



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 16 OF 2017

JOEL KIVULA KING'OOPLAINTIFF

=VERSUS=

JOSEPH NGUI KITONYODEFENDANT

JUDGEMENT

1. Joel Kivula King'oo, the Plaintiff herein, commenced this suit by way of a plaint dated 26th April, 2016 and filed in court on 27th April, 2016.

2. The Plaintiff prays for judgement against the Defendant for: -

- (i) An order of a permanent injunction restraining the Defendant from entering interfering and/or trespassing into the suit premises.**
- (ii) General damages for unlawful trespass.**
- (iii) Costs and interest of the suit.**
- (iv) Any other or further relief this court deems fit to grant.**

3. He has averred in paragraphs 3, 4 and 5 of his plaint that at all material times he was the registered owner of all that parcel of land known as 49 Ngulu Adjudication Section (suit property) situate in Kibwezi area within Makueni County, that he bought the suit property from one Aaron Muthama, Lucas Musyoki and David Masau King'oo jointly sometime in June, 1989 and he has been in possession and occupation of the suit property since then and that sometime on or about April, 2016 the Defendant wrongfully, unlawfully, illegally and without any colour of right forcibly entered and trespassed into the suit property alleging ownership and physically through the use of force denied the Plaintiff access to the suit premises.

4. The Plaintiff's claim is denied by the Defendant in his amended statement of defence and counterclaim dated 08th August, 2018 and filed in court on 29th August, 2018.

5. In paragraphs 3, 4, 5, 7, 9 and 10 of his defence and counterclaim, the Defendant has averred that the suitland was originally part of parcel number 51 Ngulu Adjudication Section but the Defendant (sic) has fraudulently curved (sic) part of the said land and had it registered in his name particulars of fraud being: -

- (a) Causing the land to be registered in his name when he did not identify the same to be his during the demarcation exercise as required under the provisions of the Land Adjudication Act.***
- (b) Colluding with officers form the lands offices to have the land registered in his name when he knew that he did not have any proprietary interest in the same.***
- (c) Forging memorandum of agreement to create an impression that the land had been sold to him when he knew the same was not true.***

6. The Defendant further avers that the Plaintiff did not buy the suitland as stated in his plaint or at all and that if he bought the land as alleged (which is denied) then he bought a piece of it, which was allegedly sold to Aaron Muthama, Lucas Musyoki and David King'oo and the Plaintiff is put to strict proof, that the land originally belonged to his father one Kitonyo Nthuku (now deceased) who had only let a portion of the same to Aaron Muthama, Lucas Musyoki and David King'oo as joint tenants for purposes of horticultural cultivation and as

such the latter persons did not have any proprietary interest capable of conferring ownership to the Plaintiff by way of sale or any other means, that the Defendant and his other family members have been in continuous occupation of the suit land since time immemorial and their occupation was only interrupted by the Plaintiff sometimes in 2016 when he started making claims over the suit property, that the suitland is within an adjudication area and as such, the Plaintiff's case is bad in law for failing to seek and obtain consent from the Land Adjudication and Settlement Officer as required by the provisions of Section 30 of the Laws of Kenya, and that the sale agreement relied upon by the Plaintiff is bad in law and incapable of conferring any rights to him since no Land Control Board consent was sought within six months of the transaction as required by the Land Control Act Chapter 302 of the Laws of Kenya.

7. The Defendant prays that the Plaintiff's suit be dismissed with costs and the court do revoke the title issued in respect of land parcel number 49 Ngulu Adjudication Section and declare the Defendant as the owner of the same by way of adverse possession.

8. The Defendant's amended defence and counterclaim is denied by the Plaintiff's reply dated 17th September, 2018 and filed in court on even date.

9. In reply, the Plaintiff prays to the court to strike out the amended defence and dismiss the counterclaim and enter judgement in his favour.

10. During the hearing, the Plaintiff told the court that by the time of filing the suit, the suitland was parcel number 49. He added that he is the owner of the said land which is now Makueni/Ngulu/49. He went on to adopt his recorded statement dated 18th April, 2016 as his evidence. He produced the title and a confirmation of ownership of the suitland as P.Exhibit Nos. 1 and 2 respectively. He said that he purchased the suitland from Aaron Muthama, Lucas Musyoki and David Masai King'oo (PW1) vide a sale agreement that he produced as P.Exhibit No.3. According to him, the three had in turn bought the suitland from one Kitonyi Nthuku who is the father of the Defendant. He added that the three persons gave him a copy of sale agreement that they had with Kitonyi Nthuku. The agreement and its translation were produced as P.Exhibit No.4(a) and 4(b) respectively.

11. It was also the Plaintiff's evidence that the three sellers showed him the markings that they had put on the boundary of the suitland. He further said that he bought the entire land from King'oo (PW1) and his two colleagues.

12. His evidence in cross-examination by Mr. Kasyoka for the Defendant was that the three sellers showed him the original copy that they had. He pointed that their agreement had a sketch of map showing the portion that he bought and he was unwilling to part with any portion of the land in question. He denied suggestion by the Counsel that the three sellers sold 7 acres of land to him that they did not own. He denied suggestions that the family of Stephen Kitonyi Nthuku have been using the land ever since he bought it and pointed out he was the one who used to cultivate on it and at other times, he would lease it. He also denied suggestion that those who sold the land to him had not bought it.

13. David Masai King'oo (PW1) adopted his statement dated 01st December, 2017. He gave evidence in support of the Plaintiff and confirmed that he and one Aaron Muthama and Lucas Mutiso are the ones who sold the suitland to the Plaintiff. That they had in turn bought it from Stephen Kitonyo Nthuku with whom there was an executed sale agreement {P.Exhibit No.4(a)}. He added that the size of the land has 7.1 acres.

14. His evidence in cross-examination was that he was a party to the sale agreement with Joel Kivula (Plaintiff) as well as party to the other sale agreement with Stephen Kitonyi Nthuku. He denied that it is not true that the suitland had been occupied by the family of the Defendant.

15. Johnson Kamoti Mbindyo (PW2) in evidence in chief adopted his statement dated 01st December, 2017. He said that he witnessed the sale agreement between Steph Kitonyo Nthuku (the Defendant's father) and David King'oo (PW1) and two others in his capacity as a village elder. He also said that he saw the land that was the subject of the sale agreement.

16. On the other hand, the Defendant in his evidence in chief adopted his recorded statement filed in court on 14th March, 2018. He said that the suit property was 49 that had been given to his step mother who had a different number. He went on to say that his father did not sell the land in question to David King'oo (PW1) and his two colleagues as they were only allowed to use a portion of it to grow horticultural produce.

17. His evidence in cross-examination by Mr. Muia for the Plaintiff was that he did not have any documents to show that King'oo (PW1) and his two colleagues had leased the suitland from his father. He said that his stepmother, one Mutunge Kitonyo, who is the owner of the land is now deceased. He said that he does not have letters of administration to enable him represent his later father's interest. He later changed his mind and said that he has the letters in question. He said that he was around when the adjudication process began and when the Surveyors visited the land in question. He pointed out that he filed an objection but did not file an appeal against the objection. Apparently, the Defendant was tacitly admitting that he lost in the objection proceedings. He said that he did not trespass into anybody's land since it belonged to his father.

18. Agnes Katangu Kitonyo (DW1) in her evidence in chief adopted her statement filed in court on 14th March, 2018.

19. Briefly her evidence was that she has lived in the suitland ever since she got married in 1986.

20. In her evidence in cross-examination, Agnes (DW1) told the Court that she is not privy to the events that occurred prior to 1986. Pressed further by the Counsel for the Plaintiff, she told the Court that she was there when the suitland was leased and that the lease was reduced into writing. She said that she knows that the land is titled but does not know in whose name it is.

21. By the time of writing this judgement, it is only the Plaintiff's Counsel who had filed his submissions.

22. The submissions by the Counsel were that the suitland were acquired pursuant to the provisions of the Land Adjudication Act and therefore, if there was any dispute as to its ownership, the same should have been addressed as per the procedure provided for under the aforementioned Act. That since the Defendant did not raise any claim during the adjudication process, he cannot raise any claim now when the adjudication process is complete. It should be noted however that during cross-examination, the Defendant alluded to objection proceedings which were before the Land Adjudication and Settlement Officer. He said that he did not appeal against the determination by the said officer. All the same, for failure to appeal against the said determination, the adjudication process became final. The Counsel was therefore not correct to say that the Defendant did not attempt to challenge the adjudication process.

23. The Counsel further submitted that the Defendant lacks capacity over the suit property which he alleged was family land firstly because the same was sold by the Defendant's father during his lifetime and therefore cannot form part of estate of the deceased. Secondly, that the Defendant did not have grant of letters of administration in respect of his father's estate if he had any desire to challenge the Plaintiff's ownership of the suit property. Thirdly, that the Defendant stated in his evidence that the suit property belonged to his step mother who is still alive and as such, he ought to have obtained power of attorney from her. However from the evidence on record, the Defendant's step mother is also deceased and in my view, if he was desirous of challenging the Plaintiff's ownership of the suit property, he ought to have obtained appropriate letters of administration.

24. The Counsel further submitted that the Defendant did not prosecute or tender evidence in support of his counterclaim thus there is no reason why judgement cannot be entered against him since the Plaintiff was a purchaser for value.

25. The Counsel also submitted that where fraud is raised it has to be proved that the registered proprietor participated in the scheme of fraud. In support of his submissions the Counsel relied on the case of **Keduiwo A. Marisin and 7 others vs. Samuel Kipsige Arap Soi [1997] eKLR**.

26. The Counsel concluded by urging the Court to award the Plaintiff Kshs.150,000/= as general damages.

27. Having read the pleadings, the evidence tendered by the parties herein as well as the submissions by the Plaintiff's Counsel, I am of the view that the issues for determination in his matter are: -

(a) *Whether or not the Plaintiff is the owner of the suit property?*

(b) *Whether he acquired the suit property by fraudulent means?*

(c) *Whether the Defendant has locus standi to prosecute his counterclaim?*

(d) *Whether the Defendant is a trespasser?*

28. From the evidence on record, the Plaintiff is the registered owner of land parcel No. Makueni/Ngulu/49 which he bought from King'oo (PW 1) and others. There is also evidence to show that King'oo (PW1) and his colleagues bought the suit property which was then unregistered from the Defendant's father. Even though the Defendant in his evidence maintained that the three had leased the land from his father, he had no lease document in support, the Defendant admitted that he was present when the adjudication process was ongoing and after losing the objection proceedings he did not appeal against the same. There was therefore no reason why the suitland could not be registered in the name of the Plaintiff. In the circumstances, I hold that the Plaintiff is the owner of land parcel Makueni/Ngulu/49.

29. As earlier on observed, the evidence on record is clear on how the Plaintiff acquired the suit property. Even though the Defendant has in his counterclaim averred that the Plaintiff acquired the suitland fraudulently, he did not tender any evidence in support of the particulars for offence. Suffice, there is nothing to show that the Plaintiff did not comply with the requirements for the Land Adjudication Act during the demarcation or even colluded with the officers from the Ministry of Lands to have the suitland registered in his name. There was no evidence to show how the Plaintiff forged the land sale agreement that he entered into with King'oo (PW1) and his colleagues. I, therefore, hold that the Plaintiff did not acquire the suitland by means of fraud.

30. The case for the Defendant is that the suitland initially belonged to his late father who bequeathed it to his step mother. Even though the Defendant told the court that he had taken out letters of administration so as to enable him represent his late father's estate, he did not produce any grant. In any case, the Defendant prevaricated on the issue of letters of administration leaving doubt as to whether he had any. From the foregoing it is clear to me that the Defendant lacks capacity to prosecute his counterclaim.

31. The Plaintiff having proved that he is the registered owner of Makueni/Ngulu/49, the Defendant was therefore not justified to bar the Plaintiff from accessing his land. The Defendant had no reason to trespass into the land. Trespass is actionable per se. In the case of **Duncan Nderitu Ndegwa vs. KP & LC Ltd & Another [2013] eKLR** P. Nyamweya J held;

"...once trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages."

32. The Plaintiff's Counsel has submitted that the Plaintiff be awarded Kshs.150,000/= as general damages. In my view, the said sum is appropriate under the circumstances. In my judgement therefore, I will award the Plaintiff Kshs.150,000/= as compensation for the Plaintiff's right to use and enjoyment of the suit property occasioned by the Defendant.

33. The upshot of the foregoing is that the Defendant's counterclaim is not proved to the registered standard. I, therefore, dismiss the defence and counterclaim with costs to the Plaintiff. On the same vein, I am satisfied that the Plaintiff has on a balance of probabilities satisfied this Court that he has a cause of action against the Defendant. I will therefore enter judgement in his favour and against the

Defendant as hereunder: -

(i) An order of a permanent injunction is hereby issued restraining the Defendant from entering, interfering and/or trespassing into the suit premises land parcel No. Makueni/Ngulu/49.

(ii) Kshs. 150,000/= as general damages for trespass.

(iii) Costs and interest of the suit.

Signed, dated and delivered at Makueni via email this 26th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi