



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 310 OF 2018

(Formerly Kisii Elc case No. 118 of 2016)

ANDREW NYADO OTHINA.....PLAINTIFF

VERSUS

EDWARD OUMA OTHINA.....DEFENDANT

JUDGMENT

1. By a plaint (Fast track) dated 26th April 2016, the plaintiff through S.M. Sagwe and Company Advocates has sued the defendants for :-

i. A permanent injunction restraining the defendant by himself, sons family number agent/servants or assignees from the passing unto cultivating and or any way whatsoever, interfering with the quiet occupation and possession of land title number KAWERE/KONYANGO/KARANDING/1429 by the plaintiff.

ii. Costs of the suit be borne by the defendant.

iii. Such further ad or other relief as the Honourable Court may deem fit and just to grant.

2. The plaintiff's case in brief is that he is the registered owner of the suit land ,LR NO. KAWERE/KANYANGO/KARANDING/1429 measuring 0.7 hectares in area. That on 15th March 2016, the defendant wrongfully, unlawfully, forcefully and illegally entered the suit land. The defendant claimed ownership of the suit and started to cultivate it without the plaintiff's knowledge thus precipitating the present suit.

3. The defendant who appeared in person herein filed his statement of defence dated 2nd June 2016, wherein he denied the plaintiff's claim and sought its dismissal with costs. He stated that whereas the plaintiff is the registered owner of the suit land, the same was left under his (defendant) care by it's original owner, Pesila Atieno Ogweno (deceased 1) who entrusted the land to him for her co-wife, Agnes Obonyo Ogweno (deceased 2) and her offsprings who had migrated to Masaba location in Kuria land. That he has been cultivating the suit land since the year 1995 with the knowledge consent and or authority of deceased 1, even until her death in year 2013.

4. The plaintiff's counsel filed agreed issues dated 29th August 2016. The defendants filed his proposed issues dated 31st October 2016. I note the issues accordingly.

5. On December 2017 the plaintiff (PW1) testified and relied on a copy of title issued on 15th April,2015 (PExhibit 1), a certificate of official search dated 22nd February 2016 (PExhibit 2), a copy of proceedings and Judgment in inheritance misunderstanding between the parties before the Chief, Central Kabuoch location (PExhibit 3), in support of his claim. He stated that the defendant cultivates the suit land. He called no witnesses herein.

6. On his part, the defendant (DW1) testified that the land is registered in the name of PW1. That the late Pricillah Atieno Ogweno (deceased 1) who had no children gave him the suit land to cultivate for an unspecified period of time. He called his step sister, PERES ADHIAMBO OBULLO (DW2) who relied on her statement dated 2nd June 2016 and stated that the suit land belongs to Ogweno Oguta (deceased 3) who died before her birth in 1975.

7. Learned counsel for the plaintiff filed submissions dated 13th March 2019 wherein he urged the court to allow the orders sought in the plaint and analysed the evidence of the plaintiff and the defendant. He relied on sections 24 (a) and 26 of the **Land Registration Act, 2016 (2012)** regarding registration of land. Counsel further cited authorities including **Machareus Obaga Anunda –v- KPLC Ltd (2015) eKLR**

and Rose Naswa Masinde –v- Lilian Nekesa Simuyu Mukupi (2014) eKLR, in support of the submissions.

8. On the part of defendant, submissions dated 5th April 2019 were filed on 8th April 2019 wherein he made reference to the orders sought in the plaint and analysed the respective cases of parties. He also framed and analysed issues for determination namely whether the suit land was a gift *inter vivos* to PW1 from deceased 1, and whether PW1 holds the suit land in trust for the estate of the said deceased 1. He relied on **Halsbury's Laws of England, 3rd Edition Vol. 18 at pages 366,397 at pages 366, 397 paragraphs 755 Sections 85 (2) and 108 (1) of the Registered Land Act (repealed), section 45 of the Law of Succession Act, (Cap 160), sections 26 (1) and 27 (1) of the Land Registration Act, 2016 (2012) and the case of Registered Trustees Anglican Church of Kenya, Mbeere Dioceses v- David Waweru Njoroge (2007) eKLR, to buttress his submissions.**

9. I have duly considered the pleadings evidence and submissions of the respective parties. I am guided by the Court of Appeal decision in the case of **Galaxy Paints Company Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** on the issues for determination in a suit generally. Having noted the agreed issues and proposed issues filed by the plaintiffs' counsel and the defendants respectively as well as issues for consideration in the defendants submissions, the issues for determination are compressed to whether:-

a. The plaintiff is the proprietor of the suit land.

b. The plaintiff holds the suit in trust for the estate of Pricilla Atieno Ogweno (deceased 1).

c. The defendant is a trespasser on the suit land.

d. The plaintiff is entitled to the reliefs sought in his plaint.

10. On the first issue, the plaintiff stated at paragraph 3 of the plaint and in his evidence that he is the registered proprietor of the suit land. The evidence of defendant (DW1) and his statement of defence especially at paragraph 3 confirm that the plaintiff (PW1) is the registered proprietor of the suit land. He testified in examination in chief that :-

“ I know the defendant. He is my step brother. The defendant forcefully and illegally entered my land Reference No. Kawere/Kanyango/Karading/1429 with effect from 15/3/2016. I have a copy of title deed issued on 15/4/2015 (PEXhibit 1).

11. I am aware of the meaning of the term **“Certificate of Title”** and **“Proprietor”** under **Section 2 of the Land Registration Act ,2016 (2012)** under which the suit was registered as shown PEXhibits 1 and 2; see also the case of **Wainaina –v- Murai and others (1976-80) 1KLR 283 at 289 and 290** where the land in question was registered under the repealed **Registered Land Act (Cap 300)**. Quite plainly, it is common ground that the suit land is registered in the name of PW1.

12. Regarding the issue of trust, DW1 testified that the original owner of the suit land was deceased 1 who entrusted PW1 with LR NO. Kabuoch/Kawere Koyango/ Karanding/1450 and 1451 and not the suit land. That the said deceased had no child. That PW1 has no right over the suit land as deceased 1 had told PW1 and himself that the suit land was to be held in trust for her (deceased 1) co-wife and children.

13. DW2 testified that DW1 is not the owner of the suit land. That her (DW2) siblings and herself live on the suit land.

14. During cross examination, DW1 stated, *inter alia*, that:-

“ I have no title deed to the land. I have no written permission to use the suit land.”

15. In his submissions, learned counsel for PW1 made reference to the case of **Rose Nasira Masinde (supra)** on trust property, among others. I am conscious of the decision in **Mbothu and 8 others –v- Waitimu and 11 others (1986) KLR 17** cited therein with regard to trust. However, the instant decision and the said decisions are distinguishable as DEXhibits 1 to 4 do not point to any trust including Customary trusts as envisaged under **sections 25 and 28 of the Land Registration Act, 2016 (2012)**.

16. Quite plainly, PW1 is the proprietor of the suit land. The registration of a title to land is a creation of the law and one must look into the considerations surrounding the registration in order to determine whether it was envisaged that a trust should be created; see **Mwangi and Another –v- Mwangi (1986) KLR 328**.

17. I find abundant help in **Isack M'inanga Kiebia –v- Isaaya Theuri M'Linturi and another (2018) eKLR** where the Supreme Court of Kenya provided some of the elements that would qualify a claimant as trustee in a suit land. The evidence of DW1 and DW2 do not discern that PW1 is a trustee in respect of the suit land.

18. Moreover, it is pretty evident that PW1 is the proprietor of the suit land. DW1 did not adduce any sufficient evidence to show that the proprietorship of the suit by PW1 squarely falls under the exceptions at **Section 26 (1) of the Land Registration Act, 2016 (2012)**.

19. It is the finding of this court that PW1 is the proprietor of the suit as shown in PEXhibits 1 and 2. The defendant's purported entry into the suit land is unjustifiable in the circumstances; see **Clerk and Lindsell on Torts (17th Edition paragraph 17-01)**. The plaintiff is entitled to the orders sought in his plaint as provided for under **Section 13 (7) (a) of the Environment and Land Court Act 2015 (2012)**. He has proved his claim against the defendant on a balance of probabilities.

20. Accordingly, I enter judgment for the plaintiff against the defendant for a permanent injunction and costs in terms of orders (a) and (b) sought in his plaint dated 26th April 2016.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of JUNE 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Nyambati holding brief for S.M. Sagwe Learned counsel for the plaintiff.

Tom Maurice – Court Assistant.