



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC NO. 323 OF 2013

RICHARD MECHA KIBAGENDI.....PLAINTIFF

VERSUS

JOHN MONG'ARE NYARONDIA.....DEFENDANT

J U D G E M E N T

Background and pleadings

1. In this suit, the Plaintiff claims that he is the registered owner of the parcel of land more specifically known as **West Mugirango/ Siamani 3757** measuring approximately 0.05 HA. (“the suit property”).

2. The Plaintiff vide the plaint dated 22nd July 2013 filed in Court on the 23rd July 2013 sought judgement against the Defendant for:

(a) Declaration that the Plaintiff is entitled to the exclusive and unimpeded right of possession and occupation of all that piece of land known as West Mugirango/ Siamani 3757

(b) Eviction order

(c) Mesne profit

(d) Cost of the suits with interest thereon

(e) Any other or further relief as this Honourable Court may deem appropriate

3. The Defendant filed a defence on the 29th of July 2013 and denied the averments by the Plaintiff. The Defendant averred that the Plaintiff had not demonstrated how he obtained the parcel of land and further stated that he had been on the land from when he was a child uninterrupted and that he only came to learn of the Plaintiff when the plaintiff started laying claim to the suit property on the basis that he had title to the property.

4. The Plaintiff testified as the sole witness in support of the case while the Defendant called 1 witness in support of his defence. At the instance of the Court the Land Registrar, Nyamira County was summoned to avail records relating to the suit property.

The Plaintiffs' case

5. The Plaintiff testified that he bought the suit property from one Nyarondia Nyarondia (now deceased) who was the defendant's father. The Plot was 100 ft by 50 ft. An agreement of sale was made. The land was subdivided and title was issued to him and he took possession of the parcel of land and fenced it.

6. The plaintiff further testified that he had sued the Defendant for unlawfully entering the suit land in 2003 and that the dispute had been dealt with by the local administration and the Defendant was requested to cease interfering with the plaintiffs land but the Defendant became violent and hence the suit before Court. The plaintiff relied upon the bundle of documents filed together with the plaint (“plaintiff's exhibits 1-4”) comprising the title deed, green card, payment receipts for land board and mutation form.

7. In cross examination, the Plaintiff reiterated he had bought the land in 1993 and they prepared a sale agreement which was witnessed by the son (now deceased) of the seller. He stated that the Seller needed the money for his sick wife. He further testified that he could not recall the date of the sale agreement and neither did he have documents that were presented to the Land Board. However at the Land Board, persons present were; the seller, his eldest son, the Plaintiff's wife, Lucas Akumba and the Plaintiff. In re-examination he reiterated that he

had followed all the procedures to get the suit land registered in his name.

The Defendant's case

8. DW1, the Defendant in his testimony denied being a witness to the agreement since he was working in Mombasa in 1993 when the agreement was allegedly made. He denied that his father attended the Land Board as alleged by the plaintiff but admitted that his mother was sick around that time though he denied it was the Plaintiff who gave money for her treatment averring that it was one Onyancha who gave the money for the treatment. He testified that he built a permanent house on the suit property in the 1990s and only came to learn of the Plaintiffs' claim to the land in 2014 when the plaintiff came to fence the property and not in 1993.

9. The Defendant further testified that at the time of his father's death in 1994 he had no knowledge of the sale of the land and only came to learn of the Plaintiff in 2013 when the police came to arrest him for alleged trespass. He denied attending any arbitration meetings before the local administration

10. In cross examination, DW 1 stated that he resides on land parcel **West Mugirango/ Siamani/ 3758** where he had constructed his house. He further testified that the parcel of land initially was West Mugirango/Siamani/2405 2405 and was later subdivided into 2 parcels 3757 and 3758. DW 1 testified that his brothers had been given titles to their respective land parcels earlier and he changed the title to his name in 2013 when he did succession. He further stated that his father had given him land parcel 2405 and he could therefore not have sold it

11. DW 2, Geoffrey Mogere Nyarondia, the Defendant's brother, testified that the Plaintiff in 1997 came to their home claiming he had bought land from their father. He came to fence the parcel of land, but defendant had already fenced the whole parcel which the Plaintiff claimed to have bought. He denied he was a witness to any agreement between his father and the plaintiff and further denied that the plaintiff facilitated them to get their titles stating that their titles were processed in 1981 and the 3 of them got their titles. DW2 testified that in 1981 the Defendant was in school. He denied accompanying his father to the Land Board. He testified that the parcel being claimed by the Plaintiff was part of the Defendant's land and his father had his own portion which he could have sold.

12. In cross examination, DW2 stated that he was given land by his father but he could not recall the number. Their father had given the 3 of them (the sons) titles but the Defendant had no title. He testified that he did not know how many portions parcel 2405 was subdivided into. He denied being involved in any arbitration with the local administration.

Submissions by parties

13. The Plaintiff and Defendant filed their final submissions as directed by the Court. The Plaintiff in his submissions identified 2 issues to be determined by the Court.

14. On whether the title is valid, the Plaintiff in his pleadings produced the Title Deed for the suit property which indicated the same was registered in his name on the 20th of March 1994 and the Title deed was issued on the 20th of June 1996. He drew the Court's attention to the following:

(a) *Section 24 (a) of the Land Registration Act No. 3 of 2012, on Interest conferred by registration.*

(b) *Section 26 of the Land Registration Act No. 3 of 2012, on the indefeasibility of registered title.*

15. The plaintiff submitted that his title could only be successfully challenged on allegations of fraud, where the Plaintiff is proved or shown to be a party to the fraud.

16. The plaintiff in support of his submission relied on the case of **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013] eKLR** where the court held that the law provided for two instances when title could be challenged and these are; if the title was obtained by fraud or misrepresentation to which the person must be proved to be a party, and/or if the Certificate of title had been acquired unprocedurally through a corrupt scheme

17. The Plaintiff submitted that his title was valid and the Defendant had no right to be in occupation of the suit land.

18. On whether the Plaintiff is entitled to the orders sought, the Plaintiff placed reliance on the case of **Ahmed Ibrahim Suleiman & Another -vs- Noor Khamis Surur (2013) eKLR** and **Josephine Chepkurgat Ruto & another –Vs- William K. Meli (2012) eKLR**.

19. In the case of **Ahmed Ibrahim Suleiman & another v Noor Khamis Surur [2013] eKLR**, the Court held that a party holding title to land was entitled to protection by the law.

20. In the case of **Josephine Chepkurgat Ruto & another vs William K. Meli [2013] eKLR** the Court held where a defendant has not demonstrated that he had any right to the suit property he would be liable to be evicted and an order for payment of mesne profits and/or damages made against him as he had remained in unlawful occupation of the plaintiffs land without any colour of right.

21. In his submissions the defendant submitted that the plaintiff had not shown he had entered into a valid contract/agreement to purchase the suit property and in particular contended the plaintiff's alleged agreement did not comply with the provisions of Section 38(1) of the Land Act, 2012 that required that any contract for the disposition of an interest in land upon which a suit is founded must be in writing.

22. The defendant further in his submissions contended there was no evidence that a valid Land Control Board consent had been obtained as

there was no evidence that any application for consent was made. Further the defendant submitted that there was no proof that anybody attended before the Land Control Board and that no documentary proof was produced to confirm the process of registration of the plaintiff as owner of the suit property was validly done.

23. The defendant further submitted the plaintiff had not discharged his burden of proof as envisaged under section 3(2), 107, 108 and 109 of the Evidence Act, Cap 80 of the Laws of Kenya and therefore his suit ought to be dismissed with costs.

Analysis and determination

24. Having reviewed the pleadings, the evidence and the submissions by the parties the following issues arise for determination.

(i) Whether the plaintiff is the registered proprietor of the suit property?

(ii) Whether the defendant is in unlawful occupation of the suit property and therefore a trespasser?

(iii) What reliefs and/or orders should the court grant?

25. On the evidence adduced the plaintiff has claimed he purchased a portion of land from the defendant's deceased father measuring 50ft by 100 ft (approximately 0.05 hectares) which was to be excised from land parcel **West Mugirango/Siamani/3757**.

26. The plaintiff produced a copy of the title deed and an abstract of title (green card) which showed land parcel No. 3757 was a subdivision from land parcel 2405. The register for land parcel 3757 was opened on 16th March 1994 and the transfer in favour of the plaintiff was registered on 20th June 1994 and a title deed issued in his favour on the same date.

27. The Land Registrar, Nyamira produced before the court the mutation form in respect of land parcel **West Mugirango/2405** dated 10th October 1993 and registered on 16th March 1994. The mutation shows that land parcel 2405 was subdivided into land parcels 3756, 3757, 3758 and 3759. The Land Registrar availed abstracts of title for all the subdivisions and for parcel 2405. The abstracts of title in respect of the subdivisions affirm that after the subdivisions all the subtitles were initially registered in the name of Nyarondia Nyarondia (the defendant's deceased father) on 16th March 1994 and thereafter a transfer in respect of land parcel 3757 was registered in favour of the plaintiff on 20th June 1996 and a title issued in his name. On the basis of the evidence adduced, I am satisfied that the plaintiff is the registered proprietor of the suit property.

28. The plaintiff's suit as pleaded is not founded on agreement and/or contract of sale made between the defendant's deceased father and the plaintiff but on the fact of ownership by virtue of being the registered proprietor. In this regard Section 3(3) of the Law of Contract Act, Cap 3(3) of the Law of Contract Act, Cap 23 of the Laws of Kenya and section 38 (1) of the Land Act 2012 which incorporates the provisions of section 3(3) of the Law of Contract Act would have no application.

29. Section 3(3) of the Law of Contract Act provides as follows :-

No suit shall be brought upon a contract for the disposition of an interest in land unless—
(a) the contract is upon which the suit is founded—
(i) is in writing;
(ii) is signed by all the parties thereto; and
(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

30. Sections 38 (1) of the Land 2012 provides:-

38. Validity of contracts in sale of land

(1) Other than as provided by this Act or by any other written law no suit shall be brought upon a contract for the disposition of an interest in land—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

31. The plaintiff following his registration as the proprietor of the suit property was pursuant to sections 24,25 and 26 of the Land Registration Act(previously Sections 27 and 28 of the Registered Land Act, Cap 28 of the Registered Land Act, Cap 300 Laws of Kenya) now repealed conferred and vested with absolute ownership rights and his title to the land was absolute and indefeasible and could only be challenged under the limited instances as provided under section 26 (1) (a) & (b) of the Land Registration Act, 2012.

Section 24 (a) of the Land Registration Act, 2012 provides:-

24. Subject to this Act:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

Section 25 (1) provides:-

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

(a) -----

(b) -----

Section 26 (1) provides:-

1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

32. The defendant in the instant suit is not the one who dealt with the plaintiff. It is the plaintiff's case that he purchased the suit property from the defendant's deceased father who procedurally got the original title 2045 subdivided and land parcel 3757 a resultant subdivision thereof transferred to him. From the copy of the certificate of death of the defendant's deceased father forming part of the record of documents furnished by the defendant, the father died on 23rd November 1994. The copy of the transfer shown to have been registered in favour of the plaintiff on 20th June 1996 was not availed in evidence but that cannot be evidence that there was no such a transfer.

33. The subdivision process as per the mutation form started in October 1993 and was completed on 16th March 1994 when the mutation was registered. If the defendant's deceased father executed the transfer in favour of the plaintiff then, the transfer would still have been valid even if presented for registration after the defendant's father's death. DW1 stated in evidence that he did succession in respect of his late father's estate and he got his title changed to his name at the Lands office in 2013. He affirmed that at the time the plaintiff's land portion was in the plaintiff's name and could therefore not have formed, part of his deceased father's estate. In my view the defendant would only have been able to sustain an action against the plaintiff in regard to the suit property, if he was acting as administrator of his father's estate. That is because the plaintiff supposedly obtained title from the defendant's deceased father and if it is alleged he obtained title irregularly or fraudulently, it was only the administrator of the estate of Nyarondia Nyarondia (deceased0 who would have had the capacity or locus standi to institute any legal action against the plaintiff.

34. I have held that the plaintiff is the registered proprietor of the suit property as evidenced by the copy of title deed and the abstract of title tendered in evidence. The registration of the plaintiff and issue of title to him conferred him with absolute rights of ownerships and his title is indefeasible and could only be challenged on grounds of fraud and/or misrepresentation and/or if it is shown the title was obtained illegally, unprocedurally or through corrupt scheme. However, the plaintiff must also be shown to have been party to the fraud or misrepresentation and/or the corrupt scheme. See sections 24,25 and 26 of the Land Registration act, 2012 reproduced above.

35. In the present matter it has not been pleaded that the plaintiff obtained title to the suit property through fraud and/or misrepresentation or illegally and no particulars of any alleged fraud misrepresentation or illegality was given. The property having been transferred from the defendant's late father to the plaintiff it is doubtful that the defendant would have had the capacity to challenge the plaintiff's title to the suit land without first obtaining grant of letter of administration to represent his late father's estate.

36. In the premises it is my determination that the plaintiff as the plaintiff as the registered owner of the suit property is entitled to enjoy the rights of ownership and the defendant had no justification to occupy and/or utilise the land belonging to the plaintiff. The defendant is the position of a trespasser and his occupation of the plaintiff's land is therefore unlawful. In my view the defendant did not adduce any or any sufficient evidence to prove that the plaintiff had obtained the title fraudulently and consequently the plaintiff's title to the suit property remains valid as there was no basis upon which it could be held to be invalid.

37. The upshot is that I find and hold that the plaintiff has proved his case against the defendant on a balance of probabilities. On the reliefs sought by the plaintiff no basis was laid for an award of mense profit to the plaintiff. I enter judgment in favour of the plaintiff against the defendant on the following terms: -

(a) A declaration is hereby made that the plaintiff is the rightful owner and is entitled to exclusive and unimpeded right of possession, occupation and use of land parcel West Mugirango/Siamani/3757.

(a) The defendant is ordered to vacate land parcel West Mugirango/Siamani/3757 within 30 days from the date of this judgment failing which the plaintiff shall be entitled to an order of eviction upon application.

(b) Costs of the suit are awarded to the plaintiffs.

Judgment dated and signed at Nakuru this 21ST day of February 2020.

JOHN M MUTUNGI

JUDGE

Judgment delivered at Kisii this 5th day of March 2020

J ONYANGO

JUDGE