



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 58 OF 2017

(FORMELY KISII ELC CASE NO. 938/16, & KISII HCCC 281A OF 2010)

ELIZABETH PRISCA OMOLLO.....PLAINTIFF

VERSUS

JANE OCHUODHO.....1ST DEFENDANT

THOMAS KAWI ONJAGO.....2ND DEFENDANT

JUDGMENT

1. The property in dispute is LR. No. KANYAMWA/KAYAMBO/KWAMO/1649 (Herein after referred to as the suit land). It is approximately one (1) acre in area.
2. By a plaint dated 26th June 2012 filed on 18th July, 2012, the plaintiff represented by learned counsel Mr. Otieno Ayayo of the firm of Otieno C.O. Ayayo and Company Advocates has sued the defendants jointly and severally for:-
 - i. Permanent injunction restraining the defendants from interfering with the plaintiff's proprietary rights of the suit land.
 - ii. Eviction of the 1st defendant from the suit land.
 - iii. Cost of the suit
 - iv. Interest on (c) above
 - v. Any other relief that shall be deemed fit to be granted in the circumstance of this suit.
3. The gist of the plaintiff's case is that the plaintiff is the registered proprietor of the suit land. That the said land was bought by the plaintiff's deceased husband, Julius Ochieng Omollo and her co-wife, Winnie Akinyi Omollo in 1992. That the plaintiff is holding the suit land in trust for her said co-wife and herself. The plaintiff's efforts to subdivide the land to her co-wife has been unsuccessful since the defendants colluded to deny the plaintiff her proprietary right to do so. The 1st defendant stays on the land and cultivates it. She pleaded particulars of fraud on the part of defendants.
4. The plaintiff states that on several occasions, she has demanded the defendants not to interfere with her peaceful enjoyment of her proprietary rights of the suit land. That the 1st defendant has refused to vacate the land, thus provoking the instant suit.
5. In their statement of defence dated 7th April 2014, the defendants who were initially represented by firm of S.M. Sagwe and Company Advocates and currently by learned counsel Mr. Sam Onyango of Sam Onyango and Company Advocates, denied the plaintiff claim. The defendants stated that whereas the plaintiff is the registered owner of the suit land, the 1st defendant resides on land parcel number Kanyamwa/Kanyambo/Kwambo/135 since the year 1975.
6. The defendant further stated that the suit is frivolous and vexatious. They have sought dismissal of the suit with costs.
7. On 17th March 2016, further to a consent of counsel for the respective parties, Homa-bay Land Registrar and County Surveyor, were ordered to visit and ascertain the boundaries of land parcel Number Kanyamwa/Kanyambo/Kwambo/135 and the suit land. The exercise was carried out accordingly. On 7th June 2016, by a letter Reference SN/LR/50 VOL. V/131 dated 29th July, 2016, the Land Registrar filed her report together with a diagram or Sketch map prepared by the surveyor in respect of said two parcels of land. Pursuant to the report and upon

examination of the Registrar and the Surveyor on 23rd January, 2018, it emerged that the instant dispute does not relate to boundary of registered land. Notably the boundaries of the two parcels of land existed or have been determined paving way for the hearing of this suit; see **Section 18 (2) of the Land Registration Act, 2016, (2012).**

8. On 23rd October 2018, the suit against the 2nd defendant was withdrawn with costs in the cause further to the prayer by the plaintiff's counsel.

9. During hearing, the plaintiff (PW1) testified that she is the registered owner of the suit land and she holds the land in trust for her co-wife, Winfred Akinyi Omollo (PW2) and herself. She relied on her list of documents dated 20th April, 2018 which include a copy of adjudication record dated 13th October 1992 (PEXhibit 2), a copy of sale agreement dated 12th December 1992 (PEXhibit 4) and copy of title deed issued 10th July, 2009 to PW1 (PEXhibit 5).

10. PW2, WILFRED AKINYI OMOLLO, stated that PW1 is her co-wife and that the suit land is registered in the name of PW1. She referred to and identified PEXhibit 4. She stated that she bought a 3rd portion of the suit land measuring 1 ½ acres while their late husband bought the other two portions of the land.

11. According to the defendant (DW1), she stays on LR NO. KANYAMWA/KANYAMBO/KWAMO/135 and not the suit land. She relied on her statement dated 7th April 2014 and confirmed that the surveyor visited the suit land and prepared a report dated 29th July, 2016 (PEXhibit 1).

12. DW 2, JOHN ANGWEN SHANGILI told the court that he relied on his statement dated 7th April 2014 and filed on 10th April 2014. That the suit land is registered in the name of PW1.

13. Learned counsel for the respective parties orally and very briefly submitted on 23/1/2019. Whereas counsel for the plaintiff argued in favour of the reliefs sought in the plaint, counsel for the defendants submitted otherwise.

14. I have anxiously considered the entire pleadings, oral submissions. Bearing in mind the decision in **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** and the defendants issues for determination dated 12th March 2015, I find that the issues for determination boil down to whether;

a. The plaintiff is the registered owner or proprietor of the suit land.

b. There are fraudulently acts on the part of the 1st defendant in respect of the suit land.

c. The plaintiff is entitled to the orders sought in her plaint

15. On proprietorship of the suit land, PW1 stated at paragraph 4 of her plaint that she is the registered owner of the land. She testified that the land is registered in her name in trust for PW2 and herself. That her late husband JULIUS OCHIENG OMOLLO and PW2 bought the land in 1992. During cross-examination, PW1 stuck to her testimony thus:-

“ I was registered as the owner of the suit land. My co-wife and my deceased husband bought the suit land.”

16. PW2 confirmed in her evidence that the suit land is registered in the name of PW1. That her deceased husband and herself bought the land from one PETER ODEMBA as shown on PEXhibit 4. She further maintained that she bought the land as per PEXhibit 4 and made reference to PEXhibit 5.

17. It was further affirmed by DW2 that the suit land is registered in the name of PW1. During cross-examination, DW2 stated that :-

“I am conversant with the suit land is registered in the name of PW1.”

18. This court is aware of the term “Proprietor” as defined under **Section 2 of the Land Registration Act, 2016** as well as interest conferred upon registration of a proprietor and rights of proprietor as provided for under **Sections 24 and 25 of the said Act.** PW1 is named in the land register as the proprietor since 29th July, 2008 as shown on PEXhibits 3 and 5. The latter having been issued to her on 10th July, 2009.

19. By virtue of PEXhibits 2,3,4 and 5 which reveal that PW1 is the proprietor of the land coupled with testimonies of PW2 and DW2, indeed PW1 has proved that the acquisition of the land by way of PEXhibit 5, was legal, formal and free from any encumbrances as recognized by the Court of Appeal in the case of **Munyu Maina –v- Hiram Githiha Maina (2013) eKLR.** Moreover, **Section 26 of the Land Registrar Act, 2012** provides that certificate of title is prima facie evidence of ownership of land. The suit land is registered in the name of PW1 under the **Registered Land Act (Cap 300 repealed)** as discerned in PEXhibit 5; see the decision in **Wainaina –v- Murai and others (1976-80) KLR 283 at 289/90.**

20. Regarding the issue of fraudulent act on the part of the defendants, PW1 stated that the defendants blocked her from enjoyment of proprietary rights on the suit land. Whereas PW1 specifically pleaded and stated particulars of the alleged fraudulently acts at paragraph 8 of her plaint, her allegations fail to meet the threshold of the term fraud as defined in the case of **Abiero –v- Thabiti Finance Co. Ltd and Another (2001) KLR 496.**

21. Be that as it may, PW1 testified that DW1 cultivates the entire suit land. PW2 fortified the evidence of PW1 that DW1 cultivates the land. Furthermore, it is quite plain from paragraphs 4 and 5 of the statement of DW1 that she (DW1) planted trees on the suit land and cultivated it.

22. It is trite law that possession can take different forms such as fencing and cultivation of the land as dispute; see the case of **Kimani Ruchine and another –v- Swift Rutherford Company Limited and another (1976-80) 1KLR 1500** which was **applied in Titus Ong’ang’a Nyachio –v- Martin Okioma Nyauma and 3 others (2017) eKLR.**

23. It is abundantly evident that DW1 is in unlawful possession of the suit land which is owned by PW1. **Section 152 of the Land Act, 2016 (2012)** provides that ;-

“A person shall not unlawfully occupy, private, community or public land” (Emphasis added)

24. Notably, DW1 gained entry into the suit land which she cultivates without the consent of PW1. The said intrusion is not justified in the circumstances and it amounts to trespass as disclosed in **Clerk and Lindsell on Torts 17th Edition paragraph 17-01.**

25. The plaintiff is entitled to the orders sought in her plaint in order to preserve the suit land and to protect her right to property as provided under **Article 40 (1) of the Constitution of Kenya 2010.** Also this court is empowered to grant permanent preservation orders including permanent injunctions as stated at **section 13 (7) of the Environment and Land Court Act 2015, (2012).** The plaintiff has proved her claim against the defendants jointly and severally on a balance of probability.

26. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders (a), (b) and (c) sought in her plaint dated 26th June 2013 and as set out at paragraph 2 hereinabove.

27. For the avoidance of doubt herein, eviction of the defendants from the suit land shall be undertaken in accordance with sections 152 B, 152E, 152F, 152G, 152H, and 152 I, of the Land Act 2016 (2012).

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 07th day of February 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Learned counsel Mr. Agure Odera holding brief for Mr. Otieno for the plaintiffs.

Learned counsel, Mr. Oyoo holding brief for Mr. Sam Onyango for the defendant.

Tom Maurice – Court Assistant.