



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**LAND CASE NO. 29 OF 2012**

**GEORGE OWEN NANDY.....PLAINTIFF**

**=VERSUS=**

**MRS. RUTH WAITIRI KIBE.....DEFENDANT**

**JUDGEMENT**

**Introduction**

1. The Plaintiff has asked this court by way of a Plaint for a permanent injunction restraining the Defendant, her servants, agents and any other persons from trespassing onto plot number Markebuni/Mambrui/40 [the suit property].
2. In the Plaint, the Plaintiff has averred that the Plaintiff has at all material times been the registered proprietor of the suit property measuring approximately 36.9 acres having purchased the same from the Agricultural Finance Corporation (AFC).
3. In her Defence, the Defendant has averred that the nature and manner in which the suit property was transferred to the Plaintiff was illegal, dubious and contrary to the laid down procedure; that she has been on the suit property for the last 29 years having purchased the same from Mzee Salim Bakshuwein with proceeds from a loan from AFC and that the prayers being sought are untenable and unjustified.

**The Plaintiff's case**

4. Jonah David Mwende, Pw 1, informed the court that the Plaintiff had authorized him to testify on his behalf. He produced the power of attorney as P exhibit 1.
5. Pw 1 stated that the Plaintiff is the owner of the suit property measuring 36.9 ha. The witness produced as PEXB 2 the transfer document. According to the Transfer, the Plaintiff purchased the suit property from Agricultural Finance Corporation [AFC] after AFC put an advertisement in the newspaper.
6. Pw 1 informed the court that the suit property was sold by AFC by way of public auction and the Plaintiff put in his bid. Before buying the land, Pw 1 stated that the Plaintiff saw the land.
7. It was the evidence of Pw 1 that after purchasing the land at an auction, the suit property was transferred to the Plaintiff on 8<sup>th</sup> February, 2010. The Defendant has refused to vacate the land since then. In cross-examination, Pw 1 stated that the Plaintiff bought the suit property at a public auction in the year 2009; that he was only in possession of a sale agreement and that before the Plaintiff purchased the land, the Defendant was staying on it.

8. Pw 2 informed the court that he lives in Magarini and he owns a nursery of trees. According to Pw 2, he was aware that the Plaintiff had purchased the suit property from AFC. Pw 2 was also aware that the Defendant had borrowed money from AFC and was unable to service her loan whereafter AFC sold the land by way of auction.
9. According to Pw 2, the Defendant has constructed a permanent house on the suit property subsequent to the filing of the suit.
10. Although the Defendant was informed by the Chief to vacate the land, Pw 2 stated that the Defendant refused and that she is still staying on the suit property even after it was sold to the Plaintiff.
11. In cross-examination, Pw 2 stated that he stays around 400 metres away from the suit property and that he has known the Defendant as his neighbour for many years. Pw 2 stated that he was shown the title deed in respect to the suit property by the Plaintiff although he never saw the other documentation.

### **The Defendant`s case**

12. The Defendant, Dw 1, informed the court that she acquired the suit property in 1984 after receiving a loan of Ksh. 80,000 from Agricultural Finance Corporation [AFC]. The Defendant produced as DEXB 1 the document showing that she was loaned Ksh.80,000 by AFC. According to the Defendant, the land was registered in her name before it was eventually registered in the name of AFC. The Defendant produced the search Certificate as DEXB 3,
13. According to DW 1, she requested AFC to allow her sell a portion of the land to enable repay the balance of the money that she owed AFC; that AFC declined to receive Ksh.100,000 which she was willing to repay whereafter she was told that her land had been sold.
14. It was the evidence of Dw 1 that she was not served with any notice before the purported sale of her property and that she is still staying on the suit property.
15. In cross-examination, the Defendant admitted that the land has now been registered in the name of the Plaintiff, that she was informed by AFC that she owed them Ksh.275,000/- and that they refused to allow her to sell a portion of the land so as to settle the amount that was due and owing.
16. The Defendant called Dw 2 and Dw 3 to testify on her behalf. According to the evidence of Dw 3, he had proposed to AFC that he was willing to pay off the amount that was due and owing.

### **Submissions**

17. The Plaintiff`s advocate filed his written submissions on 21<sup>st</sup> March 2014. The Plaintiff`s advocate submitted that the Plaintiff bought the suit property from AFC and that the Plaintiff is currently the registered owner of the said property; that the Defendant should pursue any claim she has with AFC and that the Plaintiff is an innocent purchaser for value.
18. The Defendant`s counsel submitted that the manner in which the suit property was sold to the Plaintiff was not stated. According to counsel, the Defendant has been residing in the suit property all along; that the copy of the transfer does not allude to the fact that the property was sold by way of an auction and that no title document was produced.
19. It was the submission of the Defendant`s counsel that the procedure for the recovery of land by the Agricultural Finance Corporation is set out in section 33 of the Agricultural Finance Corporation Act.
20. Counsel submitted that due notice ought to have been given to the Defendant and that the corporation could only either enter upon the land or sell it by public auction after the expiry of the said notice. That did not happen in this case.

### **Analysis and findings**

21. It is not in dispute that as at 27<sup>th</sup> August, 1997, the suit property was registered in the name of the Defendant and was charged in favour of Agricultural Finance Corporation for Ksh.80,000. According to the search that was produced as D exhibit 3, the property was charged on 4<sup>th</sup> July, 1985. Indeed, the defendant produced a letter dated 30<sup>th</sup> April 1984 as DEXB 1 showing that the Agricultural Finance Corporation had advanced to her a loan of Ksh.80,000/-.

22. The Defendant admitted in evidence that due to drought, she fell into arrears. Although she proposed to the Agricultural Finance Corporation to allow her to sell a portion of the suit property so as to settle the loan, the Agricultural Finance Corporation declined.
23. According to the Plaintiff, he purchased the suit property in an auction after AFC advertised the sale of the suit property by way of a public auction. The Plaintiff and his witnesses did not state when the said advertisement was published and in which newspaper. No evidence was placed before this court to show that there was such an advertisement.
24. Section 33 of the Agricultural Finance Corporation Act provides the manner in which the Corporation can recover land that has been charged to it in case of default by a borrower. The Corporation must first of all issue a notice to the chargor personally or by registered post demanding payment of the loan and in default, the corporation may either enter upon the land and take possession or sell it by public auction through a licensed auctioneer.
25. No evidence was placed before this court by the Plaintiff that a notice was issued to the Defendant before the alleged sale of the suit property by public auction was undertaken. Indeed, this court was not even informed the auctioneer who conducted the auction on behalf of the corporation and on which day.
26. There is also no evidence before the court on what amount was owing to the Corporation on the date of the alleged auction and whether the alleged purchase price of Ksh.1,800,000/- was ever paid to AFC after the sale of the suit property to the Plaintiff.
27. The only document that the Plaintiff is relying on to claim the suit property is the Transfer document dated 29<sup>th</sup> January, 2010 between himself and the corporation. That document does not indicate that the corporation was transferring the suit property to him as chargee. The Plaintiff did not even produce a certificate of postal search to show that he is the registered owner of the suit property.
28. In the absence of any evidence to show how the suit property passed from the Defendant to the Corporation then to the Plaintiff, and in the absence of a notice to the Defendant as required by law before the suit property was sold to the Plaintiff, I find and hold that the Plaintiff has not proved his case on a balance of probabilities.
29. For the reasons I have given above, I dismiss the Plaintiff's Plaint dated 12<sup>th</sup> September, 2012 with costs to the defendant.

**Dated and delivered in Malindi this 6<sup>th</sup> day of June 2014**

**O. A. ANGOTE**

**JUDGE**