



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.451 OF 2017

(Formerly Machakos Hccc No.102 of 2009)

MANSON MUSYOKA KISELE PLAINTIFF

VERSUS

NASHON MUKEKU KATONI

MATHIAS NZENGU MUUMBI DEFENDANT

JUDGEMENT

1. By his plaint dated 02nd March, 2009 and filed in court on 02nd April, 2009 the Plaintiff prays for judgement against the Defendant for: -

a) A declaration that the suit land herein belongs to the plaintiff and that he be registered as the proprietor thereto by the District Land Registrar, Makueni District or any other District that may be established during the pendency of these proceedings in which the suit land may fall under.

b) An order of injunction to permanently restrain the defendants, their agents/employees/assigns and or heirs or any other person claiming through them from trespassing, occupying, trespassing, disposing by way of sale or otherwise, or in any other manner from interfering with the Plaintiff's quiet possession and enjoyment of the suit land herein.

c) Costs of this suit and interest thereon at Court rates.

d) Any other and/or further relief as this Honourable Court may deem fit and just to grant under the circumstances.

2. The Plaintiff has pleaded in paragraphs 3, 6, 7, 8, 9 and 10 of his affidavit that sometime in the year 2001, he purchased a parcel of land measuring 30.40 metres by 19.8 metres from one Samuel Mbolu Katoni, the brother of the 1st Defendant, at a total consideration of Kshs.40,000/= payable in installments, that in 2005 the Plaintiff further purchased another portion which was originally part of the said Samuel Mbolu Katoni measuring 19 metres by 32 metres for a total price of Kshs.33,800 which was paid in full and the agreement reduced into writing on or about 28th December, 2005. This made the Plaintiff's total parcel of land to be 19 metres by 62 metres (hereinafter referred to as the suitland), that later the 2nd Defendant did trespass and encroach into and started working on the Plaintiff's land purporting that he had purchased it from the 1st Defendant, that the matter was taken to the 1st Defendant's clan at location level for arbitration and the clan ruled that the land belonged to Samuel Mbolu Katoni and not the 1st Defendant and, therefore, the said Samuel Mbolu Katoni had the legal right to sell the same to the Plaintiff, that the clan ruled that the 1st Defendant do refund to the 2nd Defendant the amount of the money paid as purchase price and that on or about 06th June, 2007 the District Land Adjudication and Settlement Officer, Makueni District did declare Kyamuoso sub-location, where the suitland is situated an adjudication area. The Plaintiff has sought the requisite consent from the said officer under the Land Adjudication Act, cap 284 of the Laws of Kenya to institute these proceedings. The consent has been granted and a copy thereof filed together with the plaint.

3. The Plaintiff's claim is denied by the Defendants vide their defence dated 29th June, 2009 and filed in court on 30th June, 2009.

4. In paragraphs 4, 5, 6 and 8 of the defence, the Defendants have pleaded that the Plaintiff's suit is res judicata in view of the proceedings and judgement in Land Dispute 128 of 2006 and that the Defendants shall apply for its striking off, that the Plaintiff's claim is incompetent and a gross abuse of the court process in view of the express proviso of the Land Adjudication Act, that the 2nd Defendant is the sole legal owner of all that piece of land which he has been in use and control situate at Kyamuoso Adjudication Section and has never entered into the Plaintiff's land as claimed and that the court has no jurisdiction to hear and determine the suit.

5. The Defendants did not pursue the issue of jurisdiction raised in their defence as a point of preliminary objection. The fact that the two

defendants submitted to full hearing of the suit hearing is manifestation of their acknowledgement of the court's jurisdiction. In other words, they acquiesced to the Court's jurisdiction.

6. The Plaintiff in his evidence in chief was that he obtained consent (D.Exhibit No.1) from the Land Adjudication and Settlement Officer before filing this suit. He went on to say that he bought two (2) portions of land from one Samuel Mbolu Katoni on 30th January, 2001 and 28th December, 2005. The purchase price for the two portions was Kshs.40,000/= and Kshs.39,920/= respectively which he paid in full. The Plaintiff produced sale agreements in Kamba language as P.Exhibit No.2(a) while their English translation were produced as P.Exhibit No.2(b).

7. According to the Plaintiff, the 1st Defendant who is Samuel's younger brother received part of the purchase price and both signed the agreement dated 05th October, 2005. He went on to say that he could not agree to the contention that the 1st Defendant sold land to the 2nd Defendant. That the 1st Defendant had a case before their clan and the matter was decided in favour of the latter.

8. The Plaintiff further talked of a suit filed at the Lands Dispute Tribunal in Makueni whose decision he did not agree with forcing him to file appeal in case number 110 of 2007.

9. His evidence in cross-examination was that Samuel Mbolu Katoni used to reside in the suitland before he (Plaintiff) purchased it. He added that he knows that the land in question initially belonged to one Munguti Kyengo.

10. The Plaintiff called Samuel Mbolu Katoni (PW1) as his first witness. The witness adopted his recorded and undated statement filed in court on the day of the hearing as his evidence.

11. Briefly, his evidence was that the suitland that he sold to the Plaintiff initially belonged to his father, one Katoni Mutua. He pointed out that the Plaintiff paid him for the land. It was also his evidence that prior to selling the land, he notified his family about his intention to sell it and denied the allegation that the land was sold by the 1st Defendant. He pointed out that his father sold the land that was meant to be his so that his father could pay school fees for the 1st Defendant and that his father gave him (Plaintiff) the land to compensate him. It was also his evidence that the 1st Defendant sold the land secretly and he learnt of the secret sale after he had already sold the land to the Plaintiff. He said that the suitland did not belong to the 1st Defendant.

12. His evidence in cross-examination was that his father gave him the land after the latter bought it. He said that he was present when his father bought the land. It was also his evidence that the family resolved the land in question does not belong to the Defendant.

13. His evidence in re-examination was that he did not consent to the sale by the 1st Defendant.

14. Isaac Umithi Mutie (PW2) adopted his statement dated 23rd April, 2019 and filed in court on 24th April, 2019 as his evidence. Isaac (PW2) told the court that he is the chairman of Maingi family of which the 1st Defendant is his deputy. He said that the Plaintiff is older than the 1st Defendant. Regarding the dispute herein, his evidence was that both the Plaintiff and the 1st Defendant willingly appeared before the Atangwa clan and after deliberations, the clan ruled in favour of the former who started cultivating on the land in 1980 and had mature avocado and banana plants on the land. The witness produced the decision of the clan as P.Exhibit No.3.

15. His evidence in cross-examination was that the father of the Plaintiff and the 1st Defendant had four separate parcels of land.

16. On the other hand, the 1st Defendant's evidence in chief was that the suitland is his. He adopted his undated recorded statement filed in court on 02nd March, 2015 as his evidence. He said that he bought the land in 1980 from Munguti Kakuti at a cost of Kshs.2,000/=. He later sold the land in 2002 after informing the Plaintiff about the sale. He said that he, the Plaintiff and the 2nd Defendant signed the sale agreement dated 28th November, 2002.

17. In his evidence in cross-examination, the 1st Defendant denied that his documents were fake. On being shown the Plaintiff's signature he said that it is not dated. He said that even though his father sold land so that he could pay school fees for him, the land in question did not belong to the Plaintiff nor did their father allocate it to the Plaintiff. He denied having ever received Kshs.4,000/= as is indicated in the agreement relied upon by the Plaintiff.

18. The 2nd Defendant in his evidence in chief adopted his undated statement filed in court on 02nd March, 2015. He said that the number of the land in dispute is 2227 which he bought from the 1st Defendant. He pointed out that he carried out a search to confirm that the land belonged to the 1st Defendant.

19. His evidence in cross-examination was that he did not know if the person who sold the land to him had sold it to someone else.

20. In his submissions, the Plaintiff's Counsel extensively quoted Sections 5(1), 9(1), 10(1), 11, 16 and 17 of the Land Adjudication Act submitted that the defence did not deny the assertion that the suitland was in an adjudication section. He went on to submit that the defendants were served with summons by the Land Adjudication Officer Makueni (D.Exhibit No.5) which they ignored as a result of which the Plaintiff applied for consent (P.Exhibit No.1) to enable him file this suit. The Counsel was of the view that the suitland belongs to the Plaintiff since he had adduced evidence in support of his claim. He urged the Court to find merit in the Plaintiff's claim.

21. On the other hand, the Defendant's Counsel submitted that it was upon the Plaintiff to discharge the burden of proof since he is the one who instituted this suit. The Counsel cited **Sections 107, 108 and 109 of the Evidence Act Chapter 80 of the Laws of Kenya**. The three

Sections provide as follows: -

107. Burden of proof

(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. The Counsel went on to submit that the Plaintiff who has sought a declaration that he is the absolute owner of the suit property did not enjoin Samuel Mbolu Katoni as a party to this suit. The Counsel pointed out Samuel Mbolu Katoni's (PW1) statement dated 23rd April, 2019 details that his late father bought the land from one Munguti Kyangumi and compensated him (PW1) with it. The Counsel went on to submit that when the matter was taken to the Atangwa clan, the latter decided that the suitland belonged to the Plaintiff by virtue of the fact that he was farming on it. However, the Counsel was of the view that the decision of the Land Dispute Tribunal bears more authority and persuasion than the decision of the Atangwa clan despite the fact that the Plaintiff's reliance on Article 159(2)(c) of the Constitution which provides for alternative dispute resolution.

23. It was also submitted that the Plaintiff agreed that by the time the land was purchased, the 1st Defendant was earning an income while he was not and this proves on a balance of probabilities that it is the 1st Defendant who had the ability and capacity to acquire the suit land. The Counsel added that the 1st Defendant did not sign the purported sale agreement between the Plaintiff and Samuel Mbolu Katoni (PW1).

24. The Counsel went on to submit that Samuel (PW1) did not have a good title since he sold the suitland while still aware of a previous sale.

25. The Counsel termed the award of the Land Dispute Tribunal made on 19th July, 2007 as final and binding and that it reveals that true position on ownership. The Counsel pointed out that although the Plaintiff filed an appeal on 31st August, 2007 to challenge the award, he did not pursue the appeal.

26. The Counsel was of the view that even though the Plaintiff relies on the consent to file civil case of 24th April, 2010 as evidence to suggest that the decision of the Land Disputes Tribunal is challenged, the only way that the award would have been challenged is provided under **Section 30(1) of the Land Adjudication Act** which provides that: -

“Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

27. The Counsel added that obtaining consent is only a prerequisite and that according to Section 30(1) of the Land Adjudication Act, it may only be given in cases where adjudication register has become final.

28. It was also submitted that this matter is res judicata in view of the award made on 19th July, 2007 by the Makueni Land Disputes Tribunal. The Counsel added that the appeal that the Plaintiff filed against the award of the Tribunal is still pending at the Appeals Tribunal in Embu.

29. Arising from the above, the Counsel submitted, the matter in issue in the Land Disputes Tribunal was directly and substantially same as the present matter between the same parties over the same parcel of land.

30. The Counsel relied on **Section 7 of the Civil Procedure Act chapter 21 of the Laws of Kenya** which provides that: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

31. The Counsel was of the view that since the Plaintiff has been unable to prove ownership of the suit land, his suit should be dismissed with costs.

32. The Plaintiff's Counsel did not frame any issues for determination while the Defendant's Counsel framed three (3) issues. These were: -

(i) What issues were really determined in the previous case;

(ii) Whether they are the same in the subsequent case and were covered by the decision of the earlier case;

(iii) Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

33. The above issues can be combined into one and I will address them together. In addition to the above, I am of the view the other issue that requires to be addressed is whether or not the Plaintiff is entitled to the prayers sought.

34. There is no dispute that in the clan proceedings that took place in the year 2006, it was held that the suitland belonged to Samuel (PW1). It is also not in dispute that in Makueni Land Disputes Tribunal claim No.128/2006, the suit land was awarded to the 2nd Defendant herein. This led Samuel (PW1) to file an appeal at The Appeal Tribunal in Embu on 31st August, 2007 vide case number 110/2007.

35. The Plaintiff contends that by the time the award in Land Disputes Tribunal No.128/2006 was delivered on 06th July, 2007 the area under which the suitland lies had been declared an adjudication section by The District Land Adjudication and Settlement Officer vide notice of establishment of Adjudication Section dated 06th June, 2007 (P.Exhibit No.7).

36. The above mentioned notice was made pursuant to Section 5 of the Land Adjudication Act chapter 284 of the Laws of Kenya (hereinafter referred to as the Act). **Section 5 of the Act** provides as follows: -

“Establishment of adjudication sections

(1) The adjudication officer shall by notice either—

(a) establish adjudication sections within the adjudication area;

(b) establish the whole adjudication area as an adjudication section.

(2) A separate notice shall be published in respect of each adjudication section, and in each such notice the adjudication officer—

(a) shall define as clearly as possible the area of the adjudication section;

(b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this Act;

(c) shall fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer, either in writing or in person or by his agent duly authorized according to law (including recognized customary law); and

(d) may require any person making a claim to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer.”

Under **Section 30** of the same Act, there is provision for stay of suits. The Section provides as follows: -

“Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.”

37. My reading of the above section is that once an area has been declared an adjudication section, proceedings such as Land Disputes Tribunal claim No.128/2006 that were begun before the publication of the notice under section 5 of the Act are discontinued, unless the Adjudication Officer having regard to the stage which the proceedings have reached, otherwise directs. The section is couched in mandatory terms. There is no evidence to show that the 2nd Defendant herein sought directions from the Adjudication Officer to have the Land Disputes Tribunal deliver its award. I say so because when the area was declared an adjudication section, the Tribunal had not delivered its award. As such the award of the Tribunal is neither here nor there. It therefore cannot be said that this matter is res judicata since the Tribunal had no jurisdiction to make the award in view of the suitland having been declared as falling in an adjudication section.

38. Arising from the above, it follows therefore that the determination of the Atangwa clan remains in force subject to its adoption or rejection by the Adjudication Officer.

39. It is not lost on this Court that the 2nd Defendant ignored the summons (D.Exhibit No.5) issued to him by the Land Adjudication and Settlement Officer to appear before it where he had a chance to lay his claim. This would explain why The District Land Adjudication and Settlement Officer Makueni vide letter dated 29th June, 2011 granted the Plaintiff herein consent to pursue this suit which consent superseded the letter dated 22nd March, 2011 that indicated that parcel number 2227 Kyamuoso Adjudication was registered in the name of the 2nd Defendant.

40. There is no dispute that the Plaintiff bought two portions of land from Samuel (PW1) even though the 1st Defendant contends that the latter lacked capacity to sell the land in question as he (1st Defendant) had sold to the 2nd Defendant. The Plaintiff in his evidence stated that the two agreements that he and Samuel (PW1) entered into were witnessed by among others Joshua Kaviku Kimeu. The 1st Defendant in his evidence in cross-examination informed the court that Joshua Kimeu is his maternal uncle. He admitted that Joshua gave him Kshs.5,000/= which he says was money meant for school fees for his daughter. This tallies with the Plaintiff's evidence that he gave Samuel and the 1st Defendant money on two occasions. The first one was on 18th October, 2005 when the 1st Defendant received Kshs.4,000/= and the second time was on 05th October, 2005 when he received Kshs.5,000/= from the Plaintiff to enable him pay fees. There was no reason why the 1st Defendant could have received such money from the Plaintiff on two occasions if he had indeed sold the suitland to the 2nd Defendant. It is clear that the 1st Defendant prevaricated on this issue when he was under cross-examination. This coupled with the fact Samuel (PW1) started cultivating on the suitland since 1980 and had mature avocado and banana trees, as the court was told by Isaac (PW2), the preponderance of the evidence before me tilts in favour of the Plaintiff. I hasten to add that I found the Plaintiff and witnesses candid as opposed to the defendants who in my view were untruthful.

41. The upshot of the foregoing is that I am satisfied that the Plaintiff has on a balance of probabilities satisfied this Court that he has a cause of action against the Defendants. In the circumstances, therefore, I hereby proceed to enter judgement for the Plaintiff and against the Defendants as hereunder: -

a) It is declared that the suit land herein belongs to the Plaintiff and that he be registered as the proprietor thereto by the District Land Registrar, Makueni District or any other District that may be established during the pendency of these proceedings in which the suit land may fall under.

b) An order of injunction is hereby issued to permanently restrain the Defendants, their agents/employees/assigns and or heirs or any other person claiming through them from trespassing, occupying, trespassing, disposing by way of sale or otherwise, or in any other manner from interfering with the Plaintiff's quiet possession and enjoyment of the suit land herein.

c) Costs of this suit and interest thereon at Court rates.

Signed, dated and delivered via email at Makueni this 22nd day of May, 2020.

MBOGO C. G.,

JUDGE.

Court Assistant - Mr. Kwemboi