



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 21 OF 2007

AGGREY ALUZIMBI SHIKALI.....PLAINTIFF

VERSUS

RICHARD CHESIRE CHEROP.....1ST DEFENDANT

DINAH TENAI.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiff filed a plaint dated 17/2/2007. On 27/8/2013 he filed an amended plaint dated 19/8/2013. In his amended plaint he seeks the following orders against the defendants:-

(a) A declaration that the plaintiff is the owner of PLOT NO. 282 being a portion of EX-CULLEN FARM LR. No. 6199/1 MOI'S BRIDGE of that (sic) land known as MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294.

(b) Mesne profits from loss of use of MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294

(c) Costs and interests.

(d) Any other relief this court may deem fit to grant.

2. On 18/2/2013 Dinah Tenai the applicant filed a notice of motion dated 21/12/2012 applying for orders that she be joined as the 2nd defendant in this suit. By a ruling dated 20/6/2013 the court granted the application and she was enjoined as the 2nd defendant.

THE PLAINT

3. According to the amended plaint dated 27/8/2019 the plaintiff claims ownership of plot number **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/282** (hereinafter for brevity also referred to as plot No. "294"). The plaintiff claims that the 1st and 2nd defendants encroached on plot No. 294 between 1999 and 2007 and denied him possession thereof. He claims for a declaration that he is the owner of plot No. 294 and damages for loss of use from 18/6/1999 to date.

THE DEFENCE

The 1st Defendant's Defence and Counterclaim

4. The 1st defendant filed his defence on 22/5/2007 and later amended it to include a counterclaim. In the amended defence and counterclaim dated 10/9/2013 he admits having entered into the suit land but denies that that action amounted to encroachment for the reason that he had purchased the land from the 2nd defendant in 1998. He avers that the plaintiff obtained registration to half of the land that he had purchased from the 2nd defendant; he states that the plot registered in his name is No. 293 and measures 0.57 Ha while the plaintiff is wrongfully registered as owner of plot No. 294 measuring 0.38 Ha on paper but which on the ground measures 1 acre. He avers that the land has never been in the possession of the plaintiff. In his counterclaim he claims ownership of plot No. 293 and a portion of plot No. 294 and prays for cancellation of the title issued to the plaintiff in respect of plot No. 294 and seeks that the suit land be shared between the defendants.

The 2nd Defendant's Defence and Counterclaim

5. According to the defence and counterclaim of the 2nd defendant she denies the plaintiff's claim and avers that she owned plot No. **216**, out of which she carved out **2 acres** which she sold to the 1st defendant, thereby remaining with $\frac{1}{2}$ **an acre**. The number of plot No. **216** was subsequently changed to comprise of two plots, No. **282** and No. **283**. She alleges that the plaintiff wrongfully took her remaining $\frac{1}{2}$ **acre** caused its amalgamation with land amounting to $\frac{1}{2}$ **acre** carved out of the 1st defendant's **2 acre** portion, thus leaving the 1st defendant with **1 $\frac{1}{2}$ acres**. She prays that the title to plot No. **294** issued in the plaintiff's name be cancelled and the land comprised in that parcel do revert and be registered in the defendants' names.

REPLY TO DEFENCE AND COUNTERCLAIM

The Plaintiff's Reply to 1st Defendant's Defence and Counterclaim

6. In his separate replies to the 1st and 2nd defendants' respective defence and counterclaim the plaintiff reiterates the averments in the amended plaint and denies the allegations in the defendants' amended statement of defence and counterclaim.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

7. **PW1**, the plaintiff, testified on **20/4/2015** and **31/10/2016**. His evidence is that in **1990** he purchased **1 acre** of land from one **Philip Kiptum Choge**, now deceased, for **Kshs. 21,500/=**; that he settled on the land with his family; that Ex-Cullen Farm which hosted the purchased parcel was subdivided in **1995** and he was allocated plot No. **282** which was **1 acre**; that however his house was located on a different plot; that when he was shown plot No. **282** by the management committee of the Farm he found that the 1st defendant had built on it; that the 1st defendant was asked to move to plot No. **283** which lay contiguous to plot No. **282** but he refused to move; that however when titles issued, the plaintiff's plot was renamed "**294**".

8. The highlights of his evidence on cross-examination and re-examination are that he bought the land while there were no numbers provided to the parcels and he was only shown the physical location of the land; that he purchased land from plot No. **6199/1** in **1990**; that he had no evidence that the person who sold land to him, Philip, was a member of Ex-Cullen Farm; that he does not know if Philip was allocated a number and he does not know why his plot was changed from number No. **282** to plot No. **294** by the Ex-Cullen Farm Committee. However, Philip's remains were buried on the upper part of the Ex-Cullen Farm's land when he died in **1992**. The plaintiff also admitted to obtaining title after he had filed this suit.

9. **PW2, Jackson Leting** testified on **28/11/2018**. His evidence is that he was a village elder as at the year **1990**; that he wrote down the agreement between the plaintiff and Philip Kiptum; that the plaintiff took possession of the land; that in 1997 it was agreed by members that if a house was affected by the survey, the owner of the house would have to move to a different parcel; that the plaintiff was then transferred to an area near the river; that he was given **1 acre** of land there; that the plot was named plot No. **294**; that the 1st defendant was his neighbour who got plot No. **293**; that the plaintiff never constructed on plot No. **294** because the 1st defendant had already built on that plot. Upon cross-examination he stated that Philip had **5 acres** as he was Tenai's employee who had purchased land from Anna and Dinah Tenai, the widows of the late proprietor, and that each widow gave Philip **2.5 acres**; that the agreement giving land to Philip was however not written down, though PW2 alleges that he was present when the land was given to Philip. According to PW2, the land Philip got was situated high up on the upper side of Ex-Cullen Farm and near a road and not near a river; that it was the 1st defendant who had purchased land near the river and the parcels belonging to the plaintiff and the 1st defendant were about half a kilometre apart; that Philip's land was demarcated in **1987**.

10. **PW3, Stanley Mosibe**, testified on the same date as PW2. He adopted his written statement filed in court on **30/1/2017** as his evidence-in-chief. His evidence is that he was present during the planning and survey of Ex-Cullen Farm; that after the survey some members were partly or completely moved from their earlier settlements on the farm; that the plaintiff was moved to plot No. **294**; that PW3 personally pointed out parcel No. **294** and its extent to the plaintiff; that after the survey the 1st defendant and one Jacob came to his office with a copy of an agreement, alleging that the 1st defendant had purchased **2 acres**, and PW3 refused to sign that agreement; that he later learnt that there was an agreement that he is alleged to have thumbprinted and that he disowns that agreement. Upon cross-examination he admitted that the 1st defendant was listed as a beneficiary of Dinah's land. According to him the distance from the parcel given to Philip and the parcel bought by the 1st defendant was about 1 kilometre, and the plaintiff had already erected structures on his plot which according to the witness was on the upper side of Ex-Cullen Farm. According to the witness, Philip's wife died and the 2nd defendant took Philip's land, and now Susan Chepchumba, Philip's daughter resides with the 2nd defendant. He did not know how much land Philip had been given. According to the further evidence of the witness in cross examination, the plaintiff bought **1 acre** and the 1st defendant **1.5 acres**. When cross examined by Mr. Chebii later on, he admitted to having written and witnessed the agreement between the defendants.

11. **PW4, Reuben Lema Yator**, testified on **27/2/2019** and adopted his written statement filed in court on **30/1/2017** as his evidence-in-chief in this suit. His evidence is that he served as the vice chairman of the Ex-Cullen Farm Management Committee between 1986-1998 and subsequently as secretary between 1998-2006; that he assisted in planning, survey and allocation of parcels to members which processes were finalised in 2006; that the main parcel measured **1140 acres** and was subdivided into **323 parcels**; that the plaintiff was allocated plot No. **294** while the 1st defendant was allocated plots No. **293** and **307**; that according to him the 1st defendant is illegally occupying plot No. **294**. Upon cross-examination he stated that the plaintiff's land was originally on the upper side of the farm, and the 1st defendant's land on the lower side close to the river;

12. **PW5, Joash Wafula**, testified on **24/4/2019**. According to his evidence he analysed the foregone benefits from lack of use of plot No.

294. He produced a report accordingly, whose details this court needs not outline at this moment.

The Defendants' Evidence

13. **DW1** the 1st defendant testified on **25/4/2019** and on **23/9/2019**. He adopted the contents of his statement dated **20/2/2019** filed in the court record. He reiterated the contents of his defence and counterclaim. He stated that he was introduced to the 2nd defendant by one Jacob Kibor and that he bought **2 acres** from the 2nd defendant for the consideration of **Kshs. 140,000/=**. He produced the sale agreement for the land as **D. Exhibit 4**. It is dated **25/2/1998**; it is witnessed by PW3. He was shown the physical location of the suit land by the seller, the village elder and a surveyor. According to him the land had been surveyed by then but a ½ acre remained with the seller after the transaction. The 1st defendant took possession immediately and built a house; some persons sent by the plaintiff claimed the suit land in 2004; the dispute went to the chief; while before the chief, the 1st defendant produced an agreement and called witnesses but the plaintiff failed to do so; in the final analysis another meeting was held by the chief and the village elders and it was confirmed that the land had earlier belonged to the 2nd defendant. The 1st defendant claimed that the land that the plaintiff was entitled to had been allocated to one Philip, a brother to **PW4** who was the secretary to the committee. According to the plaintiff also there was no reason why the plaintiff should have been moved all the way from a plot a kilometre away from the plaintiff's land, to be allocated a plot on the plaintiff's land. In his view what should have happened is that the plaintiff's movement should have only affected his immediate neighbours. The 1st defendant further opinion is that the plaintiff should claim his land from those who were managing the land. Upon cross-examination he admitted that he now occupies **2.5 acres**, though his title is in respect of only **1.5 acres**.

14. **DW2**, the 2nd defendant, testified on **23/9/2019**. Her evidence is that she sold the 1st defendant **2 acres** of land out of plot No. **216** which had been pointed out to her. The 1st defendant also intended to purchase the remaining half acre; according to her, she also sold 5 acres to one Philip who later sold one acre to the plaintiff.

15. **DW3 , Jacob Chepkwony Kibor**, testified on **23/9/2019** and adopted his written statement dated **20/2/2019** as his evidence-in-chief in this suit. According to him he witnessed the agreement between the defendants for the sale of land in 1998, and PW3 was the village elder before whom the agreement was executed; the land was fenced all round; the local administration had resolved the dispute in favour of the defendants; the portion formerly belonging to the plaintiff and upon which the plaintiff had earlier on constructed houses, was now occupied by the brother to a committee member, and that occupation occurred after the dispersal of the plaintiff's family which left the land vacant and ripe for "grabbing" by the committee members.

16. **DW4 Susan Chepchumba Tum**, testified on **24/9/2019** and adopted her written statement dated **20/2/2019** and filed in the record as her evidence-in-chief. She acknowledged the sale agreement made on **20/1/2015**. Her evidence is that her father, Philip, sold one of the five acres that he had on the upper part of the farm to the plaintiff and the rest of the land was taken away fraudulently by the farm committee after that, leaving her destitute. She is being accommodated by the 2nd defendant at the latter's home. She denounced the agreement produced by the plaintiff as a forgery since she was only 16 years at the time she is purported to have signed it. She produced a copy of her identity card whose number, 36662746 differs from that attributed to her in the agreement that is 7274552/70. On cross examination she admitted that her first identity card was issued in 1996 but it got lost and was replaced in 2017.

SUBMISSIONS

17. The plaintiff did not file his submissions. The 1st defendant filed his on **13/11/2019**. I have considered the plaint, the defence and the submissions filed.

18. The issues that arise in this suit and counterclaim are as follows:

(1) Is the plaintiff entitled to the land comprised in MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294?

(2) Should the plaintiff's title to MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294 be cancelled and the land be registered in the names of the defendants?

(2) What orders should issue?

19. The issues are addressed as hereunder.

(1) Is the plaintiff entitled to the land comprised in MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294?

20. It is common ground that both the plaintiff and the 1st defendant purchased land in Ex-Cullen Farm; the vendor to the plaintiff is deceased while the vendor to the 1st defendant is still alive and she testified in this suit as DW2. However that demise is not the main fact that disadvantaged the plaintiff's case from the outset; a section of the evidence given on behalf of the plaintiff admitted that the land that the plaintiff purchased was located on another upper area of the farm about one kilometre away from the location of the 1st and 2nd defendant's land, which is the suit land in this case.

21. It was ably demonstrated that the plaintiff has never taken possession of the suit land, which has been in possession of the 1st defendant since the 2nd defendant sold a portion of it to him; there is no evidence produced by the plaintiff to the effect that the land did not belong to the 2nd defendant before she sold a portion of it to the 1st defendant who immediately occupied the same; in addition, there is also no contention on the part of the plaintiff that he ever entered into an agreement for sale of the suit land with the 2nd defendant.

22. The plaintiff is said to have purchased his land from one Philip who later died. DW4 appears to recall that Philip, her father, informed her that he had sold the plaintiff one acre of land out of the 5 acres that had been sold to him by the 2nd defendant, to cater for his medical expenses as he was unwell. How the plaintiff then came to relinquish the portion said to have been sold to him by Philip is still a mystery and in my view, no evidence was called to demonstrate that his house had been affected by the survey so as to warrant the relocation of his parcel to any other part of the farm as was the local rule.

23. Further, it was the opinion of the defendants that granted that the plaintiff could have been moved due to the effects of the survey exercise on the land, such movement could only have affected his immediate neighbours and not the defendants whose land was about 1 kilometre away. In this court's view this is a valid concern and it called for an explanation from the plaintiff and the committee members and surveyor involved in the exercise but no convincing explanation was forthcoming.

24. The whole mess appears to have emanated from the dubious practices of the Farm Management Committee who appear to have been accountable to no-one, but I also find that the lack of vigilance on the part of the plaintiff may have contributed to his loss of land; if the 1st defendant purchased land in 1998 and got allocated land in the same locality where he had bought it from the 2nd defendant, it would have been possible for the plaintiff also to obtain land at the same location where he had purchased it from Philip who had also been sold land by the 2nd defendant. The plaintiff did not obtain that land, and he has not convinced this court that there is justification for his purported relocation to the lower part of the farm where his title was apparently supplanted upon the defendants' land.

25. There is a great lacuna in the evidence of the plaintiff as to what happened to his land between the time that he purchased it and the time that it was allocated to another person. However an insight may be had into this issue through the evidence of the DW3 who stated as follows in his statement:

“I wish to state that the plaintiff constructed a house on the said portions (sic) (sold to him by Philip, DW4's late father) lived with his wife shortly before they parted ways. Thereafter nobody took care of the same and that was the time invasion and encroachment by committee members took place.”

26. This statement was filed on **25th February, 2019** before the plaintiff's case was closed and was in the possession of the plaintiff's counsel but no evidence to counter it was adduced by the plaintiff and it may be deemed to be the most probable sequence of events.

27. As I have stated herein before, if the traversing of his house by a boundary created by the survey exercise was what led to the plaintiff's movement from the plot he had bought, he never brought this evidence to the fore. He relied only on the fact that the management committee had caused him to be included in the titling exercise and he had acquired a title to plot No. 294. In my view this was not sufficient evidence to warrant the granting of the orders he seeks which would displace without remedy the 1st and 2nd defendants from land they have held for a very long time. If the defendant's sale agreement dated 25th February, 1998 providing for sale of 2 acres has been acknowledged by even the plaintiff's own witness (PW3), how can the issuance of a title for only 1.5 acres to the defendant, who was admittedly not liable to be moved by the survey exercise, be accounted for? In short, where would the half acre the plaintiff was entitled be deemed to have gone so as to reduce his entitlement to 1.5 acres? There is no evidence that the defendants were compensated by the management committee for the loss of their respective half acre portion to the plaintiff. There is absolutely no connection between the land sold by Phillip to the plaintiff and the land sold by Dinah to Richard to warrant this court to find that the plaintiff is entitled to **Moi's Bridge/Moi's Bridge Block 12(Ex-Cullen)/294**.

28. For the foregoing reasons I find that the plaintiff's claim is not merited. The plaintiff has failed to establish his claim against the defendants on a balance of probabilities as required by law and it should be dismissed.

(2) Should the plaintiff's title to MOI'S BRIDGE/MOI'S BRIDGE BLOCK 12 (EX-CULLEN FARM)/294 be cancelled and the land be registered in the names of the defendants?

29. It follows from the above that the registration of the plaintiff as the proprietor of the parcel referred to as **Moi's Bridge/Moi's Bridge Block 12 (Ex-Cullen Farm)/294** was not proper and the same must be cancelled and the same shared out in equal portions between the defendants.

30. Notwithstanding the foregoing this court is of the view that the Ex-Cullen Farm Management Committee and the responsible surveyors, who were not enjoined in this suit as parties are culpable for the greater portion of the plaintiff's misfortunes and that the plaintiff does not need to be condemned to costs of either the suit or the counterclaim.

(3) What orders should issue?

31. I therefore dismiss the plaintiff's claim against the defendants and enter judgment in favour of the defendants on the two counterclaims and I issue the following final orders:

(a) The plaintiff's claim in the main suit is hereby dismissed.

(b) Judgment is entered in favour of the defendants in their respective counterclaims as follows:-

(i) The title No. Moi's Bridge/Moi's Bridge Block 12(Ex-Cullen)/294 registered in the plaintiff's name is hereby cancelled.

(ii) The lands register in respect of Moi's Bridge/Moi's Bridge Block 12(Ex-Cullen)/294 shall be rectified and the suit

land shall be transferred to each of the defendants in equal shares.

(c) Each party shall bear their own costs of the suit and the counterclaim.

It is so ordered.

Dated, signed and delivered at Kitale on this 21st day of January, 2020.

MWANGI NJOROGE

JUDGE

21/1/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Khisa for the Plaintiff

N/A for the Defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

21/1/2020