



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 67 OF 2017

BENJAMIN KIPYEGON TERER.....PLAINTIFF

VERSUS

ROBERT YEGON 1ST DEFENDANT

SARAH MUTAI 2ND DEFENDANT

EDWIN YEGON 3RD DEFENDANT

JUDGMENT

1. By plaint filed on 27th February 2017 the plaintiff averred that he was at all material times the registered proprietor of the parcels of land known as Title number Molo South/Ikumbi Block 4/347 (Kamwaura) and Title number Molo South/Ikumbi Block 4/340 (Kamwaura) located in Nakuru County, both measuring approximately 2.72 hectares, having purchased them on 2nd February 2009.

2. The plaintiff averred that on diverse dates between the years 2012 and 2016, the 1st defendant herein forcefully invaded the suit lands, constructed a semi-permanent dwelling house thereon and felled trees. He added that the 3rd defendant has been colluding with the 1st defendant to fell the trees and that the 2nd defendant equally invaded the suit lands, constructed a semi-permanent house thereon and is currently staying in it. That despite demands, the defendants have continued the interreference.

3. The plaintiff therefore seeks judgment against the defendants for:

a) *A declaration that the parcel of lands of Title numbers MOLO SOUTH/IKUMBI BLOCK 4/347 (KAMWAURA) and Title number MOLO SOUTH/IKUMBI BLOCK 4/340 (KAMWAURA) both measuring approximately 2.72 Hectares are legally and solely owned by the Plaintiff.*

b) *A permanent injunction restraining the Defendants either by themselves, their agents, servants, workmen and or relatives from trespassing, entering, using, occupying the suit lands, restricting the applicant's use and occupation of parcel of land MOLO SOUTH/IKUMBI BLOCK 4/347 (KAMWAURA) and Title number MOLO SOUTH/IKUMBI BLOCK 4/340 (KAMWAURA) and/or interfering with the suit lands in any manner whatsoever.*

c) *An order restraining the Defendants either by themselves, their agents, servants, workmen from felling down grown trees on the suit lands.*

d) *Costs of the suit.*

e) *Any other relief the honourable deems fit to grant.*

4. The defendants filed a statement of defence and counterclaim through which they generally denied the plaintiffs' claim. They averred that the parcels of land known as Title number Molo South/Ikumbi Block 4/347 (Kamwaura) and Title number Molo South/Ikumbi Block 4/340 (Kamwaura) are subdivisions of Molo South/Ikumbi Block 4/66 which belongs to the 1st and 3rd defendants' father who is the 2nd defendants' husband. They added that Molo South/Ikumbi Block 4/66 is the only place they know as home and that the 1st defendant built the house referred to by the plaintiff in the year 2009 as opposed to 2012. They added that they have been in occupation of the suit lands all along and have never vacated it. That Molo South/Ikumbi Block 4/66 is family land and that the subdivisions leading to Title number Molo South/Ikumbi Block 4/347 (Kamwaura) and Title number Molo South/Ikumbi Block 4/340 (Kamwaura) were done without their consent and that the registration of the plaintiff's titles was fraudulent and illegal. They thus prayed for:

a) A declaration that the parcel of Land Molo South/Ikumbi Block 4/66 is a family Land and the resultant subdivisions being Molo South/Ikumbi Block 4/340 and Molo South/Ikumbi Block 4/347 were illegally made.

b) An order of cancellation of the titles of the subdivisions being Molo South/Ikumbi Block 4/340 and Molo South/Ikumbi Block 4/347 which are in the name of the plaintiff/defendant.

c) Plaintiff's case be dismissed with costs.

5. At the hearing, the plaintiff testified as PW1 and stated that he purchased the plots known as Molo South/Ikumbi Block 4/340 (Kamwaura) and Molo South/Ikumbi Block 4/347 (Kamwaura) from Mr. Joseph Mutai through a sale agreement dated 2nd February 2001. That at the time of purchase, the plot was known as Molo South/Ikumbi Block 4/66 and that he paid KShs 700, 000 for the plot and there were three (3) buildings on the land which he also paid for this making the total purchase price to be KShs 1,150,000. That they executed a transfer and obtained consent of the Land Control Board. That he was issued with title in respect of plot 347 in February 2011 while title for plot 340 was issued in 2012. He added that he took possession after purchasing the plots but later the defendants invaded the plots and destroyed his property and that when he was buying the plots the entire family signed and witnessed the sale agreement without any objection.

6. Next on the witness stand was Joseph Kipyegon Mutai who testified as PW2. He stated that he subdivided Molo South/Ikumbi Block 4/66 into 3 portions and that he sold and transferred 2 portions to the plaintiff who paid to him a total of KShs 1,150,000. He stated further that the 1st defendant is his son, that he disagreed with the 2nd defendant and that they separated in 1978 and that the 3rd defendant is his son with the 2nd defendant. He added that by the time he sold the portion to the plaintiff the defendants were not in his life and that after separating with the 2nd defendant, he married another wife with whom they later had children and who consented to his selling the plot to the plaintiff.

7. The final plaintiff's witness was Joyce Chepkoech Korir who testified as PW3. She stated that the plaintiff has been her neighbour since 2009 and that prior to 2009 her neighbour was Joseph Mutai. She stated further that she knows the defendants herein and in November 2016 she saw them demolishing the plaintiff's house. That in 2017, the 1st and 3rd defendants harvested trees from the plot and loaded them onto a lorry.

8. The plaintiff's case was then closed.

9. Robert Kipkoech Yegon, the 1st defendant, then testified as DW1, the sole defence witness. He adopted his witness statement dated 20th March 2017 and also gave oral testimony. He stated that Molo South/Ikumbi Block 4/66 is owned by his father Joseph Kipyegon Mutai and that he is residing on it by virtue of inheritance. That the said parcel is family Land where he was born and raised and that he has been in occupation of it since 2009. He added that his sister passed away on 1st June 2009 and she was buried on Molo South/Ikumbi Block 4/66 but his father did not want her buried there and he filed Molo Civil Suit No. 401 of 2010 against him. That the suit was precipitated by some existing family feuds which saw the family separate at some point when he was younger and that they went back to the land after he grew up. He added that he constructed a semi-permanent house on the land in March 2010 and lives there with his mother and his brother who are co-defendants in this matter.

10. DW1 testified further that in April 2010, his father wrote him a letter through an advocate demanding that he vacates the land and that he exhumes the body of his sister but he continued to construct. That in the year 2011, the plaintiff herein told him that he had purchased the plot but he informed him that the plot had a dispute. That he registered a caution against plot 66 on 23rd November 2010 and that this case is engineered by his father who wants to disinherit them. He added that after his father and mother separated in 1978, they were living with their grandfather when the plaintiff was buying the plots and that his father is still alive and has not distributed the plot to them.

11. The defence case was then closed.

12. Parties then filed and exchanged written submissions. The plaintiff argued in his submissions that he is the registered proprietor of the suit properties. He relied on **Section 26** of the Land Registration Act and the case of **Panari Enterprises Limited vs Lijoodi & 2 Others [2014] eKLR**. He also argued that he is an innocent purchaser for value who should be protected and pointed out that the defendants have not enjoined the vendor to this suit. That he followed due process in purchasing the suit properties and was in occupation until May 2009 when the defendants began to trespass. He further placed reliance on the case of **Eunice Grace Njambi Kamaa and another v. The Hon. Attorney General and 5 Others Civil suit No. 976 of 2012**.

13. The plaintiff also submitted that the defendants have not proved their allegations of fraud and added that he acquired the suit properties in 2002 when the vendor and the 2nd defendant had separated sometime back in 1978. He argued that in the circumstances no consent was required from the 2nd defendant. The plaintiff further submitted that the 1st defendant cannot validly claim an interest in the suit properties by virtue of inheritance yet his father is still alive. He therefore urged the court to grant him the reliefs he has sought and to dismiss the counter claim with costs.

14. The defendants submitted that it is not clear which parcels of land were purportedly sold to the plaintiff by PW2 since the sale agreement produced in court is in relation to the Molo South/Ikumbi block 4/66 while the pleadings mention Molo South/Ikumbi block 4/340 and Molo South/Ikumbi block 4/347. They added that the plaintiff's titles were issued much later after the sale agreement and that PW2 has an active court case against the 1st defendant in which PW2 avers that he is the registered owner of Molo South/Ikumbi block 4/66. They submitted that from foregoing it is difficult to determine whether there was any enforceable sale, subdivision and transfer.

15. Placing reliance on section 6 of the Land Control Act, the defendants argued that no evidence was tendered to show that consent of the Land Control Board was obtained in respect to the sale, subdivision and transfer of Molo South/Ikumbi block 4/66 and that spousal consent of the 2nd defendant was not sought. Reliance was placed on the case of **Kadzo Mkutano vs Mukutano Mwamboja Kadoshu & 2 Others [2016] eKLR**. The defendants thus urged the court to grant the prayers sought in the defence and counterclaim.

16. I have carefully considered the pleadings the evidence and the submissions herein. From the material on record, it is clear that the plaintiff is the registered proprietor of Molo South/Ikumbi block 4/347 (Kamwaura) and Molo South/Ikumbi block 4/340 (Kamwaura), the suit properties, pursuant to title deeds issued to him on 13th January 2011 and 5th March 2012 respectively. Indeed, copies of title deeds were produced at trial without any contest by the defence. The sizes of the plots are 1.21 hectares and 1.51 hectares respectively.

17. Although the defendants seemed to suggest in their submissions that the identity of the properties purchased or in dispute is not clear, their defence and counterclaim makes it clear that Molo South/Ikumbi block 4/347 (Kamwaura) and Molo South/Ikumbi block 4/340 (Kamwaura) are subdivisions of Molo South/Ikumbi block 4/66. It is equally not in dispute that the plaintiff purchased the suit properties from Joseph Kipyegon Mutai (PW2) pursuant to sale agreement dated 2nd February 2009. A reading of the agreement shows that PW2 sold to the plaintiff 2.72 hectares of land, three semi-permanent houses and trees. The land was to be excised from Molo South/Ikumbi block 4/66. The defendants do not deny the plaintiff's allegations that they have moved into the suit properties and constructed on them. If anything, the 1st defendant emphatically asserts that he is residing on the suit properties by virtue of inheritance. One wonders what inheritance means in the context of this case where both his parents are admittedly alive.

18. The defendants' contention is that the sale, subdivision and transfer are illegal for want of spousal consent, because the land is family land, for want of consent of the land control board and because the registration of the plaintiff's titles was fraudulent and illegal. I will examine each of those contentions as a separate issue. Finally, I will examine whether the reliefs sought by the parties are available.

19. Was spousal consent necessary as regards the sale, subdivision and transfer of the suit properties to the plaintiff? The burden of proving the allegation that such a consent was necessary rests with the defendants. Parties have based their submissions on the **Matrimonial Property Act, 2013** and the **Land Registration Act, 2012**. The sale agreement herein was entered into on 2nd February 2009, long before the advent on those two statutes. Similarly, the plaintiff's titles were issued before the said statutes were enacted. Thus, the provisions cited in the two statutes do not aid the parties at all.

20. Under **Section 30 (g)** of the **Registered Land Act** (repealed) which was in force as at the date of the sale agreement and even when the plaintiff became the registered proprietor, the rights of a proprietor were subject to such overriding interests as "*the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.*"

21. The defendants have not demonstrated that they were in occupation of Molo South/Ikumbi block 4/66 as at 2nd February 2009 when the sale agreement was executed. It is my finding that they were not in occupation. All that we have on record is the 1st defendant's testimony that he constructed a semi-permanent house on the land in March 2010 and that lives there with the other defendants. The 1st defendant also testified that his parents separated in 1978 and that he and his mother went away only to return to Molo South/Ikumbi block 4/66 when he was an adult. I am not persuaded that any spousal consent was necessary regarding the sale, subdivision and transfer of portions of Molo South/Ikumbi block 4/66 to the plaintiff. For the same reasons, I am not persuaded that Molo South/Ikumbi block 4/66 was family land.

22. Was there no consent of the land control board in respect of the sale, subdivision and transfer of portions of Molo South/Ikumbi block 4/66 to the plaintiff? Once again, he who alleges must prove. The burden of demonstrating that no consent was obtained rests with the defendants. Beyond the allegation, no evidence has been adduced by the defendants to demonstrate that no application for consent was made, no deliberations were made by the board or that no consent was issued at all. It is not enough to allege lack of consent then expect the plaintiff to disprove.

23. Was the registration of the plaintiff's titles fraudulent and illegal? Fraud is a serious allegation which cannot simply be inferred from the facts. It must be pleaded, particularised and proved on a standard above balance of probabilities but below the criminal law standard of proof beyond reasonable doubt. See **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR**. Beyond alleging fraud, the defendants have neither particularised it nor made any effort to prove it to the requisite standard.

24. As the registered proprietor of the parcels of land known as Molo South/Ikumbi block 4/347 (Kamwaura) and Molo South/Ikumbi block 4/340 (Kamwaura), the plaintiff is by law entitled to the rights, privileges and benefits under **Article 40** of the **Constitution** and **Section 24** of the **Land Registration Act**. The said section 24 provides 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;

25. In view of the foregoing discussion, I am persuaded that the plaintiff is entitled to the reliefs sought. The defendants' counterclaim however fails.

26. I therefore enter judgment in favour of the plaintiff as follow:

a) A declaration is hereby issued that as between the plaintiff and the defendants herein, the parcels of land known as title numbers Molo South/Ikumbi Block 4/347 (Kamwaura) and Molo South/Ikumbi Block 4/340 (Kamwaura) are solely owned by the plaintiff.

b) A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants, workmen and or

relatives from interfering with, trespassing upon, entering, using, occupying or restricting the plaintiff's use and occupation of the parcels of land known as title numbers Molo South/Ikumbi Block 4/347 (Kamwaura) and Molo South/Ikumbi Block 4/340 (Kamwaura) in any manner whatsoever.

c) An order is hereby issued restraining the defendants by themselves, their agents, servants, workmen from felling down grown trees on the parcels of land known as title numbers Molo South/Ikumbi Block 4/347 (Kamwaura) and Molo South/Ikumbi Block 4/340 (Kamwaura).

d) The defendants' counterclaim is dismissed.

e) Costs of both the suit and the counterclaim are awarded to the plaintiff.

Dated, signed and delivered at Nakuru this 11th day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Cherono for the plaintiff

No appearance for the defendants

Court Assistants: B. Jelimo & J. Lotkomoi