



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 114 OF 2013

MIRIAM KUBAI.....PLAINTIFF

VERSUS

MARGARET NEKESA MOSES.....1ST DEFENDANT

PHILIP WACHILONGA.....2ND DEFENDANT

CHRISTINE WANJALA WABOMBA.....3RD DEFENDANT

JUDGMENT

1. The plaintiff commenced this proceedings by way of a plaint dated **9th September, 2013** and filed in court on **10th September, 2013**. She prayed for judgement against the defendants for:

(i) A declaration that the Plaintiff is the sole and legal owner of Plot/Land measuring 0.1 acres being part of Plot Number. 260 In Masaba Farm, formerly referred to as Land Reference No. 4538/2.

(ii) A permanent injunction restraining the defendants, their agents, servants, employees and/or any persons claiming title through them from entering, constructing, wasting, alienating, damaging, fencing and /or in any other ways/ manner interfering with the said suit land measuring 0.1 acres part of Plot Number 260 Masaba Farm.

(iii) Costs of the suit

(iv) Any other relief the court deem fit and just to award.

2. The plaintiff avers that he is the owner of **0.1 acres** being part of Plot No. 260 Masaba Farm Kiminini formerly referred to as **LR No. 4538/2** and that she bought that portion from one John Andove (now deceased) in **March, 2009**; however the defendants have trespassed on the said parcel hence this suit.

3. The 1st defendant filed a defence dated **25th September, 2013** on the same day. In that defence she avers that she is the lawful owner of Plot No. 260 Masaba Farm Kiminini which is formerly part of LR No. 4538/2; that she has been in lawful occupation and use of the land since **1999** when she and John Andove jointly bought the land; that the plaintiff was deceived by the 1st defendant's co-wife into buying the suit land, and the suit is defective.

4. The 2nd and 3rd defendants filed their defence dated **11/12/2013** on **16/12/2013**. In that defence they denied the plaintiff's allegation of trespass and averred that they reside in Kiminini sub-location about 3 kilometres away from the disputed plot which is located in Nabiswa. They denied they have any claim or interest of any portion of Plot No. 260 Masaba Farm; that they have never engaged in any construction work on the plot as alleged and that the suit should be dismissed with costs.

5. This suit came up for hearing on **24/6/2015** when the plaintiff testified as **PW1**. She adopted her statement filed in this case on **10/9/2013**. She reiterated the contents of the plaint and her statement. Her evidence is that the 1st defendant brought the 2nd and 3rd defendants to the land and that the 2nd and 3rd defendants asked her for documents in support of her claim to having purchased the land. She maintained that she bought the land from **John Andove** on **10/3/2009** whereupon she paid **Kshs.70,000/=**. She produced the original agreement between her and John as **P. Exhibit 1**. She avers that she was given vacant possession and that she built a house on the plot and she has been living on that plot. She stated that the 2nd and 3rd defendants completed the house they were putting up and are now staying on the suit land. She produced a copy of the death certificate of John Andove showing that he died on **5/10/2009**. She maintained that John Andove was selling the land as an individual and that he was not in joint ownership with any other person.

6. **PW1** also testified that she was present at John Andove's burial and that when those who owed John Andove money were called she was one of them. She identified John Andove's wife as Agnes Khasiala Andove. She states that at the burial she declared that she had **Kshs.50,000/=** which she owed the deceased and that she paid that money to the eldest son of John Andove in the presence of Agnes Khasiala Andove whereupon they signed on the agreement that they had received that money. They later went to the chief's office with Agnes with her son to confirm that she did not owe the family any more money so that she could begin constructing a permanent house on the plot. It was her evidence that John Andove had bought the land from one Rosemary N. Wafula on **21/9/1999**. She produced minutes of the family of the late John Andove held after his burial on **15/10/2009** and averred that **Kshs.50,000/=** being the money she had paid and **Plot No. 260** were reflected in those minutes.

7. When cross examined by Mr. Bungei she stated that she only came to know the defendants when she found them on the suit land; that she did not know if the 1st defendant is John Andove's wife and that Philip Wachilonga proceeded to build his house on the suit land after the court declined the plaintiff an injunction.

8. **PW2 Francis Milimo Yayuka** testified on **8/2/2016**. He testified that John Andove was his son and Agnes Khasiala was his wife. He recognized the proceedings of the family meeting held on **15/10/2009** which addressed the deceased's assets, debts and other issues. He testified that the deceased had sold his plot to Miriam Kubai the plaintiff in order to raise money for medication and that Miriam assisted the family when John Andove died. He confirmed that Miriam has since paid the balance of **Kshs.50,000/=** and that that money was received by Kenneth Andove who is son to John Andove in the presence of Agnes Khasiala. Under cross examination he denied knowing Margaret Nekesa the 1st defendant or that John Andove had two wives.

9. **PW3 Agnes Khasiala Sisiko** testified on 8/2/2016. She stated that John Andove was her late husband who owned the suit land and that before he died he had sold the land to the plaintiff. She died selling the land and maintained that Miriam initially paid **Kshs.20,000/=** to her land husband as first installment and the balance of **Kshs.50,000/=** was paid to her son Kenneth Andove. She averred that she took the money because she wanted to raise fees for her children. She acknowledged that she and her son were present when the agreement between John Andove and Rosemary Nafula.

10. **DW1 Margaret Nekesa, the 1st defendant** testified on **15/11/2018** and adopted her statement filed in court on **25/9/2013**. During examination in chief she first stated that she bought the suit land from one Roseline Namala and soon thereafter stated it was her husband who purchased it from Roseline. She confessed being illiterate but maintained she was present when the agreement was made; that after purchase of the land they lived on the plot after which she became sick and went home. Later she heard that John Andove was selling the land; that she was not present when the land was being sold; that Kennedy is son to Agnes Khasiala whom she terms as her co-wife; that since she bought the land jointly it cannot be sold as she has his children. She admitted not having the original agreement and attributed the loss to the demolition of her house during which she alleged to have lost things. When cross examined she admitted she normally affixes her thumbprint rather than writes her signature by pen when she is required to execute the documents. She defended her use of the name Moses at the end of her first and second names saying that Moses is her uncle. She admitted that **40** days after John Andove died there was a meeting in his home. She maintained that Francis Milimo was just an uncle to John Andove. She acknowledged that Philip Wachilonga and Christine Najala were her neighbour's in Kiminini next to the suit land. However, she died having ever tried to sell them the suit land. She denied knowledge of the presence of any building brick on the suit land and averred that she does not know if the plaintiff's worker lives on the suit land. She maintained that Miriam the plaintiff does not live on the plot and that does not know whether the 2nd and 3rd defendants are husband and wife. With that the defendant closed her case and the court orders submissions to be filed. The plaintiff filed her submissions on **30/11/2018**. I have looked through the record and found that no submissions on the defendants are in the record.

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

(i) Did the plaintiff purchase the suit land from John Andove or from Agnes Khasiala?

(ii) Have the defendants trespassed on the suit land?

(iii) What orders should issue?

12. I have analysed at length the evidence of the witnesses in this case. The plaintiff called two independent witnesses to testify in aid of her case. The defendant alone testified in her defence.

13. The documentary evidence in this case points to the fact that there was an agreement between John Andove and the plaintiff. That is the agreement for the sale of the suit land to the plaintiff. The plaintiff took possession and remained on the land by virtue of that agreement till the defendants came onto the scene.

14. The plaintiff's witnesses confirmed that the minutes of the meeting held by the seller's family after the seller's death that recognized the sale of land to the plaintiff were genuine and that the outstanding purchase price was paid after the demise of the seller to John Andove's son, Kennedy. The original agreement vide which the deceased had purchased the land from one Rosemary N. Wafula was in the possession of the plaintiff and she produced it as **P.Exhibit 3**.

15. The evidence of the plaintiff above was not controverted.

16. Though she claimed to have been involved in the purchase of the suit land she never produced any documentary or oral evidence to substantiate that claim. Though she claimed that the plaintiff purchased the land from **PW3** was not established to be true. She never produced any copy of an agreement between the plaintiff and **PW3** to prove that allegation. In the circumstances this court must believe, on the basis of the evidence on the record, that **P.Exhibit 3** is genuine.

17. The defendant's evidence is uncorroborated, weak and unreliable.

18. However I have considered the submissions of the defendant concerning the agreement. He states that the agreement was made on 26/4/2012 while the acknowledgement of receipt of the balance of the purchase price by the deceased's son is expressed on the said agreement to have occurred on 15/11/2011. I think the two dates were adequately explained by the witnesses.

19. According to the evidence on the record the date 15/11/2011 is when the Ksh 50,000/= was paid by the plaintiff to the deceased's son while the date 26/4/2012 is when the plaintiff and members of the deceased's family went to the chief's office to clarify that there was no balance remaining in respect of the purchase price and that the plaintiff could develop the land. There is indeed an official stamp of the assistant chief, his name and signature and designation clearly marked beside that date. The submission by the defendant attempting to discredit the evidentiary value of that agreement (PEXh 1) is not well founded.

20. As to the claim of trespass, the plaintiff's evidence is that the three defendants accumulated building bricks on the suit land, and that during the pendency of this suit, the 2nd and 3rd defendants completed the construction of a house on the suit land. The 2nd and the 3rd defendants never called evidence to rebut the plaintiff's evidence.

On the other hand the very defence filed by the 1st defendant shows that she has never recognized the plaintiff's claim over the portion she purchased from the deceased.

At paragraph 5 of her defence she alleged to be the owner who is in occupation of the suit land since 1999. However this court has noted that part of her evidence is that at one time she ceased being in possession of any part of the suit land and that during that interregnum she heard that John Andove was selling the land. In my view the plaintiff has established that the three defendants trespassed on the plot and interfered with her peaceful occupation thereof.

21. In the end I find that the plaintiff has proved his claim against the defendants and I hereby enter judgment in her favour against the defendant jointly and severally and I issue the following orders:

(i) A declaration that the Plaintiff is the sole owner of the Plot/Land measuring 0.1 acres being part of Plot Number. 260 in Masaba Farm, formerly referred to as Land Reference No. 4538/2 sold to her by John Andove(deceased).

(ii) A permanent injunction restraining the defendants, their agents, servants, employees and/or any persons claiming title through them from entering, constructing, wasting, alienating, damaging, fencing and /or in any other ways/ manner interfering with the said suit land measuring 0.1 acres part of Plot Number 260 Masaba Farm.

(iii) The defendants shall bear the costs of this suit.

It is so ordered.

Dated, signed and Delivered at Kitale on this 28th day of February, 2019.

MWANGI NJOROGE

JUDGE

28/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Elias

Mr. Ingosi holding brief for Onyancha for plaintiff

N/A for defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

28/2/2019