



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 50 OF 2015

NAFTAL KERONGO ONGWESO.....PLAINTIFF

VERSUS

SIMON MOGERE.....1ST DEFENDANT

JUSTUS MOGERE.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this suit against the Defendants vide a Plaint dated 11th August, 2015 seeking the following reliefs;

- a) A declaration that the Plaintiff is the rightful allottee and owner of the leasehold interest on plot 15B Section A/3 Gesonso Market (hereinafter referred to as 'the suit property') not the Defendant.
- b) An order of permanent injunction restraining Defendants either by themselves, agents, and/or anyone acting upon the directions or instructions from interfering with Plaintiff's access to, possession, use and enjoyment of plot No. 15B Section A/3 Gesonso Market.
- c) Costs of the suit be borne by the Defendants.

2. In his Plaint the Plaintiff claimed that he is the rightful owner of the leasehold interest in the suit property. He further alleged that he was desirous of developing the suit property but the 1st Defendant had blocked him and denied him access as the Defendant falsely alleged that the plot belongs to him.

3. He has stated that on or about the 7th November, 2014 he, in company of the County Surveyor and the Town Planning officials attempted to access the suit property to fix beacons so as to enable him undertake construction thereon but the Defendants barred him through threats of violence and assault.

4. It is his case that his efforts to have the dispute resolved before the elders, the area Chief, and the Ministry of Lands officials have not borne fruit. He claims that as a result of the Defendant's actions he has unlawfully been deprived of possession, use and enjoyment of the suit property and he has suffered immense loss, suffering and inconvenience.

5. The 1st Defendant filed his Defence dated 25th March, 2015 in which he denied all the allegations by the Plaintiff. He averred that the suit property was owned by his son Nahashon Mogere and at no time had he transferred the same to the Defendants. He further claimed that if at all the Plaintiff was the registered owner of the suit property the registration must have been obtained through fraud.

THE EVIDENCE

6. The matter proceeded to hearing and each party was accorded sufficient time to present witnesses to testify in support of their cases.

PLAINTIFF'S CASE

7. The Plaintiff testified as PW1. He testified that in 1973 his late father Peter Nyangweso in partnership with the late Francis Nyamwaro purchased the suit property from the late Nahashon Mogere who was the 1st son of the 1st Defendant. To support this averment, he produced

a transfer form signed by the Town Clerk of the Chairman, Gensonso Market Committee dated 23rd August, 1972 together with the extract of minutes approving the transfer by Gusii County Council dated 23rd February 1973.

8. He told the court that after the approval of the transfer by the Council, a plot card was issued to his father though it was in the Joint names of his late father and the late Francis Nyamwaro. He produced the plot card dated 6th October, 1973 as an exhibit.

9. It was his testimony that after the death of his father, he together with his family members applied for a Grant of Letters of Administration in respect of his father's estate vides Succession Cause No. 1341 of 2004 and they listed the suit property as one of the assets forming part of his estate. He produced the consent to Confirmation of Grant form as an exhibit.

10. He stated that after the succession of his father's estate, his father's partner (Francis Nyamwaro) sold off his interest in the property to the estate of his father. He produced a copy of an agreement between the late Francis Nyamwaro and the administrators of the estate of his late father dated 5th November, 2011.

11. He stated that after the late Francis Nyamwaro transferred his interest in the suit property to the administrators of his late father's estate, his brothers who were the administrators of his late father's estate consented to have the suit property registered in his name. He produced a copy of the consent dated 5th November, 2011 signed by all his brothers who indicated as being administrators to his father's estate.

12. He went on to state that he was finally issued with a plot card dated 20th November, 2011. Having been registered as the owner of the property, he started receiving demands for rents from the County Government of Kisii, He produced Demand Notices dated 5th March, 2010, 19th November, 2010 and 9th November 2012 as his exhibits.

13. He lamented that he had visited the suit property severally but the Defendants had denied him access. He told the court that he had approached the County Surveyor to establish the boundary between plot 15A and 15 B Gesonso Market. He produced the County Surveyor's report dated 7th November 2014 as his exhibit. He therefore prayed for an injunction to restrain the Defendants from interfering with the suit property.

14. Upon cross examination by counsel for the Defendants, the Plaintiff reiterated that the suit property was previously owned by his late father and his partner who is also deceased. He further stated that the father and the partner were in occupation of the suit property though he could not recollect when they took occupation of the same. He confirmed that the suit property and Plot 15A were joint properties.

15. He conceded that he did not know how old the late Nahashon Mogere was when he effected the transfer of the suit property to his late father and his father nor did he know why the two did not carry out any developments on the suit property.

16. After the testimony of the Plaintiff, counsel for the Plaintiff indicated that he was not going to call any other witnesses and he closed the Plaintiff's case.

DEFENDANT'S CASE

17. The 2nd Defendant testified as DWI. He testified that the 1st Defendant was his father and that since he was 97 years old and sickly, he was unable to attend court. He had therefore been made a party to the suit to represent him and defend the suit on his behalf. He went on to testify that his father was the owner of plot No. 15A and 15B, the suit properties herein.

18. He further testified that when growing up he always believed that Plot 15 A and Plot 15B were one plot where there was a butchery and a shop. He refuted claims by the Plaintiff that his late brother, Nahashon Mogere had sold off the suit property to the Plaintiff's father and Francis Nyamwaro.

19. He contended that his brother could not effect such a sale and subsequent transfer of the suit property to the two persons since all the documents relating to the property were in custody of his father and that he did not have any authority to transfer the suit property from him. He told the court that if there were minutes indicating that his late brother had agreed to transfer the property to the Plaintiff's father, then the said minutes were false.

20. It was his testimony that the Plaintiff had never taken possession of the suit property and that his father had always been in possession of the suit property. He claimed that apart from the temporary structure that was constructed by his father, there was no other additional structure thereon.

21. Upon cross examination, the 2nd Defendant stated that he did not know whether his late father has the plot cards for the two properties 15A and 15B. He stated that the suit property (15B) was in the name of his late brother, while 15 A was registered in the name of his father.

22. He stated that his father only realized the documents relating to the suit property were missing when he had been sued by the Plaintiff. He stated that his father had given the said document to the late Francis Nyamwaro for safe custody.

23. He told the court that even though his father had complained to Francis Nyamwaro that some of the documents were missing, he did not know whether he filed any formal complaint against him with the police.

24. He stated that the section that had butchery was not in use but was he aware that the Plaintiff had not taken possession of the suit property. He conceded that he did not have any document to show that his father owned the two properties (15A and 15B).

25. Thereafter the court directed the Plaintiff and the Defendants to file their respective written submissions. The Plaintiff filed his submissions on 8th October, 2021 while the Defendants filed their submissions on 22nd October, 2021.

PLAINTIFF'S SUBMISSIONS

26. Learned counsel submitted that the Plaintiff had proved both by oral and documentary evidence that he is the lawful owner of the suit property. He argued that 2nd Defendant had in his testimony admitted that 1st Defendant had not presented any documents to show that the suit property had indeed been allotted to him.

27. Counsel further contended that nothing would have been easier for the Defendants than to bring evidence from the County Government of Kisii (formerly Gusii County Council) challenging and/or disapproving that the documents availed by the Plaintiff from the County Government that he is the owner of the suit property. He relied on the case of **Nancy Wanjiku Kunyiha v Samuel Njoroge Kamau (2018) eKLR** where the court held that a plot card along with other documents were adequate to confirm ownership of the suit plot.

DEFENDANTS' SUBMISSIONS

28. Learned counsel for the Defendant submitted the 1973 transaction where the late Nahashon Mogere is alleged to have transferred the suit property to the Plaintiff's late father and the late Francis Nyamwaro was illegal because the late Mogere was a minor aged 12 years and he had no capacity to effect the transfer.

29. It was counsel's submission that the 1st Defendant had taken the documents to Francis Nyamwaro who was his bishop for safe custody and there is no way his late son Nahashon Mogere could have sold the suit property to Francis Nyamwaro and the Plaintiff's father without his authority.

30. It was his further submission the transaction is said to have been effected in 1973 leading to the suit property being transferred to the Plaintiff's late father and the late Francis Nyamwaro is a nullity since there was no sale agreement entered between Nahashon Mogere and the two parties. He contended that there was no proof that the late Nahashon was paid for the purported agreement and as such, it cannot be said that such a transaction took place and thus the Plaintiff cannot be declared as the owner of the property.

31. It was counsel's contention that the Defendant had been in peaceful occupation of the said plot without any interruption and had at no time surrendered the same to any person. He submitted that the Plaintiff did not tender any evidence that he was in occupation of the suit property despite holding the plot card and he only wanted to take possession of the suit property that has all along been occupied by the Plaintiff.

32. He argued that a plot card was not sufficient evidence for the Plaintiff to assert proprietary rights over the suit property. He contended that even if the Plaintiff owned the plot card the court could declare a trust in favour of the person in possession. He relied on the case of **Mukangu v Mbui (2004) KLR 256 and Jason Gitimu Wangara v Martin Munene Wanara & Others (2013) eKLR**.

33. Counsel finally submitted that the Plaintiff owning a plot card does not in any way confer him rights over the suit property. He cited on the case of **Mogusu Okwogo v Nyakundi Momanyi (2020) eKLR** where the court relied on the case of **Wreck Motors Enterprises v The Commissioner of Lands & 4 Others (1997) eKLR** in which the Court of Appeal stated that title to land comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to the provisions held.

34. He contended that even though the Plaintiff produced a plot card and some receipts to show that he owns the suit property, he did not acquire the property through the right procedure and the plot did not belong to him.

ISSUES FOR DETERMINATION

35. Having considered the pleadings, the evidence tendered and the submissions by the advocates for the parties. I find that the dominant issue for determination is whether the Applicant has proved that he is the rightful owner of plot 15A.

ANALYSIS AND DETERMINATION

Whether the Plaintiff is the rightful owner of the suit property.

36. The gist of the matter before me is that both the Plaintiff and Defendant claim title to plot No. 15 B Gesonso Market. The Plaintiff produced a plot card dated 20.11.2012 issued by the Kisii Municipal Council as proof of ownership of the suit property. In addition to the plot card he produced an application for transfer form dated 23rd August 1972, purportedly signed by Nahashon Mogere who is the 1st Defendant's son, Minutes of the Gusii County Council dated 22nd February 1973. He also produced a sale agreement dated 5.11.2011 between Francis Nyamwaro Onderi and the administrators of the estate of Peter Gisiara. He also produced demand notices and a letter from the County Surveyor dated 2nd November 2014.

37. The Defendant on his part argued that the property belonged to him and had at no time did he authorize his son, Nahashon Mogere (deceased) in whose name he had registered the plot to sell it. DW1 testified that at time the Transfer Form dated 23.8.1972 was signed, Nahashon Mogere was a minor aged 12 years. He maintains that the Plaintiff obtained the transfer unprocedurally. He further contends that the Plaintiff had never taken possession of the suit property as the Defendants have been in occupation thereof since it was allocated to them. In his testimony DW1 stated that when he was growing up he believed that plots no. 15A and 15B were one plot as there was only one single

semi-permanent structured stretching across the two plots. The letter by the County Surveyor which was produced by the Plaintiff confirmed that there was no boundary between plots 15A and 15B.

38. In his submissions learned counsel for the Plaintiff urged this court to consider that unlike the Defendants who had not tendered any document to prove ownership of the property, the Plaintiff had given a very elaborate explanation backed up with documentary evidence on how the property transitioned from the late Nahashon Mogere in 1973 up to the time the property ended up being registered in his name in 2011.

39. Learned counsel for the Defendants on his part argued that unlike the Plaintiff who had not demonstrated any occupation of the suit property, the 1st Defendant through his witness DW1 testified that the 1st Defendant was in occupation of the suit property which had purportedly been transferred to strangers in 1973 by his son Nahashon Mogere who was a minor at the time of the purported transfer.

40. Although the Plaintiff produced various documents in support of his case, a close scrutiny of the said documents casts some doubt on their authenticity. For example, the Transfer Form dated 23.8.1973 bears a signature which is crossed out and the name N. Mogere is inserted in place of the signature. The minutes which are purported to have approved the said transfer are printed on the letter head of Kisii County Government yet the meeting is said to have taken place way back in 1973, long before the County Governments were established. The Plaintiff did not produce any sale agreement between Nahashon Mogere, Peter Gisiora and Francis Nyamwaro to support the application for transfer. Furthermore, the DW1 told the court that his father had given all the documents relating to the suit property to Francis Nyamwaro who was his pastor for safe custody but he later discovered that documents relating to plot no. 15B were missing.

41. It is trite law that in civil cases the Plaintiff must prove his case on a balance of probability. **Section 107(i)** of the **Evidence Act** provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

42. In the case of **Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993)** Justice Juma stated: -

“The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.”

43. In the case of **Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR** J.L. Onguto, J, in determining the issue as to who between the plaintiff and the defendants was the owner of the plot stated thus:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in Sen v Headley [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

44. Having scrutinized the documents produced by the Plaintiff, I am not satisfied that the said documents establish a broken chain that leads to a good root of title. Furthermore, in the case of **Wreck Motors Enterprises v The Commissioner of Lands & 4 Others (1997) eKLR** the Court of Appeal made it clear that title to land comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document. The absence of an unbroken chain that leads to a good title coupled with the fact that the Defendants have been in possession of the suit property since the seventies leads me to the conclusion that the Plaintiff has failed to prove his case on a balance of probabilities.

45. Accordingly, the Plaintiff’s suit is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF DECEMBER, 2021.

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J.M ONYANGO

JUDGE