



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 49 OF 2016

EVERLINE NANGILA WEKESA.....PLAINTIFF

VERSUS

MARTIN BUKAMU.....1ST DEFENDANT

EDWARD BARASA.....2ND DEFENDANT

REVIEWED JUDGMENT

INTRODUCTION.

1. The plaintiff commenced the instant suit vide a plaint dated 7/3/2016 and filed in court on the same date seeking judgment against the defendants for the following orders:

(a) An eviction order against the 1st and 2nd defendants, their agents and/or servants from the said parcel of land known as LR. No. Kwanza/Kwanza Block 7/Tonyoto/190 measuring 0.1214 Hectares.

(b) A permanent injunction restraining the 1st and 2nd defendants, their agents and/or servants from trespassing upon and/or committing any acts upon the plaintiff's parcel of land known as Kwanza/Kwanza Block 7/Tonyoto/190 measuring 0/1214 Hectares.

(c) General damages for illegal trespass.

(d) Costs of this suit.

(e) Any other or further relief that this honourable court may deem fit and just to grant.

PLEADINGS.

The Plaintiff

2. In the plaint, the plaintiff's case is that she is the registered owner of Land Reference No. **Kwanza /Kwanza Block 7 /Tonyoto /190** measuring **0.1214 ha**; that the defendants have trespassed upon the suit land and carried on various activities thereon and that they should be evicted.

The Defence

3. The defendants filed their joint statement of defence on 12/4/2016. The defendants deny the claims of encroachment or trespass and state that they are the legal owners of the suit property having purchased it for value and they have been in occupation thereof for a period of 27 years; that the plaintiff unlawfully caused the suit land to be registered in her name; that the plaintiff is however in possession of the land that she had purchased and that the dispute can be resolved by way of a visit to the disputed land by the government Surveyor.

EVIDENCE OF THE PARTIES

The Plaintiff's case

4. **PW1, Everline Nangila Wekesa**, the plaintiff, testified on 23/2/2021. She adopted her written statement dated 7/3/2016 as her evidence-

in-chief. Her evidence is that she is the registered owner of the suit land; that she purchased it from one Reuben and his wife Dinah in **1994**; that the land is located within Zuberi Farm which was under the Mutua Farmers Cooperative Society; that she was issued a share certificate by the said society; that the 1st defendant and 2nd defendant own plots number **186** and **193** respectively; that she took possession of the suit land but moved away from it when robbers attacked her home and murdered her daughter; that she went to her parents' home at Marinda in Kapomboi in Trans Nzoia; that while away the 1st and 2nd defendants encroached on her parcel and degraded or wasted it. She produced the agreement dated **3/2/1994** vide which she purchased the land; she stated that a title deed was later issued over the suit land in her name. (**PEXh 2**). She produced a certificate of official search dated **8/12/2015** showing that the land was still registered in her name.

5. PW2, William Nabutola testified on the same date as **PW1**. His evidence is that he was the secretary of Mutua Co-operative Society and that plot no **190** belongs to the plaintiff. Upon cross-examination he stated that the plaintiff had utilized the land from **1990**.

6. PW3, Moses Nyaboe, testified on **10/5/2021**. His evidence is that he worked in the County Survey office as a Surveyor. He stated that he visited the land upon an order of this court to confirm the boundaries of the suit land among other plots; that he made a report of his findings which he produced as **PEXh 11**; that on the ground plot **186** is present but its owner has encroached on plot no **190**; that plot no **193** was also present on the ground but its owner had encroached on plot no **190**; that plot no **190** is not in its right position on the ground and is misplaced and that he was unable to place any boundaries on the ground as the people present during the visit were hostile.

7. Upon examination by the court **PW3** stated that the plaintiff is residing on plot no **204** which she also owns and that it is separated from plot **190** on the map by other plots, **193** and **194**.

8. At that point the plaintiff closed her case.

The Defendants' Defence

9. The hearing of the defence case took place on the **19/5/2021**, when the 1st defendant, **Martin Wanjala Bukamu**, testified as **DW1**. He adopted his written statement dated **13/7/2018** as his evidence-in-chief. His evidence is that in **1987** he purchased half an acre from one Musa and occupied it; that he has lived on that land for **29** years; that the plaintiff came to the farm in **1994** after purchasing half an acre from one Reuben; that Reuben had also purchased his land from Musa; that the plaintiff took possession of the land and has been in possession ever since; that Mutua Farm Cooperative Society Ltd joined hands with Tonyoto Company to process title deeds in **1990** since the original owner of Zuberi Farm had passed away; that as a result a company called **Kwanza Mutua Tonyoto Block 7** was formed; that a surveyor came to the land and surveyed it and made an error; that the map does not reflect what is on the ground; that the boundaries of the plots in question are still intact; that he has never encroached on the plaintiff's parcel; that the dispute can be resolved through amendments to the map by the County Surveyor. Upon cross examination by Mr. Bororio he stated that he does not have a title deed for **Plot No 186** and that the plaintiff has never been charged with any fraud.

10. DW2, Edward Barasa, the 2nd defendant, testified on the same date as **DW1**. He adopted his written statement dated **13/7/2018** as his evidence-in-chief. His evidence is that he also purchased one acre of land from Musa Ludenyoo; that he took possession of the land and developed it; that he has lived on the land for **27** years; that Musa had purchased the land from the original owner, Zuberi; that the plaintiff also purchased her land in **1994** from Musa and immediately occupied it; that the only issue that arises in this matter is the location of the plaintiff's plot. He asserts that there was an error that was made by the surveyors before the plot numbers were allocated. He maintained that the parties should be allowed to live on the parcels they currently occupy with the County Surveyor rectifying the Registry Index Map to reflect the existing physical boundaries. On cross-examination he stated that he has not obtained his title to his plot. According to him the plaintiff has only one plot. He also stated that he has built on the area near the road.

11. DW3, Samwel Maiywa, testified on the same date as **DW1**. He adopted his written statement dated **13/7/2018** as his evidence-in-chief. His evidence is that he is the first born son to Reuben and Dinah who sold land to the plaintiff; that he signed the agreement dated **3/2/1994**; that the plaintiff never cleared the balance of the purchase price and that his parents did not own any other plot in Zuberi Farm save the one the plaintiff bought.

At that juncture the defendants closed their case.

SUBMISSIONS

12. The plaintiff's written submissions was filed on **2/6/2021**. I have perused the court file and found no submissions filed on behalf of the defendants.

DETERMINATION

13. I have considered the plaint, the defence, the evidence of the parties and the filed submissions.

14. It is common ground that all the three parties in the instant suit are entitled to separate portions of land located within what was formerly called Zuberi Farm. The Registry Index Map for the farm was prepared and, as far as is pertinent to this suit, the three portions numbered **190**, **193** and **186** were created. Each party took a plot and occupied it. The 1st defendant took the proper plot numbered **186** and the same corresponds with what is in the RIM save that he appears to have encroached on the plaintiff's Plot No **190**. The 2nd defendant appears to have also taken his proper plot save for the fact that he has encroached on the plaintiff's plot no **190**. There is no clarity on the allegation that the plaintiff owns another plot number **204** on the farm on which she resides. The Surveyor's report however indicates that the portion she has occupied on the ground extends into the plot referred to as **193** on the official RIM.

Issues for determination.

15. The issues for determination are as follows:

- a. **Have the defendants trespassed onto the plaintiff's land?**
- b. **Should the defendants be evicted and enjoined from any further interference with the plaintiff's land?**
- c. **Who should bear the costs of the suit?**

16. Regarding the first issue above it is the surveyor's evidence based on the existing Registry Index Map made in 1995 that the defendants have trespassed onto the plaintiff's land as claimed. This is the same Registry Index Map that has been used to generate the plaintiff's title among others.

17. The defendants have failed to obtain title to their proper portions while the plaintiff has obtained title in her name to the disputed land. It is clear that the defendants took possession of their proper portions as demarcated in the Registry Index Map and then extended their boundaries to wholly annex the plaintiff's land. They appear to have shared it almost in equal portions.

18. I do not deem it coincidence that the defendants are in occupation of the greater portions of their land and that they have shared the plaintiff's land between themselves in almost equal proportions or that they have failed to obtain title to their portions to date.

19. The inconsistency of the defendants' evidence is considerable. Allegations of fraudulent obtainance of title must be established within the provisions of **Section 26** of the **Land Registration Act**. However, the defendants' claim in the defence that the plaintiff has obtained her title fraudulently are not backed by any evidence. I must deem the title deed (**PExh 2**) as genuine and properly obtained in the absence of any proof of fraud.

20. I must also examine the defendants' claims of error on the part of the survey office in the preparation of the registry index map and the numbering. No evidence was adduced to show that there was error and in any event the Director of Surveys office was not enjoined to the suit by any of the parties to answer such a serious claim. Nevertheless the burden of proof lay on the defendants' shoulders and the defendants only gave their opinion which was not supported by the County Surveyor who could only say that there "may" have been an error.

21. For this court to find that there was an error in respect of survey of a farm in which the defendants appear to have properly identified their portions and occupied them, a credible amount of evidence, including conclusive evidence from a competent surveyor acknowledging such an error was necessary and the availed evidence fell short of that requirement.

22. For that reason I must also find that the plaintiff has all the full rights of a proprietor under **Section 25** of the **Land Registration Act** in respect of the physical parcel of land her title represents. That is the land that the County Surveyor has confirmed to be occupied by the defendants on the ground. The ineluctable conclusion is that the defendants have trespassed onto plot no **Kwanza/ Kwanza Block 7/Tonyoto/190** owned by the plaintiff.

23. Should the defendants be evicted from the suit land and enjoined from any further interference with the plaintiff's land? The answer to this question lies in whether the defendants have any justification to the plaintiff's land and this court has already determined that they are trespassers on **Kwanza/Kwanza Block 7/Tonyoto/190**. They are the legal owners of the suit property as claimed in their evidence and defence. In the opinion of this court, they should therefore be evicted and enjoined from any further interference with the suit land.

24. As to who should bear the costs of the suit, I find that the defendants have failed to justify their occupation of the plaintiff's land hence prompting the instant suit and that they are liable for the costs of this suit.

CONCLUSION.

25. This is a case that exemplified the need for developers to ascertain by way of competent survey services the proper boundaries to their land parcels before any development of land. In the end this court finds that the plaintiff has established her claim on a balance of probabilities against the defendants. I therefore enter judgment in this suit in the plaintiff's favour against the defendants jointly and severally and I issue the following final orders:

(a) The County Surveyor Trans Nzoia County shall visit the suit land and demarcate the boundaries of all that plot known as No. Kwanza/Kwanza Block 7/Tonyoto/190 and affix the necessary beacons to mark the boundaries.

(b) The defendants shall remove themselves and their property from all that parcel of land known as Kwanza/ Kwanza Block 7/ Tonyoto /190 forthwith in default of which they shall be forcibly evicted therefrom and the plaintiff shall be allowed unimpeded and quiet possession of the said land parcel Kwanza/Kwanza Block 7/Tonyoto/190.

(c) A permanent injunction is hereby issued restraining the 1st and 2nd defendants, their agents and/or servants from further trespassing upon and/or committing any acts upon the plaintiff's parcel of land known as Kwanza/Kwanza Block 7/Tonyoto/190.

(d) The defendants shall pay to the plaintiff nominal general damages of Ksh. 20,000/= for trespass.

(e) The defendants shall bear the costs of this suit.

Reviewed, signed and delivered at Kitale via electronic mail on this 15th day of September, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.