



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 160 OF 2014

NATHANIEL NGIGE WARUIRU.....PLAINTIFF

VERSUS

LAWRENCE MWAURA.....DEFENDANT

JUDGMENT

1. The plaintiff sought the following orders against the defendant in this suit brought by way of a plaint dated **4/11/2014** and filed in court on the same date:-

(a) A declaration that the parceling and registration of the defendant of Title No. Trans-Nzoia/Sinyerere/1257 was obtained by fraud.

(b) An order that the Title No. Trans-Nzoia/Sinyerere/1257 be cancelled from the register and the same to revert to Title No. Trans-Nzoia/Sinyerere/1229.

(c) A permanent injunction restraining the defendant or any other person from trespassing, claiming, accessing or in any other way interfering and/or dealing with suit land.

(d) Costs on the suit.

(e) Interest on the above at court rates.

2. According to the plaint the plaintiff is the proprietor of parcel number **Trans Nzoia /Sinyerere/1229** measuring four (4) acres situated within Trans-Nzoia County having purchased the same from Chemtai Chemiri and Kibiwot Arusei vide an agreement for sale executed on 27/9/1997 and taken possession thereof. After following the due process he was issued with title deed on 20/5/2009; sometime in the year **2009**, the defendant by himself or through his agents unlawfully and without his consent or authority carved out of parcel of land measuring half ($\frac{1}{2}$) an acre and by means of fraudulent representation registered and obtained a title No. **Trans-Nzoia/Sinyerere/1257** in his name in respect of the said parcel; that by virtue of the defendant's unlawful and fraudulent actions, the plaintiff has not enjoyed quiet peaceful, uninterrupted and/or exclusive use of his land and has suffered and continues to suffer loss and damage particulars of which are in the plaint and that the plaintiff avers that the title issued to the defendant is a fraud and should be cancelled forthwith and an order of eviction issued against him.

The Defendant's Defence and Counterclaim

3. The defendant filed defence and counterclaim dated **8/12/2014** denying the plaintiff's claim. In his counterclaim, the defendant reiterates the contents of the defence in its entirety and includes a counterclaim. The defendant avers that he was, and still is, the registered owner of land parcel No. **Trans-Nzoia/Sinyerere/1257**; that on or about **23/9/2014** the plaintiff placed a caution on the entire suit land claiming interest as a purchaser. The defendant avers that he has never had any sale transaction with the plaintiff.

4. The defendant prays that the plaintiff's suit be dismissed with costs and judgment be entered in favour of the defendant for:-

(i) An order directed to the District Land Registrar Kitale to remove the caution placed on land parcel No. Trans-Nzoia/Sinyerere/1257.

(ii) Costs of the suit.

(iii) Interest

The Plaintiff's Reply to Defence and Counterclaim

5. In his reply to defence and counterclaim the plaintiff reiterates the averments in the plaint. The plaintiff also denies the contents of the defendant's counterclaim against him.

The Evidence of the Parties

6. The suit came up for hearing on **9/5/2016**. The plaintiff gave evidence. He reiterated the matters in the plaint and the reply to defence and counterclaim.

7. The defendant gave evidence on **6/2/2019** in this suit after which evidence he closed his case. He also reiterated the matters contained in his defence.

Submissions

8. The defendant filed his submissions on **25/2/2019**. The defendant relies on the case **Wreck Motor Enterprises -vs- The Commissioner of Lands & 3 Others Civil Appeal No. 71 of 1997** where the Court held:-

“The pleadings do not disclose any fraud on the part of the second respondent. In such an event therefore, the second respondent is the bona fide purchaser for value without notice”.

9. I have perused the court record and found no submissions have been filed on the part of the plaintiff. I have considered those submissions. The issues that arise in this suit are as follows:

(1) Did the defendant or his agents fraudulently carve out half an acre of land from the plaintiff's land parcel?

(2) What orders should issue?

(1) Did the defendant or his agents fraudulently carve out half an acre of land from the plaintiff's land parcel?

10. The plaintiff in this case believes that the defendant carved out half an acre of land from his parcel. Both the plaintiff and defendant bought 4 acres and 1 acre respectively from the same person, albeit on different occasions.

11. The plaintiff purchased his land vide an agreement dated **27/9/1997** and the defendant vide an agreement dated **30/3/2005**.

12. At the end of their respective transactions plaintiff's plot was assigned plot number **Trans Nzoia / Sinyerere/1229** while the defendant's was **Trans Nzoia / Sinyerere 1257**.

13. It is true that the defendant came into the scene much later than the plaintiff but did he steal the plaintiff's land?

14. An examination of the documentary evidence supplied by the plaintiff in this case shows that a consent to subdivide the land into 26 portions was obtained by the seller on **24/10/2007**. The mutation shows that 27 portions were created.

15. The plaintiff clearly states in his statement that he took possession of the 4 acres immediately upon purchase. He admits that there were 26 purchasers in total. He has produced the list of their names. However, the defendant ranks among them.

16. The plaintiff's further evidence is that there was a wetland beside the river; the seller approached him to buy it and when he refused to do so, the seller sold it to the defendant. However, they instead carved the 0.4 acres sold to the defendant from the plaintiff's land and it was named **Trans Nzoia/Sinyerere/1257**.

17. The plaintiff avers that no consent was obtained for the creation of plot 1257. After that excision, the plaintiff alleges to be in occupation of only 3.5 acres.

18. The plaintiff produced only one page of the mutation used to subdivide the land. The defendant produced the copy of the entire mutation. It shows that parcel number 1257 was included in that mutation. The parcel numbers reflected in that document run from 1228 up to parcel number 1251. However there is an interruption in the numbering sequence in the series of parcel numbers provided in that mutation. It omits numbers 1250-1256. The next number seen is No. 1257. There is no explanation provided as to why parcel numbers **1250-1256** are not part of the subdivision. No consent to subdivide was produced by the defendant. This lends credence to the plaintiff's claim that the defendant's plot was created after the subdivision that created his plot was done. This may be so but the claim that the plaintiff must prove is that the half acre plot sold to the defendant and named 1257 was carved out of plot 1229 and that that was done fraudulently. In my view a mere irregularity in the procedure employed in arriving at the subdivision named 1257 *per se* is not proof of fraud. The plaintiff needed to show that his land was excised and that it was so excised with an intent to defraud him. Without this kind of evidence of the state of mind of the defendant the plaintiff's claim cannot succeed in this case.

19. Though the plaintiff's evidence is that the plot was carved out of his land, he has failed to demonstrate that this was so, or that the plot

that he is occupying is only 3.5 acres. There is no evidence of a qualified surveyor to support the plaintiff's claim. I find that the allegations of the plaintiff have not been proved on a balance of probabilities and I dismiss the plaintiff's suit. Without evidence of excision, this court can not delve into the issue of fraud in this case.

20. However I note that the suit arises out of a revisit of a subdivision which had left ample riparian land beside a river and the carving out of an additional parcel of land for sale or allocation. It is doubtful that this new excision underwent the full process of vetting by the physical planning authorities but that is an issue for another day. In this case it may not matter because the plaintiff's case is not about whether riparian land was appropriated or not, but whether the plaintiff's land was illegally excised.

(3) What orders should issue?

21. I have found that the plaintiff has not proved his case to the required standard. I therefore issue the following orders:

(a) The plaintiff's suit is dismissed.

(b) The District Land Registrar Kitale shall remove the caution placed on land parcel No. Trans- Nzoia/Sinyerere/1257.

(c) Each party shall bear their own costs of the suit and counterclaim.

Dated, signed and delivered at Kitale on this 13th day of May, 2019.

MWANGI NJOROGE

JUDGE

13/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

13/5/2019