



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC SUIT NO 20 OF 2018

AGNES KALUKI KASYOKI (*Suing as the*

Administrator and legal representative of the Estate of

KASYOKI MALITI DECEASED).....PLAINTIFF

VERSUS

MARY KIMULI.....DEFENDANT

JUDGMENT

1. The Plaintiff Agnes Kaluki Kasyoki suing as the Legal Representative of the Estate of Kasyoki Maliti initiated this suit against the Defendant and sought for the following orders:-

a) A declaration that land parcel Nzai/Masumba/492 is the sole property of kasyoki Maliti.

b) A permanent injunction restraining the Defendant by herself, her agents and/or servants from entering into and/or encroaching, trespassing, remaining on, and/or grazing on, cutting down trees, cultivating on or in any other manner whatsoever interfering with land parcel Nzai/Masumba/492.

c) Cost of the suit and interest.

d) Any other relief that the Honourable court deems fit to grant.

2. The Defendant entered appearance and filed a statement of defence on the 19th of June 2019.

3. On the 19th of April 2021 the court directed that the matter to proceed as undefended since the beneficiaries of the Estate of the Defendant chose not to respond to the citation in Makueni CMCC No. 182 Of 2020.

4. The Plaintiff Agnes Kaloki Kasyoki adopted her statement dated 13/3/2018 as her evidence in chief. She stated that her late father Kasoyoki Maliti was the registered owner of land parcel Nzai/Masumba/492. She produced a copy of the title as exhibit 2. That as the only child, she was the sole beneficiary of the Estate of her late father since her mother had passed on in 1996. She produced the letters of administration ad litem as exhibit 1.

5. She further stated that between 2016 and 2018, the Defendant trespassed on her late father's land and cut down trees, cultivated and grazed her animals. That she reported the matter to the Makueni Land's Office and upon a site visit, it was established that the Defendant was the owner of the adjacent parcel of land No Nzai/Masumba/443 and that she had trespassed on the suit land. She produced the surveyor's report as exhibit 3 That despite being warned by the Makueni Lands Office and by a demand letter from the firm of Mwangangi & Co Advocates, she continued trespassing on the suit land. She produced the demand letter as exhibit 4.

6. The Plaintiff closed its case and filed written submissions on the 28th of October 2021 which I have considered. The Plaintiff submitted that she had proved her case on a balance of probabilities.

ANALYSIS AND DETERMINATION

7. Although this suit was undefended, the Plaintiff has the duty to formally prove its case on a balance of probabilities as required by the law.

8. In the case of **Kirugi and Another –vs- Kabiya & 3 Others (1987) KLR 347** the Court of Appeal held that:-

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as a formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

9. Similarly, in the case of **Gichinga Kibutha –vs- Caroline Nduku, (2018) eKLR**, the court held that :-

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

10. I have considered the evidence on record, the written submissions and the documents produced by the Plaintiff and I find that the issue for determination is whether the Plaintiff is entitled to the orders sought.

11. The Plaintiff filed this suit as the Legal Representative of the Estate of Kasyoki Maliti her late father. She produced the Letters of Administration Ad Litem as exhibit 1. The court finds and holds that the Plaintiff has legal capacity to commence and prosecute the proceedings before this court.

12. The Plaintiff testified that the suit land was registered in the name of her late father Kasyoki Maliti. It is evident from the certificate of title produced as exhibit 2 that land parcel No Nzau/Masumba/492 is registered in the name of Kasoyki Maliti. I have carefully looked at the certificate of title and I find that the registration was done on the 1/12/76 and the certificate of title was issued on the 17/10/07.

13. It is trite law that the registration of a person as the owner of the land and the certificate of title held by such person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, the registration of such title is not absolute as the same may be impeached under certain circumstances as provided by Section 26(1) of the Land Registration Act which provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

14. The law is very clear on the position of the holder of the title. The Defendant did not adduce evidence to challenge the Plaintiff's certificate of title nor indicate that it was obtained by fraud, misrepresentation, illegally or unprocedurally or through a corrupt scheme. I therefore find that the Estate of Kasyoka Maliti is the absolute proprietor of land parcel No. Nzau/Masumba/492.

15. As to whether the Defendant had trespassed and encroached on the Plaintiff's late father's land, the Plaintiff stated that after she reported the matter to the Makueni Land's Office, the surveyors visited the site and confirmed that the Defendant had encroached on the suit land. It is evident from the District Surveyor's Report date 20th of April 2018 that the Defendant who is the owner of land parcel No 443 had encroached on land parcel No 492 as she was in occupation of the same.

16. I find that the uncontroverted evidence adduced by the plaintiff as well as the production of the certificate of title and the District surveyor's report are enough proof that indeed the Defendant has encroached on the suit land.

17. Section 24 of the Land Registration Act provides for the interest conferred upon registration. It stipulates that:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of land together with all the rights and privileges belonging or apparent thereto”

18. Section 25 of the Land Registration Act provides for the rights of a proprietor. It provides that:-

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject...”

19. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the rights can be taken away. The Defendant's entry on the land belonging to the Estate of Kasyoki Maliti, without the authority or permission of the Plaintiff amounts to trespass. The Defendant has no legal justification to encroach and trespass on the suit property.

20. Having established that the suit land is the property of the Estate of Kasyoki Maliti, I find that the plaintiff is entitled to the protection of the law from the Defendant who has interfered with her rights and privileges. In so finding, I am persuaded by the case of **Willy Kipsongok Morogo –vs- Albert Morogo (2017) eKLR** where the court held that:-

“the evidence on record shows that the suit parcel of land is registered in the names of the plaintiff and therefore is entitled to the protection under section 24, 25 and 26 of the land registration Act.”

21. I therefore find that it would be proper to restrain the Defendant from encroaching, trespassing or interfering with the Plaintiff's quiet possession of the Estate of her late father.

22. In the end, I find that the Plaintiff has proved her case against the Defendant on a balance of probabilities. Accordingly, I enter judgment for the Plaintiff against the Defendant as follows:-

a) A declaration is hereby issued that the Estate of Kasyoki Maliti is the registered proprietor of land parcel number Nzai/Masumba/492.

b) A permanent injunction is hereby issued restraining the defendant by herself, her agents and/or servant from entering onto and/or encroaching, trespassing, remaining on, and/or grazing on, cutting down trees, cultivating and/or in any other manner whatsoever interfering with land parcel Nzai/Masumba/492.

c) The plaintiff is awarded Costs of the suit.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY THIS 15TH DAY OF DECEMBER 2021

.....

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Kemboi – Court Assistant

Mr. Muthiani for the Plaintiff