



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 720 OF 2017

(formerly Kisii ELC Case No. 280 of 2013(O.S))

TIMOTHEO OGUTA ORIGA.....PLAINTIFF

Versus

RODGERS NYARIBO MOSE.....1ST DEFENDANT

MOSE KENNEDY NYANG'WARA ROOSEVELY.....2ND DEFENDANT

JUDGMENT

1. By an originating summons dated 21st June 2013, and filed on even date, the plaintiff, TIMOTHY OGUTA ORIGA, who is represented by learned counsel, Mr, Sam Onyango, has sued the defendants namely RODGERS NYARIBO MOSE and MOSE KENNEDY NYANGWARA ROOSEVELY claiming bona fide ownership of the suit land, LR NO. KAMAGAMBO/KANYAJUOK/1356 measuring approximately 2.64 hectares. He is seeking the following reliefs:-

a) **THAT** the registration of RODGERS NYARIBO MOSE and MOSE KENNEDY NYANG'WARA ROOSEVELY as the proprietors of the suit, land KAMAGAMBO/KANYAJUK/1356 be revoked and /or nullified.

b) **THAT** there be issued a declaration that all that parcel of land comprised in title No. KAMAGAMBO/KANYAJUOK/1356 belongs to and ought to be registered in the name of TIMOTHEO OGUTA ORIGA, the plaintiff herein as the sole proprietor thereof devoid of any encumbrances.

c) **THAT** there be issued an order of the rectification of the register of parcel NO. KAMAGAMBO/KANYAJUOK/1356 directing the cancellation of registration of RODGERS NYARIBO MOSE and MOSE KENNEDY NYANG'WARA ROOSEVELY as proprietors of the said parcel and reinstating TIMOTHEO OGUTA ORIGA as the sole proprietor of the said parcel.

d) **THAT** there be issued an order of permanent injunction restraining the defendants by themselves, their agents, their servants, their employees or any person acting with their express or implied authority from entering into, working into, working on, titling , cultivating , disposing of or in any way interfering with the plaintiff's possession of the suit land LR NO. KAMAGAMBO/KANYANJUOK/1356.

e) **THAT** there be granted any such further orders as may enable the effective implementation of the foregoing orders.

f) **THAT** the costs of this summons be borne by the defendants.

2. The originating summons is anchored on six (6) grounds on the face of it. The grounds are that :-

i. The registration of the defendants as the proprietors of the parcel in dispute was obtained by fraud, mistake and/or misrepresentation.

ii. The defendants were privy to and/or committed the fraudulent acts leading to their registration as such proprietors.

iii. The defendants did not acquire the parcel in dispute as purchasers for value or by any other lawful means.

iv. The plaintiff's right to ownership has been unlawfully and unjustifiably impeached.

v. The defendants have unlawfully evicted the plaintiff from the parcel in dispute and are committing waste thereon.

vi. The plaintiff continues to suffer irreparable loss and damage as a result of the unlawful registration.

3. The originating summons is further premised on the plaintiff's supporting affidavit sworn on even date. To the said affidavit, are annexed the following documents:-

- a) A copy of certificate of official search of 28/1/2013 (PExhibit 2)
- b) A certified copy of the suit land register (PExhibit 1)
- c) Copies of plaintiff's Advocate's letters including letter dated 12/6/2013 (PExhibit 4).

4. Briefly, the plaintiff alleges, inter alia, that he acquired the original suit land LR. KAMAGAMBO/KANYAJUOK/797 on first registration. That the said land has since been subdivided into two portions including the suit land registered in the name of the plaintiff since 7th March 1990. That on 14th December 2012, the defendants were unlawfully and fraudulently registered as proprietors of the suit land. The plaintiff has pleaded particulars of fraud on the part of the defendants at paragraph 5 of his supporting affidavit. That the defendants have since evicted him from the suit land and destroyed his crops thereon thus precipitating the present suit.

5. The defendants through the firm of Asati, Anyona and Company Advocates, have denied the plaintiff's claim. By 1st defendant's replying affidavit sworn on 5th August 2013, the defendants state that this suit is res judicata since it has been heard and determined in Kisii HCC NO. 134 OF 1987 between the plaintiff and the defendant's father namely Mose Omwoyo Nyakwena and another in favour of the defendants in that suit. That the suit land was originally owned by the defendants' grandfather Omwoyo, Nyansarora whose estate the defendants litigated in the said Kisii HCC NO. 134 of 1987. That they have acquired the suit land by way of transmission from their fathers who had acquired it through purchase.

6. The defendants have counterclaimed that they have acquired the suit land by way of adverse possession as they have stayed on the land for over twelve (12) years without any interruption from the plaintiff. In support of the 2nd defendant's replying affidavit, are a copy of proceedings and decree in Kisii HCCC No. 134 of 1987 marked RNM 1(a) and (b) respectively.

7. In the plaintiff's further affidavit sworn on 15th April, 2014, he averred that whereas he was the plaintiff in Kisii HCCC No. 134 of 1987 which was dismissed for want of prosecution, the defendants were never parties thereto. That the said suit was never heard and determined on merit hence the present suit is not res judicata.

8. The plaintiff further averred that he did not sell any part of suit land to the defendants who have not enjoyed continuous and uninterrupted possession of the land as alleged by them. Copies of a plaint and defence in Kisii HCC No. 134 of 1987 marked (T00 1 (a) and (b) respectively, accompany the further affidavit.

9. Directions in the suit were given on 2nd December 2013 by Samson Okongo J sitting at Kisii Environment and Land Court. On 21st November 2018, last adjournment was given to the parties who were duly represented and hearing on priority and marathan basis due to the nature and age of the matter, was fixed for 10th December 2018.

10. During hearing, the plaintiff (PW1) testified and relied on his list of documents dated 21st June 2013 (PExhibits 1 to 5). He also relied in his statement filed on 21st January 2013 as his evidence in chief.

11. The defendant's counsel was fully aware of hearing fixed for 10th December 2018. There was no appearance on the part of the defendants thus their case was deemed closed; see also **Republic -v- John Wambua Munyao and 3 others (2018) eKLR 1** where a prosecution counsel fails to attend proceedings in Criminal cases.

12. Counsel for the respective parties did not submit in this suit.

13. I have carefully considered all the pleadings and evidence of PW1 herein. In the case of **Great Lakes Company (U) Ltd -v- Kenya Revenue Authority (2009) KLR 720**, the Court of Appeal held that issues for determination in a suit generally flow from either pleadings or as framed by the parties to the suit. The plaintiff framed issues 1 to 6 in his originating summons. The issues for determination are distilled as follows:-

- a) Are the defendants the current registered proprietors of the suit land?**
- b) Was the registration in (a) herein above obtained unlawfully, fraudulently, mistakenly and or irregularly?**
- c) Is this suit res judicata?**
- d) Have the defendants been in open and notorious occupation and possession of the suit land for over 12 years?**
- e) Are the parties entitled to the reliefs sought in their respective pleadings?**

14. On the issue of registration of the suit land, I am conscious of the definition of the term “Proprietor” under **section 2 of the Land Registration Act, 2012**. I note that interest conferred by registration, rights of a proprietor and certificate of title issued are provided for under **sections 24, 25, and 26** respectively of the same Act.

15. The plaintiff stated in the originating summons and averred at paragraphs 5,6 and 7 of his supporting affidavit that the defendants are registered as proprietors of the suit land. In his testimony by way of a statement filed on 21st June,2012 at paragraph 5, the plaintiff (PW1) stated in part that:-

“I thereafter conducted a search at the Land Registry,Migori and noted that indeed the land had been registered in the name of the defendants”.

16. PE Exhibits 1 and 2 reveal that the defendants are the proprietors of the suit land with effect from 14th December 2012. It is noted plainly that the land in question is registered under the **Registered Land Act (Cap 300 repealed)**; see **Wainaina –v- Murai and Others (1976-80) 1 KLR 283 at 289/90**. The defendants have not contested the fact of their registration as the proprietors of the suit land.

17. Regarding the issue of fraud, the plaintiff stated on grounds (a) and (b) of the originating summons that the defendants obtained registration to the suit land by fraud. He pleaded particulars of fraud at paragraph 5 of his supporting affidavit to the originating summons in consonant with the decision in **Abiero –v- Thabiti Finance Co. Ltd and Anor (2001) KLR 496**. He averred that he was the registered sole proprietor of the suit land sometimes on 7th March 1990, but the defendants got registered as proprietors thereof by fraud on 4th December 2012. Paragraphs 5,7 and 8 of his statement and paragraph 13 of his further affidavit discern the issue of fraud on the part of the defendants.

18. The defendants termed the plaintiff’s allegations of fraud as false. They claimed at paragraph 14 of the 1st defendants replying affidavit thus;

“We have automatically become owners as we inherited the said land from our father who acquired it through purchase of the same.”

19. In **Fletcher –v- Peck 10 U.S 87 (1810)** the rights of third persons who are purchasers without notice for valuable consideration was not disregarded, see also **Kuria Greens Ltd –v- Registrar of Titles and another (2011) eKLR**. The doctrine of Equity under **Article 10 (2) (b) of the Constitution of Kenya 2010** applies very handy in the protection of such purchasers by virtue of constructive trust.

20. The plaintiff (PW1) averred that he did not sell or transfer the suit land to the defendants and that registration to the suit land in the name of the defendants be rectified by court. Bearing in mind the definition of “fraud” in **Abiero case (supra)**, the pleadings and the testimony of PW1, I find that the plaintiff has proved his allegations of fraud against the defendants not beyond reasonable doubt but on a balance higher than balance of probabilities as recognized in **Paul Kimaru Njuguna –v- Pius Kimaru Kiguni and another (2009) eKLR**.

21. With regard to Res Judicata, **section 7 of the Civil Procedure Act (Cap 21)** provides the essential elements of res judicata doctrine. **Black’ Law Dictionary 10th Edition** defines the term “Res Judicata” as an issue that has been definitively settled by judicial decision and it provide the three elements thus:-

- a) An earlier decision on the issue.
- b) A final Judgment on merits, and
- c) The involvement of the same parties or parties in privity with the original parties.

22. The defendants pleaded the defence of res judicata as discerned at paragraphs 4, 8 and 11 of the 1st defendants replying affidavit. The plaintiff opposed the res judicata defence in his further affidavit at paragraphs 3 and 8.

23. The proceedings and decree (RNM -01 (a) and (b)) and plaint and defence (TOO 1(a) and (b)) reveal that there was an earlier decision on the issue in Kisii HCCC No. 134 of 1987. The parties in that case were the plaintiff and father of the defendants. Therefore the defendants are somewhat different from the parties in the said civil case. Moreover, it is quite plain that Kisii HCCC No. 134 of 1987 was dismissed for want of prosecution hence there was no final Judgment on its merits and Res Judicata doctrine inapplicable in the circumstances.

24. The defendants claimed adverse possession by the 1st defendants replying affidavit at paragraphs 9, 10,16, and 17. The claim is denied by the plaintiff in his further affidavit especially at paragraphs 11 and 12.

25. In the case of **Wilson Kazungu Katana and 101 others –v- Salim Abdallah Bakshwein and another (2015) eKLR**, the court held that the doctrine of adverse possession dictates that:

- a) The suit land be registered in the name other than the applicant.
- b) The applicant be in open and exclusive possession in adverse manner to the title of the owner of the land.
- c) The applicant be in occupation of the suit land for a period in excess of twelve (12) years having dispossessed the owner or discontinued the possession of the owner of the land.

26. The plaintiff stated that he was the registered owner of the suit land from the 7th March 1990. That the defendants got registered as proprietors of the land on 14th December 2012 as shown on PExhibits 1 and 2. I take into account the decision in **Gatimu Kinguru –v- Muya Gathangi (2008) (1976-80) 1KLR 317** in respect of adverse possession. In the instant suit, the suit land is registered in the name of the defendants since 14th December 2012 hence their claim for adverse possession has not attained the threshold in **Kazungu Katana case (supra)**.

27. I further take into account the defendants' list of documents dated 24th May 2018 which is the same as the one filed on 19th November 2018 as well as the 2nd defendant's statement dated 24th May 2018 and filed on 25th May 2018. I weigh them against the plaintiff's pleadings and evidence including PExhibits 1 to 5. The defendants' root of title is under challenge and they must go beyond the instrument of title and prove the legality of how they acquired the title and that the acquisition was legal, formal and free from any encumbrances; see Court of Appeal decision in **Munyu Maina –v- Hiram Githiha Maina (2013) eKLR.**

28. In sum, the plaintiff has established that the defendants acquired title to the suit land on 14/12/2012 fraudulently as noted above. He is entitled to the reliefs sought in his originating summons as his claim has not been thwarted by the defendants' defence which is unmerited and hereby dismissed. I find that the plaintiff's claim against the defendants has been proved to the required standard.

29. Consequently and for those reasons, I enter Judgment for the plaintiff against the defendants in terms of orders 1 to 6 sought in the plaintiffs originating summons dated 21st June 2013.

Orders accordingly

DELIVERED, DATED and SIGNED at MIGORI this 30th day of January 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Tom Maurice – Court Assistant

Mr. Sam Onyango learned counsel for the plaintiff