



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

civ case 217 of 98

SUSAN WAVINYA NDALITIPLAINTIFF

VERSUS

PETER WAMBUA MUASYADEFENDANT

J U D G E M E N T

The plaintiff Susan Wavinya Maliti filed this suit against Peter Wambua Muasya averring that she is the sole registered owner of all that parcel of land known as Kangundo/Kitwii/359, she has planted trees on the said land and she farms the same and has planted Trees, the defendant has without any colour of right encroached on the same land and act down trees and rendered the said parcel into in told waste and subjecting parts of the said land into waste, has destroyed the plaintiffs trenches on the said parcel.

In consequence thereof she seeks an order that the defendant be restrained by himself and or agents of servants from in any manner interfering with plot parcel number Kangundo/Kitwii/359 the property of the plaintiff damages for trespass and malicious damage and costs.

The defendant filed a defence and the over merits there were that the land was sold to the defendant by the plaintiffs late husband in her presence consent and witness and she reached the first payment in the year 1975, paragraph 5, 6 and 7 of the plaint were denied and the plaintiff put to strict proof, that the defendant has been in occupation of the said land since 1975 June with full knowledge and awareness of the plaintiff, that the plaintiff is a mother in law and she and her daughter Agnes Mbithe have taken advantage of his ill heath since 1995 – 96 to frustrate him and remove him from the said parcel of land which property was sold and blessed to him by the late father in law Elijah Maliti Kibuda in 1975.

The evidence on behalf of the plaintiff came from her self and PW 2 her daughter Agnes Mbithe Wambua and it is to the effect that PW 2 Agnes Mbithe daughter of PW 1 married the defendant in the year 1975 in Mombasa. They had no where to stay and she asked her late father to give them place to stay as they look for their own place. They were given a portion of the land in dispute in which they constructed a house for servants. They used the land form 1977 – 78 and they got their own place and left and they demolished the structure they had put up. They denied the suggestion that the land had been sold to the defendant PW 1 added that her husband died in 1990 and she succeeded him in respect to properties forming the Estate among the disputed portion which is shown on exhibit 1 the certificate of confirmation. After the death of her late husband in 1990 is when the defendant encroached on the land destroying trees; it is her stand as supported by her daughter that the land was never sold to the defendant

there is no sale agreement and there are no witnesses that after confirmation of the grant the plaintiff became the registered owner as shown by exhibit 3. She then filed the case against the defendant before the elders as shown by exhibit 4. Since the land was registered she was advised to move to this court and filed this case. She was granted an injunction to restrain the defendant from interfering with the land exhibit 2 she seeks the reliefs she is seeking. She says trees of various sizes were destroyed and she wants to see what it can do to compensate her for the destruction done. Defence evidence in form 3 witnesses the defendant Duncan Peter Wambua, DW 2 John Mwanzia Kajoli and Pius Musimba Mwasya DW 3. The key witness is DW 1 the defendant and the sum total of his evidence is that he purchased the suit land from his father in law 1975 in the presence of Dominic Mutua and Gerald Mulei Who are both dead. He paid 900/= and also paid the fee for elders . In December of the same year he paid 600/= and 4/= to the plaintiff as a witness. He planted coffee in 1976 and made bench fences, he only became aware of the succession proceedings when he was served with the proceedings in this file.

It is his evidence that they made a sale agreement between him and his father in law. The copy of the father in law is with the plaintiff who has refused to produce it to court while copy is with the wife PW 2 who has run away from him.

That he has been persistently asking for a transfer of that land into his name even before the father in law died but they have always been telling him to wait as there would be no problem. That they stayed peacefully and he continued with developments till 1994 when the wife PW 2 retired from the employment with Kenya Posts and Telecommunications and she went to stay with her mother PW 1. There after they started frustrating him to the present day and caused him to develop blood pressure for which he has been treated. That PW 1 lied to court as she has been aware of his presence on the land from 1977 to date that the trees and bench terraces she is alleged to have destroyed are his. It is not true that he encroached on the land in 1997. He confirms that the dispute was first handled by the elders and then the matter came to court, that he fully paid for his wife's dowry and the mother in law blocked the transfer of the land because she demanded more dowry for her daughter which he DW 1 refused to pay as shown by exhibits D 4,5. That the plaintiff processed succession and registered herself in respect of a smaller portion of land then is actually on the ground because the portion he accomplished already been sold off. He has never been requested to leave and he refused to do so. He maintains he has been on the land for the last 25 years.

Turning to the evidence of PW 2 his wife he says her evidence contradicts that of the mother as he agrees they built a house and planted coffee contrary to the denial of the mother. He uses the court to disregard the testimonies of these two people as there are men in the family who should have come to testify but they were not called to testify.

When cross-examined he said the sale agreement between him and his father in law is with his wife PW 2 and he last saw it in 1995 but he has not demanded it from her. He says the register shows that the land was registered in the name of the deceased on 18.3.77 and by that time he defendant was cultivating the land by that time. He agrees that he did not ask the adjudication people to have the land excused and registered in his name in 1977 when the process was going on, there is no consent to the sale or transfer, that his home was demolished but he did not complain over to police or provincial administration neither did he rebuilt it.

DW 2 says he was present when they went to view the land but the signatures to the agreement stood aside from them and entered into an agreement. In 1976 he saw the defendant construct a main house, Kitchen, store, latrine. He DW 2 brought him to casuals to dig holes for planting coffee and after the coffee was planted he went in with the defendant to the cooperative in law for him to be given a number which was done and he was given number 1872m that disagreement over the land arose in 1990 when the father in law died. When cross-examined he said that he did not witness him buy the land as he stood aside. He was told by the defendant that he was buying land did not see what they were doing.

DW 3 said he knows the defendant purchased land from the father in law and he carried out developments on it inclusive of houses and planting of coffee trees. That after the defendant's witnesses died in when the land disputes started when cross examined the witness said that he did not witness the sell.

At the close of the whole case both parties filed written submissions. The points raised by the plaintiff submission are that:- 1. The plaintiff is the registered proprietor of the suit land through transmission from her deceased husband the late Elijah Maliti. She followed the laid down procedure and had the first grant issued on 2.8.1993 and confirmed on 3.10.1994. The defendant who appeared to be an enlightened person when giving evidence in court did not protest at being left out as a beneficiary. He says he became process late but since then he has not taken any steps to reverse that situation. It follows that the plaintiff is the absolute owner of the said property and the defendant is either a licensee or a trespasser. 2. That the land under went the due process of land adjudication but the defendant never raised any objection or take steps to have land adjudicated his favour.

3. That the defendant in his evidence alleged to have purchased the parcel of land from the plaintiff's husband but he produced no sale agreement to that effect. Secondly the sale if any was subject to www.kenyalawreports.or.ke v Page 8 the land control act whose conditions were not fulfilled and so the same cannot be enforced. 4. Though the defendant stated that he had been on the land from 1975 that cannot assist him as adverse possession was not pleaded.

5. There is no counter claim for the land in the defendant's defence. 6. That award by the elders in favour of the defendant will not assist the defendant as the plaintiff is the one who had referred the matter to the elders but later withdrew the dispute but the elders for in explained reason went ahead to decide the dispute and filed an award. That they have applied to have the same quashed. 7. That the issue of dowry brought out in the defence by the defendant are irrelevant and they should be ignored. The court was referred to the case of Kagua versus Kachingi Machakos HCCC no. 1769/80 where the plaintiff sued the defendant for eviction stating that he the plaintiff was the registered proprietor of the suit land. The plaintiff had made an oral agreement with the defendant in 1967 for the sale of part of the land after which the defendant was allowed to occupy it. Further a written agreement was made in 1976 in which the plaintiff acknowledge receipt of the purchase price. None of these agreements had the consent of the land control board. Although land control board forms were thereafter executed the plaintiff failed to take the action necessary to get the consent. The defendant counter claimed for an order directing the plaintiff to transfer the land to him and for a declaration that the plaintiff held the land in trust for him or that he was entitled to the land by virtue of the doctrine of adverse possession. It was held inter alia that both the verbal and the written agreements were void as they lacked the consent of the land control board. As these agreements were void the defendant could not rely on the contract.

2. Although the agreements were void the fact that they were made was admissible to show that the defendant had been allowed onto the land with the consent of the land control board. (b) The creation of a first is a controlled transaction for which land control board consent has to be given in the absence of such consent no trust existed in favour of the defendant.

(c) For a claim of whose possession to succeed it is material that the person to have been in exclusive possession for twelve years. The defendant was in possession for less than the requisite period.

5. In the absence of consent the defendant is entitled to return the money paid under the contract. The defendant also put in written submissions prepared by a lay man in a lay man language. The major points relied on by him are:-

(1) That he has been in and in open occupation and possession of the said parcel of land from 1975 to July, 12th 1998 a period of 23 years that he worked in the land until 1.7.1990 when the seller died. There were no complaints and he continued so working until 12.7.1998 when complaints arose. (2) That he purchased the land legally in 1975 in the presence of the elders and he paid 1,500/= in the presence of the elders and he also paid charges for the wazees who planted the sisal boundary.

(3) That the plaintiff obtained the title deed when her married daughter ran away from the matrimonial home confiscating the said agreement of sale from the defendant.

(4) That the plaintiff lied when she said he encroached onto the said land in 1998 when he has been on the land since mid 1970's and had a house on the land and had also planted coffee. (5) The plaintiff had about

the number of trees destroyed as that was gross work because she knew the defendant has been staying and using the land.

(6) That according to Kamba Customary an in law cannot farm on an in laws land without a vivid agreement. There were witnesses who stated he farmed openly and carried out developments. (7) That the plaintiff lodged tribunal case no. 45 of 1998 and as the Senior Chief one waiting to arbitrate over if she jumped and rushed to court and this is double dealing.

(8) That the demand for fresh dowry and personal prompted the plaintiff and her sole witness who is the legally wedded wife of the defendant to file this case. (9) That Agnes Mbithe agreed that coffee was planted by her and her husband in 1976 and that they also put up a house in this land (10) That the plaintiff filed the proceedings to vex and harass him as she is aware of his financial weakness. (11) That the plaintiff applied for a title deed when he knew that he was on ill health.

(12) That the plaintiff went to the elders as a first choice and appeared there twice and paid 600/= which proceedings were heard and an award filed and the same has been read to the parties. (13) He relies on the evidence of his witnesses that had it not been for the marital misunderstanding between him and his wife the land would still be his. It is his testimony that this suit and the arbitration proceedings set by the plaintiff were all commenced in bad faith and on that basis he urges this court to dismiss. On the courts assessment of the facts herein it is clear that there is no dispute that the suit land parcel number Kangundo/Kitwii 359 was first registered in the name of one Elijah Maliti husband of the plaintiff who died in 1990.

2. There is no dispute that the plaintiff has now become a registered owner through transmission by way of succession to her late husband Estate to which process no objection were lodged to the present date.

3. There is no dispute that PW 2 was wife of the defendant but are currently separated and there are pending divorce proceedings. The plaintiff came to court seeking in juncture orders against the defendant claiming that the defendant has encroached on her land as from 1997 without her consent and has committed acts of waste. The defendant has defended that claim without putting in a counter claim to the effect that he purchased the land in 1975 from the deceased father in law. This is a claim of purchase of land based on contract. As submitted by the plaintiffs counsel the transactions was subject to the provision of the land control Act cap 302 Laws of Kenya. The said provision vide section 6 of the said act shows that sale of agricultural land in one of the named controlled transactions. It means that in order for the sale to be valid it has to obtain the blessings of the area land control bond. Herein there was no such consent, there is no letter or any move made by the defendant to have the father in law take him to the area land control board for consent. He explained and said that he To request to be taken to the area land control board but he was being told to wait but there is no positive evidence on this.

This position in law is that where there is no consent to such a transaction then the same is void abinitio and it cannot be enforced see section 7 of the LCA. The foregoing and in line with the principle in the case cited that the defendant cannot succeed on his defence based on contract.

The defendant put up another defence of long stay on the land of 23 years. As submitted by the plaintiffs counsel this is a claim whose possession which has not been pleaded and there is no counter claim for the long stay. This claim also fails. The net result of the foregoing is that there is no defence to the plaintiffs claim which is bound to succeed. The plaintiff has proved her case on balance probability as regards the claim of absolute proprietor is concerned and she will get judgement for that.

As regards the claim of general damages for trespass and distribution of trees I agree with the defendant that this was not proved because the number of destroyed trees was not pleaded, the plaintiff gave contradicting evidence as regards the number of the trees destroyed, lastly this was special claim and cannot be as general damages claim. The plaintiff was required to work on the value of the destroyed trees and then claim the same specifically as a special claim. This claim is not proved and the same will be dismissed. I therefore make the following orders;-

1. An order be and is hereby made and ordered that the defendant be restrained by way of himself, agents servants or whosoever claims through him from in any manner interfering with plot parcel number Kangund/Kitwii/359 which is the property of the plaintiff.
2. The claim for general damages is dismissed as it was not proved.
3. The plaintiff will have costs of the suit.

Dated, read and delivered at Machakos this 17th day of

January 2003.

R. NAMBUYE

JUDGE