



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 120 OF 2013

APOLLO AMBUTSI SHIKANGA.....PLAINTIFF

VERSUS

JOMO GODWIN KORORIA.....DEFENDANT

JUDGMENT

THE PLEADINGS

The Plaintiff's Case

1. In the amended plaint dated **24/6/2016** which was filed on **27/6/2016** the plaintiff seeks the following orders against the defendant:-

(a) A declaration that parcel of land title number Kapkoi/Mabonde Block 1/Ex-Prison/627 belongs to the plaintiff and the defendant, whether by himself or his servants or agents or otherwise howsoever, s not entitled to remain on the suit property.

(b) A permanent injunction restraining the defendant, whether by himself or his servants or agents or otherwise howsoever, from entering, trespassing or otherwise interfering with the plaintiff's quiet possession and enjoyment land title number Kapkoi/Mabonde Block 1/Ex-Prison/627.

(c) Costs of this suit together with interest thereon.

(d) Any such other or further relief as this honourable court may deem appropriate.

2. According to the amended plaint the suit land was once part of the plaintiff's plot number **Kapkoi/Mabonde Block 1/Ex-Prison/229** (herein also referred to as "**Plot No. 229**") before its subdivision in **2013**. After subdivision plot number **Kapkoi/Mabonde Block 1/Ex-Prison/627** (herein also referred to as "**Plot No. 627**") among others, was created. Plot number **627** was registered in the plaintiff's name. However in or about August, 2013 the defendant wrongfully and without any justification entered and took possession of the land now comprised in title number **627** and has remained in possession thereof and has embarked on various activities aimed at settling on the suit property as well as committed acts of waste and environmental degradation thereon without having acquired any rights from the plaintiff. He is, according to the plaintiff, a trespasser thereon who has defied all demands to vacate.

The Defendant's Case

3. By an application dated **19/4/2017** the defendant applied for leave to issue a Third Party Notice to one **Joseph Makarios Masinjila** and **Bernard Muyeka Masinjila**, brothers to the plaintiff who were alleged to have sold the suit land to the defendant. However by the time of the hearing of the suit such Third Party Notice as leave had been applied for had not been served on the intended third party and the suit proceeded principally between the plaintiff and the defendant.

4. The defendant filed the defence dated **30/7/2015** on the same date. He denies being a trespasser on the suit land. His case is that plot number **229** is not owned by the plaintiff; that in 2011 the defendant purchased one acre from **Joseph Makarios Masinjila**, a brother to the plaintiff at a valuable consideration; that Joseph was a beneficiary in the estate of **Barnabas Ambutsi Masinjila**, now deceased; that later on in **2013** the defendant purchased a further portion of plot number **229** from one **Bernard Muyeka Masinjila**, also a beneficiary to the estate for valuable consideration; that he has been in possession of the land for some years; that as a purchaser having legal and exclusive ownership of the land he does not require the plaintiff's consent to be on the land or to carry on any developments thereon and that he has not committed any acts of environmental degradation thereon. The defendant reads fraud in the acts of the plaintiff and alleges that the plaintiff forged signatures and colluded with the Land Registrar and processed title to the land before confirmation of grant and failed to disclose that the suit property was subject to distribution between all the beneficiaries of the estate of the deceased.

5. The plaintiff filed a reply to defence on **24/8/2015** and reiterated the matters contained in his plaint. There was no reply to the amended plaint and the defendant is, as is the practice, deemed to be relying on the defence filed and whose contents are analysed as above.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. PW1, Apollo Ambutsi Shikanga testified on **21/11/2018**. He stated that he is an advocate practicing as Ambutsi & Co. Advocates; that in the year 2013, the defendant encroached onto his land parcel number 229 which had been transferred to the plaintiff by his father; that that parcel was later subdivided and the title surrendered to produce titles Nos. 627 to 632; that the defendant is in occupation of plot number 627 registered in the plaintiff's name on 28/10/13; that the defendant has no permission to be on the land; that the property does not form part of his father's estate and his brothers who sold the defendant the land had no authority and that the defendant should be evicted.

7. Upon cross-examination by Mr. Analo the plaintiff admitted that the defendant has developed the land; that he did so after the year 2013; that the alleged sellers are his brothers; that his father died in 2004; that the grant to the estate has not been issued or confirmed; that his mother and brother are administrators to the estate; that the land parcel was transferred to him by his father in the year 2007.

The Defendant's Evidence

8. The D.W.1 Jomo Godwin Kororia testified on **21/11/2018**. His evidence matched with the contents of his defence; he first bought one acre on **28/12/2011** from the plaintiff's brother, Joseph, and that an agreement were executed signifying the sale. After he was put into possession of the land by the seller he approached the plaintiff as advised by the seller for a road of access and the plaintiff showed him the road meant to serve the plot. He resided on the land for some time and then later on 19/9/2013 he purchased 2.5 acres out of the same land from the plaintiff's other brother, Bernard.

9. When cross examined by Mr. Ingosi the defendant admitted that he never conducted an official search before the purchase; that he genuinely believed that the land was registered in the name of the plaintiff's father; that he had been leasing the land since 2009; that he is not able to prove forgery against the plaintiff; that he has no evidence that plot number 229 falls under the estate of the deceased; that he had already put up two fishponds on the land and fenced it by the time the suit was commenced; that according to him this suit was filed pursuant to a personal decision of the plaintiff and not the entire family. On re-examination the defendant stressed that Bernard had leased from him land before the sale and that there were existing boundaries consisting of posts that convinced him into believing that the land was surveyed. With that evidence on the record the defendant closed his case.

SUBMISSIONS

The plaintiff filed written submissions on **20/3/2019**. On 11/3/2019 the defendant's counsel informed the court that the defendant did not intend to file submissions in the matter.

DETERMINATION

Issues for Determination

10. The issues for determination in this suit are as follows:

(a) Is the defendant a trespasser on the suit land?

(b) What orders should issue?

(a) Is the defendant a trespasser on the suit land?

11. The defendant claims to have been leasing the land for several years before purchase. The lessors were the plaintiff's brothers. If this court finds that they were not entitled to sell the suit land then it must find that the defendant is a trespasser on the land.

12. That the defendant had leased the land since 2009 has not been effectively controverted by the plaintiff. The plaintiff has also not controverted the agreements that were entered into between his brothers and his mother on the one part and the defendant on the other. His only objection is that the persons who sold the land had no authority to do so.

13. Whereas the agreement dated 28/12/2011 refers to the one acre portion being sold as the seller's share out of the whole land, the agreement dated 19/9/2013 is silent on the nature of the land being sold.

14. The plaintiff produced the original title showing that plot number 229 was registered in his name on **23/6/2007**. That was at least four years before the agreements between the defendant and the plaintiff's brothers were made. Before that the land was registered in his father's name.

15. The plaintiff having laid down evidence before the court that he was registered owner of the suit land as at the year 2007, which is four years before the purported sale, the burden of proof still lay on the defendant's shoulders to prove that the plaintiff was registered as the proprietor fraudulently, illegally at the expense of the estate whose beneficiaries sold him land

16. In this suit, though the defendant avers that the land belonged to the estate of the defendant's deceased father he has no proof.
17. It is very unfortunate for the defendant that this court was not allowed by any of the parties to have any evidence in respect of **Eldoret High Court Succession Cause Number 284 of 2006** which the defendant had alleged in the defence that the suit land is the subject of.
18. The defendant has not indicated when the plaintiff's father died in order to lay a basis for comparison of that date of death with the date of registration of the plaintiff as the owner of the land.
19. This court is perfectly in the dark as to how the plaintiff came to own the land which the defendant believed at the time of the sale to belong to the plaintiff's father's estate.
20. Whereas a party must establish his claim or defence through evidence of facts in existence, the defendant's defence is therefore not supported by any facts. He has not demonstrated that the land belonged to the estate of the plaintiff's deceased father at the time of the agreements made between him and the plaintiff's brothers.
21. The mere fact that the plaintiff never produced any signed transfer to show that the land was transferred to him by his father does not aid the defendant, for while it was upon the defendant to prove fraud on the plaintiff's part, it is normally not common for parties to adduce evidence that is against their interest in litigation.
22. Since the defendant did not discharge the burden of proving the contents of his defence this court has to go by the evidence from the land register, which was placed before it, and which shows the plaintiff was registered owner as at the time of the purported sale.
23. The provisions of **Sections 25 and 26 of the Land Registration Act** provide as follows:

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

24. The defendant's greatest undoing lies in his admission at the hearing that he never conducted an official search which would have pointed out to him that the land was already registered in the plaintiff's name before entering into agreements with the purported sellers but in my view this also earns him credit as an excruciatingly honest witness who deserves better treatment than he is getting from the plaintiff and his brothers.

25. However, when all is said and done, I must uphold the provisions of **Sections 25 and 26 of the Land Registration Act** in this suit by finding that the defendant has no right to the suit land and that he is a trespasser thereon.

CONCLUSION

(b) What orders should issue?

26. In the light of the foregoing I find that on the basis of the evidence on the record the plaintiff has proved his case on a balance of probabilities against the defendant.

27. I therefore enter judgment in favour of the plaintiff against the defendant and I issue the following orders:

(a) A declaration that parcel of land title number Kapkoi/Mabonde Block 1/Ex-Prison/627 belongs to the plaintiff.

(b) A declaration that the defendant, whether by himself or his servants or agents or otherwise howsoever, is not entitled to remain on Kapkoi/Mabonde Block 1/Ex-Prison/627.

(b) A permanent injunction restraining the defendant, whether by himself or his servants or agents or otherwise howsoever, from entering, trespassing or otherwise interfering with the plaintiff's quiet possession and enjoyment land title number Kapkoi/Mabonde Block 1/Ex-Prison/627.

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

It is so ordered.

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

Mr. Ingosi for the plaintiff

Mr. Bisonga for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

13/5/2019