



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.160 OF 2017

PAUL MUTUKU KISWII.....PLAINTIFF

VERSUS

RAEL MUSYOKI.....1ST DEFENDANT

MUSYOKI MUINDE.....2ND DEFENDANT

MUTHIANI MUSYOKI.....3RD DEFENDANT

JUDGEMENT

1. By his amended plaint dated 06th May, 2019 and filed in court on 07th May, 2019, the Plaintiff prays for judgement against the Defendants for:-

a) A permanent injunction restraining the defendants by themselves, their agents, surrogates and/or employees or otherwise howsoever from the following acts or any of them that is to say entering, trespassing upon, offering for sale, dealing or in any manner whatsoever from interfering with the Plaintiffs parcel of land known as Title Number MAKUENI/KIOU/1591.

b) A declaration that the Plaintiff is entitled to exclusive, quiet and unimpeded right of possession of his private property namely land parcel title Number Makueni/Kiou/1591 and further that the defendants demands that the plaintiff vacate the suit property are unreasonable, unjustified and unlawful and a consequential order of eviction.

c) An order compelling the 3rd defendant to remove the caution lodged in parcel number Makueni/Kiou/1591 within 14 days in default the Makueni County Land Registrar do remove the caution lodged by Justus Muthiani Musyoki forthwith.

d) Costs of the suit.

e) Any other or further relief as this honourable court may deem fit and just to grant.

2. The Plaintiff has averred in paragraphs 4, 5, 6 and 7 of his amended plaint that at all material times he has been and still is the registered proprietor of all that piece of land known as title number Makueni/Kiou/1591 situate in Makueni County and containing by measurements 0.81 Ha or thereabouts (hereinafter referred to as the suit property), that the Defendants acting jointly, have been harassing him since January, 2015, by demanding that he surrenders the suit property to them, that the 3rd Defendant illegally lodged a caution against the Plaintiffs said title No. Makueni/Kiou/1591 and prays for an order compelling the 3rd Defendant to withdraw the said caution in default the Makueni County Land Registrar do remove the same and that he lawfully purchased the suit property from the 2nd Defendant who signed all the relevant transfer documents.

3. The Plaintiff's claim is denied by the 1st and the 3rd Defendants amended defence and counterclaim dated 20th August, 2019 and filed in court on 21st August, 2019.

4. In their counterclaim the 1st and 3rd Defendants have averred in paragraphs 10, 11, 12, 13 and 14 of their counterclaim that the suit property is a family property and hence any sale or transfer thereof was illegal, unlawful, irregular and unconstitutional, that the 1st and 3rd Defendants by virtue of being wife and son of the 2nd Defendant ought to have been involved in the transaction, that the 1st and 3rd Defendant's claim against the Plaintiff is for the nullification of the purported transfer of title No.Makueni/Kiou/1591, that the Plaintiff should be restrained from entering, interfering in any manner from dealing with title No.Makueni/Kiou/1591, until hearing and determination

of the suit, that if there was any title issued the same was obtained by fraud whose particulars are:-

- (i) Coercing the 2nd Defendant to enter into a sale agreement on the suit property.**
- (ii) Uttering documents without authority of 1st and 3rd Defendants.**
- (iii) Making documents without authority.**
- (iv) Making illegal and unlawful contracts.**
- (v) Forging documents.**

5. The two Defendants pray for the Plaintiff's suit to be dismissed with costs and judgement be entered against him for: -

- a) An Order that the sale between the 2nd Defendant and the Plaintiff was illegal, null and void and a further order cancelling the title issued to the Plaintiff and reverting the same to the 2nd Defendant.**
- b) An Order of Permanent injunction restraining the 2nd Defendant from selling, transferring, alienating or in any other manner dealing with the title to MAKUENI/KIOU/1591 without the consent of the 1st and 3rd Defendants.**
- c) An order of permanent injunction restraining the Plaintiff from entering, trespassing into, using, cultivating, grazing or in any other manner interfering with the L.R No. MAKUENI/KIOU/1591.**
- d) Costs and interest of this suit.**

6. On the 23rd September, 2019, the Plaintiff filed his reply to the 1st and 3rd Defendant's amended defence and counterclaim. He prays that the counterclaim be dismissed with cost and judgement entered as prayed in the amended plaint.

7. The 2nd Defendant though served with summons to enter appearance and to file his defence failed to do so. As such, the matter against him proceeded as undefended suit.

8. In his evidence, the Plaintiff adopted his recorded statement dated 03rd February, 2015 as his evidence in chief. His evidence was that he bought land parcel number Makueni/Kiou/1591 from the 2nd Defendant. He denied having ever acquired it fraudulently and pointed out that the suit property initially belonged to Syontheke Kawali then known as plot number 118 Kiou Adjudication Section. He went on to say that he together with Katubenge Kawali, Musyoki Muindi and Mbuku Nzuvela inherited the land, the latter three being brothers. He termed the allegation by the 1st and 3rd Defendants that the suit property as family land as not true and as such, they should get their share from the 2nd Defendant who was awarded parcels numbers 1590 and 1595. He said that the adjudication proceedings show that the suit property was shared and as such the 1st and the 3rd defendants have no right to trespass into his land. He urged the court to dismiss the counterclaim with costs and grant the orders sought in his amended plaint.

9. The Plaintiff produced two agreements dated 09th December, 2000 and 16th October, 2002 a copy of title deed, adjudication proceedings and surveyors report as P.Exhibit Nos. 1, 2, 3, 4 and 5 respectively.

10. His evidence in cross-examination by Mr. Mulei for the 1st and 3rd Defendants was that during the sale agreement, one Agnes Nduku signed as the wife of the 2nd Defendant. He admitted that the second wife of the second defendant did not sign the said agreement. He said that the first agreement dated 09th December, 2000 was signed by witnesses and that the only person present was the assistant chief. He agreed that the agreement was signed by the chief one year later on 16th July, 2001 due to wrangles within the family of the defendants. He pointed out that the 1st and the 3rd Defendants used to trespass into his land. He went on to say that he was not aware of appeal No.281 of 2005 before Mukaa Sub-County offices. He however revealed that he learnt about the notification of the appeal on 27th September, 2018. According to him, the appeal referred to was dismissed but he admitted that he did not give his advocate any document of dismissal. He also said that he acquired his title deed while there was still an appeal. It was also his evidence that removal of caution was one of his prayers. He went on to say that he bought 16 metres of plot number 1595 and that he only claims 6 metres.

11. The Plaintiff was recalled on 16th October, 2019 for a further cross-examination. He agreed that although beneficiary can lodge a caution, the defendants herein did not lodge a caution in order to protect their interest in the suitland. In his further re-examination, the Plaintiff pointed out that the defendants have no interest in his land.

12. In her evidence, the 1st Defendant adopted her recorded statement dated 07th September, 2015 as her evidence in chief. Her evidence was that she was not aware that her husband who is the 2nd Defendant herein sold the suitland and added that she has no other land. She said that she lodged a caveat to prevent sale of the land in question. She produced two copies of certificates of official search and a demand letter as D.exhibit Nos.1(a) & (b) and 2 respectively.

13. Her evidence in cross-examination was that she does not know the parcel number of her land. She also told the court that although the Plaintiff cultivates on the suitland, he has not fenced it. She denied having ever damaged the Plaintiff's fence. She also said that they do not graze their livestock in the Plaintiff's land. According to her, the title deed to the suitland could either have been issued to her or her

husband. She agreed that the land initially belonged to one Syontheke Kawalo and that it was later subdivided between her husband and his brothers. She agreed that the adjudication officers allocated each brother their own respective parcel of land. She said that she did not attend the adjudication proceedings and added that she was not aware that the Plaintiff had acquired his title deed.

14. Her evidence in re-examination by Mr. Kamolo for the Plaintiff was that the 2nd Defendant did not involve her when he sold the suitland.

15. The 3rd Defendant in his evidence in chief adopted his recorded statement dated 07th April, 2015. He said that apart from land parcel number 1591, they have no other land. He added that he only came to learn that the suitland had been sold when he went to lodge a caution so as to prevent the land from being transferred to someone else. He pointed out that they have never prevented the Plaintiff from accessing the land but asserted that the land in question belongs to them.

16. On being cross-examined by Mr. Kamolo, the 3rd Defendant told the court that the search that he conducted revealed that parcel number 1591 belongs to the Plaintiff while parcel number 1590 belongs to one Musyoki. He also said that he and the 1st Defendant reside in parcel number 1590. He said that notwithstanding the fact that the Plaintiff has title deed to the suitland, he was wrong in erecting benches on the land in question. He insisted that he had a right to caution the Plaintiff's land and pointed out that his father did not follow due procedure when he sold the land. He however admitted he did not sue his father.

17. In his written submissions, the Plaintiff's Counsel urged the court to dismiss the amended defence and counterclaim and proceed to enter judgement for the Plaintiff as prayed in amended plaint. The Counsel was of the view that the Plaintiff had proved his case on a balance of probabilities.

18. On the other hand, the Counsel for the 1st and the 3rd Defendants framed four issues for determination namely: -

1) Whether the Plaintiff has proved a prima facie case on a balance of probabilities,

2) Whether the Plaintiff is entitled to the orders sought in the plaint,

3) Whether defendants offered a plausible defence and

4) Whether their counterclaim raises triable issues.

19. The Counsel argued issue number 1 and 2 jointly and submitted that the Plaintiff's title was obtained through fraud and misrepresentation. The Counsel added that despite the fact that the 2nd Defendant had two wives, he misrepresented himself fraudulently that he had only one wife who signed the sale agreement. The Counsel went on to submit that the 1st Defendant testified that the land sold to the Plaintiff was a portion of the larger land No.118 Kiou Adjudication Section.

20. It was also submitted that under Section 70 of the Land Registration Act No.3 of 2012 it has been settled that absolute ownership to land shall be evidenced by a certificate of title. **Section 26(1) of the Act** provides: -

“Certificate of title to be held as conclusive evidence of proprietorship

(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.”

The Counsel further cited the case of **Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others [2015] eKLR** where Munyao Sila, J stated thus: -

*Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012** where I stated as follows: -*

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

21. Arising from the above, the Counsel submitted that the first sale agreement dated 09th December, 2000 was attested by the Chief Kiou Location on 16th July, 2001 which was around seven and a half months later. The Counsel pointed out during cross-examination the Plaintiff stated that he took the document to the chief for purposes of making it official. The Counsel further submitted that during re-examination the Plaintiff stated that the 2nd Defendant did not inform him that he had two wives.

22. It was further submitted that the 1st Defendant derives her claim from the interest and right acquired by reason of marriage to the 2nd Defendant. That due to such relationship, she acquired the right to encumber the suit property so as to stop the 2nd Defendant from selling it without her consent. The Counsel termed the caution lodged in respect of Makueni/Kiou/1961 as lawful for purposes of safeguarding the beneficial interest of the 1st and 3rd Defendant.

23. The Counsel concluded by urging the court to dismiss the Plaintiff's suit as it has no merits and allow the 1st and 3rd Defendants' counterclaim.

24. Having read the evidence on record and the submissions filed by the Counsel for the parties herein, I am of the view that the issues for determination are: -

(1) Whether or not the Plaintiff is the registered proprietor of all that parcel of land known as Makueni/Kiou/1591.

(2) Whether the title to land parcel number Makueni/Kiou/1591 was obtained by means of fraud.

25. In his evidence, the Plaintiff stated that he bought from the 2nd Defendant portions of land from a greater portion of land known as plot number 1595 in Kiou Land Adjudication Section. He went on to say that he paid the full purchase price to the 2nd Defendant who proceeded to sign the relevant transfer documents leading to him being issued with title number Makueni/Kiou/1591. Amongst the documents that the Plaintiff filed were objection proceedings before Land Adjudication Officer in objection number 82(P.Exhibit No.4).

26. From the determination of the adjudication proceedings, the name of Syontheke Kawali was cancelled from the register and the names of four (4) persons substituted to include among others the Plaintiff herein whose parcel number is given as 1591. There appears to have no appeal filed to the Minister in line with Section 29 of the Land Adjudication Act chapter 284 of the Laws of Kenya. It would therefore appear that the title deed number Makueni/Kiou/1591 was therefore issued pursuant to the determination in the objection proceedings. As such, I hold that it was not necessary for the 2nd Defendant to consult the 1st and 3rd Defendants before selling the suitland since the issue was *fait accompli*. Needless to say, there is no evidence to show that the Plaintiff coerced the 2nd Defendant to enter into the sale agreement nor can the Plaintiff be accused of uttering documents without the authority of the 1st and 3rd Defendants. Suffice it to say, the particulars of fraud pleaded in paragraph 14 of the defence and counterclaim have not been proved. The evidence adduced by the Plaintiff remains uncontroverted. I found the Plaintiff candid as opposed to the 1st and the 3rd Defendants who in my view were out to try their luck in court by alleging fraud.

27. 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. I am not satisfied that the 1st and the 3rd Defendants meet the threshold of burden of proof. In the circumstances, I hereby proceed to dismiss their defence and counterclaim with costs to the Plaintiff. I will therefore proceed to enter judgement of the Plaintiff and against the Defendants as follows: -

a) A permanent injunction is hereby issued restraining the Defendants by themselves, their agents, surrogates and/or employees or otherwise howsoever from the following acts or any of them that is to say entering, trespassing upon, offering for sale, dealing or in any manner whatsoever from interfering with the Plaintiff's parcel of land known as Title Number MAKUENI/KIOU/1591.

b) It is declared that the Plaintiff is entitled to exclusive, quiet and unimpeded right of possession of his private property namely land parcel title number Makueni/Kiou/1591 and further that the Defendants demands that the Plaintiff vacate the suit property are unreasonable, unjustified and unlawful. In case the Defendants decline to vacate the suit premises, the Plaintiff will be at liberty to apply for an order of eviction.

c) The 3rd Defendant is hereby compelled to remove the caution lodged in parcel number Makueni/Kiou/1591 within 14 days in default the Makueni County Land Registrar do remove the caution lodged by Justus Muthiani Musyoki forthwith.

d) Costs of the suit.

Signed, dated and delivered via email at Makueni this 21st day of May, 2020.

MBOGO C. G.,

JUDGE.

Court Assistant - Mr. Kwemboi