



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 127 OF 2016

STEFANA NICOLOSI.....PLAINTIFF

VERSUS

GARAMA SHUTU MITSANZE aka

GABRIEL GARAMA.....1ST DEFENDANT

FRANCIS KARISA NGUMBAO.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 24th May 2016 Stefania Nicolosi (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:-

- a) A permanent injunction restraining the Defendants by themselves, legal representatives or any person claiming interest through them from interfering in any way with the Plaintiff's use and enjoyment of 2.58 acres in Plot No. 60 in Mambri/Sabaki Settlement Scheme in Kilifi County;*
- b) An order (directed) to the Registrar of Lands, Kilifi to register the Plaintiff as the proprietor of 2.58 acres thereof in respect to Plot No. 60 in Mambri/Sabaki Settlement Scheme in Kilifi County;*
- c) Damages for wrongful entry by the Defendants on to the Plaintiff's said parcel of land and obstruction of profitable developments thereon.*
- d) Costs and interest of this suit.*
- e) Any other relief this Honourable Court may deem fit to grant.*

2. The Plaintiff's suit arises from her contention that by two Sale Agreements dated 17th December 2004 and 10th April 2006 she bought 2.58 acres of land from the 1st Defendant's father one Shutu Mitsanze Mwabaya which acreage of land was to be carved out of Plot No. 60 Mambri/Sabaki Squatter Settlement Scheme. It is the Plaintiff's case that at the time he purchased the land, the 1st Defendant who was a signatory to the Sale Agreements with the other members of the Shutu family agreed to vacate the land and she took vacant possession thereof.

3. The Plaintiff states that the 1st Defendant later reneged on the agreements and started accusing her of demolishing their houses and structures. At around the same time, the 2nd Defendant who owns a neighbouring plot in collusion with the 1st Defendant started accusing the Plaintiff of encroaching on his land. As a result, the Plaintiff has been forced to move away from the suit property and she is now apprehensive that the Defendants are bent on selling, alienating and/or transferring the property to 3rd parties.

4. In a Written Statement of Defence dated and filed on 20th July 2016, Garama Shutu Mitsanze (1st Defendant) and Francis Karisa Ngumbao (2nd Defendant) aver that there is no time the 1st Defendant's father sold a portion of their land as alleged by the Plaintiff. It is further their case that the parties who signed the alleged sale agreements had no legal capacity to do so and as a result the resultant agreements are not enforceable in law.

5. The Defendants further accuse the Plaintiff of unlawfully demolishing the 1st Defendant's structures and assert that they are entitled to compensation therefor.

6. Specifically the 2nd Defendant avers that he has no claim on the suit property and denies threatening the Plaintiff as stated in the Plaint or at all.

THE PLAINTIFF'S CASE

7. At the trial herein, the Plaintiff called two witnesses.

8. PW1- Stefania Nicolosi (the Plaintiff) testified that by a Sale Agreement dated 17th December 2004, she bought one acre of land from Shutu Mitsanze Mwabaya. She paid the full purchase price. Again on 10th April 2006, she entered another sale agreement with Shutu for the purchase of a further 1.58 acres to be carved from his Plot No. 60 in Mambui/Sabaki Squatter Settlement Scheme.

9. PW1 further testified that at the time of the said purchase, the family of Shutu had the original Letter of Offer for the land in Shutu's name. The first agreement was also signed by the 1st Defendant as well as his brother one Kahindi Shutu Mitsanze. The 1st Defendant's mother Kache Mweri Tsofa also signed.

10. PW2 told the Court that the 2nd Agreement was equally signed by the family members including the 1st Defendant. It was agreed that they were to hand over the letter of offer and signed transfer forms to the Plaintiff to enable her transfer and register her 2.58 acres from Plot No. 60. The 1st Defendant and his family also agreed to vacate the land and the Plaintiff took vacant possession thereof. While vacating the land, the family left behind some structures and mud-walled houses which they were to demolish within three months.

11. According to PW2, the family did not however demolish the houses and structures as agreed. After six months, the Plaintiff demolished them as she needed to develop the land. After that, the 1st Defendant went back to the land and started accusing the Plaintiff of illegally demolishing their house and stealing their land.

12. PW1 testified that around the same time, the 2nd Defendant who owns a neighbouring plot also started accusing her of encroaching on his land and together with the 1st Defendant they started demanding back what they called 'their' land. They threatened to burn the Plaintiff's house, and their constant threats eventually forced the Plaintiff to move away from the land some three months before this suit was filed.

THE DEFENCE CASE

13. The two Defendants herein testified in support of the Defence Case.

14. PW2-Marko Lugwe was a farmer and resident of Mambui. He was also the Chair of Mambui Sabaki Settlement Scheme Committee. He testified that on 20th May 2015, his committee received a complaint in regard to the suitland herein. The committee asked the parties involved to avail their respective documents. After going through them, they came to the conclusion that the Plaintiff was the rightful owner of the land having purchased the same.

15. DW1-Gabriel Garama aka Garama Shutu (the 1st Defendant) told the Court that prior to the demise of his father, the Plaintiff had purchased a total of $\frac{3}{4}$ of an acre. However since the demise of his father, the Plaintiff has extended the boundaries by force and was at the time of filing this suit claiming 2.58 acres.

16. DW1 further states that he is not the Administrator of his late father's estate and he does not understand the criteria that the Plaintiff used to single him out to be sued.

17. DW2-Francis Karisa Ngumbao (the 2nd Defendant) on his part told the Court that he has no interest on the suitland. He stated that his Parcel of land is No. 94 measuring 0.12 Ha and is developed and clearly distinct from the land in dispute.

ANALYSIS AND DETERMINATION

18. I have considered the pleadings, the oral testimonies of the witnesses who testified for both the Plaintiff and the Defendants as well as the evidence tabled before me. I have equally perused and considered the written submissions and the authorities filed herein by the Learned Advocates for the parties.

19. From the material placed before me, it was not in dispute that the 1st Defendant's father Shutu Mitsanze Mwabaya sold some land out of the family's Plot No. 60 Mambui to the Plaintiff. While the Plaintiff asserts that she was sold a total of 2.58 acres, the 1st Defendant asserts that his father and the family only sold $\frac{3}{4}$ acres of the land.

20. In support of her case, the Plaintiff produced two sale agreements. The 1st Agreement dated 17th December 2004 (Pexh 1) shows that the Vendor sold one acre of the said piece of land at Kshs 75,000/- which sum was paid in cash to the Vendor upon execution of the Agreement.

21. The 2nd Agreement dated 10th April 2006 (Pexh 2) shows that the Plaintiff purchased a further 1.58 acres for a sum of Kshs 54,000/-. Again the Agreement indicates that the purchase price was paid in cash to the Vendors with an extra Kshs 4500/- paid to them to offset what is indicated as "debt owed to them."

22. The 1st Agreement was signed by the said Shutu Mitsanze, the 1st Defendant, the 1st Defendant's brother Kahindi Shutu and his mother Kache Mweri Tsofa. The 2nd Agreement on the other hand was thumb-printed by Mrs Shutu Mitsanze-the 1st Defendant's mother as well as the 1st Defendant himself.

23. While it was not made clear why Shutu Mitsanze Mwabaya in whose name the Letter of Offer for the land was issued did not execute the 2nd Agreement; it is possible that the old man was unwell. According to the Certificate of his Death produced as Dexh 2, he died ten days after the date of the Agreement on 20th April 2006 at the age of seventy three years.

24. While the 1st Defendant testified that they only sold $\frac{3}{4}$ acres of his father's land, he admitted during cross-examination that the two Agreements reflect a total of 2.58 acres. He did not have any agreement reflecting the purchase of the $\frac{3}{4}$ acres he claimed they had sold.

25. It was telling that the 1st Defendant acknowledged the existence of the 2nd Agreement and even asserted during cross-examination that the Plaintiff had remained with their balance of Kshs 10,000/-.

26. Indeed while the 1st Defendant purports that the Plaintiff only purchased $\frac{3}{4}$ acres of the suitland, he did not produce any agreement to that effect. It was also evident that the dispute had gone before the Mambui Sabaki Squatters Settlement Committee who upon perusal of the documentation on 20th May 2015 were satisfied that the Plaintiff had purchased those 2.58 acres of land from the original owner and the 1st Defendant's father Shutu Mitsanze Mwabaya. That position was also confirmed by a letter from the Area Assistant Chief.

27. I was therefore left in no doubt that the Plaintiff had procedurally and lawfully bought 2.58 acres of Plot No. 60 Mambui (Sabaki Squatter Settlement Scheme).

28. According to the 1st Defendant, his father left behind nine beneficiaries of the Estate and he did not understand why the Plaintiff had singled him out in this suit. I think the answer to that clearly lies in the fact that the 1st Defendant's family sold the land and granted vacant possession of their premises to the Plaintiff. According to the Plaintiff, she then moved into the land and constructed a residential house thereon.

29. During his cross-examination, the 1st Defendant confirmed that the Plaintiff had built a house on the land and used to live there although much of it is now in ruins. He did not deny that his family vacated the land pursuant to the Sale Agreements.

30. The Plaintiff however accuses the 1st Defendant of constantly being the only family member who goes back to the land causing trouble and in cohorts with the 2nd Defendant demanding that the Plaintiff vacates the land. In her testimony-in-chief, the Plaintiff told this Court how the Defendants had organized her neighbours to constantly demonstrate against her insisting that she should vacate their land.

31. Thus while it is true that the 1st Defendant's family may not have letters of administration, I do not think it will serve the interest of justice for the defendants to be allowed to continue trampling on the Plaintiff's right to own property by continuous interference with her entitlement to quiet possession thereof.

32. The Plaintiff has been in actual possession of the land for more than twelve years. She bought the same from the very person who now cites the fact that he lacks letters of administration to frustrate her out of the land in which she has constructed her dwelling house. I think the doctrines of proprietary estoppel and constructive trust must be applied herein to stop the 1st Defendant in particular from renegeing on the agreements that he executed.

33. In the circumstances of this case, I am satisfied that there is merit in the Plaintiff's case and that the same has been proved to the required standard. I will in the circumstances enter Judgment as prayed at paragraphs 'a' and 'b' of the Plaint.

34. The 1st Defendant shall bear the costs of this suit.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE