



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 805 OF 2017

ROSEBELLA ANYUMBA.....PLAINTIFF

VERSUS

CLEMENT O. SAKIRI.....DEFENDANT

JUDGMENT

A. INTRODUCTION

1. In the instant suit, the main property in dispute is a portion of land measuring approximately three (3) acres of land reference number Suna East/Wasweta 11/1533 (The suit land herein). The same is contained in Registry Map Sheet number 12 and located in Migori County.
2. The suit land is registered in the name of the defendant, Clement O. Sakiri. Originally, it was registered in the name of Francis Opetia Otieno –Deceased 1, who was the father of the defendant.
3. The plaintiff, Rosebella Anyumba (suing for and behalf of the estate of Paul Anyumba Ngonda –Deceased 2) is represented by Messrs Agure Odero and Company Advocates.
4. The defendant's is represented by Messrs Odondi Awino and Company Advocates.

B. THE GIST OF THE PLAINTIFF'S CASE

5. By a plaint dated 21st August 2017 and amended on 13th April, 2021 duly filed herein on 14th April, 2021 further to leave of this court granted on 20th January 2021, the plaintiff is seeking the following orders;-
 - a. An order for permanent injunction against the defendant, his agents, servants, employees, legal representatives from trespassing, leasing, alienating, building structures on a portion of parcel **LR. NO. SUNA WEST/WASWETA 11/1533** measuring 3 acres.
 - b. An order compelling the defendant to transfer a portion of **LR. NO. SUNA WEST/WASWETA 11/1533** measuring 3 acres to the plaintiff herein.
 - c. Cost of the suit.
 - d. Any other relief this Honourable Court may deem fit to grant.
6. It is the lamentation of the plaintiff that in the year 1975, her husband (deceased 2) did purchase the portion of the suit land from deceased-1 for a consideration of Kshs 4,800. That deceased 1 died before transferring the same to deceased -2 who died in the year 2007. That the defendant transferred the whole parcel of land in his name and excluded the plaintiff's family therefrom after he succeeded the estate of deceased -1 in Kisii High Court Succession Cause No. 603 of 2009. That the plaintiff and her son have been rendered homeless and suffered immense loss hence, it precipitated the instant suit.
7. The plaintiff (PW1) testified and relied on her list of documents dated 21st august 2017 (PEXhibits 1 to 8) to fortify her claim. She called two (2) witness:-
 - a) Her brother in-law, Albert Okwaro Ngonda (PW2) who testified in part that deceased-1 sold the portion of the suit land to decease-2 as per PEXhibit 2. That the defendant chased away PW1 from the suit land in the year 2015.
 - b) Her son, John Arogo Anyumba (PW3) relied on his statement filed on 21st August 2017 as part of his evidence. PW3 stated inter

alia, that deceased 2 purchased the suit land from deceased-1 and that PW1 is entitled to it. He identified PEXhibit 8 herein.

8. The plaintiff's counsel filed submissions dated 17th September 2021 on 21st September 2021. Counsel urged this court to grant the orders sought in the plaint. To buttress the submissions, counsel relied on the case of **Elizabeth Wambui Githinji & 29 others –versus- Kenya Urban Roads Authority**, among others.

C. THE GIST OF THE DEFENDANT'S CASE

9. In his statement of defence dated 20th September 2017 and filed herein on even date, the defendant denied the plaintiffs claim. He stated that he has no reason to include the plaintiff as a beneficiary of the estate of deceased 1. That the plaintiff is not in possession and occupation of the suit land as alleged by the plaintiff.

10. The defendant (DW1) testified that the suit land belonged to deceased 1 who was his father and that he has title deed and a certificate of official search thereto as per list of documents dated 29th July 2020 (DEXhibits 1 and 2). He further stated that he is in occupation of the suit land. That PW1 does not live thereon and that PEXhibits 1 to 8 are deficient of the name of deceased 1 and the suit land.

11. The defendant's submissions are three (3) paged dated 7th September 2021 and filed herein on 9th September 2021. Reference was made to the orders sought in the plaint, the cases of **Cecilia Nyambura Murunga-vs- John Ndungu Maina (2018) eKLR**, **Macharia Mwangi Maina and 87 others-vs-Davidson Mwangi Kagiri (2014) eKLR** and **David Sironga ole Tukai-vs-Francis Arap Muge (2014) eKLR**, to fortify the submissions.

D. POINTS FOR DETERMINATION

12. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Co. Ltd =vs= Falcon Grounds Ltd (2000) 2 EA 385**.

13. I have duly studied the parties' respective pleading, evidence and the **rival submissions** including the authorities cited therein. So, the issues for determination are condensed to whether the plaintiff has proved her case on balance of probabilities to entitle her to the orders sought in the plaint.

E. DISCUSSION AND DETERMINATION

14. The plaintiff testified that her deceased husband (Deceased-2) bought the suit land from deceased 2 as shown in PEXhibit 2. The title of plaint and paragraph 1 of the same discern that PW1 is suing on behalf of deceased-2.

15. PEXhibit 8, a Limited grant of administration ad litem shows that PW1 is the personal representative of the estate of deceased 2. This court is not unconscious of the term "**Personal representative**" and "**Legal representative**" as defined in **sections 3 and 2 of the Law of Succession Act Chapter 160 Laws of Kenya and the Civil Procedure Act Chapter 21 Laws of Kenya** respectively.

16. In **Rajesh Pranjivan Chudasama =vs= Sailesh Pranjiran Chudasama (2014) eKLR**, the Court of Appeal stated;-

"..... A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession."

17. It is common baseline that DW1 is a son of deceased 1. PW1 has the right to appear and be heard in court as revealed in PEXhibit 8 and noted in the case of **Alfred Njau and others =vs= City Council of Nairobi (1982-88) 1 KAR 229**.

18. It is also common ground that deceased 1 did not obtain consent of the relevant Land Control Board (LCB) regarding sale of land. PEXhibit 2 is disputed by DW1 who stated that deceased 1 sold land to another person who is deceased but not to deceased -2. That deceased 1 gave deceased 2 and PW1 temporary accommodation at his (deceased 1) home on the suit land for one year only.

19. In examination in chief, DW1 stated that PW1 does not live on the suit land. During cross examination, he stated in part;-

"..... I do not intent to chase away PW1 from the suit land....."

20. PEXhibit 2 shows the name of deceased 1 and deceased 2. It was signed by two (2) witnesses. I am aware of **section 3 (3) of the Law of Contract Act Chapter 23 Laws of Kenya** and its limitation as provided for under subsection 7 thereof. The terms "**Interest in land**", "**Party**" and "**sign**" are defined in **section 3 (6) of the Act** and I bear in mind the same accordingly.

21. In **Kariuki =vs= Kariuki (1983) KLR 227**, it was held that a transaction is void for all purposes for want of consent. The court stated the only remedy open to a party under **section 7 of Land Control Act Cap 302 the Land Control Act Chapter 302 Laws of Kenya**.

22. In the case of **Macharia Mwangi Maina (supra)** at paragraph 26, the Court of Appeal held, inter alia;-

"This is a court of law and a court of equity. Equity shall suffer no wrong without a remedy..... and equity detests unjust enrichment.... Aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property"

23. The lack of consent of Land Control Board was discussed by the Court of Appeal in the case of **Willy Kimutai Kitilit =vs= Michwal Kibet (2018)** at page 15 thus:-

“..... the lack of consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.....”

24. Similarly, in the case of **William Kipsoi sigei =vs= Kipkoech Arusei Civil Appeal No. 54 of 2016 (2019) e KLR**, the Court of Appeal applied constructive trust and equitable estoppel principles in favour of a purchaser who paid full purchase price and took fourteen (14) years possession of a parcel of agricultural land but failed to obtain Land Control Board consent under section 6 (1) of the Land Control Act Chapter 302 Laws of Kenya. The court held that the agreement between the appellant and the 1st respondent was valid and enforceable.

25. **Article 10 (2) (b) of the Constitution of Kenya, 2010** stipulates that equity is one of the national values and principles of governance and this court is bound thereby. Therefore, this court shall protect and promote the said principles as provided for under **Article 159 (2) (e) of the same Constitution.**

26. The rights of appropriator are absolute and indefeasible by dint of a certificate of title as stated in **section 26 (1) of the Land Registration Act ,2016 (2012)**. Be that as it may, those rights are subject to trusts including customary trusts under **sections 25 (b) and 28 (b) of the same Act.**

27. Prohibition of unlawful occupation of private land, among others, is captured in section 152 A of the Land Act, 2016 (2012). This court has the mandate to grant preservation orders including permanent injunction. In the case of **Nguruman Ltd-vs- Jan Bonde Nielsen and 2 others (2014)eKLR**, the Court of Appeal held that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits. The present case is mounted within the said conditions and attracts permanent injunctive relief as well as other orders sought in the plaint.

28. To that end, it is the finding of this court that the plaintiff's case is solid and outweighs the defendant's case. The plaintiff has established her claim against the defendant on a balance of probability and she is entitled to the orders sought in this suit.

29. Wherefore, Judgment is hereby entered for the plaintiff against the defendant in terms of prayers 1, 2 and 3 in the plaint dated 21st August 2017 and as set out in paragraph 5 hereinabove.

30. In the event the defendant fails to comply with relief number 2 sought in the plaint, the Deputy Registrar of this court shall execute the requisite transfer documents accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY VIA EMAIL SINCE THE PARTIES WERE DULY NOTIFIED ACCORDINGLY, THIS 28TH DAY OF SEPTEMBER 2021

G.M.A. ONGONDO

JUDGE