



REPUBLIC OF KENYA



KENYA LAW
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**Nguli & 2 others v Leli & another (Environment & Land Case
10 of 2013) [2023] KEELC 16263 (KLR) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 10 OF 2013**

CA OCHIENG, J

MARCH 13, 2023

BETWEEN

WANZA NGULI 1ST PLAINTIFF

MUKILYA NGULI 2ND PLAINTIFF

MUKANDA KILANDI 3RD PLAINTIFF

AND

HENRY MULU LELI 1ST DEFENDANT

NDULEVE MUSEMBI LELI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated January 4, 2011, the plaintiffs pray for judgment against the defendants for:
 - i) Permanent injunction order against the defendants restraining them from entering and/or being in possession of the said portion which forms part of LR No Wamunyu/Kyamatula/296.
 - ii) Costs of this suit.
2. The defendants filed a Statement of Defence including a Counter-claim on February 11, 2011 where they sought for judgment against the plaintiffs for:
 - a) A declaration that the defendants are lawful owners of the purchased portion of the land parcel number Wamunyu/Kyamatula/296.
 - b) An order that the land registrar, Machakos do transfer the said portion of the land to the defendants.
 - c) Costs of the suit and interest thereon.



- d) Any other and further reliefs that this honourable court may deem just and fit to grant.
3. The plaintiffs who are defendants in the Counter-claim filed their Defence dated March 9, 2011 where they denied the averments in the Counter-claim. They explain that the 3rd plaintiff husband to 1st plaintiff entered into a written agreement in that they rent the disputed land for a reasonable season. They insist that the plaintiffs in the Counter-claim have been unlawfully in occupation of the suit land after the expiry of the time they had agreed upon.
4. The matter proceeded for hearing where the plaintiffs called one witness while the defendants has two witnesses.

Evidence of the plaintiffs

5. The plaintiffs claim to be owners of land parcel number Wamunyu/ Kyamatula/296 hereinafter referred to as the 'suit land'. PW1 Mukilya Nguli Maxwell in his testimony claimed the defendants had entered the suit land, cut down trees and burnt charcoal which they sold for their benefit. Further, that the defendants declined to stop the said acts despite demand from the plaintiffs. He confirmed that he inherited the suit land. In cross-examination he admitted that the suit land belonged to his uncle Mukanda Kilandi and his father Nguli Kilandi. He denied knowledge of whether the suit land was sold to the defendants' father Leli. It was his testimony that the land dispute arose in 2007. He further confirmed that prior to 2007, the defendants had sued him together with his mother at Tawa Law Courts being RMCC No 40 of 1984 claiming that their father had bought suit land. Further, that the court directed each party to reside on their respective portions. He further admitted there had been disputes over the suit land which were arbitrated by the clan including local chief. He explained that in 2007 they lodged a complaint at the Land Disputes Tribunal which Tribunal ruled in favour of the defendants and held that they owned the suit land. In re-examination, he insisted that the defendants had leased the suit land from August 15, 1973 to August 15, 1975. Further, that it is the defendants' father who leased the suit land. The plaintiffs produced the following documents as exhibits: agreement dated August 15, 1973 and Copy of certificate of official search for Wamuyu/Kyamatula/296.

Evidence of the defendants

6. The defendants claim a portion of the suit land belongs to them. DW1 Henry Muli Leli in his testimony explained that vide Machakos CMC Miscellaneous Case No 160 of 2007 the court issued a decree and directed the district land registrar to slice the portion of land they bought from the suit land and transfer the same to them. Further, that he paid for subdivision and the surveyor undertook measurements as well as filled the mutation forms but the plaintiffs refused to sign. In cross-examination he insisted that he had been in possession of the suit land and utilized it. Further, that the vendors Mukanda Kilandi and Mukilya Nguli promised to transfer the portion of suit land to him but they failed to do so. He explained that they purchased the suit land and never leased it as claimed. He contended that the succession cause for Nguli Kilandi's Estate was done during the pendency of this suit. DW2 Nduleve Musembi Leli testified that she got married to Musembi Leli in 1970. She contended that at the time of her marriage, the family was using the suit land. She was aware of the dispute over the suit land. Further, that her husband filed case no. 40 of 1984 and she also attended court at Uaani. She was also present during the hearing at the Land Disputes Tribunal in 2007. In cross-examination she stated that her husband bought the suit land and had been using it. She clarified that she reported the land dispute to the Land Disputes Tribunal together with her brother in law, which tribunal ruled that the land belonged to Leli. She did not know if the family of Nguli Kilandi undertook succession proceedings in respect to his estate. The defendants produced the following documents as exhibits: Acknowledgment/Agreement dated August 24, 1975; acknowledgement/agreement dated



August 31, 1975; notes of the clan meeting held on October 19, 1980; assistant chief's letter dated September 23, 1984; notes for the meeting held on September 23, 1984; 2nd plaintiff's notes dated October 22, 1984; notes of the meeting held on October 24, 1997; letter of complaint dated October 25, 2005; application to file a claim with the Land Disputes Tribunal; tribunal proceedings dated September 26, 2007; decree dated December 6, 2007 issued in Machakos CM Misc Application No 160 of 2007; department of lands fees receipts No 0846882 dated August 7, 2008 for kshs 9,580 and district surveyor's letter dated September 30, 2008.

Submissions

Plaintiffs' submissions

7. The plaintiffs in their submissions reiterated the evidence presented and contended that they are entitled to injunctive reliefs. They insist that they have discharged their burden of proof. They aver that the certificate of title they hold is indefeasible against any adverse claims. Further, that the defendants' failed to produce any sale agreement to prove that their father Leli Mbuvi purchased the suit land. They state that the suit is statute barred. To support their averments, they relied on the following decisions: *Giella Vs Cassman Brown Co Ltd*; *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR; *M'bito Ntiro v Mbae Mwirichia & Another* [2018] eKLR; *Charles Karathe Kiarie & 2 others v Administrators of the estate of John Wallace Mathare (deceased) & 5 others* [2013] eKLR and Mombasa HCC No 7 of 2018: *Cosmas Rombo Moka v Cooperative Bank of Kenya Limited & Anor*.

Defendants' submissions

8. The defendants in their submissions reiterated their evidence as presented and contended that the suit land was initially sold to their father by the 3rd plaintiff. Further, the 3rd plaintiff later demanded extra pay for the land which was done vide an agreement dated August 31, 1975. They made reference to the clan meeting, assistant chief's letter, meetings held on September 23, 1984 and October 24, 1997 confirming they purchased the suit land. They further made reference to the Land Disputes Tribunal proceedings including decree dated December 6, 2007 in Machakos Chief Magistrate's Miscellaneous Application No 160 of 2007. To support their averments, they relied on the decision of *Joseph Kipchirchir Koech v Philip Cheruiyot Sang*.

Analysis and determination

9. Upon consideration of the Plaintiff, Defence including Counter-claim, testimonies of the witnesses, exhibits and rival submissions, the following are the issues for determination: Who is the proprietor of land parcel number Wamunyu/Kyamatula/296. Whether the plaintiffs are entitled to the orders sought in the Plaintiff. Whether the defendants are entitled to the orders sought in the Counter-claim.
10. As to who is the proprietor of land parcel number Wamunyu/Kyamatula/ 296.
11. The plaintiffs claim to be the absolute proprietors of land parcel number Wamunyu/Kyamatula/296. PW1 in his testimony confirm they inherited the suit land vide Machakos Succession Cause No 403 of 2015 and no one filed an objection to the said proceedings. They produced the certificate of title to prove ownership. They contend that the defendant's father merely leased the suit land for two years which lease lapsed in 1975 and did not purchase it as claimed. They insist the defendants have trespassed on the suit land and should hence be restrained therefrom. PW1 during cross-examination admitted that the dispute over the suit land had been determined at Tawa Law Courts vide RMCC No 40 of 1984 where the court directed them to share the suit land with the defendants. Further, that the court also directed each party to reside on their respective portions. The defendants on the other



hand contend that their father purchased the suit land with DW1 later making additional payment towards the purchase price to the 3rd plaintiff. DW1 further explained that the court had awarded them a portion of the suit land which they occupy. DW1 explained that vide Machakos CMC Miscellaneous Application No 160 of 2007 the court issued a decree and directed the district land registrar to slice the portion of land they bought from the suit land and transfer the same to them. He confirmed engaging a surveyor, paying fees for subdivisions after which the surveyor undertook measurements as well as filled the mutation forms but the plaintiffs refused to sign. DW1 insisted that they had been in possession of the suit land and utilized it. He denied leasing the suit land and stated that the vendors Mukanda Kilandi and Mukilya Nguli promised to transfer a portion of the suit land to him but they failed to do so. Further, that the succession proceedings in respect to estate of Nguli Kilandi being Machakos Succession Cause No 403 of 2015 which PW1 referred to, was filed during the pendency of this suit. DW2 also confirmed in her testimony that their family was using the suit land. She was aware of the dispute over the suit land and confirmed her husband filed Case No 40 of 1984, and she was also present during the hearing at the Land Disputes Tribunal in 2007. I have had a chance to peruse the proceedings from the Land Disputes Tribunal including the decree from Machakos Chief Magistrate's Court and various correspondence as well as considered testimony of PW1 and I note two courts indeed awarded the defendants a portion of the suit land. Further, the plaintiffs never demonstrated whether they appealed against the two court decisions emanating from Machakos and Tawa respectively. I note the plaintiffs despite the pendency of this suit, proceeded to lodge succession proceedings in 2015 and obtained title to the suit land so as to defeat the previous decisions from the two courts. It is trite that he who comes to equity must come with clean hands and injunctive remedies are equitable remedies. At this juncture and from the evidence before court including the exhibits presented, even though the plaintiffs' are waving the certificate of title they have over the suit land, I find that they are not being candid in their claim over the said suit land.

Section 26(1) of the *Land Registration Act* provides thus:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” Emphasis mine.

12. The Court of Appeal in the case of Joseph N K Arap Ng'ok v Moijo Ole Keiwua & 4 Others [1997] eKLR, held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation” Emphasis mine

13. I note there were agreements/acknowledgment of payments dated August 24, 1975 and August 31, 1975 in respect to transaction over suit land. From various notes from meetings held on October 19, 1980, September 23, 1984 and October 24, 1997 which were produced as exhibits, it is clear that the defendants were in occupation of the suit land and occupied the share they had purchased. Further, since there were already orders granting the defendants' ownership of a portion of the suit land by



courts of competent jurisdiction being decree dated December 6, 2007 issued in Machakos Chief Magistrate's Court Miscellaneous Application No 160 of 2007 as well as the judgment from Tawa Law Courts vide RMCC No 40 of 1984, as a court I find the same still valid since there were no orders setting them aside. Based on the evidence before me including my analysis above, I find that the plaintiffs' mischievously obtained the certificate of title over the suit land unprocedurally and through misrepresentation since they failed to divulge to the succession court that there were already subsisting court orders awarding a portion of the deceased estate to the defendants which made them creditors to the said estate. I opine that the certificate for confirmation of grant though issued cannot defeat valid court orders issued prior to the confirmation of the said grant. It is my considered view that the defendants can still proceed to lodge objection proceedings in the said succession cause and challenge the certificate for confirmation of grant. In the circumstances, I find that the defendants are indeed entitled to the portion of the suit land they have occupied as purchasers and the plaintiffs are not absolute proprietors of the whole suit land as claimed.

14. Based on these findings, I find that the plaintiffs are hence not entitled to the orders as sought in the Plaintiff.
15. As to whether the defendants are entitled to the orders sought in the Counter-claim. The defendants sought to be declared to be lawful owners of the purchased portion of the land parcel number Wamunyu/Kyamatula/296. Further, that the land registrar, Machakos be directed to transfer the said portion of the land parcel number Wamunyu/Kyamatula/296 to them. Based on my findings above, I find that since the defendants have proved ownership of a portion of the suit land, and there are two courts that have awarded them the said portion of land they have occupied, they are hence entitled to the orders as sought in the Counter-claim.
16. In the foregoing I find that the plaintiffs have not proved their case on a balance of probability and will proceed to dismiss it with costs. I will proceed to enter judgment in favour of the defendants as per the Counter-claim and make the following final orders:
 - a) A declaration be and is hereby issued that the defendants are lawful owners of the purchased portion of the land parcel number Wamunyu/Kyamatula/296.
 - b) The land registrar, Machakos be and is hereby directed to transfer the said portion of the land parcel number Wamunyu/Kyamatula/296 to the defendants.
 - c) Costs of the suit is awarded to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE

