



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NUMBER 49 OF 2017

(Formerly Kisii Elc case No. 143 of 2016)

PETER JAMES OGUTA.....PLAINTIFF

VERSUS

DAVID OUMA GOR.....1ST DEFENDANT

GEORGE ASANGO GOR.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The present dispute concerns property known as land reference numbers;

a. Gem /Genga 1945 measuring approximately one decimal one hectares (1.1 Ha) in area (The 1st suit parcel of land herein).

and

b. Gem/Genga/1952 measuring approximately zero decimal three three hectares (0.33 Ha) in area (The 2nd suit parcel of land herein).

2. The 1st and 2nd suit parcels of land are subdivisions of land reference numbers Gem/Genga/1941 and Gem/Genga/1944 (Respective original parcels of land). The same are contained in Registry Map sheet number 19. They are located in Homa-Bay County within the Republic of Kenya.

3. The plaintiff, Peter James Oguta is represented by Messrs Oguttu, Ochwangi, Ochwal and Company Advocates formerly, Oguttu Mboya and Company Advocates.

4. The 1st and 2nd defendants namely David Ouma Ogor and George Asango Gor respectively, appear in person. Previously, they were represented by Messrs G.S. Okoth and Company Advocates who filed a notice of withdrawal in court on 20th November 2018. Indeed, on 12/3/2019, this court allowed the notice accordingly.

5. Initially, the suit was lodged at Kisii Environment and Land court. On 1st February 2017, Mutungi J transferred it to this court upon it's establishment, for hearing and determination.

B. THE GIST OF THE PLAINTIFF'S CASE

6. The plaintiff initiated the suit by way of a plaint dated 23rd May 2016 and duly filed in court on 24th May 2016 seeking orders infra:-

i. Declaration that the plaintiff is the lawful, bona-fide and registered owner of LR Nos GEM/GENGA/1945 and 1952, the 1st and 2nd parcels of the suit land herein.

ii. Permanent injunction restraining the defendants by either by themselves, agents, servants and/or anyone claiming under the

defendants from re-entering upon, trespassing onto laying a claim to, cultivating, leasing, building onto, interfering with and/or in any other manner, whatsoever dealing with the 1st and 2nd parcels of the suit land or any portions thereof, that is, LR Nos. GEM/GENGA/1945 and 1952, in any manner prejudicial and/or adverse to the rights and interest of the plaintiff.

iii. General damages for trespass.

iv. Costs of this suit be borne by the defendants.

v. Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.

7. It is the plaintiff's complaint that in the year 2016, he bought the 1st and 2nd suit parcels of land from Peter Otieno Gor (**The vendor and PW2 herein**). Consequently, the plaintiff got registered as the proprietor of the 1st and 2nd suit parcels of land upon their purchase. That the plaintiff has been and still is the registered proprietor thereof and he is entitled to absolute and exclusive usage of the same.

8. The plaintiff also laments that on or about 2nd March 2016, the defendants trespassed into the 1st and 2nd suit parcels of land and uprooted his sugarcane crop which was growing thereon. That the defendants have remained and continue to trespass upon the 1st and 2nd suit parcels of land hence dispossessing him of substantial portions of them, to the extent, that he can not continue with any developments thereon. Thus, it provoked the present suit.

9. In his reply to statement of defence dated 19th August 2016 duly filed in court on 22nd August 2016, the plaintiff further stated inter alia, that at the time of entering into the sale of land agreement with the vendor, the 1st and 2nd parcels of land were duly registered in the name of the vendor. That there was no need to petition for acquisition of grant of letters of administration in any manner or at all. That titles over and in respect of the 1st and 2nd suit parcels of land were not recalled on the authority of the Homa-Bay County Land Registrar who is devoid of jurisdiction thereof. He denied the defendants' statement of defence lodged in court on 16th August 2016, sought its dismissal and that Judgment be entered in terms of the plaint.

10. The plaintiff (PW1) testified that he bought the 1st and 2nd suit parcels of land lawfully from the vendor. He relied on copies of documents admitted as PExhibits 1 to 22 which include; his National identity card (PExhibit 1) green card sale of land agreement and title deed, in respect of the 1st suit land (PExhibits 2,3 and 7 respectively) and mutation form, title deed and Agriculture officer's report of assessment of damaged crop in regard to the 2nd suit parcel of land (PExhibits 8,12, and 18 respectively).

11. **PW2, Peter Otieno Gor (The Vendor)**, did testify that he is a son of John Gor Otieno (deceased herein) who distributed his parcels of land during his life time. That the said parcels of land include the original land to the 1st suit parcel of land which was given to PW2, who then sold the same to PW1 as per PExhibit 3.

12. **PW3, ANDREW OKELLO OKAMBO** stated that he was the Chief, Genga Location in Rangwe sub county in Homa-Bay county. That PW1 was the proprietor of the 1st and 2nd suit parcels of land. That he did receive a report that sugarcane crop of PW1 had been destroyed thereon, sent a villager elder who confirmed the alleged destruction. That he (PW3) wrote a letter (PExhibit 19).

13. By submissions dated 17th November 2016 and duly filed in court on 24th November 2016, learned counsel for PW1 gave a brief background of the matter, identified five (5) issues for determination, among them, whether PW1 is the registered proprietor of the 1st and 2nd suit parcels of land and whether he is entitled to the orders sought in the plaint. In analysing the issues in favour of PW1, counsel cited authorities including **Kuria Kiarie and 2 others vs= Sammy Magera (2016) e KLR and sections 107 and 108 of the Evidence Act Chapter 80 laws of Kenya**. Counsel submitted that the transaction leading to the alienation, transfer and registration of the 1st and 2nd suit parcels of land to and in favour of PW1, is indefeasible and sacrosanct thus, PW1, has proved his claim against the defendants on a balance of probabilities.

C. THE GIST OF THE DEFENDANTS' CASE

14. On 19th August 2016, the defendants filed their joint statement of defence dated 15th August 2016 whereby they sought dismissal of the suit with costs. They stated in part that PW1 based his claim on a title deed held by him which is null and void as the same had been nullified and cancelled by the county Land Registrar on 31st May 2016.

15. The defendants further stated that PW1 has no legal capacity to sell the original suit land to the 1st suit parcel of land as he did not obtain a grant of letters of administration intestate in respect of the estate of deceased. That the vendor colluded with PW1 with intent to defraud the estate of the deceased of equitable interest in the said original land. They pleaded particulars of fraud at paragraph 5 of the statement of defence. That upon discovery of fraud, the trespasser on the 1st and 2nd suit parcels of land, is PW1. They denied the allegation of trespass levelled against them.

16. The defendants were duly served for the hearing of the present suit as per affidavit of service sworn on 12th October 2020 by Rajab O. Otieno, a licenced Process Server of this court. The contents of the affidavit are noted accordingly.

17. On 15th October 2020, Mr. Mulisa learned counsel for PW1 moved this court which remarked that :-

“The defendants duly served as per affidavit of service sworn on 12/10/2020. They are absent without reason. Their case

deemed closed.”

D. POINTS FOR DETERMINATION

18. I have carefully examined and anxiously considered the plaint, the joint statement of defence, the testimonies of PW1, Pw2, PW3 and the plaintiff’s submissions. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court’s determination; see the Court of Appeal decision in **Galaxy Paints Company Ltd =vs= Falcon Grounds Ltd (2000) 2EA 385** restated in **Great Lakes Transport Company (U) Ltd =vs= Kenya Revenue Authority (2009) KLR 720**.

19. The statement of agreed issues (Plaintiff’s version) dated 19th August 2016 and duly lodged in court on 22nd August 2016 is noted herein. So, the issues to resolve herein are compressed thus:-

a. Is PW1 the lawful registered proprietor of the 1st and 2nd suit parcels of land?

b. Is PW1 a trespasser on the 1st and 2nd suit parcels of land?

c. Is PW1 entitled to the reliefs sought in the plaint?

E. DISCUSSION AND DETERMINATION

20. On the issue of proprietorship, PW1 asserted that he is the registered proprietor of the 1st and 2nd suit parcels of land which he lawfully bought from PW2 as revealed at paragraphs 1 to 7,8 and 9 of the plaint. PExhibits 1 to 14 speak to the transaction, transfer and registration of the same in the name of PW1.

21. The revelation is PExhibits 7 and 12 is that the 1st and 2nd suit parcels of land are registered in the name of PW1 with effect from 20th November 2009 and 13th January 2011 respectively. Indeed, the same were registered pursuant to sections 2,24,25,26, 28 and 30 of the Land Registration Act,2016 (2012).

22. Besides, in the case of **Munyu Maina =vs= Hiram Gathiha Maina (2013) eKLR**, the Court of Appeal held thus:-

“When a registered proprietor’s root of title 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.....”

23. The defendants alleged at paragraphs 4,5,6 and 7 of their statement of defence that PW2 had no legal capacity to sell the original land of the 1st suit parcel of land as he had not obtained a grant of letters of administration in respect of the estate of the deceased. That PW2 did collude with the plaintiff (PW1) with intent to defraud the estate of the deceased of the equitable interest in the said original land.

24. The particulars of fraud are stated at paragraph 5 of the statement of defence. In that regard, in **Kinyanjui Kamau =vs= George Kamau (2015) eKLR**, the Court of Appeal stated that:-

“it is trite law that any allegation of fraud must be pleaded and strictly proved in case when fraud is alleged. It is not enough to infer from the facts”

25. Additionally, in **Rajesh Pranjivan Chudasama =vs= Sailesh Pranjivan Chudasama (2014) eKLR**, the Court of Appeal pronounced itself thus;

“A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”

26. Article 10 (2) (b) of the Constitution of Kenya,2010 anchors the principles of equity. This court is not precluded from giving effect to equitable principles as observed by the Court of Appeal in **William Kipsoi Sigei =vs= Kipkoech Arusei and another (2019) eKLR and Macharia Mwangi Maina and 87 others =vs= Davidson Mwangi Kagiri (2014) eKLR**, among other leading pronouncements.

27. Fraud and misrepresentation as provided for under **section 26 (1) of the Land Registration Act (supra)** as grounds for impeaching a certificate of title, must be distinctly pleaded and proved ; see **Kuria Kiarie case (supra)**.

28. PW1 stated in cross examination in chief that the deceased passed on as per PExhibit 22. In cross examination, he testified that :-

“John Gor Atieno died 29/5/2009 and the seller and 2nd defendant approached me for sale of the suit land on 30/5/2009”

29. According to PW2, the deceased was his father who died on 29th May 2009. During cross-examination, he stated;

“ I am son of John Gor Atieno (deceased). He died on 29/5/2009. The land was initially, registered in his name in 1973.

Consent was given by my late father to me in respect of the land. I attended Land Control Board at Rangwe for transfer of the land...”

30. In the words of the area chief (PW3), the deceased was known to him. That the deceased had died by the year 2011. During cross examination, he told the court that;-

” I knew the late Gor Otieno the father of the defendants. He died in my location where he came from. He had died by year 2011. He had four wives. I am aware of Succession in land matters especially involving deceased persons. The 1st and 2nd suit parcels of land or suit properties belonged to the late Gor Atieno and I can not tell if succession was done thereof.....”

31. PE Exhibit 3 was prepared on 3rd June 2019 between PW1, on one hand and PW2 together with the 2nd defendant on the other hand. Clearly, it was done approximately five (5) days from the date of death of the deceased.

32. PE Exhibit 2 shows that PW2 got registered as the proprietor of the 1st and 2nd suit parcels of land on 11th November 2009 and 3rd December 2010 respectively. PE Exhibits 3 to 18 were all prepared after the death of the deceased.

33. In the obtaining circumstances did PW2 obtain PE Exhibits 7 and 12 in accordance with the law? PW2 ought to have obtained them through transmission as envisaged under **section 26 (1) of the Land Registration Act (supra)**. Therefore, the sound answer to the foregoing question is in the negative as I subscribe to the case of **Munyu Maina (supra)** on acquisition of title to land.

34. As regards the issue of trespass, I am aware of Black’s law Dictionary 10th Edition page 1733 where the term “**Trespass** “ is defined thus;-

“An unlawful act committed against the person or property of another especially, wrongful, entry on another’s real property”

35. At paragraphs 10,11, and 12 of the plaint, PW1 alleged trespass on the 1st and 2nd suit parcels of land, on the part of the defendants. PW2 testified that the defendants invaded thereon as revealed in PE Exhibits 15,16,17 18,19, and 20 herein.

36. PW3 confirmed to have received a complaint regarding the alleged trespass causing destruction on sugar cane crop growing on the 1st and 2nd suit parcels of land. He prepared PE Exhibit 19 thereof.

37. In their statement of defence, the defendants vehemently denied the alleged trespass. They stated that PW2 colluded with PW1 and 2nd defendant and obtained PE Exhibits 7 and 12 to the 1st and 2nd suit parcels of land fraudulently. That registration thereof was completed on 29th July 2008 and fraud was discovered in January 2012.

38. The defendants have raised the issue of legal capacity and fraud in this suit against PW1 and PW2. They claim equitable interest on the 1st and 2nd suit parcels of land as stated in sections 25 (b) and 28 (b) of the Land Registration Act, **Sigei and Macharia Mwangi Maina cases (supra)**. On that score, it can not be concluded that the defendants are trespassers thereon hence, the 2nd point is resolved thereby.

39. With regard to the 3rd issue, this court is conscious of the right to property under **Article 40 (1) of the Constitution (supra)**. Both the plaintiff and the defendant have laid claim over the 1st and 2nd suit parcels of land. However, the plaintiff has not discharged the burden of proof as envisaged in the Court of Appeal decision in **Kirugi and another vs= Kabiya and 3 others (1987) KLR 347**. It is therefore, the finding of this court that the plaintiff is not entitled to the reliefs sought in the plaint. He has not proved his case against the defendants on a balance of probabilities and the defendants’ statement of defence thwarts the same.

40. A fortiori, the plaintiff’s suit originated by way of the plaint dated 23rd May 2016 and filed in court on 24th May 2016, be and is hereby struck out with costs to the defendants.

Orders accordingly.

Delivered, Dated and SIGNED at MIGORI this 15th day of December 2020.

G.M.A ONGONDO

JUDGE

In presence

Mr. G.S. Okoth learned counsel holding brief for Mr. Oguttu Mboya for the plaintiff

Tom Maurice – Court Assistant