



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**CIVIL SUIT NO.331 OF 2016**

**JOHANA TARUS BOR.....PLAINTIFF**

**VERSUS**

**ZIPPORAH ALUSA.....DEFENDANT**

**JUDGMENT**

By a plaint dated 3<sup>rd</sup> November 2016 the plaintiff herein sued the defendant seeking for the following orders:

- a) A declaration that the plaintiff is the lawful owner/proprietor of that parcel of land known as LEMBUS/KABONYONY/MORINGWA/206 in Eldama Ravine Baringo County.
- b) A declaration that the defendant is a trespasser on the suit property known as LEMBUS/KABONYONY/MORINGWA/206 in Eldama Ravine Baringo County and demolition of the structures erected thereon.
- c) Costs of the suit and interest.
- d) Any further relief this Honourable court may deem fit to grant.

The plaintiff had filed an application to strike out the defendant's defense dated 30<sup>th</sup> November 2016 for being an abuse of the court process and the defendant also filed an application dated 17<sup>th</sup> July 2017 for a temporary injunction against the plaintiff restraining him from interfering with the suit land. Counsel later agreed to abandon the applications and maintain the status quo until the suit is had been determined.

**PLAINTIFF'S CASE**

The plaintiff gave evidence and stated that he is the registered owner of land parcel No. LEMBUS/KABONYONY/MORINGWA /206 having bought it from the late Joseph Talam through an agent on the 19<sup>th</sup> April 2003. The plaintiff further stated that he entered into an agreement and paid Kenya shillings 122,500/which was inclusive of title deed processing fee and was given a receipt for the sale.

The plaintiff also stated that he was issued with a title deed on 4<sup>th</sup> September 2007 of which he produced a copy in court as an exhibit. It was his evidence that he did not develop the land but later found out that the defendant had encroached on his parcel of land.

PW 1 also stated that when he realized that the defendant had trespassed on his land, he reported the matter to the police in Eldama Ravine. He later went to his lawyer who wrote a letter to the defendant asking her to vacate but she did not move out. PW 1 further stated that he reported the matter to the chief who wrote to the defendant a letter dated 25<sup>th</sup> January 2017 summoning her to appear before the chief whereby she was to appear with her documents but she never did.

It was PW 1's evidence that he conducted a search and established that the suit land is registered in his name. He also stated that he bought 0.045Ha and that one Amon Njuguna who testified as PW2 bought 0.04 ha making a total of 0.08 Ha. That the title deed was registered in PW 1's name.

PW 2, Mr. Amon Njuguna Waiguru who adopted his witness statement confirmed that he bought 0.04ha that was to be excised from the suit land parcel in May 2003 and due to financial constraints, the suit land was registered in the name of the plaintiff. He was in possession of the suit land until 2007 when he relocated to Molo due to post-election violence but later returned only to find the defendant in occupation.

PW3, the Koibatek Sub-County surveyor testified that KABUNYON/ARAMA/POROR/206B does not exist. He confirmed that the mutation form dated 28<sup>th</sup> January 1993 which was produced in court as the correct one. He also testified that the mutation form dated 28<sup>th</sup> June 2003 relied upon by the defendant as an incorrect one for the reason that the mutation was dividing another land parcel indicated as KABUNYON/ARAMA/POROR/206B which does not exist.

It was also PW3's evidence that there is no way the mutation form dated 28/6/03 could purport to subdivide a land parcel into a measurement of 25 x 100 as no title is issued for such minute measurements in Kenya.

PW 3 further stated that he checked the records of parcel No. 132 and confirmed that plot No. 206 belongs to Johanna Tarus Bor and not Zipora Alusa the defendant herein. He also stated that they did not have a registration section known as KABUNYON/ARAMA/POROR/206B. He finally stated that according to the letter it combined three registration sections namely KABUNYON, ARAMA, and POROR which are distinct registration sections.

On cross-examination by the defendant's Counsel, PW 3 stated that the correct mutation form is in respect of LEMBUS/KOBONYONY/MORINGWA/206 which is dated 28<sup>th</sup> January 1993. The plaintiff therefore closed his case.

### **DEFENDANT'S CASE**

The defendant adopted her witness statement. She stated that she bought 25 x 100ft being plot no. 206 B at a consideration of kshs 80,000/= from Joseph Talaam in 2008 and took possession of the land after payment of 1<sup>st</sup> installment. She confirmed that the plaintiff is her neighbor and an occupant of plot no. 206.

The defendant produced a supplementary list of documents which included an application for electricity from KPLC co Ltd, a letter dated 3/4/12 from KPLC, letter from Deputy County Commissioner to Chief Lembus Central location, OB report abstract, death certificate of Joseph Kiptanui Kipkoech which were to the effect that there was a dispute on the suit land.

DW1 stated that the letter by the Deputy County Commissioner was to the effect that the matter should be left to the courts to deal and not the chief. The defendant claimed that the suit land belongs to her.

On cross examination the defendant stated that she was shown the suit land by Joseph Tallam who sold to her the land. She further stated that she based electricity bills on the suit land. The defendant therefore closed her case.

### **PLAINTIFF'S SUBMISSIONS**

The plaintiff filed submissions and listed the following issues for determination by the court:

- a) Who between the plaintiff and the defendant is entitled to the suit land?
- b) Whether the transaction conferring the defendant land can be maintained in law

On the first issue as to who between the plaintiff and the defendant is entitled to the suit land, Counsel submitted that the plaintiff proved that he bought the suit land vide a sale agreement dated 19<sup>th</sup> April 2003 which he produced as an exhibit before the court. That the defendant contends to have bought the suit land from Joseph Talaam sometime in 2008 but never produced an agreement to that effect.

It was therefore Counsel's submission that the transaction leading to the purchase of part of the suit portion of land by the defendant is null and void and contravenes section 3(3) of the law of contract act cap 33 which states that:

3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) The contract upon which the suit is founded—

(i) Is in writing;

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Counsel for the submitted that the defendant's testimony that the sale agreement got lost is not tenable as she never called a witness who attested to the agreement to confirm the same. That there was no evidence that she reported the matter to the police about the loss. Counsel therefore urged the court to find that the transaction is null and void.

Counsel submitted on the indefeasibility of title as provided for under section 26 of the Land Registration Act. He stated that the plaintiff having been issued with a title deed for the suit land was proof of ownership which should be taken as prima facie by the courts as sufficient proof unless the title was procured through fraud, misrepresentation or through a corrupt scheme. Counsel therefore urged the court to find that the plaintiff is the registered owner of the suit land as no evidence of fraud was established. Mr. Nyagaka Counsel for the plaintiff submitted that the plaintiff's evidence was corroborated by PW3's evidence in respect of the mutation forms which indicated that plot

No.KABUNYONY/ARAMA/POROR/206B does not exist on ground. That the correct mutation existing on ground was for LEMBUS/KABONYONY/MORINGWA 206.

Further that there is no way the suit land could be subdivided to allow the defendant to occupy 25 x 100 ft yet no titles are issued to such minute parcels of land within Kenyan registration system.

On the issue as to whether the defendant is an equitable owner and a bonafide purchaser, Counsel submitted that the defendant's interest is unregistered and that her claim cannot defeat the legal interest of the plaintiff as a registered owner of the suit land. There was no evidence of fraud and misrepresentation or acquisition of the suit land by way of corrupt scheme. There was no claim of adverse possession by the defendant.

On the issue as to whether the defendant is a bona fide purchaser, Counsel stated that a bonafide purchaser is one who buys in good faith, honesty, without fraud, collusion or participation in wrong doing. He cited the definition as per Black's law Dictionary 8<sup>th</sup> Edition which defines "bona fide purchaser" as:

*"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."*

Counsel cited the case of KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 B.A. 173 quoted in Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR where the Court of Appeal in Uganda held that:

*"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine (he) must prove that:*

- a) He holds a certificate of title;*
- b) He purchased the property in good faith;*
- c) He had no knowledge of the fraud;*
- d) He purchased for valuable consideration;*
- e) The vendors had apparent valid title;*
- f) He purchased without notice of any fraud;*
- g) He was not party to any fraud."*

Counsel therefore submitted that relying on above the cited authorities, the defendant cannot be said to be a bonafide purchaser because from her evidence, she stated that at the time of purchasing her portion of land, the plaintiff was already in occupation of plot 206, further that the defendant does not have certificate of title to seek protection under this doctrine. That the defendant did not produce any sale agreement, payment receipt or call a witness to testify on the transaction therefore she cannot qualify as a bona fide purchaser for value. Counsel urged the court to allow the plaintiff's claim as prayed in the plaint with costs.

## **DEFENDANT'S SUBMISSION**

Counsel for the defendant reiterated the evidence of the plaintiff and the defendant and submitted that there was no document to show that the plaintiff was a co-owner to the suit land with one Ammon Njuguna Waiguru. That the title to the suit land was processed in the year 2007 in the Plaintiff's name and not in their joint names. Counsel for the defendant further submitted that the parcel of land that Amon Njuguna sold to the plaintiff was not part of parcel No LEMBUS/KABONYONY/MORINGWA/206 but another parcel adjacent to it

Counsel for the defendant further submitted that PW 2 gave contradictory evidence in respect of the transaction and therefore should not be believed by the court. It was Counsel's submission that the issue for determination by the court is as to whether the defendant purchased the said portion of land and whether the defendant is a trespasser in the said land.

On the first issue Counsel submitted that the defendant purchased part of the suit land measuring 25ft by 100ft for valuable consideration from the then owner Joseph K. Tallam

sometimes on or about the year 2008 and took possession and constructed permanent dwellings on the said parcel of land. That the Plaintiff instituted the suit 8 years after the Defendant had purchased and occupied the said portion of land; this was also six years after the death of the original owner of the said land.

Counsel also submitted that the defendant relied on the fact that the widow of the deceased wrote a letter to Kenya Power and Lighting Company authorizing them to go ahead and connect power for the defendant, shows that indeed the sale transaction took place and that she also received the third installment of the payment of purchase price.

Counsel relied on the doctrine of bona fide purchaser for value and stated that the defendant falls under that category and should be declared as such. She therefore had the court dismiss the plaintiff's claim with costs to the defendant.

### **Analysis and determination**

The issues for determination in this case are who between the plaintiff and the defendant is the rightful owner of the suit land, whether the defendant is entitled to part of land measuring 25 x 100ft, and whether the defendant is a trespasser.

The plaintiff gave evidence and called two witnesses who included a Sub County Surveyor who testified as PW 3. The evidence of this witness was very crucial in this case. It was his evidence that the registered owner of parcel of land known as LEMBUS /KABONYONY/MORINGWA/206 is Johanna Tarus Bor having been registered as such on 4<sup>th</sup> September 2007.

PW 3 further informed the court that LR No KABONYONY/ARAMA/POROR/206B does not exist in their registration records as the three cited are distinct registration sections.

He also clarified that the mutation form dated 28<sup>th</sup> January 1993 produced by the plaintiff as an exhibit is the correct and genuine one. That the mutation form dated 28<sup>th</sup> June 2003 relied upon by the defendant is not genuine.

PW 3 also confirmed that the mutation form produced by the plaintiff is what is reflected on the ground and their records. The Sub County surveyor clarified to the court that KABONYONY, ARAMA, POROR are distinct registration sections which cannot be combined into one registration section as per their records.

Of importance from the Sub County Surveyor was the fact that minute subdivisions or measurements of land of 25 x 100ft cannot be titled under the Kenyan registration system. How was the defendant to get registration of such parcel of land?

The plaintiff gave evidence produced a sale agreement that he used to purchase this land in 2003. He also produced a receipt for payment of the purchase price which was in full and final settlement of the purchase price, mutation form and a title deed his name. This was evidence that he fulfilled the terms of the agreement which allowed him to take possession of the suit land. It is on record that the defendant admitted that the plaintiff is her neighbor. If the plaintiff is the defendant's neighbor, then why would she claim to be the owner of the suit land?

From the documents produced and the evidence adduced it is clear that the plaintiff is the rightful owner and registered proprietor of all that parcel of land known as LEMBUS /KABONYONY/MORINGWA/206. There was no evidence to rebut this position.

Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally. The plaintiff having produced evidence that he is the registered owner of the suit land and there being no evidence to disprove its authenticity, the court must find that he is the rightful owner of the suit land. There was further no evidence to suggest or prove that the title was procured fraudulently or through misrepresentation.

The defendant's evidence hinged on a letter authorizing her to apply for electricity connection. Anybody can apply for electricity connection even if they are not registered owners of a property. Tenants also apply for connection of electricity but that does not mean that they own the property. The defendant further did not produce any document to show ownership. She only alleged that her documents got lost. There are procedures that can be followed to establish loss of documents.

The defendant could have called the widow of the person she alleged to have sold to her the land and received part of the installments. This was not so. I therefore find that the plaintiff is the rightful owner of the suit land. It should be noted that the defendant filed a defense which was a general denial of the plaintiff's claim. She did not file a counterclaim in respect of the land that she was claiming. Her claim does not lie on the suit land as the land she's claiming does not exist in the registration section as was confirmed by PW3 the Sub County Surveyor. She should look for her remedy with the person she claimed to have sold to her the land. The defendant does not meet the threshold of a bona fide purchaser as was submitted by her Counsel.

I have considered the pleadings, the evidence, the documents produced and the relevant judicial authorities and I come to the conclusion that the plaintiff has proved his case to the required standard and enter judgment in his favor in the following terms:

- a) A declaration is hereby issued that the plaintiff is the lawful owner/proprietor of that parcel of land known as LEMBUS/KABONYONY/MORINGWA/206 in Eldama Ravine, Baringo County.
- b) That the defendant do give vacant possession of the suit land known as LEMBUS/KABONYONY/MORINGWA/206 in Eldama Ravine Baringo County and demolish the structures erected thereon within 45 days failure of which eviction order to issue.
- c) Defendant to pay costs of the suit.

**Dated and delivered at Eldoret this 24<sup>th</sup> day of April, 2019**

**M.A ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of Mr.Kibii holding brief for Mr.Nyagaka for Plaintiff and Miss. Mbembe for defendant.

Mr.Mwelem – Court Assistant