



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC. NO. 120 of 2015

JUSTINE CHELAGAT NAIBEI.....PLAINTIFF

VERSUS

STONEJ NJOGU GATONGE..... DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by way of a plaint dated 10th September, 2015 seeking a permanent injunction restraining the defendant by himself, through his agents, servants and/or employees from stepping onto, cultivating, using, trespassing onto or dealing with that piece of land known as TRANS NZOIA/CHEPCHOINA/TWIGA/296. The plaintiff avers that on or about 14th February 2012 she entered into a sale agreement wherefore she purchased the parcel of land known as Plot No. 296(Shirika) Settlement measuring 5 acres from one Kolil Kimaiyo Kios who was the first allottee of the plot. The plaintiff avers that she paid Kshs.500,000.00 being the full consideration for the sale and that she settled all outstanding debts due to the Settlement Fund Trustee and obtained a discharge to that effect. The plaintiff states that she pursued all other procedures and ensured that transfer and eventual registration was effected and indeed acquired title deed for PARCEL NO. TRANS NZOIA/CHEPCHOINA/TWIGA/296. The plaintiff contends that she is the legal proprietor legitimately entitled to own, use, benefit, deal, control and enjoy all rights and privileges that are appurtenant to the suit property. It is the plaintiff's case that she has faced a lot of resistance from the defendant who has forcefully ploughed her land and planted crops thereon without the plaintiff's consent permission or authority. It is the plaintiff's contention that the defendant's conduct amounts to trespass and infringement of her proprietary rights over her lawful property. The Plaintiff states that as a result of the defendant's action, she has suffered financial damage due to deprived user.

2. The plaintiff adopted her witness statement dated 10th September, 2015 and filed on 15th September 2015 as her evidence and produced the title deed, sale agreement, transfer, receipts, letter of allotment, letters dated 23/3/2015 and 24/3/2015 and demand notice dated 31/3/2015. The plaintiff stated that after executing the sale agreement, they went to the lands office and found that the land had a debt of Kshs. 13,500 which the plaintiff paid and a transfer was executed in her favour after the discharge of charge. The plaintiff states that she took possession of the land when the defendant came and stopped her. The matter was reported to the area chief but the defendant proceeded and ploughed the land. It was then that the plaintiff instructed her advocates who issued demand notice and later filed suit. The plaintiff maintained that she obtained her title lawfully and urged the court to grant the orders sought.

3. When cross-examined by Mr. Bungei, learned counsel for the defendant, the plaintiff stated that she was not aware that the suit land had been sold to somebody else and that she purchased it on the basis that it was being leased out.

4. KOLIL KIMAIYO KOIS testified as PW2 and stated that he sold the suit land to the plaintiff. He stated that he had leased out the land to one Kibet Cheruiyot in 1989 and was paid Kshs.30,000 being six years rent. That whereas the lease was for 12 years, Mr. Cheruiyot only paid for 6 years. He denied transferring the land to Mr. Kibet Cheruiyot, maintaining that he had only leased it out to him, and that Mr. Cheruiyot had no right to sell his land. That when the defendant refused to vacate from the land, he sued him but later withdraw the case after selling the land to the plaintiff. He denied knowledge of the agreement between Kibet Cheruiyot and the defendant.

5. The defendant filed a statement of defence and counterclaim dated 16th October, 2015. While admitting that Kolil Kimaiyo Kios was the original allottee of plot no.296, Twiga Settlement Scheme, the defendant avers that the said Kolil Kimaiyo Kios had sold the plot to Peter Kibet Cheruiyot on 8th March 1989. The defendant further avers that he bought the said plot from Peter Kibet Cheruiyot on 12th March 1998. The defendant denies that the plaintiff paid any dues to the Settlement Fund Trustees and avers that it is Peter Kibet Cheruiyot (who is now deceased) who paid the said dues. It is the defendant's contention that the plaintiff, in collusion with Kolil Kimaiyo Kios intend on fraudulently denying the defendant his lawful rights over the suit property yet Kolil Kimaiyo Kios had legally sold it and the defendant had purchased it from the purchaser. The defendant cites various particulars of fraud against the plaintiff and Kolil Kimaiyo Kios. The defendant states that he has been in occupation, use and enjoyment of the suit plot since March 1998 and he has developed the same by fencing it and planting trees. The defendant avers that there is a pending suit being ELC Case No.28 of 2012. In the counter claim, the defendant avers that he is the legitimate owner of the suit property having bought the same from the purchaser Peter Kibet Cheruiyot earlier than the plaintiff. In the counter claim, the defendant seeks for an order that the registration of the plaintiff as proprietor of the suit land is null and void and an

order that the registration of the plaintiff as proprietor of thereof be cancelled and instead the defendant be registered as proprietor.

6. The defendant adopted his witness statement dated 16/10/2015 as his evidence –in-chief. His evidence is that he bought the suit land from Peter Kibet Cheruiyot in 1998. That Peter Kibet Cheruiyot had purchased the land from Kolil Kimaiyo Kios in 1989. The defendant states that he took over possession and use upon purchase in 1998 and developed the same. It is the defendant’s evidence that the land has been fraudulently registered in the plaintiff’s name. He urged the court to dismiss the plaintiff’s suit and he be registered as the lawful owner of the plot. The defendant produced the sale agreement dated 8/3/1989 between Kolil Kimaiyo Kios and Peter Kibet Cheruiyot, payment voucher, agreement dated 12/3/1998 between the defendant and Peter Kibet Cheruiyot. He stated that he later learnt that Mr. Peter Kibet Cheruiyot had died and the defendant came with Mr. Cheruiyot’s widow to Mr. Kolil Kimaiyo Kois who informed them that he had sold the land and wanted the defendant to give vacant possession. The defendant lodged a complaint with the area chief who wrote the letter dated 19/2/2012 which was also produced as an exhibit. That Mr. Kolil insisted that he had leased the land and now had sold it. That he showed them an agreement entered in 1989 which was in fact an agreement for sale. The defendant stated that he went to the Chief, Sergoit Location who wrote the letter dated 13/2/2012. That Mr. Kolil sued the defendant in Kitale HCCC No. 28 of 2012. The pleadings in that case were also produced as exhibits.

7. When cross-examined by Mr. Karani learned counsel for the plaintiff, the defendant stated that he knew that when one wants to buy land, you carry out due diligence. He stated that he was shown the sale agreement which indicated the purchase price as Kshs.60,000/= out of which the sum of Kshs. 30,000/= was paid by the purchaser, leaving out a balance of Kshs.30,000/=. Though Mr Kibet told him he had paid the balance, he never showed the evidence of payment. That according to the agreement, the balance was to be paid on or before 20/1/1990, but he was not aware if the same was paid.

8. Both parties filed written submissions through their respective advocates on record. Mr. Karani, learned counsel for the plaintiff submitted inter alia , that as a willing buyer, the plaintiff did due diligence to establish the status of the suit property, the ownership and whether it had any encumbrances. That the plaintiff discovered that the property was charged and paid the sum of Kshs. 13,500 that was outstanding to the Settlement Fund Trustee and the plot was discharged. That henceforth the plaintiff commenced the conveyance process which culminated in issuance of a title in her favour. Counsel referred to the provisions of Section 24 (a) of the Land Registration Act and relied on the case of **Dr. Joseph Arap Ngok –v- Justice Moijo Ole Keiwua & 5 Others, Civil Appeal No. Nai 60 of 1997**. He also cited Section 25 (1) of the Land Registration Act and relied on the case of **David Paterson Keingo & 2 Others –v- Kamuki Thuo, Machakos HCCC No. 180 of 2011**. Counsel further submitted that under Section 39 of the Land Registration Act, consideration must be paid in full and argued that the law contemplates that failure by the purchaser to pay up the consideration in full, the vendor can exercise the right to regain possession of the land sold. Counsel submitted that the defendant could not acquire any right especially from Peter Kibet Cheruiyot since none passed to him from the first allottee. The plaintiff’s counsel submitted that the defendant has not proved the elements of fraud and misrepresentation alleged in the defence and counter-claim. That there was no evidence availed to show that the plaintiff was involved in fraud or irregular registration of the suit property. The plaintiff relied on case of **Munyu Maina –v- Hiram Gathiha Maina, Civil Appeal No. 239 of 2009; Urmila w/o Mahendra Shah –v – Barclays Bank International Ltd & Another (1976)KLR 76**. The plaintiff urged the court to enter judgment in her favour and dismiss the defendant’s counter-claim.

9. Mr. Bungei, learned counsel for the defendant submitted that the plaintiff’s case is fatally defective and orders sought cannot obtain. That there is no substantive order sought such as a declaratory order and an injunction alone is not obtainable. Further, the defendant’s counsel submitted that the reply to defence and defence to counter-claim is not dated and is not a pleading and therefore should be struck out, expunged and or dismissed. Mr. Bungei further submitted that Mr. Kolil Kimaiyo Kios swore an affidavit in support of an application for injunction dated 5th March 2012 in **Kitale HCCC NO. 28 of 2012** in which he did not disclose that there was any other agreement. That it is evident that after the dismissal of that application, the said Mr. Kolil Kimaiyo Kios and the plaintiff herein colluded and fraudulently transferred the suit property to the plaintiff so as to defeat the ends of justice, adding that an injunction is an equitable remedy and one has to come to court with clean hands. It was submitted that the court should exercise its powers under Section 80 (1) and (2) of the Land Registration Act and grant the orders sought in the counter-claim. Counsel relied on the case of **Esther Ndegi Njiru & Another –v- Leonard Gatei, Nairobi ELC case No. 128 of 2011**.

10. I have reviewed and considered the pleadings, the evidence by the parties and submissions made. The court identifies the following issues for determination.

i. Whether the registration of the plaintiff as proprietor of the suit property was fraudulent, and therefore null and void.

ii. What are the remedies available to the parties.

11. Regarding the first issue it is not contested that Kolil Kimaiyo Kios was the original allottee of the suit property. The plaintiff’s case is that on 14th February, 2012 she purchased the suit property from Kolil Kimaiyo Kios who eventually transferred the land to her and that she is now the legally registered proprietor and entitled to its use, benefit, control and enjoyment of all rights and privileges appurtenant to the property. The plaintiff produced the Title Deed in her name as well as the Letter of Allotment, Sale Agreement, Transfer, payment receipts, discharge of charge as well as correspondence from the Lands Office confirming that the plaintiff is the current registered owner of the land. Mr. Kolil Kimaiyo Kios the original allottee of the property testified on behalf of the plaintiff and confirmed that indeed he sold and transferred the property to the plaintiff.

12. The defendant’s case is that he bought the suit land from one Peter Kibet Cheruiyot (now deceased). The defendant testified that the said Peter Kibet Cheruiyot had purchased the suit property from Mr. Kolil Kimaiyo Kios. However, Mr. Kolil Kimaiyo Kios has disowned the sale agreement allegedly between him and the late Peter Kibet Cheruiyot. According to Mr. Kolil Kimaiyo Kios, he only leased out the land to Peter Kibet Cheruiyot but did not sell it to him. It also emerged from the evidence adduced that Mr. Kolil Kimaiyo Kios had filed Kitale HCCC NO. 28 of 2012 against the defendant herein. However, that case was later withdrawn before it was heard but after an application for temporary injunction by the plaintiff was dismissed as the defendant herein was in possession of the land.

13. I have perused the sale agreement dated 8th March, 1989, between Kolil Kimaiyo Kios and Peter Kibet Cheruiyot which was produced by

the defendant as D.exhibit 1. In the said agreement, the purchase price is stated to be Kshs.60,000/= out of which a deposit of Kshs.30,000/= was paid on or before execution of the agreement. There is also a payment voucher dated 8/3/1989 which clearly indicates that it was for part sale price of plot Twiga S.F.T. It appears the payment voucher was for the deposit paid. The question that arises is, was the outstanding balance ever paid? Of course Mr. Kolil Kimaiyo Kios states that the transaction he entered into with the Late Peter Kibet Cheruiyot was a lease agreement but not a sale agreement. He admitted receiving only the sum of Kshs.30,000/= but no more. Even assuming that the agreement was for sale of the suit land, and not a lease as Mr. Kios maintains, there was no evidence adduced to confirm that the full purchase price was paid by the deceased. Pursuant to Section 39 of the Land Act, a vendor is entitled to rescind a contract by reason of a breach of the contract by the purchaser. In the absence of sufficient evidence to show that the late Peter Kibet Cheruiyot had fulfilled all the terms and conditions of the contract between him and Mr. Kios, then it is doubtful that he had acquired an interest in the suit property that he could pass to the defendant herein.

14. Besides, the suit parcel of land was offered to Mr. Kios by the Settlement Fund Trustees upon certain terms and conditions. For example, Clause 1(b) of the Letter of Allotment dated 8th August 1985 provided that the land shall not be transferred without the prior consent in writing of the Settlement Fund Trustees. The land was also charged and before any transfer could be effected, a Discharge of Charge had to be obtained. Indeed, it was only the Settlement Fund Trustees who could effect a valid transfer in respect of the suit property. That is what transpired in the transaction between the plaintiff herein and Mr. Kios. The plaintiff produced the receipts for payment made to discharge the charge, including the discharge of charge and transfer duly executed by the Settlement Fund Trustees. The plaintiff has tendered evidence to show the process how the suit property was transferred into her name. Whereas the defendant avers that the registration of the property in the plaintiff's name was fraudulent, it is clear from the documents produced by the plaintiff that the process that led to the title in her name was not fraudulent. In my view the defendant bought the suit plot from a person who had not authority or right to sell. On the basis of the evidence tendered, I am satisfied that the registration of the plaintiff as proprietor of the suit property was not fraudulent.

15. Having held and found that the plaintiff lawfully processed and acquired the title to the suit property in her name, my view is that the defendants' counter claim must fail. It is clear that the title held by the plaintiff cannot be impugned under Section 26 (1) (a) of the Land Registration Act as no fraud or misrepresentation has been proved. Further, the Plaintiff's title as transferred to her by the Settlement Fund Trustees and with the permission of the Original allottee was obtained legally and procedurally.

16. Having come to the finding that the plaintiff obtained a valid or a good title, it is my finding that the plaintiff is the absolute and indefeasible owner of the suit property. Section 24 (1) of the Land Registration Act vests in the person registered as proprietor of land or lease the absolute ownership of that land or the leasehold interest together with all rights and privileges associated with that status. As a proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which include exclusive use, possession and enjoyment thereof without interference by any third party save with her consent. The plaintiff has accused the defendant of forcefully ploughing her land and planting crops thereon without her consent, permission or authority. Indeed the defendant has not denied that he is in possession of the suit land. The defendant has submitted that the order of injunction cannot obtain in the absence of a declaratory order on ownership. With due respect, I do not agree with the defendant's submission. In my view, the order sought can and ought to issue. I find that the defendant's action are unlawful and amount to trespass. I find the evidence on record sufficient to prove that the plaintiff has proved her case on a balance of probabilities. Once trespass is established, it is actionable per se and no proof of damage is necessary for the court to award general damages.

17. The upshot is that this court is satisfied that the plaintiff has proved her case against the defendant on a balance of probabilities on the other hand I find that the defendant has failed to prove his counter-claim on a balance of probabilities. Accordingly, judgment is entered for the plaintiff against the defendant in the following terms:

a. A permanent injunction is hereby issued restraining the defendant by himself, through his agents, servants and or employees from stepping onto, cultivating, using, trespassing onto and/or dealing with that parcel of land known as TRANSNZOIA/CHEPCHOINA/TWIGA/296

b. Kshs 100,000/= as general damages for trespass

c. The defendant's counter-claim is dismissed.

d. Costs of the suit are awarded to the plaintiff.

DATED and SIGNED at MOMBASA this 2nd day of March, 2020.

C. YANO

JUDGE

Delivered at KITALE this 7th day of May 2020

Mwangi Njoroge

JUDGE