



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 66 OF 2017

FORMERLY MERU ELC CASE NO. 188 OF 2016

SARAH KATHINI KAMUNYU.....PLAINTIFF

VERSUS

MAKUNYI RWANDA1ST DEFENDANT

KATHIIRI MAKUNYI.....2ND DEFENDANT

AND

BEATRICE MUTHONI KANAKE.....INTERESTED PARTY

JUDGMENT

1. This is an interesting case where the 1st defendant and the 2nd defendant all admit that the 1st defendant, who is husband to the 2nd defendant sold land to the plaintiff. However in their defences, they all deny that they had trespassed upon or interfered with the plaintiff's land parcel **No. S. THARAKA/TUNYAI "A"/3138**.
2. The plaintiff prays for judgment against the defendants jointly and severally as follows:
 - a) A permanent order of injunction restraining the defendants by themselves, their agents, workmen or representatives from ever interfering with **L.R. No. S. THARAKA/TUNYAI "A"/3138**.
 - b) Costs of the suit to be paid by the defendants.
3. The 2nd defendant in her counter-claim prayed for judgment against the plaintiff for:-
 1. An order of permanent injunction restraining the plaintiff whether by herself, her agents, employees, servants, family members or anyone acting on her behalf from trespassing, occupying, entering, cultivating, utilizing, ploughing or in any other way interfering with the 2nd defendant's quiet possession, occupation and use of the land reference **No. S. THARAKA/TUNYAI/ "A"/2789**.
 2. Costs of the counter-claim and suit be paid by the plaintiff.
4. In his defence, the 1st defendant claims that there are 3 parcels of land between his land and the plaintiff's land. He also says that the dispute in this suit involves a boundary dispute and the party's should have gone to surveyors instead of the plaintiff filing this suit.
5. The plaintiff avers that the two defendants have colluded and made it impossible for her to enjoy quiet possession of her land and even erected fencing posts with the sole intention of alienating part of the plaintiff's land.
6. I do note that on **26th March, 2019**, the 1st defendant told the court that he had no case against the plaintiff. By so saying, he was constructively admitting the plaintiff's case as set out in her pleadings. He, however, told the court that he did not know Beatrice Muthoni Kanake, the Interested Party. He also, however, apologised to the court for having told the court that he did not know the Interested Party even though he had sold land to her. He apologised only after being shown an agreement entered into between him and her. He also told the court that both of them had gone to the Land Control Board and consequently, the Interested Party, Beatrice Muthoni Kanake, had obtained a title to her property.

7. In her oral evidence, PW1, Sarah Kathini Kamunyu, the plaintiff, asked the court to adopt her witness statement dated **28th September, 2018** as her evidence in this suit. The witness statement is reproduced in full herebelow. Any spelling or other mistakes are ascribable to the plaintiff or her advocates.

STATEMENT OF SARAH KATHINI KAMUNYU – PLAINTIFF

I come from Tharaka Nithi County.

I am the owner of all that parcel of land known as L.R. No. S. Tharaka/Tunyai “A”/3138. It measures about 1.50 acres. I bought the land from the 1st defendant in two phases. I first bought 0.50 acres in the year 2011 at a price of Kshs.130,000/=. I paid him in full. I took possession of that 0.50 acres and I started using it. In the year 2013 the 1st defendant added to me 1.00acre adjusted to the 0.50 acre that he had sold to me in the year 2011. We agreed at the purchase price of Kshs.230,000/=. I paid the purchase price in full.

The 1st defendant the excised for me the total of 1.50 acres, transferred to me and the same was registered in my name. the boundary beacons were clearly marked. I started cultivating the whole land. I fenced the land, but at some point, the defendants stopped me from fencing some portion of the land. I reported the matter to the district surveyor, who came to the land and re-established the beacons.

In the month of August, 2016, while I was away, the two defendants dug holes on my land. They then proceeded to erect fencing poles with the intention of fencing off a portion of my land. I protested the move but could not bear about it. The area they have fenced off takes away almost one half of my land. This denies me the use and enjoyment of my land. I will not be able to access and cultivate my land. I need to have the defendants stopped by an order of the court. I also need them to pay the costs of the suit.

DATED AT MERU THIS 28TH DAY OF SEPTEMBER, 2017

SIGNED BY.....

SARAH KATHINI KAMUNYU – PLAINTIFF

8. During cross-examination by the 1st defendant, Makunyi Rwanda, PW1’s evidence was not controverted. The 1st defendant told the court that his clan and the plaintiff’s clan were culturally prohibited from engaging in court cases. The plaintiff countered that past efforts to resolve the dispute at home had proved futile.

9. In her cross-examination, the 2nd defendant wondered why the plaintiff had brought her to court and yet it is her husband, Makunyi Rwanda, the 1st defendant who had sold land to her. She also asked the plaintiff why she had not involved her when she bought land from the 1st defendant. The plaintiff replied that the 2nd defendant had acquiesced to the sale of land to her by her husband and showed her the sale agreement where her name appeared as being a witness and her identity card number had been recorded. She also told the court that the 2nd defendant was present when her land was surveyed.

10. DW1, the 1st defendant, told the court that he indeed had sold land to the plaintiff. He blamed the 2nd defendant, Kathiri Makunyi, his wife, for having encroached upon the plaintiff’s land.

11. DW2, Kathiiri Rwanda, the 2nd defendant denied encroachment upon the plaintiff’s land. She also told the court that the plaintiff and the 2nd defendant had not involved her when the 2nd defendan sold land to the plaintiff. For that reason, she wondered why the plaintiff had brought her to court. She told the court that the plaintiff should only pursue the 1st defendant, Makumi Rwanda, who had sold land to her. She asked the court to remove her from this suit.

12. During cross-examination by Mr. Murango Mwenda, the plaintiff’s advocate, DW2, contrary to the evidence she had tendered in her examination in chief, admitted that she and her co-wife, Joyce Wanja Makumi, were in the chief’s office as witnesses when they agreed that the 2nd defendant, their common husband, could sell the suit land to the plaintiff. She went on to tell the court that she did not bother the plaintiff and laconically added that it was her husband, the 1st defendant, Makunyi Rwanda who continued to harass the plaintiff.

13. I do note that the 1st and 2nd defendants did not move the court to adopt their witness statements as their evidence in this court. Nevertheless, this court has taken them into account when determining this suit.

14. In terms of the provisions of Order 21 Rule 4 of the Civil Procedure Rules, I find that I have already set out a concise statement concerning this case. I find that the only issue for determination is if or if not the plaintiff has shown to the satisfaction of this court that she merits the granting of the orders sought in her plaint. The 2nd defendant has not prosecuted her counter-claim.

15. From my consideration of the totality of the evidence adduced by the parties, I find that the 1st and 2nd defendants are dishonest persons. One cannot know when to believe them and when not to believe them. They have blamed each other. I opine that this disingenuous contrivance will not discombobulate this court towards closing its eyes to the truth. Their chicanery exposes them as veritably incorrigible liars who have colluded, and formed an evil cartel of two, to sell land and after that harass the purchaser, the plaintiff in this case. This conduct is pellucidly unmitigable.

16. I do note that the report regarding a site visit to the suit land on **11th May, 2018** by the Land Registrar and the surveyor, filed in court on **23rd May, 2018**, is rather nebulous in as far as the orders sought by the plaintiff in this suit are concerned. However, it is not controverted

that the defendants did show the plaintiff the land she had bought from the 1st defendant.

17. I find the plaintiff's evidence credible. I also find that she had proved her case on a balance of probabilities.

18. I note that the Interested Party did not make any specific claim against the defendants.

19. I enter judgment for the plaintiff against the 1st and 2nd defendants in the following terms:

a) A permanent order of injunction is issued restraining the defendants by themselves, their agents, workmen or representatives from ever interfering with **L.R. No. S. THARAKA/TUNYAI "A"/3138** as was shown to the plaintiff when she bought it.

b) The 2nd defendant's counter-claim is hereby dismissed.

c) Costs shall follow the event and are awarded to the plaintiff against the defendants.

d) The OCS in charge of the area where **L.R. No. S.THARAKA/TUNYAI "A"/3138** is hereby directed to facilitate the implementation of order (a) above.

Delivered in open Court at Chuka this **26th day of June, 2019** in the presence of:

CA: Ndegwa

Sarah Kathini Kamunyi – Plaintiff

Makunyi Rwanda – 1st Defendant

Kathiiri Makunyi – 2nd Defendant

P. M. NJOROGI,

JUDGE.