



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 72 OF 2015

(FORMERLY KERUGOYA ELC NO. 206 OF 2013)

JOHN KIHU NDUKU.....PLAINTIFF

VERSUS

RUKEMI NGECHU.....1ST DEFENDANT

GITONGA GITHINJI.....2ND DEFENDANT

MUSIEMI MUCEE.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated and filed on 4th July 2011 the Plaintiff sought the following reliefs against the Defendants:

a. A declaration that the Plaintiff is entitled to half of the parcel of land known as L.R. No. 272 Gachabari Kiambere and more particular adjacent to the river and consequently the 1st defendant do transfer the same to the Plaintiff.

b. An order that the 2nd Defendant vacate the said half of the piece of land known as L.R. No. 272 Gachabari Kiambere.

c. A permanent injunction be issued restraining the defendants by themselves, their agents, servants, or employees from carrying away, selling by public auction and/or dealing in any manner whatsoever with all the goods attached or interfere with quiet possession or evict and/or in any manner to alienate all that leased business premises known as half (½) of the parcel L.R. No. 272 Gachabari Kiambere from the plaintiff.

d. Costs of the suit herein and any other relief that this honorable court may deem fit to grant.

2. The Plaintiff's case was that sometime in 1990 he purchased one half (½) of all that portion of land known as L.R. 272 (hereinafter the *suit property*) Gachabari Kiambere within Gichiche Adjudication Section in Mbeere South Sub County from the 1st Defendant. He thereupon took possession and developed it by erecting a semi-permanent house and undertaking some agricultural activities thereon.

3. It was the Plaintiff's further case that some in 2003 he temporarily left the suit property in order to take care of his ailing wife but when he returned in 2010 he found that the 1st Defendant had sold the suit property to the 2nd Defendant who was then in possession.

4. It was the Plaintiff's contention that the purported sale of the suit property to the 2nd Defendant was unlawful and without justifiable cause. He, therefore, sought recovery of the suit property.

5. The record shows that none of the Defendants entered an appearance to the suit. There was no defence filed to the action hence the suit proceeded as undefended.

6. At the trial hereof, the Plaintiff testified on his own behalf and called two more witnesses who claimed to have been his neighbours. The Plaintiff adopted his witness statement dated 10th October 2018 as his sworn testimony. He testified that he paid the 1st Defendant the full purchase price of Kshs.10,000/- for the suit property at the material time.

7. It was his further evidence that upon taking possession he constructed 3 semi-permanent houses, a toilet and a store on the suit property.

He then planted trees and kept some goats and bees. He stated that upon being away for several years between 2003-2010, he returned in 2010 only to find the 2nd Defendant in occupation of the suit property. His houses and other structures thereon had been demolished. Upon inquiring from his neighbours, he found out that the 1st Defendant had sold the suit property to the 2nd Defendant.

8. The court has considered the plaint, evidence and submissions on record. Since the Defendants did not defend the suit, the Plaintiff's evidence remains unchallenged and the court accepts the same in proof of his claim. The court accepts that the Plaintiff purchased ½ of the suit property from the Defendant and that he was initially given possession by the 1st Defendant. There is no evidence on record to demonstrate that the said agreement for sale was ever rescinded or nullified. Accordingly, the court finds and holds that the Plaintiff has proved his case on a balance of probabilities as against the 1st and 2nd Defendants.

9. There is no material on record to demonstrate why the 3rd Defendant was sued. Apart from his description in the plaint as a male adult residing in Siakago in the Republic of Kenya, there were no allegations made against him in the body of the plaint on the basis of which any liability could be laid upon him with respect to the suit property. There was no evidence led against him at the trial either. Accordingly, the court holds that no reasonable cause of action has been disclosed against him by the Plaintiff.

10. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case against the 1st and 2nd Defendants only. The court also finds and holds that the Plaintiff is entitled to prayers (a) (b) and (d) of the plaint only. Prayer (c) is not tenable since no basis was laid for the prayer in both the plaint and the evidence on record.

11. The court, therefore, shall enter judgement for the Plaintiff in the following terms:

- a. Judgement be and is hereby entered for the Plaintiff against the 1st Defendant in terms of prayer (a) of the plaint.
- b. Judgement be and is hereby entered for the Plaintiff against the 2nd Defendant in terms of prayer (b) of the plaint.
- c. The prayer for a permanent injunction in terms of prayer (c) of the plaint is hereby declined.
- d. The suit against the 3rd Defendant is hereby dismissed with no order as to costs.
- e. The Plaintiff is awarded costs of the suit to be borne by the 1st Defendant only.

12. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 18TH DAY of JULY, 2019

In the presence of Ms. Kung'u holding brief for Ms. Ndorongo for the Plaintiff and in the absence of the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

18.07.19