



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 248 OF 2017

(FORMERLY KISII HCC NO. 182 OF 2011 AND KISII ELCC NO. 498 OF 2016)

ZEPHANIA MOHONI MARWA.....PLAINTIFF

VERSUS

MACHUGU CHACHA.....DEFENDANT

JUDGMENT

A. INTRODUCTION

1. At the heart of the present dispute is a parcel of land known as LR No Bwiregi/Bukihenche/286 measuring approximately ten decimal six (10.6) hectares in area (hereinafter referred to as the suit land). The same is situate in Kuria East sub county within Migori County.
2. The plaintiff, Zaphania Mohoni Marwa (PW1 herein) is represented by learned counsel, Mr. Kerario Marwa of M/S Kerario Marwa and company Advocates.
3. The defendant, Machungu Chacha (DW1 herein) is represented by learned counsel, Mr. R Abisai and Mr. B Singei of M/S Abisai and company Advocates.
4. Initially, this suit was filed at Kisii Environment and Land Court whereby Samson Okongo J heard the evidence of PW1. Thereafter, the suit was transferred to this court where I heard the evidence of Mwita Wambura (PW2) and **DW1 herein**.

B. THE GIST OF THE PLAINTIFF'S CASE

5. On 14th September 2011, PW1 lodged this suit by way of a plaint dated 28th August 2011 seeking the following reliefs;
 - a. An eviction order against the defendant and his household from the suit land.
 - b. An injunction restraining the defendant by himself, his agents, servants, family members or anybody whatsoever under his direction from entering and or interfering in whatever manner with the suit land.
 - c. Costs of the suit.
6. It is the case for PW1 that he is a cousin to DW1 and they share the same grandfather, Marwa Monanka (Deceased 1). That in the year 1975, the suit land was registered in the name of Marwa Monanka Kemosi (Deceased 2) who was the father of PW1. That in the year 2000, Deceased 2 transferred the suit land to PW1 who was registered as its proprietor accordingly. DW1 then trespassed into the suit land and erected thereon, a homestead causing interference with the quiet enjoyment of the land by PW1 thus precipitating the present suit.
7. In his reply to defence dated 18th January 2012 and filed in court on 19th January 2012, PW1 maintained that registration of the suit land in his name was not fraudulent as claimed by DW1 in his defence. That the suit land had never been registered in the name of Deceased 1.
8. In his testimony, PW1 relied on title deed in respect of the suit land issued on 6th December 2000 (PEXh1). To fortify his claim, he called his witness, PW2.

9. Learned counsel for PW1 filed submissions dated 6th November 2019 providing a brief background and evidence in this suit as well as framed and analysed in favour of PW1, issues (a) to (d) for determination which include whether the suit land is lawfully registered in the name of PW1 and that DW1 trespassed thereunto. To buttress his submissions, counsel cited section 28 of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act herein) and sections 24 and 25 of the Land Registration Act, 2016 (2012) alongside **Obiero-vs- Opiyo (1972) EA 227 and Esiroyo-vs-Esiroyo(1973)EA 389** and urged this court to grant the orders sought in the plaint.

C. THE DEFENDANT'S CASE IN BRIEF

10. By his statement of defence dated 24th November 2011 and filed in court on even date, DW1 denied the claim mounted by PW1 and sought its dismissal with costs. He stated inter alia, that he was born on the suit land where he grew up peacefully alongside PW1. That the suit land was initially registered in the name of Deceased 1, who was survived by his two sons; the father of PW1 and the father of DW1.

11. DW1 further stated that without any colour of right and in total disregard of the interests of the other beneficiaries, PW1 and his father unlawfully and fraudulently transferred the suit land in their names in order to defraud DW1 of it. He pleaded particulars of fraud at paragraph 4 of the statement of defence.

12. In his testimony, DW1 made reference to a copy of certificate of official search and a certified copy of register in respect of the suit land (DEXhibits 1 and 2 respectively). He called a witness, Mahiri Morenda (DW2), to reinforce his evidence.

13. On 15th January 2020, learned counsel for DW1 filed submissions dated 13th January 2020 giving brief facts of the case, framed and analysed issues (i) to (iv) including that the suit land was ancestral land and that it did not lawfully pass to PW1. Counsel relied on authorities inter alia, **Isack M'Inanga Kiebia-vs- Isaaya Theuri M'Lintari and another (2018) eKLR, Gichinga Kibutha-vs-Caroline Nduku(2018) eKLR** and urged this court to dismiss the instant suit with costs to DW1.

D. ISSUES FOR DETERMINATION

14. I have duly considered the respective pleadings, evidence and rival submissions of the parties in the present suit. I also note the draft issues (the plaintiff's version) dated 14th November 2013 and filed in court on 28th November 2013 and the issues for determination framed in the respective submissions.

15. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints co Ltd-vs-Falcon Grounds Ltd(2000) 2EA 385** applied in **Great Lakes Company (U) Ltd-vs-Kenya Revenue Authority (2009)KLR 720**.

16. From the foregoing discourse, the issues for determination in the present suit are condensed as follows;

- a. Is DW1 the lawful registered proprietor of the suit land?
- b. Has PW1 established his case against DW1 on a balance of probabilities to entitle him to the reliefs sought in the plaint?

E. ANALYSIS AND DETERMINATION

17. At paragraph 3 of his plaint, PW1 stated that he is the registered owner of the suit land. He also testified that his father (deceased 2) transferred the suit land in his (PW1)name in the year 2000 and PW1 obtained title deed thereof (PEXh2).

18. During cross examination, PW1 stated that:

“...I inherited the suit property although my father was still alive. He transferred the suit property to me...”

19. **Section 26(1) of the Land Registration Act, 2016(2012)** stipulates that title to land can be obtained through transfer or transmission. In the present scenario, PEXh2 was procured under the Repealed Act as also observed by Simpson J (as he then was) in the case of **Wainaina-Vs-Murai and others(1976-80)IKLR 283 at 289 and 290**.

20. According to DW1, the suit land is registered in the name of PW1 with effect from 6th December 2000 as shown in DEXhibits 1 and 2. This court is not unaware of sections 27 and 28 of the Repealed Act, sections 24,25 and 26 of the Land Registration Act,2016(2012) as well as **Obiero** and **Esiroyo cases**(supra) on proprietorship of land.

21. The term “**proprietor**” is defined at section 2 of the Land Registration Act, 2016(2012). The said definition is noted accordingly.

22. PW1 asserted that the suit land is registered in his name pursuant to its transfer from Deceased 2. On the other hand, DW1 contended otherwise.

23. Be that as it may, PEXh1, DEXhibits 1 and 2 reveal that the suit land is registered in the name of PW1. In that regard, is the said registration lawful?

24. DW1 alleged at paragraph 4 of his statement of defence that PW1 obtained PEXh2 by fraudulent means. The particulars of fraud are pleaded thereunder in consonant with the decision in **Ndolo v Ndolo (2008)IKLR (G&F) 742**.

25. The Black's Law Dictionary, 9th Edition at page 731, defines the term "fraud" thus:

"A knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment."

26. Fraud and misrepresentation are grounds for impeaching a certificate of title as stated under **section 26(1) (supra)**. The grounds must be distinctly pleaded and proved as observed in the case of ***Kuria Kiarie and 2 others-vs- Sammy Magera (2018) eKLR***.

27. It was the contention of PW1 that deceased 2 corrected his name from Marwa Monenka to Marwa Monenka Kemosi to be in line with his identity card and name in the register of the suit land. Quite clearly, DExh2 is the said register.

28. DW1 relied on DExhibits 1 and 2 to show that PW1 obtained registration of the suit land by fraud. That deceased 1 was the original registered owner of the suit land.

29. It is important to note that PW2 testified in examination in chief, inter alia, that deceased 1 was the proprietor of the suit land. That the said proprietor is deceased and was the father of PW1.

30. In ***Munyu Maina-vs- Hiram Gathiha Maina (2013) eKLR***, the Court Of Appeal held;

"When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership... and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances..." (Emphasis added)

31. In the obtaining scenario, PExh 1 is under challenge. DW1 has proved that PExh1 was obtained by concealment of material facts. DExh1 and 2 show that PExh1 was not acquired legally, formally and free from any encumbrances. There is no dispute that DW1 is in occupation and use of part of the suit land originally owned by deceased 1. Thus, DW1 has demonstrated some of the key elements of a customary trust over the suit land as envisaged under section 28(a) of the Land Registration Act, 2016 (2012) and the Supreme Court of Kenya decision in ***M'Inanga Kiebia case (supra)***.

32. By the way, Migori ELCC number 39 of 2018(O.S) featured in the testimony of DW1. Apparently, the said suit is pending hearing and determination on merits hence I cannot venture into the same.

33. To that end, it is the finding of this court that the plaintiff's case has not been proved against the defendant on a balance of probabilities. I proceed to dismiss the present suit generated by way of a plaint (fast track) dated 28th August, 2011 with costs to the defendant.

34. Orders accordingly.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 20th day of May, 2020.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. L. Okota learned counsel for the defendant

Tom Maurice – Court Assistant