



Okemwa v Nyangera (Civil Suit 6 of 2019) [2023] KEELC 17191 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII**

CIVIL SUIT 6 OF 2019

M SILA, J

MAY 3, 2023

BETWEEN

DAVID ONKOBA OKEMWA PLAINTIFF

AND

MARCELLA KEMUMA NYANGERA DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to stop the defendant from interfering with the suit properties which are two parcels of land abutting each other and upon which the plaintiff developed a hotel and residential house; plaintiff having purchased the two properties from the erstwhile owner; defendant asserting that one of the properties was sold to her late husband and thus belongs to her; defendant placing a restriction against the title claiming a beneficial interest; no evidence from defendant of any sale agreement, any consent of the Land Control Board, or any payment of purchase price; no witness provided by the defendant to support the allegation of sale; in those circumstances, nothing to support the oral allegation that the land was sold to the defendant and/or her late husband; defendant's inaction while the plaintiff was developing the land also indicating that they never thought that they had any interest in the land; judgment entered for the plaintiff)

A. Introduction And Pleadings

1. This suit was commenced through a plaint which was filed on March 4, 2019. The plaintiff pleaded that in the years 1976 and 1978, he respectively purchased from one Osamo Motika (now deceased) the land parcels Central Kitutu/Daraja Mbili/948 and Central Kitutu/Daraja Mbili/3446 (the suit properties, also hereinafter referred to simply as parcels No 948 and 3446). He averred that he took possession of the parcels of land and developed a hotel, residential house and a hall. He pleaded that he lived outside the county and when he came back in the year 2012, he found the seller deceased. The seller's wife, Anna Kerubo Osamo, took out letters of administration and transferred the parcel No 3446 to him in the year 2013. He pleaded that from the year 2014, the defendant has laid claim to this parcel No 3446 on the allegation that the same land was sold to her late husband one Timotheo Nyangera Ombati. He



pleaded that the defendant and her agents, in an effort to evict him, destroyed the wall of the hall that he had developed. In the suit, the plaintiff seeks to have the defendant permanently restrained from the suit properties, a declaration that he is the absolute owner thereof, costs and interest.

2. The defendant entered appearance and filed defence on January 25, 2022. She admitted that the parcel No 948 belongs to the plaintiff but contended that the parcel No 3446 was purchased by her late husband Timotheo Nyangera Ombati. She averred that the transfer of the parcel No 3446 to the plaintiff was cancelled by the Land Registrar on the realization that the transfer was illegal and fraudulent and the title reverted to the name of Anna Kerubo Osamo (Anna). She contended that Anna holds the land in trust for her (defendant) and her family. She also denied that the plaintiff took possession of the parcel No 3446 and built a hotel, house and hall, and also denied destroying any of his properties.

B. Evidence of The Parties

3. The plaintiff testified that he purchased the parcel No 3446 in the year 1979 from the late Osamo Motika. He testified that the land got registered in the name of Anna (Osamo's wife) while he (plaintiff) was living in Belgium. When he got back into the country in the year 2013, Anna transferred the land to him after going to the Land Control Board (LCB) for consent. He had the LCB consent and his title deed which he produced as exhibits. He testified that in the year 2014, he was informed that a restriction was registered against his title by the defendant and was summoned by the Land Registrar. He presented his case and was informed that he could continue developing the land. In the year 2019, the defendant's agents invaded the land, destroyed his wall, and also harassed his tenant on the property by throwing stones on his roof. They were arrested and charged in Kisii Criminal Case No 717 of 2019. He produced a surveyor's report to demonstrate that the land was developed as he had pleaded and that he was the one in occupation. He produced a search done on 3 November 2020 which he averred that it confirms that he is still the registered proprietor of the parcel No 3446.
4. Cross-examined, he reiterated that he purchased the parcel No 3446 in the year 1979, though he did not have a sale agreement. He obtained his title deed in the year 2013 after Anna, the wife of the seller, transferred the land to him. The parcel No 948 had earlier been transferred to him by the seller. The two parcels, i.e No 3446 and 948 abut each other and he stated that he had commenced developments before the seller died. He denied pulling down a structure of the defendant. He denied that his title had been cancelled as claimed by the defendant.
5. With the above evidence, the plaintiff closed his case.
6. DW-1 was Oswera Cecilia Harriet, the Land Registrar, Kisii. She testified that the parcel No 3446 was initially registered in the name of Ann Kerubo Osano on March 11, 2011 and she was issued with a title deed on November 4, 2011. On April 29, 2013, the land was transferred to the plaintiff though he was never issued with a title deed. On July 15, 2013, the defendant registered a restriction claiming a beneficiary interest. She testified that in the Green Card (extract of the register), the transfer is not signed by the Land Registrar and she speculated that the transaction was not completed. Cross-examined, she testified that the defendant placed a restriction claiming a beneficiary interest though there was no document to support the nature of her interest. The original title deed of the plaintiff was put to her and she could see that it shows that it was issued on May 3, 2013 and had all features required of a title deed though there was no corresponding entry in the Green Card indicating issue of the title deed. She acknowledged that the parcel file had the instrument of transfer which appeared well executed and the documents of transfer were complete. No letter was written to the parties informing them that their documents were not complete and the transfer should have gone through. She could



not tell why the entry of transfer in the Green Card was not signed by the Land Registrar. She affirmed that there was no entry of cancellation of the title of the plaintiff.

7. DW-2 was the defendant. She testified that her husband, Timotheo Nyangera Ombati, died in April 2011. She testified that Osamo Motika had sold the parcel No 3446 to them but had not effected the transfer before his death. She contended that the plaintiff was never issued with a title deed and what he holds is fake. She asserted that title was still in the name of Anna Kerubo Osamo and produced a search dated July 15, 2014 to support that claim. She otherwise relied on her witness statement for the rest of her evidence. In it, she stated that all she knows about the land is that it was sold to her late husband and that possession was given to him which possession they still enjoy. She further stated that the plaintiff got registered as proprietor in 2013 which registration was revoked by the Land Registrar and the plaintiff requested to return the title deed which he has not done so.
8. Cross-examined, she asserted that Osamo Motika sold the land to herself and her late husband in the 1970s. She did not have in court any document relating to the sale. She testified that nobody could purchase the land from Anna as the land was already theirs. She affirmed that she has no claim over the parcel No 948. She acknowledged that in the parcel No 3446, the plaintiff has built a hotel, lodgings and a residential house where he resides. She has never lived on this land despite claiming to have purchased it in the 1970s. She averred that her husband was sick and on bed rest when the plaintiff was developing the land. They did not present any complaints over the developments. She insisted that the plaintiff's title was cancelled but did not have any evidence to that effect.
9. With the above evidence, the defendant closed her case.

C. Analysis And Disposition

10. I invited counsel to file their submissions which they did. I have taken note of these before arriving at my decision.
11. It is the plaintiff's case that he is the registered proprietor of the land parcels Central Kitutu/Daraja Mbili/948 and Central Kitutu/Daraja Mbili/3446. From the pleadings and evidence of the defendant, there is actually no dispute regarding the plaintiff's ownership of the parcel No 948 and what is in contention is the parcel No 3446. The plaintiff's evidence is that he purchased this land from Osamo Motika and that Anna, Osamo's wife, later transferred the said land to him. It is his evidence that he took possession of the land and built a hotel in it, which he had been leasing out as he was out of the country.
12. I have seen from the land records that the parcel No 3446 was registered in the name of Anna Kerubo Osamo. There is ample evidence that she did execute a transfer to the plaintiff and that the plaintiff became registered as proprietor of the said land on April 29, 2013. There is controversy as to whether or not the plaintiff was issued with a title deed, for the plaintiff does indeed hold a title deed but this is not reflected in the Green Card. To me, this is neither here nor there. What is important is that the register reflects that the plaintiff was registered as proprietor on April 29, 2013. His registration would not be affected merely because a title deed was not issued to him. However, to address the controversy, my view is that indeed a title deed was issued to the plaintiff and it was probably only an omission in failing to record that the title deed was duly issued. DW-1, the Land Registrar, did affirm that the title deed held by the plaintiff has all the features of a good title deed and she found no evidence of it being an improper document. It is therefore my holding that the plaintiff is the registered proprietor of the land parcel No 3446 and that he was indeed issued with a title deed for the said land.
13. The defendant of course claims that the plaintiff ought not to have been registered as proprietor because the land had earlier been sold to her and her late husband by the late Osamo Motika. Despite



making this assertion, the defendant had nothing to show that this land was sold to her and/or her late husband. She produced no sale agreement, no application for consent of the Land Control Board, no consent of the Land Control Board, and no transfer instrument. She vaguely testified that they bought the land in the 1970s; she could not even tell the exact year of purchase. She did not offer to say for how much she and/or her husband purchased the land and had absolutely no evidence of payment of the purchase price. She had no witness to support her contention that she purchased the land. Save for her word of mouth, there is nothing to support her allegation that she and/or her late husband ever purchased this land parcel Central Kitutu/Daraja Mbili/3446. Neither does the action, or should I say inaction, of the defendant demonstrate any sale to her and/or her late husband. She acknowledged that she saw the plaintiff develop the land. She and her late husband never raised any issue when the plaintiff was developing. You would expect, that if indeed they had purchased the land, then they would move with speed to stop the plaintiff from further developing the land.

14. I am afraid to inform the defendant that she has failed to prove, on a balance of probabilities, that she and/or her late husband did purchase the said land. My holding is that the defendant has no interest in the land parcel Central Kitutu/Daraja Mbili/3446. The plaintiff has demonstrated that he is the registered proprietor of this land and has title it. Having been so registered, he is the one who is vested with rights of ownership over the land. This is provided for in Section 24 of the [Land Registration Act](#), which is drawn as follows :-

24. Interest conferred by registration.

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

15. These rights vested upon the plaintiff under Section 24 above include the right of ingress and egress, and the right of use and occupation of the land. The defendant has no right to disturb the quiet possession of the plaintiff of the land. She also has no right to continue having a restriction placed on the land as she has not demonstrated any right to the land.

16. The plaintiff has succeeded and the defendant will shoulder the costs of this suit.

17. Given the above, I enter judgment for the plaintiff and make the following final orders :-

- a. That as between the plaintiff and the defendant, it is the plaintiff, David Onkoba Okemwa, who is the registered proprietor of the land parcels Central Kitutu/Daraja Mbili/948 and Central Kitutu/Daraja Mbili/3446.
- b. That it is hereby declared that the defendant has no legal interest in the land parcels Central Kitutu/Daraja Mbili/948 and Central Kitutu/Daraja Mbili/3446.
- c. That an order of permanent injunction is hereby issued, stopping the defendant and/or her servants/agents, from entering, being upon, using, developing, demolishing any structure,



or in any other way disturbing the plaintiff's use and possession of the land parcels Central Kitutu/Daraja Mbili/948 and Central Kitutu/Daraja Mbili/3446.

- d. That the restriction registered by the defendant on July 15, 2014 against the title Central Kitutu/Daraja Mbili/3446 be removed forthwith.
- e. The defendant shall pay the costs of this suit.

18. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 3RD DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

