



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 139 OF 2013

VINCENT SAMSON ODUOR.....PLAINTIFF

VERSUS

DISMAS OTIENO OGOYA.....DEFENDANT

JUDGEMENT

1. Vincent Samson Oduor, the Plaintiff, commenced this suit against Dismas Otieno Ogoya, the Defendant, through the plaint dated the 5th June 2013 and filed on the 6th June 2013. The Plaintiff seeks for;

a) “An order for eviction from parcel No. N. Ugenya/Sega/2066 by himself, his agents, servants, and other persons claiming through him.

b) Costs of the suit.

c) Any other relief.....”

He avers that N. Ugenya/Sega/2066 originally belonged to his late father Gabriel Onyango Rawayo alias Mutula. That after Mutula’s death, the Defendant forcefully took possession and occupied two portions of the land under titles N. Ugenya/Sega/2321 and 2322, alleging to have bought them from the deceased. That the Plaintiff filed Kisumu H. C. Succession Cause no. 102 of 2011 and obtained registration with N. Ugenya/Sega/2066 through transmission. He then filed this suit for eviction orders.

2. The Defendant opposed the Plaintiff’s claim through the statement of defence dated and filed on the 6th September 2013, averring that he bought and got registered with North Ugenya/Sega/2322 from the late Onyango Rawayo Mutula. That he established a home there in 2004. That he also bought parcel 2321 which he uses for farming. That the Plaintiff is a son to George Odhiambo, who is brother Ogola Omwanda and the late Onyango Rawayo Mutula. The Defendant also indicated in the defence that he will be raising a preliminary objection, and subsequently filed the notice of preliminary objection, dated the 7th October 2013 before appointing an advocate who filed the notice dated 10th February 2014.

3. The Plaintiff filed the notice of motion dated the 27th March 2017, seeking for leave to amend the plaint to add a prayer to cancel parcels North Ugenya/Sega/2321, 2322 and 2321 purported to be subdivisions of parcel 2066. The application appears not to have been served, as there is no affidavit of service filed. There is also no evidence that it was ever heard and or granted. Therefore the annexed amended plaint has not been formally filed.

4. The Plaintiff testified as PW1 and called George Odhiambo Rawayo, who testified as PW2. Their evidence is that after the death of the first registered proprietor of the suit land parcel North Ugenya/Sega/2066, the Plaintiff filed Kisumu H. C. Succession Cause No. 102 of 2011 and got registered with the land through transmission on the 11th September 2012. That the Defendant had by then settled on two portions of the suit land referenced as North Ugenya/Sega/2322 and 2321, registered on the 31st March 2000 and 20th February 2008 respectively, claiming that he had bought them from the deceased. That when the defendant was asked for documentary evidence to support the acquisition, he had none. That a search at the Land registry did not support the Defendant’s claim that the two parcels were subdivisions from the suit land which was still intact. The Plaintiff then filed this suit. During cross examination PW1 stated that the survey map for Sega area shown to him by counsel for the Defendant, that was obtained on the 21st November 2013, had two parcels bearing number 2321, while parcel 2066 does not appear. He confirmed that the Defendant home is on parcel 2322. He added that the parcels 2321, 2322 and 2323 were created through fraud as no sale agreement existed between the Defendant and the first registered proprietor of parcel 2066.

5. The Defendant testified as DW1 and called Dickson Okore Ndulo, the District Land Registrar Ugenya/Ugunja Sub counties, who testified as DW2. The Defendant told the court that he bought portions of land parcel North Ugenya/Sega/2066 from the owner, Gabriel Onyango, in 2000 and 2008 which are now registered as parcels 2321 and 2322 respectively. He informed the court that they had made written sale agreements that was witnessed by the late Ogolla and obtained the Land Control Board Consents. That the surveyor then subdivided and

registered the parcels but the sale agreements have since got lost. That he has lived on parcel 2321 for 17 years and parcel 2322 for nine years without any challenge from the Plaintiff until 2013, when this suit was filed after the original owner's death. During cross-examination, DW1 denied that parcel 2066 has never been subdivided insisting that it was subdivided, giving rise to parcel 2321 and 2322 which were registered in his names in 2000 and 2008 respectively. That he had not conducted a search before buying the two parcels, but relied on the confirmation from the surveyor. That he had no documentary evidence from the Land Control Board or the Land registrar to confirm that they had authorized the subdivision of parcel North Ugenya/Sega/2066. In re-examination DW1 said he bought parcels 2321 and 2322 in 2008 and 2000 respectively as indicated by the certificates of official searches. DW2 produced the survey sheet map No. 13 for North Ugenya/Sega that showed that there were two parcels bearing No. 2321. It also contained parcel 2322. The witness also produced the green cards for parcels 2321 and 2322 in the name of Defendant and contained details of the cautions filed by the Plaintiff on the 30th April 2013. That upon the witness being shown certificates of official searches for North Ugenya/Sega/2066 dated 6th June 2013 and 28th March 2017 that indicated the land was in existence contrary to his position that it did not exist, he requested for time to look for the copies of the mutation forms, Land Control Board Consent and transfer documents used to create and register parcels 2322 and 2321. The court granted him time and when he came back after about ten months he informed the court that he had not traced any of the aforementioned documents. He further told the court that he had prepared and filed a report dated the 11th December 2017 with the court which shows that the records held at the Land registry indicates that land parcel North Ugenya/Sega/2066 was still intact and in the of the Plaintiff. That upon consulting the surveyor on the Registry Index Map No. 13 for North Ugenya/Sega, he was informed that existence of two parcels bearing number 2321 on the map is an error as one should read 2323. That he visited the Siaya District Lands office and was given access by the Land Registrar, Mrs. Phelesia Ocheya, to check on the records and there was no document traced on the presentation of documents for subdivision of North Ugenya/Sega/2066 or transfer of any parcels subdivided thereof to the Defendant. That upon visiting the offices of Jooyata Surveyors who reportedly did the subdivision for the Defendant, they had no documentary evidence to confirm that the subdivision had been effected. That a visit to the County Surveyors office could not yield any copy of mutation forms under which the subdivision of North Ugenya/Sega/2066 could have been done. The witness also visited the suit land with the District Surveyor and found the following;

- **That parcel 2321 is occupied by relatives of the late Onyango Rawayo Mutula and is also where he was buried.**
- **That parcel 2322 is occupied by the Defendant and his family.**
- **That parcel 2323 is still in the name of the late Onyango Rawayo Mutula. That Defendant has been claiming that this parcel was number 2321, which is erroneous in view of the arrangement of the title numbers of the actual piece of land.**

During cross-examination DW2 confirmed that the documents held at Land Registrar's office indicated that North Ugenya/Sega/2066 was registered with the Plaintiff and was still intact.

6. That at the close of oral evidence, the Plaintiff and Counsel for the Defendant undertook to file and exchange submission. The Counsel for the Defendant filed their undated submissions on the 11th October 2018. The Plaintiff had earlier filed his written submission dated the 27th March 2017 on the 7th November 2017 long before the defendant closed his case.

7. The following are the issues for the court's determinations;

- a) **Whether land parcel North Ugenya/Sega/2066 exists, and whether the Plaintiff was registered as its proprietor regularly, legally and procedurally.**
- b) **Whether the Defendant is in occupation of any portions of North Ugenya/Sega/2066, and if so, whether he has any legal or beneficial rights to be there.**
- c) **Whether eviction order against the Defendant should issue.**
- d) **Who pays the costs of this suit.**

8. The Court has after carefully considering the pleadings by both parties, documentary and oral evidence tendered, written submissions, come to the following conclusions;

a) That the copy of the green card for North Ugenya/Sega/2066 issued on the 20th November 2013, title deed issued on the 11th September 2012, certificates of official searches dated 21st April 2010, 6th June 2013 and 28th March 2017 confirms that the land was first registered on the 23rd June 1998 in the name of Onyango Rawayo Mutula, having been subdivided from North Ugenya/Sega/1245. That the land was on the 11th September 2012 registered on the name of the Plaintiff through transmission and as of the date the certificate of official search dated the 28th March 2017 was issued, the land still existed under the same proprietorship.

b) That though the Defendant has claimed that he bought two parcels of land from the late Onyango Rawayo Mutula, out of North Ugenya/Sega/2066, that were registered after subdivision as North Ugenya/Sega/2321 and 2322 in year 2008 and 2000 respectively and in support referred to two certificates of official searches and copies of the title deeds showing the dates of his registration as 20th February 2008 and 31st July 2000, the existence of the two titles as subdivision from North Ugenya/Sega/2066 has been disputed by the Plaintiff. That the existence of the said titles has further been questioned through the evidence of DW2 who confirmed that the source documents like the mutation forms of parcel 2066, Land Control Board Consents to subdivide and transfer plus the transfer form in favour of the Defendant of the parcel 2321 and 2322 did not exist at the Land Registrar's and surveyor's offices.

c) That the Defendant alleged that he had entered into written sale agreements with Onyango Rawayo Mutula and that they had obtained the Land Control Board Consents. That however he could not avail a copy of the sale agreements or consent to the court. That the Defendant having known that his title to the portions of North Ugenya/Sega/2066 was under challenge, he had an obligation to show that he had acquired the said land and the title legally, formally and free from any encumbrances as was held by the Court of Appeal in **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**. That the testimony of the plaintiff and DW2 clearly shows that as land parcel North Ugenya/Sega/2066 is still intact in the way it was registered on the 23rd June 1998, then the alleged subdivision on the parcel to create North Ugenya/Sega/2321 to 2323 on the 31st March 2000 cannot have been done and registered legally, regularly and procedurally. That the titles the Defendant holds over portions of North Ugenya/Sega/2066, not having been legally and formally created and registered are incapable of granting or conferring upon him the right of an absolute and indefeasible proprietor envisaged in **Section 26 of the Land Registration Act No. 3 of 2012**. The court agrees with the finding of Kemei J in **John Kiguro Karume vs Kenya Institute of Administration & 4 Others [2017] eKLR** where she held;

“20. In the case of Milankumar Shah and 2 Others vs City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (OS) the court held;

“We hold that the registration of title to land is absolute and indefeasible to the extent, first, that the creation of such title was in accordance with the applicable law, and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or a body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest”.

21. The concept of absolute and indefeasible ownership of Land cannot be clothed with legal and constitutional protections if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner, if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Others vs A/G & Another, HCCC No. 145 of 1997, it was held that *the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.*”

d) That the Plaintiff’s prayers are only eviction and costs as per the plaint dated the 5th June 2013, in view of the court’s earlier observation that the amended plaint attached to the notice of motion dated the 27th March 2017 was never formally filed, as the motion was never served and or heard. That accordingly and as parties are bound by their own pleadings and the court cannot determine issues not before it, the cancellation of North Ugenya/Sega/2321 and 2322 that the Defendant claims he owns is not a prayer before this court. That however, it is clear that the said parcel North Ugenya/Sega/2321 to 2323, if at all they legally exist in the documents held at Land Registrar’s Office, none of them is a subdivision of North Ugenya/Sega/2066 whose acreage has since 23rd June 1998, when it was first registered, remained as 1.01 hectares. The Defendant should possibly follow the surveyor who allegedly did the survey for him, and the Land Registrar who allegedly registered the non-existent mutation to point out for him where his parcels are positioned on the ground. That from the available evidence, the Plaintiff, whose title to the suit land through transmission has not been challenged, even by his father, PW2, has established that the Defendant is a trespasser on the suit land. That accordingly the Plaintiff is entitled to the prayers sought.

9. The court therefore enters judgment for the Plaintiff against the Defendant and orders as follows;

a) That the Defendant having been found to be a trespasser on land parcel North Ugenya/Sega/2066 is hereby ordered by himself, and or all other persons claiming through him, to vacate from the said land and give vacant possession to the Plaintiff within 90 (ninety) days, and in default eviction order to issue.

b) That the Defendant do pay the Plaintiff the costs of the suit.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff Present

Defendant Present

Counsel Mr. Odongo for Ingosi for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE