



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 131 OF 2015

BERNARD NYAWADE OKETCH.....1ST PLAINTIFF

JOHN OUMA MAGERO.....2ND PLAINTIFF

= VERSUS =

HENRY IMALU OYIEL.....DEFENDANT

J U D G M E N T

1. By a Plaint dated 28th October 2015 and filed on 18/11/2015 the Plaintiffs, **BENARD NYAWADE OKETCH** and **JOHN OUMA MAGERO** instituted this case against the Defendant **HENRY MAILU OYIEL**. The Plaintiffs pleaded that they were the sole registered owners of the land parcels known as **LR Nos BUKHAYO/MALANGA/2979** and **BUKHAYO/MALANGA/2980** respectively. The two parcels were resultant subdivisions of **BUKHAYO/MALANGA/482** which devolved upon them and other parties by transmission.

2. The Plaintiffs pleaded further that sometime in 2014, the Defendant illegally trespassed upon the property and registered restrictions against **LR Nos BUKHAYO/MALANGA/2979** and **BUKHAYO/MALANGA/2980** yet he did not have any purchaser's interest in them nor was he related to the Plaintiffs. They then filed suit against him and prayed for an order of his eviction from **LR Nos BUKHAYO/MALANGA/2979** and **BUKHAYO/MALANGA/2980**, removal of restrictions thereon, and costs of the suit.

3. The Defendant entered appearance on 20th January 2016 and filed his Defence on the same date. He denied the Plaintiffs' allegations of trespass and averred that his occupation of the suit properties was by consent and by virtue of a valid sale agreement with the Plaintiffs. He pleaded further that the inhibition and cautioning of **LR Nos BUKHAYO/MALANGA/2979** and **BUKHAYO/MALANGA/2980** was justified as he had a purchaser's interest in the properties. The Defendant denied this Court's jurisdiction to determine the case on the basis that there was another case pending before the Land Registrar on the same subject matter.

4. The hearing of the case commenced on 2nd May 2017. The two Plaintiffs testified as PW1 and PW2 and a third witness, **WILSON OTIENO MAGERO**, PW3 gave evidence in support of their case. PW 1 testified that he is the owner of Land Parcel No. **LR BUKHAYO/MALANGA/2979** as at 23rd September 2015 having purchased it from one **JAMES OCHIENG MAGERO**. He stated further that the Defendant had occupied the aforementioned property from 2014 before he bought it. He had done his due diligence by conducting a search on the original property at pre-subdivision stage which showed the owners as **WILSON OUMA MAGERO, JOHN OUMA MAGERO, JAMES OCHIENG MAGERO** and **OKENDA KAALA WOMEN GROUP**.

5. PW1 testified that the Defendant was not entitled to ownership or occupation of the property in any way whatsoever. He had not sold it to the Defendant and was not related to him. He did not have any title documents to the property. The Defendant caused a caution to be placed on the land and refused to remove it despite being summoned to appear before the Land Registrar. The Defendant however stopped using the land after the suit was instituted. PW1 prayed for the caution to be removed as well as costs of the suit.

6. PW2 mostly rehashed PW1's testimony. He testified that he was the registered owner of Land Parcel No. **LR BUKHAYO/MALANGA/2980** upon which the Defendant had also placed a restriction. Just like PW 1, PW 2 was categorical that he had not sold his land to the Defendant for Kshs. 100,000 as alleged nor was he related to him. He stated further that it was his brother, **JAMES OCHIENG' MAGERO** who sold land to the 1st Plaintiff. He however admitted that the Defendant had leased the property to plant sugarcane which exercise was undertaken by the Defendant's wife. The Defendant built a house that is on the property to date and lived with his wife thereon for 3 months. The property was given to PW2 by his brother **JAMES** and he was not sure whether it had been sold to any other party before. PW3 basically reiterated the testimony of his counterparts.

7. The Plaintiffs produced the following exhibits in support of their case:

P.Exh 1: Title Deed for LR No. BUKHAYO/MALANGA/2979

P.Exh 2: Certificate of Official Search for LR No. BUKHAYO/MALANGA/2979

P.Exh 3: Title Deed for L. R. No. BUKHAYO/MALANGA/2980

P.Exh 4: Certificate of Official Search for LR No. BUKHAYO/MALANGA/2980

8. The Defendant testified as DW 1. He asserted that he bought a portion of the original **LR. No. BUKHAYO/MALANGA/482** measuring 1 acre for a consideration of Kshs.100,000 sometime in 2011. He lived on the property for 4 years where he built a house, toilet, dug a well and cultivated sugarcane. He also fenced the property. DW1 admitted that he did not have a sale agreement as evidence of the aforesaid transaction. Interestingly, he rejected paragraph 4 of his defence that states that he occupied the land by virtue of a sale agreement that the Plaintiffs had neither rejected nor repudiated. DW1 testified further that he did not obtain the Land Control Board's consent and confirmed that the Plaintiffs were the registered owners of **BUKHAYO/MALANGA/2979** and **2980**. He placed restrictions on the said properties but ceased occupying them in March 2015. DW1 prayed for the Plaintiffs' case to be dismissed with costs.

9. Both sides filed submissions. The Plaintiffs' were filed on 23rd November 2017. The Plaintiffs submitted that they were entitled to the orders sought as they were the sole absolute registered owners of the suit properties with titles and searches indicating the same as proof. They quoted sections 24(a) and 26 of the Land Registration Act on absolute ownership and indefeasibility of title. It was further submitted that the Defendant admitted to encroaching upon the suit properties by building structures. He also did not produce any documents showing he purchased the properties as alleged and did not obtain the Land Control Board's consent for the transfer and subdivision of his portion. The Plaintiffs relied on sections 6 and 8 of the Land Control Board Act Chapter 302, Laws of Kenya to buttress this point.

10. The Defendant's submissions were filed on 7th March 2018. The Defendant's counsel submitted that there was no trespass as the Defendant had already harvested his sugar cane from the suit properties and does not reside thereon. He submitted further that the restrictions by virtue of a purchaser's interest were justified at the time because the properties had been sold to the Defendant by the previous owners.

11. I have considered the parties' pleadings, submissions and applicable law. It is trite law that he who alleges must prove. The Plaintiffs availed title documents and searches proving that they are the owners of **LR. Nos BUKHAYO/MALANGA/2979** and **2980**. The Defendant on the other hand did not produce any documents showing his interest and entitlement to the suit properties. He spoke of a transaction where he bought a portion of the original **BUKHAYO/MALANGA/482** in 2011. However, he did not produce a sale agreement to substantiate his claim. If at all the sale occurred then it was handled very casually to the detriment of the Defendant. All dealings in land must be in writing. I am inclined to follow the pronouncements of the Court in the case of **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR: "It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market..."**

12. Moreover, the Defendant did not take any steps to regularize his position after registering the cautions. In his Defence, it was stated that there was a case pending before the Lands Registrar. However, no document was presented to back up this claim. It is therefore clear that the Defendant has not entitlement whatsoever to ownership or occupation of the suit properties. In the case of **Mbira Vs Gachuhi 2002 1 EA Page 138** Kuloba J. as he then was held as follows, **"Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser"**.

13. The Defendant had denied the jurisdiction of the court to handle the matter on the ground that such jurisdiction is vested in the Land Registrar. He even intimated that he would raise a preliminary objection on this ground. The preliminary objection was never raised and no reference was made to this issue again in the proceedings. The court therefore does not know what the Defendant meant. As it was not even demonstrated that there was a dispute before the Land Registrar, it is unnecessary to make any findings on this issue.

14. In light of the foregoing the Plaintiff's claim succeeds in terms of prayers (b) and (c). As regards the prayer for eviction, both parties have confirmed that the Defendant is no longer on the properties hence it has been overtaken by events.

Dated, signed and delivered at Busia this 26th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs: Present

Defendants: Present

Counsel for Plaintiffs: Present

Counsel for Defendant: Absent

Court Assistant: Nelson Odame