



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 257 OF 2012

PETER KIGIA JORAM.....PLAINTIFF

VERSUS

BORNES CHERONO BARTAL.....DEFENDANT

JUDGMENT

(Suit by the plaintiff claiming possession of the suit land which is in occupation of the defendant; plaintiff having title to the suit land after transfer from the previous owner; defendant claiming to have purchased the suit land and filing a counterclaim; agreement displayed by the defendant not executed by the previous owner but by persons who had no authority of the previous owner to sell the land; no consent of the Land Control Board given to the transaction by the defendant; clear that the defendant fell into a scam; no reason not to give judgment in favour of the plaintiff; judgment entered for the plaintiff; defendant given 90 days to vacate the suit land; plaintiff awarded general damages for trespass and costs of the suit).

1. This suit was commenced by way of a plaint filed on 27 March 2012. In the plaint, the plaintiff has pleaded that he is the registered owner of the land parcel Nakuru/Sondu River/36 (hereinafter referred to as "the suit land") . He pleaded that about the year 2009, the defendant, without any colour of right, trespassed into the suit land and occupied it and has since continued with her acts of trespass. He has pleaded that before the trespass, he and his family used to use the land for cultivation and realized good yields of pyrethrum, irish potatoes, cabbages and carrots, besides rearing dairy cows which would annually generate income of not less than Kshs. 300,000/=. In the suit, the plaintiff has sought for the following orders :-

(a) Vacant possession and an order of eviction;

(b) Mesne profits at the sum of Kshs. 300,000/= annually with effect from 2009 until payment in full (sic) ;

(c) General damages for trespass;

(d) Permanent injunction restraining the defendant either by herself, agents and/or servants from in whatsoever manner dealing with the property or interfering with the plaintiff's quiet enjoyment of the property;

(e) Costs of the suit;

(f) Any other relief this Honourable Court deems fit to grant.

2. The defendant did not initially file defence and the matter proceeded ex-parte with judgment being entered for the plaintiff on 5 July 2013. The defendant however successfully later applied for the setting aside of the judgment and was allowed to file defence out of time. She did file the defence and a counterclaim on 9 June 2017. She pleaded in her defence that the suit land is owned by one Daniel Mburu Wainaina who sold the same to her on 17 June 2009. She averred that she entered into the suit land after paying the purchase price to the said Mr. Wainaina. In her counterclaim, she pleaded that the defendant got registered as proprietor through fraud, on the grounds that he caused the suit land to be registered in his name while the suit land had been sold to the defendant; and he caused the District Land Registrar to issue him with a title, while knowing that Daniel Mburu Wainaina had no interest in the land, as his rights had been extinguished by the sale to the defendant. She has sought orders of the cancellation of the plaintiff's title and for rectification of the register to reflect that she is the rightful proprietor of the suit land.

3. In his evidence, the plaintiff testified that Daniel Mburu Wainaina, had given this land to the plaintiff's father, one Francis Njuguna Michuki, who died in the year 2002. After the death of his father, Mr. Wainaina transferred the land to the plaintiff. He explained that Mr. Wainaina is married to his father's sister thus an in-law, and that they sat as a family, and agreed that the suit land should be transferred to him. He produced as his exhibits, a copy of the transfer form, consent of the Land Control Board (LCB), and stamp duty receipts. I note that

the LCB consent was issued on 24 February 2011, and the transfer was registered on 10 March 2011. The plaintiff eventually became registered as proprietor on 10 March 2011 and was issued with a title deed on the same day. He testified that his father and his family, including himself, lived on this land since the year 1985 to 1992 when they left due to tribal clashes and they moved to Nakuru. They did not go back for fear of being attacked but he used to contact a neighbor to check on the status of the land. He stated that it was in the year 2011, after he got his title deed, that he decided to go to the land and he discovered that the defendant is in possession of it. He also found that the defendant had built some grass-thatched houses. He reported to the Chief and later the District Officer (D.O) but the issue was beyond them and he then filed this suit. Under cross-examination, he testified that the land was previously under the Settlement Fund Trustees (SFT) and that the land was actually not sold to his father. He admitted that he does not have anything to show that he cultivated the land and did not have any document to show income from the land. He stated that he was born in the year 1977 and he affirmed that from the year 1992 when they left the suit land, owing to clashes, he made a return in the year 2011. Re-examined, he stated that the land was actually transferred to him as a gift and was not sold to him.

4. PW-2 was one Esther Njeri Kigia, the mother of the plaintiff. She testified that the plaintiff is her first born son and that her husband is deceased. She stated that she has been resident on the suit land since the year 1985 and that she lived here with her late husband and family. She testified that this land was given to her late husband by Mr. Wainaina in the year 1985 and that Mr. Wainaina asked her late husband to pay off the SFT loan. She testified that they had pyrethrum, potatoes, maize and cabbages planted on the farm, and also kept cows and goats. They had also developed several houses. She stated that they fled the land in the year 1992 owing to clashes and did not leave the land to anyone. Her husband later died in the year 2002. She stated that he had given the plaintiff this land, and the family had no contest to this, and they informed Mr. Wainaina to transfer the land to the plaintiff. She herself has never been back to the land since the year 1992, owing to fear, as their houses were burnt.

5. In cross-examination, she asserted that Mr. Wainaina did not sell the land to her late husband but gave the same to him. Her husband then paid off the SFT loan although she did not have the said documents. She was not aware of any other sale of the suit land by Mr. Wainaina.

With the above evidence, the plaintiff closed his case.

6. DW-1 was Mr. Richard Kiprotich Misoi, a brother to the defendant. He testified inter alia that the defendant has been living on the suit land since the year 2008 after purchasing the land, and that he accompanied her to the advocate's office for the drawing of the sale agreement, which he stated was done before Mr. Ayusa Advocate. The purchase price was paid and the defendant given the documents for the land. He testified that at the advocate's office, they were with the defendant, one Mr. Nganga, one Mr. Karanja, and one Mr. Joachim, and that it was Mr. Karanja who gave them the land. It is also Mr. Karanja who was paid the purchase price. As far as he was aware, it was Mr. Karanja who was selling the land.

7. DW-2 was the plaintiff. She testified inter alia that on 17 June 2009, she visited the offices of Mr. Ayusa Advocate. She placed a thumbprint on the sale agreement and paid the purchase price but she could not recall how much she paid. She testified that the seller of the land was Mr. Karanja, who also signed on the agreement. Mr. Wainaina was not present, but she stated that a copy of his ID was given to her together with some SFT documents (but which were not produced as exhibits). She stated that she then proceeded to settle on the land. She claimed ownership of the land through purchase.

8. In cross-examination, she testified that she was shown the land by a Mr. Kosgey and Mr. Nganga. She previously used to live in Bomet and she made inquiries on whether there is any land for sale and this was shown to her. When Mr. Kosgey and Mr. Nganga showed her the land, she did not know who the owner was, but was informed that the owner was present when they did the sale agreement. She said the owner shown to her was Mr. Karanja. She testified that they did not go to the Land Control Board and she has never been to the land with the said previous owner. She stated that she is illiterate, and that at the advocate's office, it was Mr. Kosgey who read to her the agreement before she thumb printed on it. She stated that the land was vacant when she moved into it and there were no structures nor any crops.

9. DW-3 was Mr. Joachim Njuguna Karanja. He testified that the defendant wished to buy land at Sondu River area and she was directed to him. He testified that he had been assigned to sell the suit land by the owner Mr. Wainaina. On 17 June 2009, they went to the offices of Mr. Ayusa and signed the agreement. Since he has a physical disability and walks with crutches, he did not climb up to Mr. Ayusa's office but he sent one Gabriel Karanja, to represent him in the office. He testified that they had negotiated the purchase price at Kshs. 70,000/= an acre and since the land is 7 acres, he received Kshs. 490,000/= which he was to transmit to Mr. Wainaina. He stated that he placed this money in the account of one Patrick Mburu Karanja, his own brother, who he testified was a former classmate and close friend of Mr. Wainaina and that he was indeed Mr. Wainaina's best man during his wedding. He testified that Mr. Wainaina had sent the said Mr. Patrick Mburu to receive the money and had also given Mr. Mburu the documents for the land. He stated that the money reached Mr. Wainaina.

10. Cross-examined, he stated that he knew the suit land, as his own sister, used to own the neighbouring parcel No. 37. He had seen the land in the year 1989 but had not visited it since, owing to tribal clashes in the area. He had no document to show that he had been authorized to sell the suit land by Mr. Wainaina and in fact affirmed that Mr. Wainaina never wrote to him any letter of authority. He testified that it is Gabriel Karanja, who is also his nephew, who signed the agreement with the defendant, on his behalf. He was not present at the office of Mr. Ayusa and therefore did not see the document being executed. He stated that Mr. Wainaina never gave him a selling price but he was permitted to negotiate. He did not have the deposit slip to show that he actually deposited the purchase price in Mr. Mburu's account but he insisted that he did not keep a cent of it.

11. With the above evidence, the defendant closed her case and I invited both counsel for the plaintiff and defendant to file their submissions which they did. I have taken note of these in arriving at my decision.

12. In this case, the plaintiff asserts to being owner of the suit land and I have seen from the title deed and certificate of official search, that he became registered as proprietor on 10 March 2011. The defendant on the other hand wants this title cancelled on the ground that the suit land was sold to her by the previous owner, the said Mr. Wainaina. It is apparent to me that if I am not persuaded that the defendant purchased the suit land, I must dismiss her counterclaim, and would have no reason not to enter judgment for the plaintiff, at least in so far as ownership of the suit land is concerned.

13. It is the defendant's assertion that she purchased the suit property from the previous owner but an analysis of the evidence produced on her behalf shows otherwise. There is consensus that Mr. Wainaina never executed the sale agreement dated 17 June 2009, which the defendant relies upon to claim title to the suit land. I have seen the sale agreement which shows Mr. Daniel Mburu Wainaina as vendor, and the defendant as purchaser, and that the parties have agreed to sell the land at the purchase price of Kshs. 562,500/=, which is said to have been paid on execution of the agreement. The agreement shows that it is signed by Joachim Njuguna Karanja (DW-3) on behalf of the vendor. Now, firstly, it is apparent that Mr. Joachim Njuguna Karanja, never signed this agreement, but the same was signed by one Gabriel Karanja. But more importantly, I have no document that Mr. Joachim Njuguna Karanja, or Gabriel Karanja, had any authority from Mr. Wainaina to execute the sale agreement on his behalf. They are therefore not appointed agents or appointed attorneys of Mr. Wainaina, and they had no capacity to sell the land to the defendant. Moreover, their agreement never had the sanction of the Land Control Board, and no application for consent to transfer were ever made to the Land Control Board, and it follows that no consent of the Land Control Board was ever issued.

14. I sympathize with the defendant, but from what I can see, she fell into a scam. She is unfortunately illiterate, and she believed that the persons who presented themselves as owners, were indeed the owners of the suit property, which was not the case. Her sale agreement is not worth the paper in which it is written upon and I must disregard it for the simple reason that the owner of the suit land at the time, never executed the sale agreement. The people who purported to execute it on behalf of the owner, did not have his authority. Although it was said that the purchase price got to Mr. Wainaina, I have no proof of this, and I cannot hold that Mr. Wainaina received the purchase price. Even if I was to uphold the sale agreement, which I cannot for the obvious reasons I have given above, the sale agreement would still not have been upheld for want of consent of the Land Control Board. In short, I am unable to hold that the defendant properly purchased the suit land from the previous owner and she cannot therefore be declared owner of the suit land. Her counterclaim must fail and it is hereby dismissed.

15. Having dismissed the defendant's counterclaim, I have no reason not to hold for the plaintiff. He is the registered proprietor of the suit land and there is no complaint from Mr. Wainaina, that he never transferred the suit land to him. I have taken note of the submissions of counsel for the defendant that there are some inconsistencies as to whether or not the land was actually sold to the plaintiff or gifted to him, but to me, it really does not matter, as his title is not contested by the previous owner. I also take note of the submissions that there are inconsistencies on the time that the family of the plaintiff were in possession, but again to me, these are not material to the determination of whether or not the plaintiff has good title to the suit land. They may probably only affect the issue of damages but no more. It also means nothing to me that Mr. Wainaina did not appear as a witness to the suit. I do not think that the plaintiff's title is defective, but even if it is, then it is Mr. Wainaina who is to contest it, but not the defendant who clearly has not properly obtained interest in the suit land.

16. I therefore hereby declare that as between the plaintiff and the defendant, it is the plaintiff who is entitled to ownership of the suit property. The plaintiff is thus entitled to the prayers of vacant possession and permanent injunction against the defendant. As I said, I sympathise with the defendant, and being accommodative to her, I do give her 90 days to vacate the suit land.

17. There is of course the prayer for loss of user and damages. On the loss of user, I have no proof of the same. In fact, from the plaintiff's own evidence, he never independently used the land. He left the land in the year 1992, when he was about 15 years or so, and I have no evidence that he himself ever derived any income from the suit land. He cannot therefore claim any loss of use of it. However, he is entitled to damages for trespass for the defendant never vacated the suit land despite having been informed to do so, by the plaintiff, who was rightfully the owner of the suit land. In my discretion, after taking into consideration the size and user of the land, I award the plaintiff the sum of Kshs. 300,000/= as damages for trespass, in recognition of the fact that his rights to possession, occupation and use of the land, were violated by the defendant, despite the defendant being duly informed that the plaintiff has title to the land. She had this knowledge but she refused to give possession to the plaintiff but insisted on fighting a suit when she knew or ought to have known that she cannot have good title to it. She will also pay costs to the plaintiff.

18. I believe that I have dealt with all issues and now make the following final orders:-

(i) That as between the plaintiff and defendant, it is hereby declared that it is the plaintiff who is the rightful proprietor of the land parcel Nakuru/Sondu River/136.

(ii) That the defendant is hereby ordered to vacate the suit land forthwith and no later than 90 days from the date of this judgment and in default, an order of her eviction do issue.

(iii) That a permanent injunction is hereby issued against the defendant stopping her from entering or being in possession of the suit land or making use of it, or interfering with it, upon expiry of the 90 day window given above.

(iv) That the plaintiff is hereby awarded the sum of Kshs. 300,000/= as general damages for trespass as against the defendant.

(v) That the defendant shall shoulder the costs of the plaintiff's suit and of the counterclaim.

19. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 3RD day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Felix Orege for the plaintiff.

Ms. Nancy Njoroge for the defendant.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU