



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND COURT CASE NO. 46 OF 2017

ADELINE AZUNTA NYONGESA.....PLAINTIFF

VERSUS

JAMES JUMA MILIMO.....DEFENDANT

J U D G M E N T

ADELINE AZUNTA NYONGESA (the Plaintiff herein) filed this suit on 22nd March 2017 seeking Judgment against **JAMES JUMA MILIMO** (the defendant herein) in the following terms:-

1. An order of eviction.

2. A permanent injunction restraining the defendant by himself, his agents and/or servants from remaining on, using or impeding the plaintiff from occupying and using land parcel NO. E. BUKUSU/N. KANDUYI/9345.

3. Costs.

The basis of the Plaintiff's claim is that she is the registered proprietor of land parcel **E.BUKUSU/N.KANDUYI/9345** (the suit land) and as such, she is entitled to un-limited right and possession thereof. However, the defendant has without any legal justification or right whatsoever impeded the Plaintiff's use thereof and taken possession of the suit land yet he has no equitable or legal interest in the same. That despite demand, the defendant has refused and/or neglected to deliver possession.

As part of her documentary evidence, the plaintiff filed an agreement for sale in respect of the suit land between **BILIA NASAMBU SIMIYU** (as Vendor) and herself (as Purchaser) dated 13th March 2008, payment schedules, Certificate of Search, copy of title to the suit land and Judgment in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 142 OF 1999**.

The defendant filed a defence dated 21st November 2017 claiming that the registration of the Plaintiff as the proprietor of the suit land was obtained through fraud. He added that he has lived on the suit land for over 40 years after the same was gifted to him by his kin and the plaintiff has never been entitled to the same. He therefore pleaded that the plaintiff's claim be dismissed with costs.

As part of his documentary evidence, the defendant filed the following documents:-

1. Grant of P & A NO 138 of 2006.

2. Copy of register of E.BUKUSU/N.KANDUYI/640.

3. Certificate of Confirmation in P & A 138 of 2006.

4. Transfer of Land Form (R.L.1).

5. Application for consent of Land Control Board from MUYABI NGOBOLA to SILVANUS WASIKE NALWAKHO.

The parties were the only witnesses who testified in respect to their cases.

The Plaintiff adopted as her evidence the statement dated 22nd March 2017. In that statement, she claims to have bought the suit land on 13th March 2008 from one **BILIA NASAMBU SIMIYU** but the defendant has forcefully occupied it and is cultivating the same enjoying all the rights of a registered proprietor. She added that in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 138 OF 2006**, the Court

declared that the defendant did not have any proprietary interests either equitable or legal in the suit land and should therefore be evicted and restrained.

On his part, the defendant also relied on his statement dated 5th July 2017 in which he has stated that he lives on the suit land which is a sub-division of land parcel **NO E.BUKUSU/N.KANDUYI/460**. That the land parcel

NO E. BUKUSU/N. KANDUYI/640 was registered in the names of **MUNYABI NGOLOBA** who before his death in 1978 had transferred it to **SYLVANUS WASIKE NYALYAKHO**. That it was fraudulent for the said land to be treated as part of the Estate of **MUNYABI NGOBOLA** as happened in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 138 OF 2006**. That the Plaintiff obtained title to the suit land by fraud.

I have considered the evidence by both parties as well as the submissions by **MR OCHARO KEBIRIA ADVOCATE** for the Plaintiff **MR SIFUMA ADOVATE** for the defendant did not file any submissions.

It is common ground that the suit land is registered in the names of the Plaintiff since 17th June 2016 as per copy of the title deed. That title was issued under the Land Registration Act 2012. The Plaintiff is therefore the absolute and indefeasible owner of the suit land because **Section 26(1) 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

In his defence, the defendant has pleaded that the plaintiff’s registration as proprietor of the suit land was through fraud. He reiterated that in his oral testimony during the trial and added that he lives on the suit land. Having pleaded that the plaintiff’s registration as proprietor of the suit land was obtained fraudulently, it was the duty of the defendant to prove fraud to the required standard. Indeed the law is that particulars of fraud must be specifically pleaded and proved to a standard that is higher than a mere balance of probability. In **VIJAY MORJARIA .V. NANSINGH MADHUSING DARBAR & ANOTHER C.A CIVIL APPEAL NO 106 OF 2000 [2000 eKLR]** which **MR OCHARO KEBIRIA** has cited, **TUNOI J.A** stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.” Emphasis added.

See also **GIDEON LETOYA OLE HAPU & ANOTHER .V. ESTATE FINANCE CO LTD C.A CIVIL APPEAL NO 259 OF 2011 [2019 eKLR]**. In paragraph 3 of his defence, the defendant has pleaded as follows:-

*“The defendant denies contents of paragraph 3 of the Plaintiff and states that registration of the plaintiff as proprietor of land parcel number **E. BUKUSU/N/ KANDUYI/9345** (hereinafter referred to as the “suit land”) was procured by fraud and therefore a nullity.”*

No particulars of fraud as against the plaintiff were disclosed in that defence. **Order 2 Rule 10(1) (a) of the Civil Procedure Rules** also provides that:-

“Subject to Sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –

(a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and

(b) _____”

Emphasis added.

While it is clear therefore that the defendant set out to impugn the plaintiff’s title to the suit land as having been fraudulently obtained, his attempts to do so fell well below the standard required in law. Indeed even in his oral evidence during the trial, all that he made was the following bare assertion against the plaintiff:-

*“However, **SILVESTER WASIKE NALIAKHO** fraudulently acquired land parcel **NO EAST BUKUSU/NORTH KANDUYI/640** and used the title to acquire a loan from the Bank of Kshs. 18,000/=. So I paid the loan and retrieved the title. So the plaintiff obtained the title to the suit land by fraud. I have been living on the land to-date.”*

Even assuming that the defendant had pleaded fraud, such evidence would hardly have been sufficient to challenge the propriety of the plaintiff's title to the suit land. It would appear from his oral evidence that the defendant believes he has an interest in the suit land because he saved it from being auctioned and also because he lives on it. But that alone is not enough to entitle him to the suit land. In any case, he did not file any counter – claim and conceded as much in cross – examination.

I am satisfied from the evidence that the plaintiff has established her ownership to the suit and is therefore entitled to evict the defendant therefrom.

Ultimately therefore, there shall be Judgment for the plaintiff against the defendant in the following terms:-

- 1. An order that the defendant vacates the land parcel NO EAST BUKUSU/ NORTH KANDUYI/9345 within 60 days from the date of this Judgment and in default, he be evicted therefrom as provided for in law.**
- 2. A permanent injunction restraining the defendant by himself, his agents and/or servants from remaining on, using or impeding the plaintiff from occupying and using land parcel NO EAST BUKUSU/NORTH KANDUYI/9345.**
- 3. The defendant shall meet the plaintiff's costs of this suit.**

Boaz N. Olao.

J U D G E

30th May 2019.

Judgment dated, delivered and signed in Open Court this 30th day of May 2019 at Bungoma.

Ms Mutunda for Mr Ocharo for plaintiff present

Mr Kundu for defendant present

Right of Appeal explained.

Joy/Felix – Court Assistants - present

Boaz N. Olao.

J U D G E

30th May 2019