



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT GARISSA**

**ELC CASE NO. 16 OF 2017**

**MWANZIA KIMWELE.....PLAINTIFF**

**VERSUS**

**KITHOME KUBORA.....1<sup>ST</sup> DEFENDANT**

**IBRAHIM MUSINGA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

This suit was instituted on 3<sup>rd</sup> December, 2012 at Kyuso Principal Magistrates Court and was later transferred to this court through consent of the parties in a letter filed on 10<sup>th</sup> March, 2017 transferring the matter to Garissa ELC Court. The Plaintiff herein vide his amended Plaint dated 21<sup>st</sup> July, 2017 and filed on 24<sup>th</sup> July, 2017 sought for the following orders: -

- a. Permanent injunction restraining the defendant's servants, employees from using, developing, alienating, building trespassing, and encroaching land parcel situated at Kangusu village, Ngungani sub location, kakuyu location, Mumoni Sub County of Kitui County.
- b. Declaration that all that piece of land situated at Kangusu village, Ngungani sub location, kakuyu location, Mumoni Sub County of Kitui County measuring 70 hectares is the property of the Plaintiff.
- c. Costs of the suit
- d. Any other and/or further relief this Honourable Court deems fit to grant

The plaintiff avers that he is the legal owner of all that unsurveyed land situated at Kangusu village, Ngungani sub location, kakuyu location, Mumoni Sub County of Kitui County measuring 70 acres, and that the Defendants herein on 3<sup>rd</sup> November, 2013 encroached in his subject land and began subdividing it into two.

Additionally, he avers that there were issues relating to the subject parcel of land but such issues were resolved in his favour. Further, he avers that he reported the matter to the Assistant chief Ngungani sub location and attempts to resolve the matter has been hampered by the Defendants absence and non-attendance.

Furthermore, he avers that he has constructed permanent house in the land, that includes permanent houses for his two sons and that he is in occupation and ownership of the subject parcel of land.

**Defence Case**

The 2<sup>nd</sup> Defendant in response to the Plaintiff suit filed an Amended Defence and Counterclaim dated 4<sup>th</sup> August, 2017 and filed on even date. He avers that the Plaintiff in the year 1973 entered into an oral agreement for the sale of 10 acres of land from his deceased father Musinga Ngesu. It is his case that the sale was for a triangular piece of the subject land which was about 10 acres (4.047 Hectatres) out of the entire 70 acres parcel of land.

At the hearing of the Counterclaim, the Defence called one witness. **DW1** Ibrahim Musinga testified that he is the 2<sup>nd</sup> Defendant herein and produced documents in support of his case. The gist of the 2<sup>nd</sup> defendant case is that the Plaintiff herein approached his late father for sale of land, where his late father agreed to sale to him 10 acres of their parcel land which was payable in installments in two years. It is his case that the Plaintiff never paid the agreed sum, but continued to occupy the said 10 acres of their 70 acres parcel land.

It is his position that the Plaintiff began encroaching on the other remaining 60 acres and as a result he moved in and began subdividing the remaining parcel of land. He urged the court to declare the acquisition of the 10 acres by the Plaintiff void for want of considering and evict him from the subject parcel of land. He also claims mesne profits from the Plaintiff for his trespass onto the 60 acres of land in which was not part of his purchase from the year 2012

**Analysis and Determination**

I have perused and considered the pleadings filed the evidence of the sole witness for the Defence and the evidence placed before me.

The Plaintiffs had instituted this suit seeking an injunction against the defendants and a declaration that the subject parcel of land in dispute herein belongs to him since he did not tender any evidence or attend court during the hearing.

The 2<sup>nd</sup> Defendant herein disputed the Plaintiffs' claim and sought instead by way of his Counterclaim a declaration that he is the legal or rightful owner of the suit property. The 2<sup>nd</sup> Defendant also urged the Court to declare the Plaintiff as trespasser on the property and to issue a permanent injunction compelling the Plaintiffs to vacate the land.

As it turned out, the Plaintiffs failed and or neglected to prosecute their claim and following an application in court by the 2<sup>nd</sup> Defendant, the Plaintiffs' suit was dismissed for want of prosecution.

From the material placed before me, the dispute herein relates to a unsurveyed parcel of land measuring 70 acres. It is also not disputed that the Plaintiff has been in occupation of the parcel of land since the year 1973. From the 2<sup>nd</sup> Defendant position, it is his case that his late father sold 10 acres of the subject parcel to the Plaintiff, who however alleges did not pay a cent.

As it were, the Defence testimony and the evidence placed before me remain uncontroverted. That evidence points to the fact that the Plaintiff had purchased part and not the entire 70 acres of the subject parcel of land. Nothing was placed before me to demonstrate that the Plaintiffs had acquired ownership of the entire property either by prescription or through adverse possession. On the contrary, the 2<sup>nd</sup> Defendant has proved on a balance of probability that it was entitled to the orders sought in the Counterclaim, only to the extent of the remaining 60 acres of the subject parcel of land. In the absence of the Plaintiff and his Counsel to cross-examine the evidence placed before the Court, the defence evidence remained unchallenged and uncontroverted.

Accordingly, this Court is satisfied that there is merit in the Defendant's Counterclaim. Judgment is accordingly entered for the Defendant as prayed in the Counterclaim to the extent of the 60 acres out of the 70 acres parcel of land, the subject of this suit. This court presumes in the circumstances that in any event the 10 acres purportedly in possession of the Plaintiff even if there was no consideration, is not being demanded by the Defendant. On mesne profits, the 2<sup>nd</sup> Defendant did not sufficiently establish the same and the prayer is declined.

The upshot of my finding is that the Plaintiffs suit is dismissed and the 2<sup>nd</sup> Defendant's counterclaim is allowed as prayed. Each party to bear their own costs.

**Read, Delivered and Signed in the Open Court this 28<sup>th</sup> day of May, 2021**

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**E. C. Cheronu (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Ibrahim Musinga
2. Plaintiff/Advocate;Absent
3. Ijabo; Court Assistant