



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 764 OF 2017

JARED OTIENO WANYERA.....PLAINTIFF

VERSUS

GEORGE OKOTH OWUOR.....1ST DEFENDANT

ISACK OKOTH OWUOR.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The central property in present dispute is land reference number kanyamkago/Kawere 11/3346 measuring approximately zero decimal nine hectares (0.9 Ha) in area (The suit property herein). It is a sub division of the original land LR NO Kanyamkago /Kawere 11/999 and contained in Registry Map Sheet number 8. The same is located in Migori County.
2. On 9th December 2019, this court ordered and directed that the report dated 29th December 2018 by the County Surveyor Migori be deemed as duly filed and served by the plaintiff's counsel. This followed orders of the court given on 31st July 2017.
3. The plaintiff Jared Otieno Wanyera is represented by M/s Mudeyi Okumu and Company advocates.
4. The 1st and 2nd defendants namely George Okoth Owuor and Isack Okoth Owuor appear in person herein.

B .THE GIST OF THE PLAINTIFFS CASE.

5. By a plaint (Fast track) dated 25th July 2017 and filed herein on even date, the plaintiff has sued the 1st and 2nd defendants' jointly and severally for:
 - a. An order of permanent injunction/ prohibitory orders stopping/ restraining the defendants either by themselves and/or agents, and/or servants, and/or anyone claiming under them or deriving interests through them from trespassing and/or encroaching into and/or utilizing and/or burying and/or interfering with the plaintiff's use and/or peaceful occupation on Land Parcel No. Kanyamkago/Kawere II/3346 in howsoever and/or whatsoever manner.
 - b. An order of eviction and/or exhumation.
 - c. General damages for trespass.
 - d. Costs of this suit.
 - e. Any other remedy that this Honourable Court may deem fit and just to grant in the circumstances.

6. Briefly, the plaintiff contended as per the plaint that he is the sole registered owner of the suit property and that he is entitled to absolute ownership, possession and the cultivation of the same. That in the years 2016 and 2017, the 1st and the 2nd defendants jointly did trespass upon and or encroached on the suit property. The particulars of the trespass are set out at paragraphs 7(a) to (e) of the plaint. As a result, the plaintiff has been denied user of the suit property occasioning him loss and damage. Thus, it provoked this suit.

7. On 9th December 2019, the plaintiff (PW1) testified and relied on his statement dated 25th July 2017 in its entirety as part of his evidence. He stated that he bought the suit property from the 2nd defendant who is the 1st defendant's father in the year 2003 at a consideration and obtained title deed thereto. He also relied on his list of documents dated 25th July 2017 serial numbers (a) to (d) seriatim (PExhibits 1 to 4) and the surveyor's report noted in paragraph 2 herein above (PExhibit 5).

8. This court ordered and directed the parties to file and exchange submissions within forty-four (44) days from 9th November 2020. However, on 20th January 2021, the plaintiff informed the court as hereunder-

“My advocate.....does not intend to file and serve submissions. We rely on evidence as recorded.....”

9. The plaintiff's counsel did not file his submissions herein.

THE GIST OF 1ST AND 2ND DEFENDANTS' CASE.

10. In their joint statement of defence dated 25th January 2019 and filed in court on 1st February 2018, the 1st and 2nd defendants denied the cause of action and sought dismissal of the suit with costs. They stated that whereas the suit property and LR NO.Kanyamkago/Kawere 11/3348 were some of the sub divisions of the original land, they were altered as per the mutation to suit the interest of PW1 from 0.8 hectares to 0.9 hectares and from 1.8 hectares to 0.6 hectares respectively. That the alteration was tampered with since it does not conform with the information contained in the minutes of the area Land Control Board (LCB).

11. The 1st and 2nd Defendants further stated inter alia, that the plaintiff's suit is punctuated with fraud thus, cannot stand the test of trial. That the title held by PW1 in this suit was obtained through fraud and it criminales him.

12. On 9th November 2020, the 1st defendant (DW1) testified that PW1 bought a portion of land measuring zero point eight hectares (0.8Ha) of the original land from the 2nd defendant (DW2) at kshs 130,000/= being full purchase price for the same. That later, PW1 claimed an extra portion which is in dispute hence a caution dated 7th November 2005 (DEXhibit 3) was lodged over the suit property. He relied on his list of documents dated 21st March 2009 (DEXhibits 1 and 2) and further list of documents dated 3rd December 2019 (DEXhibits 3 and 4) as part of his evidence in this suit.

13. DW2 told the court that the suit property belonged to the late Omoyo Ochieng (Deceased). That upon the death of the deceased, one Raphael Ochieng an uncle to (DW2) purported to sell it to PW1 as succession process was not carried out over the estate of the deceased. That he (DW2) sold two (2) acres of the suit property to PW1 at kshs 130,000/= but PW1 tried to interfere with the family of DW2 thus DEXhibit 3 was lodged in respect of the suit property. He relied on DEXhibits 1 to 4 in support of their joint statement of defence.

14. By a two (2) paged submissions dated 21st April 2021 and duly filed in court on 28th April 2021 , the 1st and 2nd defendant made reference to the orders sought in the plaint and that the purported purchase of the suit property by PW1 was fraudulent and devoid of proof thereof. They referred to the alteration in the mutation allegedly caused by PW1. That the plaintiff's claim is an outright infringement of equity and should be disallowed.

D. POINTS FOR DETERMINATION

15. I have carefully noted the plaint, the joint statement of defence, the testimonies of PW1, DW1 and DW2 as well as the 1st and 2nd defendants' submissions in their entirety and the fact that the plaintiff did not file his submissions herein. I also take into account the Court of Appeal decision in the case of **Great Lakes Transport Company (U)Ltd-vs-Kenya Revenue Authority (2009) eKLR 720** on the issues for determination in a suit generally.

16. In that regard, I am of the considered view that the issues for determination in this suit are whether;

- a) The plaintiff (PW1) is the lawful proprietor of the suit property,
- b) The 1st and 2nd defendants are trespassers on the suit property,
- c) The plaintiff is entitled to the orders sought in the plaint.

E. ANALYSIS AND DETERMINATION

17. As regards the first issue, PW1 claims to be the sole registered proprietor of the suit property. On the face of PExhibit 1, PW1 is the absolute proprietor of the suit property with effect from 23rd April 2010 and title issued to him on 26th April 2010. Plainly, PExhibit 2 speaks to the nature of the title as discerned in PExhibit 1.

18. In **section 2 of the Land Registration Act, 2016 (2012) (The LRA herein)**, the term “Proprietor” means-

- “ (a) in relation to land or lease, the person named in the register as the proprietor; and

(b) in relation to a charge.....”

19. **Sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya (Repealed Act)** anchored absolute proprietorship. Currently, **sections 24, 25 and 26 of the LRA** provide for interests conferred by registration, rights of a proprietor and certificate of title to be held as conclusive evidence of proprietorship respectively.

20. It is common baseline that PW1 bought the suit property. That the original land showing four (4) sub-divisions as per DExhibits 1 and 4, belonged to the deceased.

21. DW2 maintained that his uncle Raphael Ouma Ochieng subdivided the original land belonging to the deceased into four (4) portions and purportedly sold a portion to PW1. In that scenario, there was intermeddling with the estate of the deceased as stipulated under Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya.

22. It is trite law that the registered proprietor must go beyond the instrument of title and show that due process was followed in its acquisition, see **Moses Parantai & Another –vs- Stephen Njoroge Macharia (2020) eKLR** and **Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR**.

23. Regarding trespass, the plaintiff pleaded particulars of trespass at paragraph 7(a) to (e) of the plaint. **Section 152 A of the Land Act, 2016 (2012)** reads:

“A person shall not unlawfully occupy private, community or public land”.

24. **Clerk and Lindsell on Torts 18th Edition paragraph 18-01** defines the term “Trespass” thus:

“An unjustifiable entry by one person upon the land in possession of another”

25. It is noteworthy that trespass is a tort actionable per se. I endorse the standpoint taken in the case of **Zachariah Onsongo Momanyi –vs- Evans Omurwa Onchagwa (2014) eKLR** where my Senior brother Justice Samson Okongo held that trespass is any unjustified intrusion of one person upon the land in possession of another.

26. This court is not unaware of Section 18 of the Land Registration Act (supra) regarding boundaries of a parcel of land. The court complied with the said provision of the law when it generated its Orders of 31st July 2017 that precipitated PExhibit 5 and the conclusion alongside the findings therein are noted herein.

27. It is further noted that PExhibit 5 is opinion evidence as stipulated under sections 48 to 54 of the Evidence Act, Chapter 80 Laws of Kenya. However, as a general rule expert evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case before it as held in the case of **Amosam Builders Developers Ltd. –vs- Gachie & 2 others, (2009) KLR 628** and this court’s decision in the case of **Registered Trustees Legio Maria Africa Church Mission –vs- Simon Nyamweya Obwocha 2018 eKLR**, among other authorities.

28. It was the testimony of PW1 that he bought the suit land from DW1 and he maintained in cross-examination that the title thereof was in the name of Raphael Ochieng, an uncle to DW2. Notably, the said Raphael Ochieng is not a party in this matter. There is also no demonstration that either DW1 or Raphael Ochieng had limited or full grant of letters of administration in respect of the estate of the deceased as noted in the case of **Rajesh Pranjivan Chudasama –vs- Sailesh Pranjivan Chudasama 2014 eKLR** and as pointed out in paragraph 21 hereinabove.

29. During further cross-examination, PW1 stated that he has not used the suit property in peace. DW1 and DW2 testified that PW1 occupies only 0.8 Hectares while PExh5 reveals that the first and second defendants erected buildings on the suit property. So, trespass claim by the plaintiff and as revealed in PExhibit 5, Clerk & Lindsell and Zachariah Onsongo case (supra), is farfetched herein. Therefore, the second issue is resolved accordingly.

30. In the foregone, the plaintiff has not proved his case against the defendants on a balance of probabilities. He is therefore, not entitled to the orders sought in the plaint.

31. Accordingly, the plaintiff’s suit originated by way of a plaint dated 25th July 2017 and duly filed in court on even date, be and is hereby dismissed with costs to the defendants.

32. It is so ordered.

DELIVERED DATED AND SIGNED AT HOMA BAY via email pursuant to Article 7 (3) (b) of the Constitution of Kenya 2010 as the parties were duly notified, THIS 29TH DAY OF SEPTEMBER 2021.

G.M.A. ONGONDO

JUDGE