



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND & ENVIRONMENT CASE NO. 128 OF 2013
[ORIGINALLY KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT CIVIL
CASE NO.75 OF 2010]

JAMES MARUTI.....PLAINTIFF

V E R S U S

JOHNSON SIMIYU MACHESO1ST DEFENDANT

JOEL WAFULA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit against the Defendants praying for a permanent injunction to issue against the defendants from interfering with the plaintiff's use or land parcel No.Bokoli/Chwele/1329. On 5th December 2013 when the matter came up for hearing, neither the plaintiff nor his advocate was in Court to present their case.This Court found the plaintiff's advocate was duly served and proceeded to dismiss the plaintiff's claim for want of Prosecution (due to non-attendance).
2. The Defendants then proceed to present this case on the counter-claim. In the counter claim, the defendants sought the following orders;
 - a) An Order of eviction to remove the plaintiff, his family, relatives and property from L.R. No. Bokoli/Chwele/1329 (hereinafter referred to as “the suit land”).
 - b) Costs of the suit.
 - c) Any other further relief the honourable Court may deem just and expedient to grant.
3. The second Defendant testified as the first witness.Joel Wafula hereinafter referred to as DW1 told the Court that the plaintiff has sued him for trespassing on his land which is not true.That he saw an advertisement in the standard newspaper of 16th July 2008 in respect of the suit land put up by Kuronya Auctioneers. He produced the newspaper cutting as Dex.1. He also produced the trading licence of the Auctioneer as Dex.2.
4. He became interested in purchasing the property and therefore did a search. Thereafter, he bought the land and paid Kshs. two hundred and five thousand (Kshs. 205,000/-) for the land and produced the receipt as Dex.3. He later got himself registered as owner of the land and produced as Dex.4 copy of the title deed. He sold the suit land to the 1st Defendant at Kshs.375,000/- and transferred the title

documents into his name. He produced copies of letter of consent and transfer forms as Dex.6 and 8 respectively.

5. Before he secured registration of the suit land into his name, he filed a suit no.185 of 2006 wherein he obtained vesting orders. He produced the orders as Dex.7(a) and 7(b). He concluded by saying he got the land in a lawful manner. James Maruti still lives on the suit land and has denied the 1st defendant access. He urged the Court to grant the orders sought plus costs of the suit.

6. Johnson Simiyu Macheso testified as DW2. He works at the office of the President. He bought the land from DW1 and showed sale agreement as evidence of sale produced as Dex.5. He also produced letter of consent from Nalondo L.C.B. (Dex.8). He got himself registered as proprietor of the land and produced a copy of the title as Dex.9 and certificate of Official Search as Dex.10 all documents proving him as the registered owner of the suit land.

7. He continued that the plaintiff (James Maruti) has never appeared in Court. He prayed for eviction orders against the plaintiff and compensation for the period the plaintiff has been on the land. He also prayed for costs. The defendants closed their case at that juncture.

8. From the record, this matter had proceeded *ex parte* on 23rd August 2011, the plaintiff having been absent from Court. Those proceedings were set aside on 1.11.2011 for the reasons given. The defendant's evidence is unchallenged as the plaintiff has again not participated in the current proceedings.

9. This Court's work is simply to determine whether the defendants have proved their case on a balance of probabilities. In the plaintiff's statement of defence to the counter-claim, he denied being aware of the sale of his land through a public auction. He pleaded further the title of the suit land was fraudulently acquired by the defendants. That these orders sought by the defendants were untenable.

10. DW1 said he saw the land advertised in the local press and proceeded to purchase it. The auction was pursuant to execution of a Court decree in Bungoma CMCC No.185 of 2006 between Jackson Kingasia and James Maruti (current plaintiff). The 1st defendant proceeded to obtain a vesting order on 1st July 2009 on that suit which vested the land to him.

11. The plaintiff instead of filing an application to set aside the sale or appealing against the judgment from which a decree to sell his land originated from chose to sue the defendants for trespass. The decree and all subsequent orders in Bungoma CMCC 185/06 remains in force to date.

Unless the same is set aside, any rights acquired in execution of those orders cannot be said to be fraudulent.

12. The 2nd defendant exhibited newspaper cutting advertising the plot for sale by public auction and a receipt dated 6th September 2008 (Dex.3) paying for the purchase of the suit land. He also exhibited Court order issued on 30.6.2007 which canceled the plaintiff's title to the suit land (Ex.7 (b)). The vesting order issued on 23rd February 2009 Ex.7(a) granted the 2nd defendant to become the new registered owner. With all these evidence, I find the 2nd defendant lawfully acquired ownership of the suit land and therefore had authority and capacity to pass title to the 1st defendant.

13. The 1st defendant is currently the registered owner. Pursuant to the provisions of section 24(a) of the Land Registration Act No.3 of 2012, the registration vested upon the 1st defendant the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The rights *inter alia* include use, occupation and accessing the land to which the plaintiff's occupation has denied the 1st defendant from enjoying.

14. In order to ensure the 1st defendant enjoys his rights provided for in law in respect of land parcel Bokoli/Chwele/1329, the plaintiff must be ordered to move out of the land. I am therefore satisfied the

defendants have proved their counter – claim against the plaintiff. I allow their claim with costs of the suit awarded to them. The plaintiff is directed to give vacant possession of the suit land within 60 days from the date of service of the decree upon him. In default, he be evicted from, the suit land Bokoli/Chwele/1329.

DATED, SIGNED and DELIVERED this 13th of day of May 2014

A. OMOLLO

JUDGE.