



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 12 OF 2017

WALTER OTISO OSORO.....PLAINTIFF

-VERSUS-

MWAURA KARUGA.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

LAND REGISTRAR3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

Walter Otiso Osoro the Plaintiff claims the following reliefs from the Defendants namely Mwaura Karuga (first Defendant), Embakasi Ranching Company Limited (second Defendant), Land Registrar (third Defendant) and the Honourable Attorney General (fourth Defendant);

1. An order that he is in lawful possession of the suit land namely KAJIADO/KAPUTIEI-NORTH/11275.
2. That the Court order in suit No. 260 of 2010 be set aside.
3. Order of Certiorari to quash entries numbers 5 and 6 in part B of the Land Register in respect to the suit parcel.
4. An order of Mandamus directed at the third Defendant to effect a transfer of suit property by the second Defendant to the Plaintiff in place of the first Defendant.
5. That a Prohibition Order do issue restraining the Defendants or anyone claiming in their name from entering, selling, or in any manner whatsoever interfering with the suit property, the Land Register for the suit property and or the quiet possession and enjoyment of the suit land by the Plaintiff.
6. Costs of the suit
7. Interest on (6)
8. Any other relief that the Court may deem fit.

The Plaintiff's case is as follows;

He bought the suit land from the second Defendant on a date which is not specified. On 11/11/2009, he presented what he calls relative completion documents to the third Defendant and the requisite fees for registration of the land to him.

The third Defendant refused to transfer and register the land to the Plaintiff as expected. Instead on 28/4/2015, the third Defendant purported to transfer the suit land to the first Defendant. This was pursuant to a Court Order in case number 260/2010.

According to the Plaintiff, this transfer to the first Defendant was unlawful because the land was not available for transfer to the said first Defendant. In addition to the above, the plaintiff is in possession of the land.

For the above reasons, the Plaintiff prays for all the prayers in the plaint.

In support of his case, the Plaintiff filed the following;

- (1) His own witness statement
- (2) Copy of title deed for LR NO. KAJIADO/KAPUTIEI-NORTH 11275 dated 29/1/2002 in the name of the second Defendant.
- (3) Copy of Certificate of Official Search dated 4/4/2005 in the name of the second Defendant.
- (4) Copies of receipts dated 29/2/2005 and 11/1/2006 issued by the second Defendant to the Plaintiff for Ksh. 80, 000/= and Kshs. 130, 000/= respectively.
- (5) Copies of Transfer Forms which are undated but executed by Kariuki Mwaganu and James Karanja Mwangi in favour of the Plaintiff.
- (6) Letter of Consent dated 4/11/2009 issued by the relevant Land Control Board.
- (7) Application for consent of the Land Control Board whose date is not clear.
- (8) Certificate of Incorporation of the second Defendant dated 19/6/1975.
- (9) P.I.N Certificates for both James Karaya Mwangi and Mwaganu Kariuki.
- (10) Stamp Duty assessment and pay in slip by the Plaintiff showing payment of kshs. 16,000/= on 11/11/2009.
- (11) Receipt Number 1499992 dated 11/11/2009 issued by the Lands Office Kajiado.
- (12) Letter dated 9/7/2010 signed by the Chairman of the second Defendant explaining how the first Defendant came to be registered as the proprietor of the suit land instead of LR NO. KAJIADO KAPUTIEI NORTH- 11270.
- (13) Copy of register for the suit land showing that the first Defendant was registered as proprietor of the suit land on 28/4/2015.

The first Defendant filed a Written Statement of Defence on 7/6/2016 through counsel on record. In the defence, the first Defendant's case is that he bought the suit land from the second Defendant on 15/7/2005 for Kshs.150, 000/=.

The second Defendant was reluctant to transfer the suit land. The first Defendant then filed High Court Machakos Civil Suit No. 260 of 2010 where he was successful and had the suit land registered in his name.

The Plaintiff's attempt to be registered as the proprietor of the land was not successful because the first Defendant had lodged a caution against any dealing with the land. The first Defendant adds that the orders in Civil Suit No. 260 of 2010 having been issued by a competent Court and cannot be set aside.

The first Defendant concludes by saying that he has always been in possession of the suit land as can be evidenced by *Machakos High Court Case No. 282/ 2010* and *Kajiado Magistrates Court Case No. 1391 of 2010*.

In support of his case, the first Defendant filed the following;

- (1) A Witness Statement dated 7th June, 2016.
- (2) Copy of receipt dated 15/7/2005 showing payment of Kshs. 200,000/= to the second Defendant for plot numbers 11275 and 11413.
- (3) Bank slip for Kshs. 50,000/= dated 30/11/2009, the amount being in favour of the second Defendant.
- (4) Copy of Certificate of Official Search for plot number KAJIADO KAPUTIEI NORTH 11275 showing a caution by the first Defendant.
- (5) Another Certificate of Official Search dated 15/3/2015 showing the same status
- (6) Pleadings, judgement and decree in Civil Suit No. 260 of 2010.
- (7) Copy of Title Deed for the suit land dated 28/4/2015 in the name of the first Defendant.
- (8) Other documents.

When the case came up for hearing on 4th October, 2021, the Plaintiff did not turn up because his Counsel said that they wished to settle the matter out of Court.

The first Defendant's Counsel was not aware of the intended settlement and insisted on proceeding with the case.

The case proceeded for reasons that are already on record.

The first Defendant called for the dismissal of the Plaintiff's case in the absence of the Plaintiff. He made no admission of any part of the Plaintiff's claim.

The first Defendant's Counsel filed written submissions dated 14/10/2021 in which he raised three issues namely absence of privity of contract, failure by the Plaintiff to call evidence and Certificate of Title as conclusive evidence of proprietorship.

I find that the three issues will settle the dispute.

On the first issue, I find that there is no privity of contract between the Plaintiff and the first Defendant. Since the Plaintiff had no agreement with first Defendant, he should not have sued the first Defendant.

On the second issue, I find that the absence of the Plaintiff on the date of trial should not bar this Court from considering his evidence which is already on record. A fair trial as envisaged in **Article 50(1) of the Constitution** would require that this Court should not disregard evidence that is already on record.

On the issue of Title held by the first Defendant, I find the same to be indefeasible under **Sections 24 and 25 of Land Registration Act**.

The Plaintiff has in this suit prayed for orders of Certiorari, Mandamus and Prohibition. These writs are not available to a party who has instituted a suit by way of a plaint. The correct procedure for the said writs is outlined in Order 53 of the Civil Procedure Rules.

Regarding the Orders issued in Civil Suit No. 260 of 2010 at Machakos, this Court cannot set them aside because they were issued by a Court of equal status. The only way to set them aside was by way of Appeal to the Court of Appeal or Review under **Order 45 Civil Procedure Rules**.

For the above stated reasons, it is clear that the Plaintiff has not established his claim against any of the Defendants on a balance of probabilities. The entire suit has not merit and I dismiss it with costs to the Defendants.

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

M.N. GICHERU

JUDGE