



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MAKUENI

ELC CASE NO. 110 OF 2017

(Formerly Machakos ELC Case No. 105 of 2016)

SUSAN MBULA MWOVE.....PLAINTIFF

VERSUS

MUTISYA MUTUNGA.....DEFENDANT

JUDGMENT

1. Through a plaint dated 02/09/2016, the Plaintiff sought a permanent injunction against the Defendant to restrain him from interfering with her parcel of land known as Kibwezi/ Mang'elete/2262 (*suit land*). She also prayed for general damages for trespass, costs and interests of the suit. During the pendency of the trial, the Plaintiff passed on and was replaced by her personal representative, Bernard Mwove Nzyuko.
2. The Defendant filed a statement of defence and denied all the allegations. He particularly denied being a trespasser and averred that he had purchased the suit land from one David Nzioka Mwove.
3. On 14/11/2019, the Court heard the matter in the absence of the Defendant after satisfying itself that he had been duly served.
4. Bernard Mwove Nzyuko was the first witness and he testified that the Plaintiff was his mother. He produced a grant of letters of administration *ad litem* as P. Exhibit 1 and adopted the statement which his mother had recorded before her demise.
5. In the statement filed on 08/09/2016, the deceased stated that the suit land belonged to her late husband, Philip Mwove, and he had sub divided it among his three wives. The suit land was her portion. Further, she stated that one of the sons of the 2nd wife known as Daudi Mwove grabbed part of her land and sold to the Defendant. A demand letter dated 11/05/2016 was produced as P.Exhibit 2. A letter dated 01/12/2015 was produced as P.Exhibit 3.
6. Gedion Kalai Mwove (PW1) testified that the late Philip Mwove and Susan Mbula were his parents. He adopted his statement filed on 08/09/2016 in which he stated that his father sub divided his land among his wives and the suit land was given to his mother. He stated that nobody was aware of how Daudi Mwove came into the suitland.
7. Daniel Mwove (PW2) also adopted his statement filed on 08/09/2016 in which he stated that Philip Mwove and Susan Mbula were his parents. He stated that together with his brother Patrick, they were given portions to construct and the rest of the land was given to their mother. According to him, the suit land was owned by his mother and not the Defendant.
8. After the closure of the Plaintiff's case, submissions were filed as directed by this Court.
9. The Plaintiff submitted that the Defendant did not file any documents to show that he purchased the suit land from David Nzioka Mwove and did not attend the hearing despite being served.
10. Having looked at the pleadings, evidence and submissions, the only issue for determination is whether the suit land belongs to the Plaintiff or Defendant.
11. The demand letter from the Plaintiff's lawyer to the Defendant indicated that the Defendant had dishonored the summons to appear before the Kambu Survey office to clarify the ownership issue and as a result, the record was set straight by inserting the Plaintiff's name. The letter goes on to state that the Defendant caused the Plaintiff's name to be cancelled from the records without showing how the land was transferred to him and without the Plaintiff's consent. The letter called upon the said office to cancel the entry and revert the land to the

Plaintiff.

12. Exhibit 2 was a summons sent to both the Plaintiff and David Mwove from the Land Adjudication and Settlement department-Mtito Andei Division. It indicated that a complaint had been received from the Plaintiff with regard to the suit land. The Plaintiff wanted to know how David Mwove had acquired and sold the suit land.

13. Apart from the correspondences, which do not prove ownership, the Plaintiff did not exhibit any records from the relevant offices. On the other hand, the Defendant did not file a list of witnesses or documents and did not even attend the trial. It has been held in numerous cases that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

14. Accordingly, it is my considered view that the Plaintiff's case stands unchallenged and is entitled to the prayers in the plaint.

15. As for general damages for trespass, a nominal amount of Kshs. 30,000/= would be sufficient in the circumstances.

16. The upshot of the foregoing is that the Plaintiff has satisfied this Court on a balance of probabilities that she has a cause of action against the Defendant. I, therefore, proceed to enter judgment in her favour and against the Defendant as hereunder: -

(a) An order of permanent injunction restraining the Defendant and/or his agents from in any way interfering with land parcel number Kibwezi/Mang'elete/2262 is hereby issued.

(b) Kshs.30,000/= being general damages.

(c) 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