



IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO. 83 OF 2013

JOSEPH WEPUKHULU WAFULA
BERNARD WANJALA WAFULA

ELIZABETH NABWOBA WAFULA..... PLAINTIFFS

VERSUS

CORNELIUS WERE JOSEPH DEFENDANT

JUDGMENT

1. The three plaintiffs have sued the defendant vide a plaint dated 28.3.2013 and filed in court on the same day. In the plaint, they have sought for prayers in terms of paragraph 6, costs of the suit, interest at court rates and any other relief the honourable court may deem just to grant. It is pleaded in paragraph 6 thus;

“The plaintiffs claim against the defendant is for an order directing the Land Registrar to cancel the registration of the suitland namely W. Bukusu/S. Mateka/960 and in his place restoration of the plaintiffs names as the proprietors of the suit parcel of land and a permanent injunction restraining him from entering and ortrespasing into the suitland plus costs and interest of the suit.”

2. Together with the plaint, the plaintiffs filed their statements, witness statements and list of documents which included the following;

- i. A copy of caution form placed on land parcel no. W. Bukusu/S. Mateka/960 dated the 23rd day of October 2012.
- ii. A letter issued by the area Assistant Chief of Lumboka sub location dated 22.10.2012.
- iii. A letter issued by the area Chief South Bukusu location requesting the defendant to appear on 5.11.2012.
- iv. A letter issued by the area Chief south Bukusu location dated 7.11.2012
- v. An official search certificate dated 12/10/2012

3. The summons to enter appearance and these documents were served upon the defendant on 21st day of May 2013 by a Mr. Calleb Sasita a court process server. It is deponed that the defendant was served at Lumboka area in his home. He declined to sign the documents served and the affidavit of

service was filed on 9th July 2013. The defendant was again served with a hearing notice on 28.4.2014. He did not appear in court on the date fixed for hearing. This case therefore proceeded to formal proof on 7th May 2014, the court being satisfied that service was proper.

4. The 1st Plaintiff, Joseph Wepukhulu Wafula is the only witness who testified to prove the plaintiffs claim. The 2nd and 3rd plaintiff chose to adopt his testimony. The 1st Plaintiff told court that they have sued the defendant because he lives on their parcel of land W. Bukusu/S. Mateka/960 without their consent. While giving his testimony, he did not produce anything to prove the land initially was theirs except a copy of a letter from their Assistant Chief dated 22nd October 2012. He said he wanted the defendant to come and tell court who gave him this land. This letter was produced as pex. 1. The witness continued that the defendant had been summoned by the village elder and Chief to come and show cause how he got the land which summonses he did not honour. He admitted the land is currently in the name of the defendant. The land however previously belonged to his father. He urged the court to allow the suit. He closed their case.

5. Based on this evidence, I am tasked to make a finding. Since the plaintiffs are not represented and the defendant did not defend the suit, I will refer to this evidence and the documentary evidence on record to determine whether the plaintiffs established a case within the required standards of the law. In paragraph 4 of the plaint, the plaintiffs pleaded fraud on the part of the defendant and gave particulars thereof. The copy of certificate of search for the suit title filed reveals the defendant became registered owner of the suit property on 23.5.1986. The plaintiffs lodged a caution dated 23rd October 2012 on the title on. As to whether it was paid for and registered, there was evidence shown to this court to that effect. The plaintiffs in support of their case relied on the Assistant Chief's letter dated 22.10.2012 addressed to the District Land Registrar Bungoma. In the letter, the chief wrote that the plaintiffs' father sold the land to the defendant but there is a dispute as that defendant had not shown any documents to prove there was sale.

6. In the written statement of the 2nd plaintiff filed, the witness said the defendant purported to have bought land from their father William Wafula Chemiati which they wished to know how much and when the transaction took place. William Chemiati also recorded a statement. In that statement, William said the defendant is his son in law and he only came to realize that he had processed the land title without his knowledge. The defendant issued threats to him which made him vacate the land together with his entire family an act which was unlawful in his view. He urged the court in his statement to revert the transaction and return the land to him. It is a requirement of the law that allegations of fraud must be properly proved on the standards slightly below that of beyond reasonable doubt but above the standard provided for civil cases. This was the position taken in the case of **R.G Patel vs Lalji Makanji (1957) E.A 314 at 317 that allegations must be strictly proved.**

7. From the evidence of record, none of the witnesses neither in their statements nor the oral testimony of 1st plaintiff endeavoured to prove any of the particulars of fraud pleaded in the plaint. The 1st Plaintiff wanted the defendant to come and tell court how he acquired registration of the suitland. He was thus shifting the burden of proving his case to the defendant who did not enter appearance. The rules of evidence require that he who alleges must prove – see **Koinange & 13 Others vs Koinange (1968) KLR 23**. The plaintiffs failed to show any evidence that this land was ever registered in the name of their father William Wafula Chemiati at any one time before it was transferred to the defendant. They have not adduced any evidence at all linking them to the suitland. They also chose not to call their father to testify in court to shed any light on whether they have a claim to this land or not. The plaintiffs have therefore failed to prove their case within the set standards of the law and it is dismissed. Since the suit was not defended, no order is made on costs.

Dated, Signed and Delivered in Bungoma this 3rd day of July 2014.

A. OMOLLO

JUDGE

