, building structures, cultivating, converting the suit land, abusing the Plaintiff's rights, interfering with and/or in any other manner dealing with the suit property that is **LR. NO. WEST MUGIRANGO/NYAMAIYA/363** and/or any portion thereof.

(d) The Plaintiff shall have the costs of the suit as well as the Counterclaim.

**Dated, signed and delivered at Kisii this 23<sup>rd</sup> day of February, 2021.**

**J.M. ONYANGO**

**JUDGE**