



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 85 OF 2005

MOSES WAFULA KHAOYA.....PLAINTIFF

VERSUS

NABAYI MULTI PURPOSE CO-OP SOCIETY.....DEFENDANT

JUDGMENT

1. In the plaint dated 30/6/2005 and filed in this suit on the same date the plaintiff prays for the following orders against the defendant:-

(a) **A declaration that the Land Reference No. 894/22 solely belongs to the plaintiff and that the defendant through its members is a trespasser therein and the said members be ordered to move out and failing which they be forcefully evicted together with their servants and or agents or anybody claiming through them.**

(b) **Costs and interest.**

(c) **Any other relief that this honourable court may deem fit to grant.**

The Plaintiff's Case

2. The plaintiff avers in the plaint that he is the registered owner of **LR. No.8994/22** measuring **36.62 Hectares** situate South West of Kitale Municipality in Trans-Nzoia District; that the **LR. No. 8994/22** was on the **17/11/2003** purchased by the plaintiff in a **Public Auction** conducted by **Ms. Jomuke Enterprises** on the instructions of **Agricultural Finance Corporation (AFC)** the latter who was exercising their statutory power of sale to recover monies owed to it by **Walter Kilele**, who had charged the land to the AFC; that the defendant through its members has without any colour of right trespassed into the said land and even erected structures therein and that they have prevented the plaintiff from making use of his land.

The Defendants' Defence

3. There are two defences on record for the defendant. The defendant filed both defences on **15/8/2005** through **Zablon Mokuia & Co. Advocates** and **Esther Chege & Co. Advocates** respectively denying the claim. This court has followed the defence dated **13/8/2005** filed by Zablon Mokuia & Co. Advocates as they appear to have followed up on representation of the defendant while the firm of Esther Chege & Co. Advocates failed to do so.

4. In that defence the defendant denies that the plaintiff is the registered owner of the suit land and avers that the plaintiff obtained registration fraudulently as the defendant had bought the land from AFC in **1998**. The defendant further pleads that any sale of the suit land to the plaintiff was in breach of court orders and is a nullity *ab initio*. The defendant states that no power of sale could have arisen for the land had been sold to it before the purported exercise of the power of sale on **17/11/2003**. It is pleaded that Walter Kilele did not owe AFC any monies as the same had been paid in full. Trespass is therefore denied. The defendant avers that it was put into possession of the suit land with knowledge and consent of the AFC and it has stayed on the suit land over **8 years**. It is averred that the plaintiff purported to enter into an agreement with AFC for the reason that the plaintiff's land neighbours the suit land and despite having full notice that the land had been sold to the defendant, hence the plaintiff is not an innocent purchaser for value without notice. It is also pleaded that **Bungoma HCCC No. 128 of 2001** exists and that this suit is an abuse of the process of the court, frivolous, and vexatious. Jurisdiction of the court is also denied for the apparent reason that no cause of action is revealed in the plaint and secondly that this matter is similar to **Bungoma HCCC 128 of 2001**.

The Plaintiff's Reply to Defence

5. In his reply to defence filed on **4/12/2007** the plaintiff denies fraud, avers that the land was available for public auction; that the land had not been sold to the defendant by AFC; that the exercise of statutory power of sale was due to default on the part of the Walter Kilele, the chargor; that the defendant was never registered as the owner of the land, its occupation of the land amounts to trespass and that the plaintiff

has never been enjoined in **Bungoma HCCC No. 128 of 2001**.

The Plaintiffs' Evidence

6. PW1, Moses Wafula Khaoya, the plaintiff gave evidence on 5/11/2015. He substantially reiterated the matters raised in the plaint. He stated that the first owner of the land was Walter Kiprono Kilele who charged the land to AFC on 4/2/1993. He produced a copy of the title as **P. Exhibit 1**. He produced a copy of Standard Newspaper in which the suit property was advertised by auctioneers as **P. Exhibit 2**. He stated that there were handbills advertising the sale by auction that were distributed before the auction. He produced a copy thereof as **P. Exhibit 3**; he attended the auction held just outside the Standard Bank Kitale presumably on the **17th November 2003**; he offered **Kshs.5 million** as the highest bidder and paid **Kshs.1.125 million** at the fall of the hammer and was issued with 2 receipts. He paid **Kshs.125,000/=** on the same date, **Kshs.1.800,000** on 28/11/2003, **Kshs.1,000,000/=** on 11/12/2003 and **Kshs.950,000/=** on 15/12/2003. He produced the receipts as **P. Exhibit 4(a) (b) (c) (d) and (e)**. He entered into a Memorandum with AFC and Jomuki Enterprises and he was issued with a certificate of sale which has never been set aside. He did not know how the Bungoma case ended. He admitted that he has never been in possession of the land. He also averred that Walter Kilele was not in possession when he bought it. He admitted that members of the defendant were on the land and he does not know how they entered the land yet the name of the defendant does not appear on the title he is holding. He denied having obtained the land by way of fraud as claimed by the defendant and stated that he has no idea that AFC had intended to sell the land to the defendant. Finally he faulted the defendant for failing to enjoin the AFC, Jomuki Enterprises Limited or Walter Kilele to the instant suit.

The Defendant's Case

7. DW1, John Kibunguchy Kisabuli testified on 27/11/2016. He stated that the society is comprised of persons who fled from Mt. Elgon and is registered vide Certificate of Registration **No. 4261 (P. Exhibit 1)**. According to him the society was told that Walter Kilele was selling his Sambata farm; that when they approached him he admitted he was ready to sell the same if the society agreed to take over a loan which he owed to the AFC; that they entered into an agreement with him (**D.Exh 2**) and began repaying the AFC loan which stood at **Kshs.1.9 million**; that AFC wrote a letter showing that the loan had been cleared; that in **Bungoma HCC No. 128 of 2001** a court order was given restraining AFC from selling the land and the same was received by the AFC on **13/11/2003 (D.Exh 3)**; that Ronald Kilele son of Walter Kilele confirmed in writing that he had no objection with the society taking up the land once they cleared the loan; that AFC confirmed in writing that the loan had been cleared (**D.Exh 5**); that Kalya & Co. Advocates returned the defendant's cheque written in favour of the AFC after **3 months**; that as at **2011** the defendants were still paying AFC; that the sale of the land to the plaintiff was unlawful and that the government had no land to give to the internally displaced persons (IDPs).

8. DW2, Geoffrey Situma Chelwei gave his evidence on 1/10/2018. He stated that he is the treasurer of the society which bought the suit land on March, 1998 when valuation of **Kshs.100,000/=** was done. However in 2003 auctioneers advertised the land for sale but the auction never took place; that the plaintiff wrote a cheque on 22/11/2003 for **Kshs.250,000/=** in favour of AFC; that they later found that the debt to AFC had been paid in full; that they were given clearance; that surveyors from the National Titling Centre subdivided the land amongst the defendants' members and an area list was made by one Stephen Wasike of the National Titling Centre showing members names, Identity Card Numbers and size of land given to them; that various titles have already issued in respect of the subdivisions. The witness produced **6** original titles for plots **Nos. Kiminini/Matunda Block 30(Nabayi)/1,2,5,13,17 and 16**, all issued on 7/7/2017 while this case was pending.

The Parties' Submissions

9. The defendant filed its submissions on the **23rd October 2018** and the first set of plaintiff's submissions were filed on **23/3/2016**. Following a re-opening of the defendant's case and the taking of further evidence of the defence the plaintiff's further submissions were filed on **2/11/2018**.

DETERMINATION

Issues Arising

10. The issues that arise for determination in this suit are as follows:

(a) Does this court have jurisdiction to determine this suit?

(b) Had the defendants bought the suit land and taken possession thereof before the date 17/11/2003 and if so, was the transaction legally valid and binding on the AFC?

(c) Was there a public auction on 17/11/2003 and if so was it valid?

(d) Is the defendant and (by extension its members) trespassing on the suit land?

(e) What orders should issue?

(a) Does this court have jurisdiction to hear and determine this suit?

11. The jurisdiction of this court is objected to twofold: for the reason that no cause of action is revealed in the plaint and secondly that this matter is similar to **Bungoma HCCC 128 of 2001**.

12. On the first limb of the objection regarding this court's jurisdiction a panoramic view of the events forming the background to this suit shows that the plaintiff purported to purchase land at a public auction on a date subsequent to the date of issuance of a court order in **Bungoma HCCC 128 of 2001** which order barred AFC from disposing of the suit property pending the hearing and determination of the suit. In a ruling on an application by the defendant for striking out of this suit this court stated as follows:

“That the defendant believes that the plaintiff acquired title irregularly or unlawfully, would not be reason enough to warrant the striking out of the plaint. I hold that the defendant has failed to demonstrate that the plaintiff's case is either an abuse of the process of the court, or that it is otherwise so hopeless that it should be struck out”.

13. Further the plaintiff's case is that he is the registered owner of the suit land. Save for what will be stated hereinafter in this judgment on the issue of procedure, the plaintiff had a right to institute proceedings in the right manner against the defendant. In my view the defendant's objection to this court's jurisdiction must be overruled.

14. On the second limb, namely, that there exists other litigation between the parties over the same subject matter, it is clear that litigation between the defendant and AFC over the suit land was in existence as far back as the year **2001** while the plaintiff purported to purchase the land at an auction in **2003**.

15. It should be noted that in **paragraphs 12, 13 and 16** of the defence filed by Zablun Mokuia & Co Advocates on **15/8/2005**, it is pleaded that a similar matter is pending in **Bungoma High Court HCCC 128 of 2001**.

16. In **paragraph 12** of the defence, it is intimated that the plaintiff herein was a party in **Bungoma High Court HCCC 128 of 2001**. In **paragraph 13** it is averred that he filed a defence and counterclaim in that case seeking the same relief that he seeks in his counterclaim in this suit.

17. In **paragraph 16** the defendants aver that this court does not have jurisdiction to hear and determine this matter in view of **Bungoma High Court HCCC 128 of 2001**.

18. Though the plaintiff was informed by the defendant's pleading as above that there was an injunction issued in **Bungoma HCCC No 128 of 2001**, he did not plead in his reply to defence that that suit finally ended in favour of AFC, the chargee who purported to sell him the suit land, and thus that by the time of the sale to him at the auction, the order barring the sale had been vacated.

19. I have examined the record and found an application dated **11/4/2006** filed by the defendant seeking that the suit herein be struck out for being similar to **Bungoma HCCC 128 of 2001**. That application was in the final analysis disallowed.

20. The supporting affidavit to that application however exhibits pleadings filed in **Bungoma HCCC 128 of 2001**, namely, an amended plaint apparently filed on **27/1/2004** and a defence and counterclaim filed by the plaintiff herein, dated **18/5/2005**.

21. In that amended plaint the defendant herein is suing the AFC, Moses Khaoya Wafula (the plaintiff herein) and Jomuki Enterprises (the auctioneers), stating that in **1998** one Joyce Nekesa Kokonya with the knowledge and or approval of the AFC sold the land to the defendant herein.

22. In **paragraph 6** of the amended plaint in that suit it is alleged that the defendant herein was put into possession of the suit land in **1998**.

23. In **paragraphs 7 and 9** of that amended plaint estoppel is pleaded against the AFC.

24. Evidence from the defendant herein has shown that there was a court order issued on **10/8/2001** restraining AFC from disposing of the property subject matter of this suit pending the hearing and determination of **Bungoma HCCC 128 of 2001**.

25. At **paragraphs 14A - 14G** of the amended plaint it is pleaded that the AFC and Jomuki enterprises were on **13/11/2003** served with the court order restraining the sale intended for **17/11/2003**, and that the AFC nevertheless purported to proceed with the auction.

26. In the defence and counterclaim he filed in the **Bungoma HCCC 128 of 2001**, the plaintiff herein states that the sale of the suit land to him at the same public auction of **17/11/2003** was proper and the transfer into his name was registered on **9/3/2004**.

27. He also pleads that he was an innocent purchaser for value without notice. He also states that his attempts to take possession of the suit property was resisted by the plaintiffs in that suit.

28. The orders sought by the plaintiff herein in the counterclaim in that suit seek inter alia that the defendant herein do vacate the suit land and in default an eviction do issue. These are substantially the same orders sought by the plaintiff in his plaint in this suit.

29. Notwithstanding all the documentation on the record, the plaintiff's reply to defence herein ambivalently avers that he was never enjoined as a party in **Bungoma HCCC 128 of 2001** and that his pleadings were struck out. The documents filed herein show that the plaintiff's documents in that suit were struck out on **10/7/2006**.

30. I have seen the ruling of this court dated **30/10/2007** interpreting the striking out order to mean that all the suit papers filed against the plaintiff in **Bungoma HCCC 128 of 2001** had no legal effect from the outset.

31. However, it is not lost on this court that the plaintiff herein had filed a defence and counterclaim in the Bungoma suit and the defendant's

assertion that the plaintiff knew and participated, at least for a while in that suit is correct.

32. Notwithstanding all the above facts of the Bungoma suit against the plaintiff, the AFC was deemed as properly joined in the suit and orders were issued which orders bound it not to dispose of the property pending hearing and determination of that suit.

33. It has not been shown by the plaintiff that such orders were ever set aside. The plaintiff's averment that the AFC was not enjoined in this suit rings hollow in the light of his knowledge of and participation in the Bungoma suit.

34. In his evidence in chief in this suit, the plaintiff simply stated as follows:

" I do not know how the Bungoma case ended".

35. Later in cross examination the plaintiff stated:

"I do not know why my name was removed from Bungoma HCCC 128 of 2001".

36. In his evidence-in-chief in this case **DW1** stated as follows:

"I am aware of Bungoma HCCC No 128 of 2001. This case was between AFC and Nabayi Farmers Cooperative Society Ltd. This case is still going on".

37. Later on DW1 states as follows under cross-examination:

"I am not aware if Bungoma HCCC No 128 of 2001 was dismissed. Our advocate was Rono. Rono did not tell us that the Bungoma case had been dismissed".

38. Evidently, the Bungoma suit was filed earlier than this suit. However, no evidence was laid before the court by either party to show whether that suit ended and if so the final orders issued therein.

39. This is the plaintiff's case. From the very moment the defendant raised the issue, the burden lay upon the plaintiff to demonstrate by way of concrete evidence that, as sworn in his verifying affidavit, there was no other suit, either pending or determined, over the same subject matter.

40. **Section 6** of the **Civil Procedure Act** states as follows: -

"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

41. The plaintiff herein was aware of the Bungoma suit. Only a technicality regarding joinder was relied on in the striking out of the plaintiff's pleadings in the Bungoma suit. From an objective analysis of the record in this suit, this suit is a duplication of the Bungoma suit whose final fate this court has not been made aware of.

42. By the time this matter was placed before me for hearing the plaintiff had closed his case and the defendant had called one witness. The evidence of **DW2** was taken thereafter and the matter was reserved for judgment.

43. However it is necessary that parties be made aware that rules are made for the purpose of handling disputes between citizens in an organized way.

44. It would not do for a litigant who is aware that the dispute is pending before another court between the chargee who sold him land in exercise of a power of sale to rush to another court situate within another geographical territory while that dispute is pending and there lodge another suit against the plaintiff in the former suit.

45. It is worse when he fails to disclose that the former suit exists. However, the worst comes to pass when he approaches this court in an assuming manner in a second suit like this one, and fails to state in black and white whether the former suit has been terminated and in what manner.

46. This court is not bound to go about hunting for evidence that would aid only one party in the suit. It is worse when that party happens to be the plaintiff, who ought to establish his claim in such a manner that the defendant would be able to respond adequately.

47. In my view, the proper thing that the plaintiff herein should have done was to formally regularize his appearance in and cause himself to be enjoined in the Bungoma suit for the sole reason that the facts pleaded in the plaint and amended plaint therein affected the sale of the suit land to him.

48. In the circumstances I find that the defendant's objection on jurisdiction has merit. This court has no jurisdiction to determine this matter.

In view of this finding, it becomes necessary for this court to down its tools. There will be therefore no need to determine the rest of the issues framed hereinabove.

49. I hereby dismiss the plaintiff's suit with costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the plaintiff

Mr. Mokuu holding brief for Mukhooli for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019