



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 294 OF 2013

KEREMENSIA MORAA TEYAPLAINTIFF

VERSUS

GICHANA OOGA.....DEFENDANT

JUDGMENT

The dispute between the parties herein concerns the ownership of the parcel of land which the Plaintiff has referred to as LR No. West Kitutu/Mwagichana/3321 (hereinafter referred to as **“the suit property”**) and the defendant as a portion of LR No. West Kitutu/Mwagichana/2360 (hereinafter referred to as **“a portion of plot No. 2360”**). In her plaint dated 1/7/2013 and filed herein on 2/7/2013, the plaintiff averred that she is the registered owner of the suit property. She averred that sometimes in the year 2005, the defendant entered onto the said parcel of land without her consent or permission and started cultivating and putting up structures thereon thereby dispossessing her of the same. The plaintiff averred that she lodged a claim against the defendant at Marani Land Disputes Tribunal (**“the tribunal”**) for trespass in Tribunal case No. 1 of 2005 which claim was determined by the tribunal in her favour. The said decision of the tribunal was lodged at the Chief Magistrate’s court at Kisii for adoption as a judgment of the court and the same was adopted as such on 27/10/2009 in Misc. Application No. 83 of 2006. The plaintiff averred that as a result of the defendant’s said acts of trespass, she has suffered loss and damage. The plaintiff sought an order for the eviction of the defendant from the suit property.

The defendant entered appearance and filed a statement of defence on 17/9/2013. In his defence, the defendant averred that he is the registered owner of all that parcel of land known as LR No. West Kitutu/Mwagichana/2361 (hereinafter referred to as **“Plot No. 2361”**) which he purchased from one Abuga Nyangeri (deceased). The defendant averred that Plot No. 2361 has no relationship with and is not part of the suit property claimed by the plaintiff herein. The defendant denied that he trespassed on the suit property in the year 2005 as claimed by the plaintiff. The defendant averred further that the award that was made in favour of the plaintiff against him by the tribunal was stayed by the High Court in Kisii High Court Judicial Review No. 119 of 2005 on 7th July 2005. The defendant averred that he is a stranger to Kisii Chief Magistrate’s court Misc. Application No. 83 of 2006 in which the said award of the tribunal was adopted as a judgment of the court. The defendant averred that if at all the said award was adopted as aforesaid, the said adoption was null and void the same having been carried out in breach of the stay order aforesaid that was issued by the High Court. The defendant contended that the plaintiff is not entitled to the reliefs sought in this suit.

At the trial, the plaintiff gave evidence and called four (4) witnesses while the defendant gave evidence and called one (1) witness. In her evidence, the Plaintiff reiterated that she is the registered owner of the suit property. She produced in evidence a copy of the title deed for the suit property which showed that she was registered as the proprietor of the said property on 1/8/2011. The plaintiff told the court that; she purchased the suit property from one Abuga Nyangeri in the year 1992 at a consideration of

Kshs.70,000/= . She produced as exhibit, a copy of the agreement for sale dated 16th May, 1992 (P. exhibit 2) which she claimed to have made with Abuga Nyangeri (hereinafter referred to only as **“Nyangeri”**). She stated that the suit property was part of a larger parcel of land that was owned by Nyangeri and that when she purchased the suit property, the defendant had already purchased a portion of land from Nyangeri and was in occupation hereof. After she completed the payment of the purchase price, they sought and obtained consent of the land control board to subdivide the said larger parcel of land then owned by Nyangeri so that a separate title could be issued in her favour for the suit property.

After the subdivision had been carried out, the mutation could not be registered because, one Ogari Nyaanga who had also purchased a portion of the said parcel of land from Nyangeri had registered a caution on the title thereof to protect his interest in the same. Due to this development, Nyangeri gave her for safe keeping the original title deed for the larger parcel of land a portion of which was to be transferred to her. The larger parcel of land was known as LR No. West Kitutu/Mwagichana/2360 (hereinafter referred to as **“Plot No. 2360”**). It was agreed between them that once the issue of the caution was sorted out, she would accompany Nyangeri to the land registry so that the portion of plot No. 2360 that she had purchased could be transferred to her. She thereafter entered into negotiations with Ogari Nyaanga with a view to having the caution aforesaid removed. They reached an agreement that the portion of Plot No. 2360 that she had purchased from Nyangeri would be divided into two equal portions between her and Ogari. Following that agreement, the said parcel of land was subdivided into two portions between her and Ogari by the clan elders.

Under this new arrangement, her portion of land fell immediately next to the parcel of land which the defendant had purchased earlier from Nyangeri namely, Plot No. 2361. The Plaintiff stated that even after the issue of the caution was resolved with Ogari Nyaanga, Nyangeri did not transfer to her the portion of land that she remained with after surrendering a portion of the initial parcel of land that she had purchased to Ogari. This is because Nyangeri became sick and did not recover. After the death of Nyangeri, the defendant entered onto her said parcel of land and started cultivating it. The matter was reported to the area Chief who asked the defendant to keep off the said parcel of land. The defendant did not heed the Chief’s advice and escalated the dispute by commencing construction of structures on the said parcel of land. When the area Chief and the District Officer failed to resolve the dispute, she lodged a complaint against the defendant at the tribunal. The tribunal made an award in her favour and ordered the defendant to vacate her parcel of land. The tribunal’s award was adopted as a judgment of the court by the Chief Magistrate’s Court at Kisii. She produced as exhibits; the proceedings and decision of the tribunal, the application that was filed in the Chief Magistrate’s court at Kisii for the adoption of the tribunal’s award as a judgment of the court and the order that was issued by the Chief Magistrate’s Court for the suit property to be transferred to her (See P. Exhibit 3 and P. Exhibit 4). She stated that the defendant ignored the order by the tribunal that required him to vacate the suit property and continued with the construction works thereon. Following the adoption of the said award as a judgment of the court, a fresh sub-division was carried out on the original parcel of land that was owned by Nyangeri (Plot No. 2360) after Ogari removed the caution that he had lodged on the title of the said property. Following the said sub-division, Ogari and she were issued with their respective titles with her having the title for the suit property. The Plaintiff’s evidence was corroborated by PW 2, PW 3, PW 4 and PW 5.

In his evidence, the defendant stated that he purchased Plot No. 2361 from Nyangeri in the year 1991. He took possession of the said parcel of land and put up a residential house thereon. When he purchased Plot No. 2361 from Nyangeri, one Evans Ogari (Ogari) who had also purchased land from Nyangeri was his neighbour. Nyangeri and Ogari had a dispute over the size of the land that had been sold to Ogari. The dispute was resolved when Ogari agreed to sub-divide the land that had been sold to him and surrender a portion thereof to Nyangeri. When Nyangeri became sick and wanted money for treatment, he offered to sell to him the portion of land that had been surrendered to him by Ogari. He purchased this portion of land that Ogari had surrendered to Nyangeri at Kshs.65,000/= . He took possession of the same in the year 2004 and started putting up rental houses thereon. It is while he was in the process of constructing the said houses that the plaintiff lodged a complaint against him with the area Chief that the said houses were being put up on her land. When the Chief and thereafter the District Officer for the area failed to resolve the dispute, the same was referred by the plaintiff to the tribunal who made an award in her favour. He however challenged the said award in the High Court by way of Judicial Review and had the same

stayed. The defendant stated that he did not participate in the application that the plaintiff had filed at the Chief Magistrate's Court for the adoption of the tribunal's award as a judgment of the court in which proceedings she also obtained an order that enabled her to obtain a title deed for the suit property. The defendant stated that he was not served with the said application. The defendant produced as exhibits; a copy of the proceedings in Kisii High Court Judicial Review No. 119 of 2005, a copy of the title deed for Plot No. 2361 and a copy of a certificate of official search on the register of Plot No. 2361. The defendant stated that the plaintiff was represented by an advocate in the said Judicial Review application. He stated that when he purchased the said additional parcel of land from Nyangeri, he was not aware that the said parcel of land had been sold by Nyangeri to the plaintiff. He stated that the disputed parcel of land which is the subject of the Plaintiff's claim herein belongs to him. The defendant's evidence was corroborated by the evidence of his witness, Joseph Nyangeri Abuga, DW 2.

After the close of the defendant's case, the parties informed the court that they did not wish to make closing submissions. The parties had not frame issues for determination by the court. From my analysis of the pleadings and the evidence on record, the following in my view are the issues that arise for determination in this suit;

- i. Whether the Plaintiff is the lawful owner of the suit property?
- ii. Whether the suit property has any relationship or connection with the portion of Plot No. 2360 which is said to be owned by the defendant?
- iii. Whether the suit property has any relationship with Plot No. 2361 which is owned by the defendant?
- iv. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff?

The first issue:

I have carefully considered the parties' respective cases as pleaded and the evidence that was tendered in proof thereof. It is my finding that the Plaintiff has established that she is the lawful proprietor of the suit property which is in dispute between the parties herein. It has come out clearly from the evidence on record that the suit property is a portion of Plot No. 2360 that was owned by Nyangeri. This fact is apparent on the face of the title deed for the suit property that was produced by the plaintiff in evidence as P. Exhibit 1. What this means is that the suit property which the plaintiff claims to have purchased from Nyangeri in the year 1992 and a portion of Plot No. 2360 which the defendant claims to have purchased from Nyangeri after the initial parcel of land (Plot No. 2361) which he had purchased earlier is one and the same. It is not disputed that the plaintiff is registered as the proprietor of the suit property. The plaintiff produced in evidence a copy of the title deed that was issued to her by the land registrar on 1/8/2011 in respect of the said property. As I have stated earlier in this judgment, the said title deed shows that the plaintiff was registered as the owner of the suit property on 1/8/2011. **Section 26(1) of the Land Registration Act, 2012** provides that, the certificate of title issued by the registrar upon registration, or to a purchaser of land upon 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 thereof and the title of that proprietor is not subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. From the evidence on record, the plaintiff was registered as the proprietor of the suit property pursuant to an award that was made by the tribunal on 7/7/2005, in Tribunal Case No. 1 of 2005. The said award was adopted by the Chief Magistrate's Court as a judgment of the court on 27/10/2009 in Kisii Chief Magistrate's Court, Misc. Civil Application No. 83 of 2006. On 11/5/2011, the said Chief Magistrate's Court ordered that the disputed property be transferred to the plaintiff. The proceedings of the tribunal and the order of the Chief Magistrate's Court that was made on 11/5/2011 were produced by the plaintiff in evidence. In his statement of defence, the defendant had contended that the said award of the tribunal was stayed by the High Court in a Judicial Review application that he had instituted to challenge the same and as such the same could not have been adopted as a judgment of the court and an order issued for the transfer of the disputed property to the plaintiff. The defendant contended that the purported adoption of the said award as a judgment of the court is in the circumstances null and void. If it is true that the order adopting the said award of the tribunal as a judgment of the court and the subsequent order that was issued by the

Chief Magistrate's Court for the transfer of the suit property to the plaintiff were made in breach of a High Court order that had stayed the said award then the same would be null and void and the Plaintiff would be taken to have acquired title over the suit property through illegal and un-procedural process a fact that would defeat the said title. Has the defendant demonstrated that the said orders that were made by the Chief Magistrate's Court were made in breach of a High Court order that was issued in Kisii High Court Judicial Review No. 119 of 2005? The defendant produced in evidence the proceedings of the court in Kisii High Court Judicial Review No. 119 of 2005. It is clear from the said proceedings that the defendant was granted leave to file application for certiorari and prohibition on 7th May, 2005. There was a further order that the leave so granted should operate as a stay.

I have not seen a formal order that was extracted by the defendant from the proceedings of 7th May, 2005 in the judicial review application aforesaid. There is no evidence that any such order was extracted and served upon the Chief Magistrates Court and plaintiff. In his evidence, the defendant stated that he was not involved in the proceedings before the Chief Magistrate's Court as he was not served by the plaintiff with the application that she had lodged before that court. This contention is far from the truth. The plaintiff had produced in evidence as part of her exhibit 3, a bundle of documents that were filed in Kisii Chief Magistrate's Court Misc. Application No. 83 of 2005. Among the documents in the said bundle were, the Notice of Motion application dated 18/7/2006 that sought the adoption of the tribunal's award that was made on 1/1/2005 as a judgment of the court, a Notice of Appointment of Advocates dated 3/8/2006 that was filed by the firm of Koina Onyancha and Company Advocate on behalf of the defendant and grounds of opposition dated 3/8/2006 by the said advocates opposing the adoption of the tribunal's award. These documents show that the defendant was served with the application for the adoption of the tribunal's award as a judgment of the court and participated in the said application. He was therefore aware of the outcome of the said application. He was represented in the said proceedings by the same firm of advocates who are on record for him herein. There is no evidence that the defendant drew the attention of the Chief Magistrate's Court to the stay order that was issued in the judicial review application. It appears from the grounds of opposition that the defendant had filed in the Chief Magistrate's Court that as at the time the plaintiff filed the application for the adoption of the tribunal's award as a judgment of the court, the defendant had not served her with the application for judicial review.

In view of the foregoing, I am not convinced that the adoption of the tribunal's award by the Chief Magistrate's Court was undertaken in breach of the High Court order that was issued in Kisii High Court Judicial Review No. 119 of 2005. The Chief Magistrate's Court and the plaintiff could not have breached orders that they were not aware of. The orders that were made by the Chief Magistrate's Court have neither been varied nor set aside. Consequently, it is my finding that the Plaintiff did not acquire the suit property illegally or un-procedurally. Apart from his contention that the plaintiff had acquired the suit property illegally, the defendant had also led evidence that he is the rightful owner of the suit property having purchased the same from Nyangeri. The defendant did not place before the court a copy of the agreement that he claimed to have entered into with Nyangeri over the disputed parcel of land. There was also no evidence in proof of the sum of Kshs.65,000/= that he claimed to have paid as consideration for the said property. The defendant did not also demonstrate that consent of the land control board was obtained for the transaction. I am not satisfied that the defendant has established any interest in the disputed property which can defeat the plaintiff's registered title. It is my finding therefore that the plaintiff is the lawful owner of the suit property.

The second issue;

I have dealt with this issue above. The suit property which is registered in the name of the Plaintiff is a subdivision of Plot No. 2360. Plot No.2360 was initially registered in the name of Nyangeri. The suit property is the same parcel of land which is claimed by the defendant and which the defendant has referred to as a portion of a portion of Plot No. 2360. From the evidence on record, Nyangeri seems to have sold a single parcel of land to three (3) people. The parcel of land which is now comprised in the title of the suit property was initially part of a larger parcel of land that was sold by Nyangeri to Ogari. Thereafter, Nyangeri resold the same parcel of land to the plaintiff. When Ogari realized that Nyangeri had resold the said parcel of land to the plaintiff, he lodged a caution on the title of Plot No. 2360 to

protect his interest in the said parcel of land. According to the plaintiff and her witnesses, the plaintiff managed to resolve the dispute that Nyangeri had with Ogari and an agreement was reached between them that the portion of plot No. 2360 that Nyangeri had sold to Ogari would be divided equally between the plaintiff and Ogari following which agreement Ogari agreed to lift the caution that he had registered against the title of Plot No. 2360. The plaintiff testified that the said portion of land was informally subdivided into two and Ogari took the upper part while the plaintiff took the lower part that was next to Plot No. 2361 which the defendant had purchased earlier from Nyangeri. The plaintiff testified that after the dispute with Ogari was resolved, Nyangeri became sick and could not attend to the process of transferring to her the said portion of Plot No. 2360. She thereafter left for Nairobi where she used to stay. It seems from the evidence on record that after the plaintiff left for Nairobi, Nyangeri who was now very sick, once again sold to the defendant the plaintiff's share of the land that they had divided with Ogari. From the evidence on record, the defendant was aware that the land that was being sold to him by the sick Nyangeri had been sold to the plaintiff. His evidence in chief that he was not aware that the land had been sold to the plaintiff is not true. His further claim that he exchanged land with Ogari is also not true. According to the proceedings of the tribunal, the defendant had stated in his evidence as follows:

“Around 2002 December the other part of the land was sold to Ogari who has been my neighbour for a long time. One day I noticed a boundary had been planted on Ogari's piece of land. I was informed it was Kelemensia (the plaintiff) who bought there”.

None of the parties called Ogari as a witness in this case. However, Ogari had given evidence before the tribunal on behalf of the plaintiff. He told the tribunal that Nyangeri had sold to the plaintiff the parcel of land that he (Ogari) had purchased from him and on realizing this, he placed a caution on Nyangeri's title. An agreement was thereafter reached between him and the plaintiff that the said parcel of land be partitioned so that the plaintiff may have a half portion thereof while he retains the other half. Ogari stated that the dispute between the plaintiff and the defendant arose when the defendant started constructing a house on the parcel of land that he (Ogari) had surrendered to the plaintiff as aforesaid. Ogari did not mention at all that he had exchanged land with the defendant. In cross-examination by the defendant, he stated that he was not even aware that the defendant had purchased the disputed parcel of land from Nyangeri. Ogari told the tribunal that when his parcel of land that was resold by Nyangeri to the plaintiff was partitioned between him and the plaintiff, he took the portion thereof that was next to the road while the plaintiff took the portion that was next to the defendant. This is contrary to the defendant's contention that it is Ogari who owned the portion of land that was next to the defendant's plot No. 2361 and that Ogari agreed to move and did move to the purported portion of land that he had surrendered to Nyangeri and which Nyangeri wanted to sell so that the defendant could acquire the said portion of land which was next to Plot No. 2361. I have also noted that DW2 who gave evidence on behalf of the defendant before this court and before the tribunal was not consistent in his evidence. Before the tribunal, DW2 admitted that indeed Nyangeri had resold to the plaintiff the land that he had sold to Ogari. He stated that **“Kelemensia had bought the whole piece of land which Ogari had bought from my father.....I know Kelemensia bought the land and paid my father but I do not know whether Ogari was refunded the money-----. I know that my father sold the land in dispute twice to Ogari and Kelemensia”.**

In his evidence before this court, DW2 stated that, **“When we sold the second portion to the defendant, we were not aware that the plaintiff had purchased the property”.** In cross-examination by the plaintiff, DW2 stated that **“I am not aware that my father sold the land in dispute to you”.** From the evidence on record, it is my finding that the suit property owned by the plaintiff and the portion of Plot No. 2360 which is claimed by the defendant are one and the same parcel of land and that as between the plaintiff and the defendant, plaintiff was the first in time to purchase the same from Nyangeri.

The third issue:

There is no dispute that the defendant is the registered owner of Plot No. 2361 which he purchased from Nyangeri sometime in the year 1992. This parcel of land is not in dispute and the plaintiff has no claim over it. Save that this parcel of land was also owned by Nyangeri before it was sold to the defendant and that it is adjacent to the suit property, the same has no other relationship with the suit property.

The fourth issue:

From what I have stated above, it is my finding that the plaintiff has proved her claim against the defendant and as such entitled to the reliefs sought in the plaint. The plaintiff has proved that she purchased the suit property from Nyangeri and that the same was transferred to her pursuant to a court order which has neither been varied nor set aside. On the other hand, the defendant has not placed before the court any material in proof of his interest in the suit property. The plaintiff having established that she is the owner of the suit property and that the defendant is occupying the same without her consent or lawful cause, the defendant is a trespasser on the property and the plaintiff is in the circumstances entitled to an order for his eviction therefrom.

In conclusion, I hereby enter Judgment for the plaintiff against the defendant as prayed in paragraph (a) of the plaint dated 1/7/2013. The defendant shall vacate and handover possession of the suit property to the plaintiff within one hundred and twenty (120) days from the date hereof failure to which the plaintiff shall be at liberty to apply to court for warrants for his forceful eviction therefrom. The plaintiff shall have the costs of the suit.

Signed at Nairobi this.....day of November, 2015.

S. OKONG'O

JUDGE

Delivered and Dated at Kisii this 4th day of December 2015.

J. M. MUTUNGI

JUDGE

In presence of

.....**for Plaintiff**

.....**for Defendant**