



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 17 OF 2011

MAURICE ANTONY WANJALA MUSEE.....PLAINTIFF

VERSUS

ANNA WANYAMA WANJALA1ST DEFENDANT

JOHN SIMIYU WEPUKHULU.....2ND DEFENDANT

ISAAC WAFULA WANAKACHA.....3RD DEFENDANT

OMOTO DAVID ALIAS OMOTO PHILIP.....4TH DEFENDANT

SOLOMON WANYONYI KHAEMBA.....5TH DEFENDANT

ABRAHAM CHENGE WEKESA.....6TH DEFENDANT

PENANA MTONYI.....7TH DEFENDANT

MARY AMBOGO.....8TH DEFENDANT

NELLY SIKHOYA BALANGA.....9TH DEFENDANT

ANNE NEKESA WEKESA.....10TH DEFENDANT

JOTHAM SIMITA.....11TH DEFENDANT

WYCLIFFE AIRO SIRIKWA.....12TH DEFENDANT

JUDGMENT

INTRODUCTION

1. In the plaint dated 21/3/2011 and filed in court on 23/3/2011, the plaintiff prays for judgement against the defendants for:

(a) An order directing the defendants their agents, employees and/or servants to vacate the suit premises and in default an order directing their eviction from the suit land.

(b) General damages for trespass and interest thereon at court rates.

(c) Costs of this suit

PLEADINGS

The Plaint

2. It is the plaintiff's case that he is registered owner of land parcel No. **Waitaluk/Kapko/Block 10/ Kapkoi Sisal/152** measuring approximately **4.039 Ha** situated in Kitale. The plaintiff states that the 1st defendant trespassed onto the said land on or about the year **2008** and unlawfully took possession thereof contrary to a court order directing that the status quo of the suit land be maintained pending the hearing and determination of a **Judicial Review Application Misc. Civil Appl. No. 123 of 2006** at **Bungoma High Court**. The 1st defendant without any colour of right proceeded to sell the plaintiff's land to the 2nd to 12th defendants and other unknown persons who are now in possession of the land and have erected illegal structures thereon. The plaintiff avers that due to the unlawful action by the 1st defendant the plaintiff has been denied access to his land and not been able to use the same for farming activities and therefore suffered damage. The plaintiff avers that an application for **Judicial Review Misc. Application No. 123 2006** at the **Bungoma High Court** was ruled in his favour, quashing the decision of the Trans-Nzoia Land Disputes Tribunal which had awarded the 1st defendant a portion of the suit land.

The Defence and Counterclaim

3. The defendants filed a joint statement of defence on **7/4/2011** and later filed an amended statement of defence and counterclaim on **19/11/2018** denying the claim. In the amended defence and counterclaim the defendants' deny the plaintiff's claim and allege that the 1st defendant and the plaintiff equally contributed to the purchase of the suit land in 1974 and it is therefore matrimonial property; that the plaintiff consented to the sale of the land to the 2nd - 12th defendants and others and all the proceeds were appropriated towards the welfare of plaintiff's children whose fees the plaintiff had refused to pay and that there is another suit pending that is **Bungoma HCCC No. 112 of 2010**.

4. In the counterclaim the defendants aver that the plaintiff and 1st defendant are husband and wife who were married under the Luhya customary law and whose marriage subsists to date; that they have 7 children; that their marriage was turbulent for the greater part; that the plaintiff secretly obtained a loan from A.F.C. using the suit land as collateral and wilfully neglected to service the said loan with the intent of causing the property to be sold by the AFC; that when the 1st defendant learnt of the sale she approached AFC and it was agreed that she liquidates the loan to avert sale of the property by AFC; that she sold part of the property to settle the loan; that at that time the 7 children of the marriage were still minors and in school and 2 of them suffered from an illness; that a land disputes tribunal decision ordered that the land be subdivided into two and the 1st defendant do get 5 acres; that it was adopted as a judgment in **Kitale Land Case No. 4 of 2004** and implemented on the ground whereupon the 1st defendant immediately commenced the disposal of part of her entitlement as awarded; that the 1st defendant only learnt in 2010 that the Land Disputes Tribunal award had been quashed; that all the 3 ½ acres sold out the suit land were disposed of before the quashing of the tribunal decision and on the strength of a decision of a court of law; that the purchasers were not aware of the judicial review proceedings and are bona fide purchasers for value without notice and who have quiet and peaceful occupation and use of the purchased land and who should not be penalized.

5. In the counterclaim defendants pray for judgment against the plaintiff for orders that:-

(a) **The agreements entered into between the 1st and the 2nd to 11 other defendants be ratified.**

(b) **An order be issued directing the plaintiff to transfer to each defendant each part of land purchased. Failure to which the Deputy Registrar of the High Court to execute all transfer instruments on the plaintiff's behalf.**

(c) **The cost of the case.**

(d) **Any other relief the honourable court may deem fit to grant.**

6. The plaintiff filed a reply to amended defence and counterclaim on **20/11/2018** in which he pleaded that the Bungoma suit was withdrawn by the 1st defendant; that he and the 1st defendant had been separated since 1994; that he never obtained a loan secretly as alleged; that the 1st defendant's payment to the AFC was not done in good faith; that the 1st defendant knew that the adoption of the tribunal award as a judgment was stayed by the High Court and later quashed on **9/12/2009** in the presence of her advocate; that the defendants who purported to purchase part of the suit land knew or ought to have known the legal status of the suit parcel by exercising due diligence and that such sale was null and void for want of land control board consent.

The Plaintiff's Evidence

7. **PW1, the plaintiff**, testified on **26/11/2018**. He adopted his written statements, one dated **30/7/2018** and another dated **20/11/2018**. His evidence is that the title to the suit land which measures 4.09 ha is registered in his name and produced the original title as **P. Exhibit 1** and discharge of charge as **P. Exhibit 2**. He narrated how his wife obtained an award of 5 acres out of the suit land from the Land Disputes Tribunal and how the same award was stayed by the court in **Bungoma HC Misc. No. 123 of 2006** on **11/6/2008** and later overturned. He produced certified copies of the stay order and ruling as **P. Exhibit 3** and **4** respectively and added that notwithstanding that the 1st defendant continued to sell the land. He denied that the land is matrimonial property and produced an agreement for sale as **P. Exhibit 5**. According to him his wife never contributed to the purchase of the land and he obtained the land using proceeds of sale of his car and his salary; he denied ever having attended the Land Control Board for consent; that his wife never sought his permission to sell the land and the sale was illegal. Under cross examination he admitted marrying the 1st defendant in **1968** and that the marriage still subsists though they are separated and that he bought the land in **1972** and married a 2nd wife in **1978** whom he settled elsewhere in Webuye. The 1st defendant deserted him in **1994** and never returned. He challenged the tribunal award at the Bungoma High Court. He admitted having 6 children who need medication. He avers that when he bought the suit land the 1st defendant was not working; he denied that the land sale proceeds had been applied for family upkeep expenses. He averred that taking loan for his purposes was a normal practice to him and denied seeing any notice of sale of the suit land though some loan repayment reminders were sent him and that his wife repaid the loan between 2008 and 2009.

Evidence for the Defence

8. DW1, the 1st defendant testified on 26/11/2018, 19/2/2019 and on 25/3/2019. In brief her evidence is that she sold the land to pay school fees and medical expenses for her children. According to her as at 1973 to 1974 she was a primary school teacher; that after purchase of the suit land her husband settled her on it; however later on the plaintiff became abusive to her; she admitted that the plaintiff bought the land but she averred that she contributed the building of the house. They built a matrimonial house of the suit land and no other wife was settled there. In 1990's her children were still in school with the last one in nursery school. In 1994 following a quarrel she fled the home to a neighbour's place but on coming back the plaintiff chased her way from the home and went to her mother in law's place with her children except the eldest two where she stayed for one year and later went to Kibomet. All this time she was paying school fees with assistance of her eldest daughter who was in employment and the plaintiff never assisted her to deal with the school or medical fees. At one time following intervention by the Justice and Peace Commission the plaintiff offered that only the children should return home. After this the 1st defendant instituted the land disputes tribunal proceedings regarding the land. She exhibited the proceedings and ruling as **D. Exhibit 1** and the court decree as **D. Exhibit 2**. Thereafter a surveyor excised for her her entitlement of 5 acres out of the suit land; she went to AFC to seek a loan and she was informed the land was already charged and due to be auctioned whereupon, with concurrence of her children, she sold ½ an acre and paid the AFC but the title remained with the AFC. Later on she sold more land and used the proceeds pay for her sons' school fees; she produced evidence of payment of school fees. She testified that she normally spent about Kshs.10,000/= per month on medication for a sick children. By the time this suit was filed she had sold 2 out of the 5 acres; she produced the agreement to that effect as **D. Exhibit 5 (a) to (j)** and averred that the first two purchasers took possession in **2008** while six more took possession in **2009** and the last two in **2010** with the knowledge of the plaintiff who only opposed the sale of the last 1.7 acres out of the 5 acres. She narrated the struggles she has had with her mentally handicapped children who are now past the age of majority. She averred that she only sold the land after she obtained the decree from the Kitale court and she never knew that the tribunal award and the decree had been challenged in a Judicial Review Case. However she only came to know of those orders sometime in June, 2009 or thereabouts. She prays the court to enable the purchasers to obtain title since she had admitted to having taken and applied the proceeds of the sales of the suit land to family needs and the repayment of AFC loan.

9. In cross examination she admitted that on the date of tribunal proceedings the land was still registered in the name of the plaintiff. She admitted to not having sought the consent to subdivide or transfer and that the plaintiff had also never given his consent to sell; she denied that she was given a hearing in the suit that effectively challenged the tribunal decision but in the same breath admitted that Risper Arunga was her counsel in those proceedings. She also having admitted having received **Kshs.40,000/=** on **14/12/2009** from one of the buyers but explained that the buyer had entered into possession of the land much earlier. She admitted that the total loan outstanding was **Kshs.92,000/=** and that she never filed any case against the plaintiff for maintenance of the children.

10. In re-examination she stated that when she learnt of the Bungoma ruling that quashed the tribunal award she stopped selling the land.

11. DW2, **Elias Ong'oro** testified on 25/3/2019. He adopted his statement filed in court on 11/10/2018 as evidence-in-chief. His evidence is that he is a village elder since 1994 at Kapkoi Sisal and a friend and a neighbour to the plaintiff. He tried to reunite the plaintiff and the 1st defendant which attempts were resisted by the plaintiff. He was among the panel of elders which sought to resolve the dispute between the two; when the decision of the elders was given the land was shared equally between the two whereupon the 1st defendant sold about 3.5 acres. According to him the 1st defendant was only selling the land that was awarded to her but he did not know whether she had obtained the plaintiff's consent to sell.

12. DW3, **Moses Kasembeli** testified on the same date and adopted his statement filed in court on 11/10/2018 as evidence-in-chief. His evidence is that the plaintiff and the 1st defendant are man and wife and that in 1974 they bought the suit land which became their matrimonial home and they have 8 children. However in 1994 the plaintiff chased away the 1st defendant and her 5 children and attempts to resolve the matter were futile.

13. In cross examination by Mr. Amasakha he stated that by the time the 1st defendant lodged the tribunal proceedings the couple had been separated for 10 years and she had lived in Kibomet on her plot which she later sold.

Submissions

14. Submissions were filed on behalf of the plaintiff on 4/4/2019. I have considered those submissions.

DETERMINATION

Issues for determination

15. Much as a wealth of evidence has been given by both the plaintiff and the defendant, the main issues for determination in this matter are few and are identified as follows:

(a) Whether the defendants are trespassers on the suitland and whether should vacate the suit premises or be evicted in default.

(b) Who should pay the cost of the suit?

(a) Whether the defendants should vacate the suit premises or be evicted in default.

16. The first observation this court makes is that the 1st defendant being a wife to the plaintiff, would remain a licensee on the suit land at the end of these proceedings no matter the outcome; the twin issues of vacant possession and eviction will therefore not affect her in this suit for that reason. The other defendants however only claim portions of the suit land by virtue of agreements for sale they entered into with the 1st

defendant. Their title is therefore dependent upon the validity of the 1st defendant's claim to title to the land.

17. It is not in doubt that the suit land was registered in the name of the plaintiff at the time it was sold to the 2nd to 12th defendants by the 1st defendant. The 1st defendant did not have any authority from the plaintiff to sell the suit land to any of the defendants; she expressly admitted so in cross-examination. In lieu of such consent, she relied on an award by the Land Disputes Tribunal which was subsequently set aside by the **Bungoma High Court in Misc. Appl. No.123 of 2006** in a ruling by the Hon. F.N. Muchemi J dated 9/12/2009. Though the 1st defendant claims ignorance of those proceedings the final ruling in that Judicial Review Application that was produced as **P. Exhibit 4** shows that Mr. Situma held brief for Ms. Arunga for the interested party, the 1st defendant herein. She also expressly admitted in cross-examination in this suit that Ms. Arunga was her advocate in the Judicial Review proceedings. It is therefore not correct for her to say that she did not know of the proceedings in that case from the start. In fact at page 2 of that ruling the court observes as follows:

“The applicant was represented by Mr. Omukunda while the interested is called Anna Nanyama Wanjala and was represented by Risper Arunga who filed a notice of appointment on 23/10/2008.”

18. The suit land was also charged to the Agricultural Finance Corporation at the time of sale and part of the justification for the sale of the land by the plaintiff, apart from obtainance of funds by which to meet the expenses of bringing up the children the plaintiff had allegedly abandoned, was to repay the balance of the loan owed to avert sale of the suit land by the AFC. However only a meagre amount of not more than Kshs.100,000/= appears to have been applied to the loan repayment while the rest is said to have met the family upkeep expenses.

19. In the circumstances of this case, can the 1st defendant be said to have had right title to pass on to the rest of the defendants? Had the 1st defendant involved the plaintiff and obtained his consent, a straight forward answer to this question may have been found.

20. However in the present case this court must contend with the presence of a decree in **Kitale SPMCC Land Case No. 8 of 2006** vide which the defendant claimed right to sell. That decree was produced as **D. Exhibit 2** and it shows that the Magistrate's Court confirmed the award of the tribunal which provided that the 1st defendant be given 5 acres and the remaining 6 acres do remain for the other wives, and that the plaintiff herein do reconstruct the home for 1st defendant and her children.

21. As well intended as award was, it appears to have been ultra vires as was soon thereafter found by the **Bungoma High Court in Misc. Appl. No. 123 of 2006** where the orders of the tribunal were described as illegal null and void. The court in that case also stated as follows:

“The claim before the Tribunal does not fall under Section 3 (1) of the Act. The orders given by the tribunal to subdivide the land of the ex-parte applicant and give a portion to the interested party were ultra vires and therefore null and void. It does not matter whether the execution has taken place as the interested party claimed. That execution is also null and void since it was based on illegal orders of the tribunal.”

22. The execution referred to by the court in **Bungoma High Court Misc. No. 123 of 2006** is clearly the subdivision of the land by which the plaintiff lost 5 acres to the 1st defendant in implementation of the Magistrate's Court decree in **Kitale SPMCC Land Case No. 8 of 2006**. It appears therefore that the propriety of the subdivision exercise that gave 1st defendant the 5 acres has already been determined to be illegal by a court of competent jurisdiction.

23. As to when the land was sold, it is noteworthy that while under cross-examination the 1st defendant admitted that she took the case to the tribunal in the year **2004** and the judicial review was filed in **2006**. She also admitted she started selling the land in year **2008** and that as at **2009** she was still receiving parts of the purchase price from some purchasers yet the judicial review proceedings and the stay order forbidding any implementation, which in my view included sale of the land by the 1st defendant, was subsisting.

24. The most disconcerting feature of the evidence in these proceedings is **DExh 5(a) - DExh 5(j)** which are the agreements between the 1st defendant and the rest of the defendants show that the plaintiff transacted with the defendants between **October 2008** and **May 2010**, yet on **11/6/2008** the court had issued a stay order in **Bungoma HC Misc. No. 123 of 2006** and that that order remained in force up to **9/12/2009** when the final orders of *certiorari* were granted to the plaintiff herein. From **9/12/2009** a new dispensation emerged by virtue of the granting of orders of *certiorari*; the temporary stay was replaced by a much more emphatic and final order vacating the tribunal award and reverting the parties to the *status quo ante*.

25. It cannot therefore be gainsaid that all through the time from the date of tribunal award to date the 1st defendant has never had any right to appropriate and/or dispose any portion of the suit land to any party. It would appear that if during the pendency of stay order and after the judicial review was finalised the 1st defendant sold chunks of the suit land, her actions may be termed as misrepresentation or outright fraud.

26. In my view all the portions of land sold by the 1st defendant to the other defendants were sold without any legal authority on the part of the 1st defendant due to the express order of the court and the *ab initio* invalidity of the tribunal award which was subsequently declared null. They amount to arbitrary deprivation of the plaintiff of his land.

27. In the case of **Elizabeth Wambui Githinji And Others Vs Kenya Urban Roads And Others Civil Appeal No 156 Of 2013 As Consolidated With Civil Appeal No 160 of 2013** the Court Of Appeal (Ouko, President) observed as follows:

“Both the Constitution and statute law emphasise the sanctity of title to land. The registration of a person as the proprietor of land vests in that person the absolute ownership of that land subject only to the leases, charges, conditions and restrictions, if any, shown in the register. See: Article 40 of the Constitution and sections 27, 28, 30, 32 and 143 of the repealed Registered Lands Act. Because

of their relevance it is apposite to paraphrase and set out some of these provisions.

Article 40 guarantees every person the right to acquire and own property in any part of Kenya and Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. Section 143 of the Registered Land Act underscores the sanctity of title to land by stating in subsection (2) that;

“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

28. The defendants have not even paper titles to the land and I doubt that they have any hope of ever possessing any unless the plaintiff authorizes it. A person can only pass good title in land if that title in his name is clean. Though the defendants attempted in the joint statement of defence to assert that the plaintiff had granted consent to the 1st defendant to dispose of the suit land, no evidence of such consent was produced and the sale agreements produced in court as **P. Exhibit 5(a) - 5(j)** by the 1st defendant did not have the plaintiff as a signatory.

29. In my view the stay orders of the court in the judicial review proceedings were meant to preserve a property from being disposed of *pendente lite* and any order of a court of law is presumed to be applicable to persons who were not aware of the proceedings.

30. The 1st defendant having been proved to have had knowledge of the proceedings and the stay order, she was bound to comply with the stay order from the High Court Judicial Review case. The rest of the defendants cannot therefore claim innocence because they failed to conduct a due diligence exercise to establish who the registered owner of the land was and to obtain the consent of the plaintiff to the disposal of the land.

31. Had the 2nd to 12th defendants conducted a serious due diligence exercise by way of a search at the Lands office they would have discovered that the plaintiff was the right person to purchase land from and that the 1st defendant had no title to transfer to them and thereafter they should have abstained from entering into the agreements they signed with her. Unfortunately they have not even bothered to call any evidence to the effect that they conducted an official search as part of their due diligence.

32. In the case of **West End Butchery Limited V Arthi Highway Developers Limited & 6 Others[2012] eKLR** the court observed as follows:

“Likewise in the case of Iqbal Singh Rai vs Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001, this court (Hon. Justice Muchelule) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is thus my finding that similarly, in this case the 1st Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2nd and 3rd Defendants who had no claim to the suit property. The 1st Defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2nd and 3rd Defendants was null and void.”

33. The defendants have failed to establish that the 1st defendant had good title to pass to them and therefore the rightful owner of the suit land is still the plaintiff. Section 25 of the **Land Registration Act 2012** provides 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.

34. The above provisions reflect the proper legal position that obtains now and which was applicable while the **Registered Land Act** (now repealed) was in force. In brief, the rights of the plaintiff are fully protected by those provisions and no party can deal with the land without

his consent in a manner adverse to those rights.

35. In the final analysis I find that the plaintiff has established his claim on a balance of probabilities against all the defendants and that the 2nd to 12th defendants are trespassers on **LR. No. Waitaluk/Kapkoi/Block 10/Kapkoi Sisal/152.**

(b) What Orders should issue?

36. Though not condoning the 1st defendant's conduct in this scenario, I find that it is not proper, in view of the undissolved marriage between her and the plaintiff, to include her in the description of "trespassers." However she has occasioned loss to the rest of the defendants by her conduct and it will be necessary that she pays costs of the suit.

37. Consequently I enter judgment for the plaintiff against 1st to 12th defendants and I issue the following orders:

(a) That the 2nd to 12th defendants their agents, employees and/or servants do vacate the suit premises, that is, LR. No. Waitaluk/Kapkoi/Block 10/Kapkoi Sisal/152 and in default they be evicted from the said land.

(b) The costs of this suit shall be borne by the 1st defendant.

Dated, signed and delivered at Kitale on this 31st day of July, 2019.

MWANGI NJOROGE

JUDGE

31/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Karani for 1st defendant

Mr. Odongo holding brief for Amasakha for plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

31/7/2019