



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 343 OF 2017

FRED MARTIN SIMBILI.....PLAINTIFF

VERSUS

ESTERA MMBONE LUSASI.....DEFENDANT

EUNICE MORAA LUSASI.....INTERESTED PARTY

JUDGEMENT

It is the plaintiff's case that at all material times, the plaintiff is the lawful purchaser of land parcel No. 51 Shaviringa Settlement Scheme measuring approximately 2 acres, having bought the same from the deceased, one Samuel Mengesa Lusasi. The defendant has without any colour of rights and/or title and without justifiable excuse and/or provocation caused strangers to settle themselves on the said parcel, occupying it with the full knowledge that the land belongs to the plaintiff. Despite demands by the plaintiff to the defendant to keep off from encroaching, intermeddling, dealing and/or undertaking any activities on his piece of land, she has remained uncooperative, adamant and evasive hence necessitating the plaintiff to seek legal redress. The plaintiff prays for judgment in his favour against the defendant for:-

(a) An order for permanent injunction against the defendant from trespassing, cultivating, intermeddling and/or interfering in any way on land parcel No. 51 Shaviringa Settlement Scheme whether herself and/or her workers, agents, servants or any other persons, pending the hearing and determination of this suit and/or confirmation of grant of letters of Administration interstate issued to her vide Hamisi Law Courts Succession Cause No. 2 of 2017.

(b) An order that the plaintiff be allowed unlimited access and or right of way to the said parcel of land pending hearing and determination of this suit.

(c) The O.C.S. Serem Police Station to be served with the said orders to ensure full compliance and co-operation on the part of the defendant.

(d) Costs of the suit to be borne by the defendant.

(e) Any other relief and or further relief that the honourable court may deem just and fit to grant.

PW1 testified that he bought the suit land from one Samwel Mengesa Lusasi in 1999 and he produced the sale agreement PEx1. The seller passed away and he dealt with the 1st wife of the seller who is the 1st defendant in this case and gave her the balance of the purchase price PEx3. He took possession in 2001 and put up a house in 2012. He has been enjoined in the succession cause which is still ongoing and the 2nd defendant who is the sellers 2nd wife has forcefully taken possession. PW2 the caretaker testified that he lived on the suit land from 2005 to 2010 when he was threatened by the 2nd defendant and decided to move away. PW3 testified that his brother sold the land to the plaintiff. However he was not a witness to the agreement. He cannot remember who the witnesses were.

DW1 the first defendant testified that he husband sold the land to the plaintiff then he died. In 1984 he married the second defendant. The plaintiff took possession for 10 years before the 2nd defendant moved there. She admits taking the balance of the purchase price from the plaintiff which was Kshs. 300.000/=.

DW2, the interested party denies that the plaintiff is the lawful purchaser of Land Parcel No. 51 Shaviringa Settlement Scheme and that the plaintiff bought the same from the deceased one Samwel Mengesa Lusasi. DW2 states that the suit land parcel was given to the late Samwel Lusasi by the government of Kenya in exchange of his land parcel No. Nyang'ori/Hamisi 'B'/578 which is restricted for compulsory acquisition by Kabinjari Primary School vide an agreement dated 5th of February, 1996. She further states that at the time of the exchange aforesaid, the suit land was subject to the process of registration and issuance of title deeds and that the said deceased died on 5th of April, 1999 without and before the due process of registering the suit land in his name had been duly completed and effected by the Land Registrar. The deceased is survived by DW2 and seven children who are still surviving and that at the time of the said exchange he had settled his

second house on the land that was being exchanged with the school. She avers that after the said exchange, the deceased moved the second house to his small plot comprising land parcel No. Tiriki/Senende/750 where they started residing in one of the small shops built by the deceased. The plot is still registered in the name of the original owner. In 1996, after the exchange of the land as aforesaid, the said deceased allocated the suit land to the DW2 and allowed her to be tilling it as he prepares to construct a homestead for her on the suit land but died before accomplishing this. She avers that it is after the death of the deceased that they learnt that the plaintiff had allegedly purchased the suit land when in 2002. She states that on 19th of April, 2010 in a Chief Baraza involving all the parties resolved that the suit land belongs to DW2. This decision was upheld by the D.O. in a meeting held on 29th of September, 2010 where it was further resolved that the plaintiff herein was to be refunded by the defendant the money received from the plaintiff as purchase price for the suit land since she had unlawfully sold the suit land which belonged to the DW2. That after it was resolved that the suit land belongs to the DW2, they entered and took actual possession of the suit land where they built a house and they have been residing and cultivating the suit land to date. She states that in the circumstances, the plaintiff is not entitled to the suit land and that any alleged transaction involving the sale of the suit land to the plaintiff or any other person is illegal, fraudulent, null and void and should thus be declared. DW3 corroborated the DW2's evidence. DW4 the Chairman of the above mentioned school confirmed the exchange of land with the deceased one Samwel Mengesa Lusasi. DW5 a family member confirmed that DW2 moved there after the Chief's Baraza allowed her. DW6 a retired teacher testified that he had been leasing the land from DW2 and the deceased one Samwel Mengesa Lusasi.

This court has carefully considered the evidence and the submissions herein. Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“ the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”

PW1 testified that he bought the suit land from one Samwel Mengesa Lusasi in 1999 and he produced the sale agreement PEx1. The seller passed away and he dealt with the 1st wife of the seller who is the defendant in this case and gave her the balance of the purchase price PEx3. He took possession in 2001 and put up a house in 2012. He has been enjoined in the succession cause which is still ongoing and DW2 who is the seller's second wife has forcefully taken possession. DW1 the defendant testified that her husband sold the land to the plaintiff then he died. In 1984 her husband married the DW2. The plaintiff took possession for 10 years before the DW2 moved there. She admits taking the balance of the purchase price which was Kshs. 300,000/=. It has not been disputed that at the time of the alleged sale agreement of the suit land in 1999 to the plaintiff both the DW1 and DW2 married to the now deceased one Samwel Mengesa Lusasi. It is also not in dispute that the balance of the said purchase price was paid to DW1 alone. The issue to be determined is whether DW1 had the locus at the material time to enter or conclude the said agreement with the plaintiff. Indeed the plaintiff testified that he took possession in 2001 and put up a house in 2012 and this is after the seller had died. The first defendant had no letters of administration at that time and could not purport to represent the deceased when it was clear to all the parties that they were other beneficiaries to the estate of the said Samwel Mengesa Lusasi. Parties all agree that there is a succession matter pending on the estate of the said Samwel Mengesa Lusasi. The sale agreement hence cannot be enforceable as DW1 did not have the locus standi and was not the administrator. She was not the owner of the land and cannot chose to lock out the other beneficiaries. DW2 has given evidence that the Chief and the DO gave her the land and permission to occupy the suit land. This cannot be determined by this court and can only be decided by the Succession Court. The hearing and determination of the suit and/or confirmation of grant of letters of Administration interstate issued to DW1 vide Hamisi Law Courts Succession Cause No. 2 of 2017 will deal with the division of the estate of the deceased. This court has carefully perused the said sale agreement PEx1a, clause 4 states that;

“The balance of kshs 300,000/=(three Hundred Thousand) shall be paid after the seller obtains the title deed and is ready to transfer.”

Why did the plaintiff pay DW1 a third party after the seller had died? This was despite the fact that she was not the administrator and only took out letters in 2017! I find that this agreement is not enforceable and orders sought cannot be granted. DW1 seems to be colluding with the plaintiff to exclude the other beneficiaries of the estate of the deceased one Samwel Mengesa Lusasi. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH JUNE 2019.

N.A. MATHEKA

JUDGE