



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 369 OF 2014

HILLARY KIBET MELLY.....PLAINTIFF

VERSUS

IRENE JERONO.....DEFENDANT

JUDGMENT

Hillary Kibet Melly, (hereinafter referred to as the plaintiff) has sued **Irene Jerono (hereinafter referred to as the defendant)** claiming that he is the sole registered owner of all that parcel of land known as **Pioneer/Ngeria Block 1(EATEC)9331**, measuring approximately 0.06 hectares having purchased the same from **Ambrose Kipyego Tuigong** on 17.9.2012. The defendant has without any colour or right or justification whatsoever encroached and trespassed onto the plaintiff's parcel of land whereby denying and interfering with the plaintiff's quiet possession of the property. The plaintiff's claim against the defendant is for an order of eviction against the defendant to vacate the plaintiff's land and an order of permanent injunction restraining the defendants, their servants and/or agents from encroaching, constructing, wasting, disposing, alienating and trespassing onto the plaintiff's parcel of land known as **PIONEER/NGERIA BLOCK 1 (EATEC) 9331**.

That the defendant has also unlawfully and without any colour of right and justification caused to be registered against the register of the aforesaid parcel of land a restriction and caution on 10th September, 2013 and 11th November, 2014 respectively. There is no suit pending neither are there previous proceedings between the plaintiff and defendant in respect of the above subject matter and cause of action. That demand and notice of intention to sue has been issued in vain.

The plaintiff prays for a declaration that the plaintiff is the sole registered owner of all that parcel of land measuring approximately 0.06 hectares known as **PIONEER/NGERIA BLOCK 1(EATEC) 9331**. He prays for an order of eviction against the defendants to vacate the plaintiff's parcel of land known as **PIONEER/NGERIA BLOCK 1(EATEC) 9331** and an order of permanent injunction restraining the defendant, her servants or agents from encroaching, constructing, wasting, disposing, alienating and/or trespassing onto the plaintiff's parcel of land known as **PIONEER/NGERIA BLOCK 1(EATEC) 9331** and an order directing and compelling the Land Registrar, Uasin Gishu County to cause to be lifted all that restriction and caution registered against the register title of land parcel **PIONEER/NGERIA BLOCK 1(EATEC) 9331** forthwith. Last but not least, he prays for costs of this suit.

In defence, the defendant states that the plaintiff is the registered proprietor of all that parcel of land known as **PIONEER/NGERIA BLOCK 1(EATEC) 9331** but avers that the title was acquired through fraud. The particulars of fraud on the part of the plaintiff are namely: -

- (i) Buying the said parcel of land while aware that the plaintiff had purchased the same on 13.02.2006 and was in possession and occupation of the same since then to date.**
- (ii) The defendant purchased the said parcel of land from one James Kiprono Sum while the plaintiff claims to have purchased the same from one Ambrose Kipyego Tuigong on 17.09.2012.**
- (iii) Purchasing the said parcel of land while knowing it had already been sold to the defendant.**
- (iv) Purchasing the said parcel of land from a person who knew he did not have or own land which he was selling.**
- (v) Purchasing the said parcel of land without verifying ownership status.**
- (vi) Obtaining a title over land the plaintiff knew was already sold and in possession of the defendant.**

The defendant denies the contents of paragraph 4 of the plaint to the effect that she has encroached and or trespassed onto the plaintiff's parcel of land and further that she has interfered with the plaintiff's quiet possession of the land. The plaintiff is put to strict proof. Contrary to what is stated above, the defendant states that she bought the disputed parcel of land on 13.02.2006 and took immediate possession while the plaintiff bought the same on 17.09.2012 and she therefore does not know or have any privity of contract with the plaintiff. The plaintiff is put to strict proof.

The defendant, in response to the claim in paragraph 6 of the plaint avers that having purchased the parcel of land for value and in priority to the plaintiff, the order of eviction cannot stand or issue and no injunction can issue against the defendant being the person in occupation since 13.02.2012.

The defendant registered the caution against the property as of right to protect her interest as a purchaser for value and a person in possession and occupation and the defendant is not aware of the restriction referred to by the plaintiff. The defendant is not aware of the contents of paragraph 7 but admits the contents of paragraphs 8 and 9 of the plaint. The defendant avers that the prayers sought cannot issue as against the defendant.

The defendant avers that this suit is bad in law, incompetent and an abuse of the court process on account of non-joinder of parties as the plaintiff has not joined the person who sold the land to him. The defendant hereby gives notice of intention to raise a preliminary objection on a point of law on account of non-joinder of parties and privity of contract at the first hearing. In the reply to defence, the plaintiff denies its contents and states that the same is a sham and ought to be struck out.

When the matter came up for hearing, Hillary Kibet Melly testified that on 17th September 2012, he entered into a sale agreement with one Ambrose Kipyego Tuygong for the sale of the parcel of land known as Pioneer/Ngeria Block I(EATEC) 9331 measuring approximately 0.06 hectares. This was after Ambrose Kipyego Tuygong had purchased the said parcel of land initially from one James Kiprono Sum. Ambrose Kipyego sold the said parcel of land to him at an agreed total consideration of Kshs. 345,000/= which amount he paid in full on 17.9.2012 when Ambrose Kipyego Tuyego and him entered into and executed the agreement for sale of land reference No. Pioneer/Ngeria Block 1(EATEC)9331. Ambrose successfully applied for Land Control Board consent which was issued to facilitate the transfer of land into his name. After paying all the requisite fees in terms of Stamp Duty and registration charges to the Government of Kenya, he was issued with an original Title Deed on 3rd October, 2012 by the Land Registrar, Uasin Gishu. He was unable to take physical occupation of the said parcel of land because the defendant herein had trespassed and illegally occupied his parcel of land. The defendant even went to an extent of registration of a caution and restriction over his parcel of land on 11th November, 2014 and 10th September, 2013 respectively. The defendant has refused and persists in illegally occupying his land despite demands for her to vacate his land. He has sought the assistance of his local chief and elders. Upon deliberations, the chief concluded and indeed confirmed that he is the rightful owner of the suit land as a purchaser for value and that the defendant herein has no proprietary rights whatsoever in the suit land. However, the defendant has refused to vacate his land and has persisted in the trespass therein without any colour of right or justification and has proceeded to cause the registration of a restriction and a caution against his parcel of land which has the effect of restricting him from undertaking any transaction over his parcel of land. He approached his lawyer's M/s Z. K. Yego Law Offices who issued a demand notice to Irene Jerono and later on filed suit on his behalf.

He prays that he be declared by this Honourable court as the sole, registered, true and legal owner of the suit land and consequently that the defendant be evicted from his land parcel No. PIONEER/NGERIA BLOCK 1 (EATEC)9331. A permanent injunction against the defendant also do issue and that this Honourable court orders that restriction and caution registered against his parcel of land by the defendant be lifted and removed forthwith plus costs of this suit.

Ambrose Kipyego Tuigong testified that on 17th September 2012, he entered into a sale agreement with the Plaintiff herein for the sale of land known as Pioneer/Ngeria Block 1(EATEC)9331 measuring approximately 0.06 hectares. At the time of the sale, he was the sole registered owner of the said parcel of land. The Plaintiff fully paid the consideration price in full of Kshs. 345,000/= at the signing of the agreement. He successfully applied for Land Control Board consent which was issued and executed all the requisite transfer documents which enabled the Plaintiff herein acquire registered title in his name. At the time of selling the said parcel of land to the Plaintiff, he had purchased it earlier on from James Kiprono Sum on 12th August, 2011. The said James Kiprono Sum had purchased the said parcel of land from Everlyne Lelei and David Mburu Wakaba but had not transferred the land to his name but was holding the original transfer documents and original title deed which he handed over to him to facilitate transfer into his name.

The defendant herein is a trespasser who has no legal justification to be physically occupying the Plaintiff's land which he personally sold to him. He makes this statement in support of the Plaintiff's prayer that he be declared the sole, rightful and registered owner of Pioneer/Ngeria Block 1(EATEC)9331 and further that the defendant be evicted from the said parcel of land and an order of injunction be issued restraining the defendant from occupying, disposing, wasting, alienating and/or trespassing onto the suit land that legally belongs to the plaintiff.

James Kiprono Sum PW2, testified that in the year 2001, he bought parcel of land known as Pioneer/Ngeria Block 1 (EATEC) 9331 from a lady known as Evelyne around 2011 his wife got sick and he had a son who was joining Form 1. So, he decided to sell the land parcel so that he could manage to meet the costs of the fees and treatment for his wife. He approached Mr. Ambrose Tuygong and asked him whether he could be interested in purchasing the piece of land. They negotiated and settled at a price of Kshs.150, 000/=, he paid him the whole amount and he signed for him all the required transfer documents. Later on, around October 2012, Mr. Ambrose Tuygong informed him that he had sold the land to Hillary Kibet Melly who he came to know and befriend. Around January 2013, Mr. Ambrose Tuygong visited him and informed him that a lady by the name Irene Jerono had moved into the parcel of land and built a temporary house she was living in. The name sounded familiar and after thinking for a while, he recalled that he had worked with her at National Housing Corporation where she had worked as a telephone operator and he as a building supervisor. He approached Irene and inquired why she had moved into the land and she failed to give any explanation. He told Ambrose to do whatever he could since he did not understand whatever was going on. He travelled back to Nairobi and went back to his village around November, 2014. Around November 2014, he was in his house and Irene in the company of police came to his house and arrested him with the offence of obtaining money by force pretenses. At the station, the Police Officers showed him agreements which they claimed he had signed. He asked the police to show him the original copies since he knows he had never signed any agreement with Irene Jerono. The Police failed to show him any original document or give him reasonable explanation as to why they could not show him the originals. He was charged with offence of obtaining money by false pretence and the case is still subsisting in court.

He prays that defendant be evicted from the land parcel No. PIONEER/NGERIA BLOCK 1 (EATEC) 9331. A permanent injunction against the defendant also do issue and that this Honorable court orders that restriction and caution registered against the parcel of land by the defendant be lifted and removed forthwith plus costs of this suit.

Irene CheronPW1 testified that on or about 13.2.2006, she purchased a parcel of land namely Pioneer/Ngeria Block 1/208 EATEC Plot No. 10 (temporary) measuring 1/8 of an acre from one James Kiprono Sum. The consideration was Kshs. 70,000/= out of which she paid Kshs. 55,000/= and the vendor acknowledged receipt. She took immediate vacant possession of the parcel of land and erected a temporary structure and moved into it. She has remained on the land to date. That sometime later before the date for clearing the balance of Kshs. 15,000 that is to say, 31.5.2006, she severally visited the office of Mr. James Kiprono Sum which was at Muya House but she found the same closed and she could not reach him. When Sum moved out of Muya House, he changed his phone number and he has never come to claim the balance from her. Mr. Sum sent his agent one Mr. Bitok who took her to the ground and showed her the Plot No. 10 Pioneer/Ngeria Block 1/208(EATEC) being the old Number before amendment of the R.I.M. to give the new numbers.

In 2012, while she was in South Sudan for some work, the lady called Mary whom she had left to take care of her land rang her and informed her that someone had come to the land with a Title Deed claiming that the land was sold to him. When she returned to Kenya from South Sudan, she met the Chief of the area one Chief Mr. Henry K. Togom who called Ambrose Tuygong to try to settle the matter but Ambrose did not attend the meeting.

In August 2012, Hillary Kibet Melly went to her land and tried to ask her caretaker Mary and other people to leave but they told him they did not know him at all. Afterwards, Hillary Kibet Melly went to the land and she met him and he called Ambrose Tuygong who came and she saw him for the first time. The three of them rang James Kiprono Sum who was in Nairobi and could not come to Eldoret. James Kiprono Sum did not come to settle the problem for a long time until she asked the police through the D.C.I.O. who assisted in having him arrested sometime in November, 2014 and he was charged with the offence of selling her property to a third party.

She has been in occupation of the land since 2006 to date. The land was later given a new Number namely Pioneer/Ngeria Block 1 (EATEC) 9331. The plaintiff herein Mr. Hillary Kibet Melly sued her in this case alleging that he has a Title in his name. She did not know Melly until the day he came to the land with Ambrose Tuygong.

She prays that the suit be dismissed with costs and she be allowed to obtain title in her name as she has no dealings with Mr. Melly.

The plaintiff submits that he is the sole registered proprietor of land parcel number PIONEER/NGERIA BLOCK 1(EATEC) 9331 having obtained title to the suit property on 13.10.2012. His title has not been challenged through a counterclaim seeking cancellation of the title. The suit parcel was unencumbered at the time of the purchase. There is no evidence that his title was illegally, corrupting or unprocedurally obtained. The plaintiff submits further that the transaction between the defendant and James Kiprono Sum was a nullity as the consent of the Land Control Board was not obtained.

The gravamen of the defendant's submissions is that there is no privity of contract between the plaintiff and the defendant. The plaintiff did not enter into any agreement with the defendant. The plaintiff bought the land from a different person so did the defendant. The defendant argues that the title to the property held by the plaintiff was not acquired legally as at the time the plaintiff obtained title, the defendant was in possession.

I have considered the pleadings, evidence and submissions and do find that the registration for PIONEER/NGERIA BLOCK 1(EATEC) 9331 was opened on 7.11.2007 after subdivision of Plot No. 208. It was registered in the names of Everlyne Lelei and David Mburu Wakaba on the 7.1.2007, but later transferred to Ambrose Kipyego Tuygong and title deed issued on the same date on the 3.10.2012 the property was registered in the names of Hillary Kibet Melly and title deed issued. A restriction was entered on 10.9.2013.

The plaintiff has demonstrated that he entered into agreement with Ambrose Kipyego Tuygong on the 17.9.2012 for the purchase of the suit parcel of land at a consideration of Kshs.345,000. He paid the purchase price and that the defendant has encroached on the parcel of land without any explanation.

The defendant on the other hand has demonstrated that on the 13th February, 2006, James K. Sum entered into agreement with the defendant in respect of land parcel No. PIONEER/NGERIA BLOCK 1(EATEC) 9331 for sale of Plot 10 (temporary) pending survey measuring 1/8 of an acre of the said parcel of land. The consideration was Kshs.70,000. The defendant paid Kshs.55,000 as point payment. The balance of Kshs.15,000 was to be paid on or before 31.5.2006. The said Sum has never claimed the balance but showed her the plot which she took possession.

It is clear that the plaintiff bought the parcel of land after subdivision of 208 that created 9331 but the defendant bought the same portion of land from Sum before subdivision. Upon subdivision, Parcel No. 9331 was created and registered in the names of the plaintiff. Upon subdivision and registration of the plaintiff as the proprietor of parcel No. 9331 he became the absolute owner of the property.

Section 24 of the Land Registration Act provides that subject thereto: —

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act states as follows: -

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all

privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 states as follows; -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

There is no evidence of fraud, illegality or corruption on the part of the plaintiff.

The defendant on the other hand bought the land from James K. Sum. The land he was buying is described as Plot 10 measuring 1/8 of an acre of PIONEER/NGERIA BLOCK 1/208 (EATEC). The parcel of land that was being bought by the defendant is not clearly defined. It is not clear whether Plot No. 10 became Pioneer Ngeria Block 1/9331. This court finds that the plaintiff being the registered owner of the suit parcel of land and there being no evidence of fraud in obtaining the title deed.

On the other hand, I do find that the defendant entered into agreement with James K. Sum for the purchase of 1/8 of an acre of the land No. 208 before subdivision but upon subdivision, Mr. James K. Sum did not comply with the terms of agreement. The transaction was a nullity as the consent of the Land Control Board was not obtained contrary to Section 6 of the Land Control Act.

Moreover, the doctrine of constructive trust cannot be applied against the plaintiff as the plaintiff is an innocent purchaser for value and without notice of any wrongdoing. Ultimately, I do find that the plaintiff has proved his case on a balance of probabilities and the judgment is hereby entered in terms of a declaration that the plaintiff is the sole registered owner of all that parcel of land measuring approximately 0.06 hectares known as PIONEER/NGERIA BLOCK 1(EATEC) 9331.

I do order the defendants to vacate the plaintiff’s parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 9331 upon being given 45 days’ notice.

Further, I do grant an order of permanent injunction restraining the defendant, her servants or agents from encroaching, constructing, wasting, disposing, alienating and/or trespassing onto the plaintiff’s parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 9331.

Lastly, I do issue an order directing and compelling the Land Registrar, Uasin Gishu County to cause to be lifted all that restriction and caution registered against the register title of land parcel PIONEER/NGERIA BLOCK 1(EATEC) 9331 forthwith. Costs to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 24th day of January, 2019.

A. OMBWAYO

JUDGE