



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 357 OF 2014

CAPTAIN NOOR ALI.....PLAINTIFF

VERSUS

JOSEPH OUMA OPANGA.....DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

The plaintiff instituted this suit vide a plaint dated 1st December 2014 seeking an order of eviction to evict the defendant from land parcel Eldoret Municipality Block 9 (Boarder farm)/1935 (*hereinafter referred to as the suit property*) coupled with a perpetual injunction restraining the defendant from trespassing into the said property. He also seeks costs and interest. The plaintiff claims to be the sole registered owner of the suit property measuring 0.043 ha. The plaintiff claims to have obtained the suit property for valuable without notice of any adverse interests whatsoever vide adverse interests vide the sale agreement dated 3rd June 2014. The defendant has trespassed on the land and has been issued with notice but has refused to vacate.

The plaintiff in his evidence in chief produced P-Ex1 which is a title deed and the green card produced as P-Ex4 to demonstrate that he is a legal bonafide owner. He claims to have bought the land at kshs.900,000/- as per the agreement produced in court. The plaintiff claims that pursuant to section 24 of the Land Registration Act he has absolute and indefeasible ownership of the suit land. From the green card, the plaintiff's title is clean contrary to the defendant's assertions that the title is restricted.

The plaintiff asserted that the first owner of the suit land and member of Boarder Farm Cooperative Society, Grishon Kinuthia Ng'ang'a gave the defendant priority to purchase the land in 1988 and he failed to do so but brought his brother to purchase the same evidenced by the defendant's *exhibit1* being the sale agreement dated 9th March 1998. The agreement is clear that the defendant was a witness and Samuel Odhiambo was registered as the sole owner of the suit land on 17th April 1998 evidenced by the green card.

It was the testimony of the plaintiff' that Samuel Odhiambo gave the defendant another chance to purchase the suit land and he failed to do so and his brother thus sold the land to Romjius Olando Ohamo whom the plaintiff purchased the suit property from in 2014 for valuable consideration. By an agreement dated 24th July 2017, P-exh 3, the defendant undertook to vacate the suit property on or before 1st November 2014. He admitted to signing the agreement but claimed he was forced. Once the 3 months lapsed he failed to vacate the suit land hence the current proceedings.

PW2, Elija Maswai Cheruiyot is the area Assistant Chief Kimumu sublocation who testified that he knew Captain Noor Ali and Joseph Ouma. He used to work in Kapsogo location as an acting chief. The plaintiff went to his office and reported that the defendant had refused to vacate the land in dispute. He called the plaintiff and the plaintiff asked for th3 months to vacate.

PW3, a retired Senior Chief Kipsogo Loction Known as Barnabas Kiprono Kibos testified that he was chief between 1998 and 2008 and knew Ouma Opanga the plaintiff as the village Elder. On 9th March 1998, one person called Gerishon Kinuthia Ng'ang'a went to the chief and told him that he wanted to sell plot number 1935 in Eldoret boarder farm to Samuel Odhiambo. He sold the plot for Kshs. 150,000 and it was paid. Joseph Ouma was a witness in the sale agreement. On cross examination by the counsel for the defendant, he states that Kshs.50,000 was paid later.

PW4, WAS Oseko Nyakundi who lives at Kenya service a quarry estate. According to this witness, the plot in dispute belongs to the plaintiff but the defendant lives there. The parcel of land was being sold by Kenya service. The defendant was given an opportunity to buy but he brought in Odhiambo his brother who paid the purchase price and the defendant was to pay Odhiambo some money which he failed to. Odhiambo gave him the opportunity to purchase the land but he was unable to and therefore Odhiambo sold the land to Olando who sold the land to Captain Noor Ali.

On cross examination by Mr Mathai, he states that he does not know how the balance of Kshs.50,000 was paid and who paid the same.

He relied on the case of *Elijah Makeri Ngangwara v Stephen Mungai Njuguna & Another (2013) eKLR* on the application of section 26 of the Land Registration Act.

He claims that the defendant has not proven any of the claims of fraud and misrepresentation by the plaintiff in acquiring the suit land.

DEFENDANT'S CASE

The defendant filed Statement of Defence on 9th January 2015 whose gist is that he was not a trespasser on the suit parcel of land and that he started living on the land in the year 1972 when the land belonged to an Asian. Thereafter, a group known as boarder farm bought the land under the chairmanship of one Ghrishon Kinuthia Ng'ang'a. Gerishon Kinuthia Ng'ang'a opted to sell his share to the defendant being plot number 1935 at a consideration of Kshs.150,000. Since he did not have the money, he called his brother Samuel Odhiambo who gave Kshs.100,000 and the balance of kshs.50,000 was paid by the defendant and it was agreed that the land be registered in the name of his brother. He did not know how the land was transferred to Remjus Olando and later the plaintiff. He has lived on the land for a period of 42 years uninterrupted. In his evidence, the plaintiff adopted the statement dated 9th January, 2014 and produced the agreement dated 9th March 1998, title deed, demand letter dated 4th July, 2014 and photographs of the place.

DW2, Wensley Lagat Saina who adopted the statement as his evidence in chief but states in cross examination that what he recorded was what he was told by the defendant.

DW3, Thomas Sagala states that the defendant has lived on the land since 1978 when he knew him.

ISSUES FOR DETERMINATION

- a. Whether the plaintiff is entitled to the reliefs sought

WHETHER THE PLAINTIFF IS ENTITLED TO THE RELIEFS SOUGHT

Section 26 of the Land Registration Act provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In *Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No. 239 of 2009*, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The defendant produced his brother's title deed as proof that the land belonged to his brother. The title deed was registered on 17th April, 1998. Further, he has provided a sale agreement as proof that the property was sold to his brother and he was a witness to the same.

The plaintiff claims that the defendant's brother, Samuel Odhiambo, sold the property to Romjius Olando Ohamo however there is neither a sale agreement nor a transfer to this effect.

This then begs the question as to how the said Romjius Olando Ohamo obtained the suit land. Further, in the absence of a Land Control Board consent, the legality of how the plaintiff acquired the title remains questionable.

In the case of *Jonathan Namulala versus Multi Business Shooters Investors & 3 others (2017) eKLR*, the court found that the charge registered was irregular as there was no Land Control Board consent on the same and stamp duty was not paid. Likewise, the plaintiff has not proven that there was stamp duty paid or that there was a Land Control Board consent in respect of the transactions on the suit land before he acquired.

It is compulsory to obtain **consent** from the **Land Control Board** before undertaking transactions that affect agricultural **land**. The written permission is required for sale, transfer, mortgage, exchange or partition in areas gazetted for that purpose. Section 6 of the Land Control Act CAP 302 Laws of Kenya provides for control on Transactions affecting agricultural land thus: -

(1) Each of the following transactions that is to say—

(a)the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within land control area;

(b)the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of land (planning) regulations 1961 for the time being apply is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

The defendant has actual possession and has lived on the suit land for well over 40 years.

There is a gap in the chain of ownership and failure to show how the property moved from Samuel Odhiambo to Romjius Olando before the plaintiff purchased shows that the property was irregularly acquired. The above irregularities were all done when the defendant was in possession with their knowledge.

Section 26 of the Land Registration Act No. 3 of 2012 provides that the Certificate of title should be held as conclusive evidence of proprietorship thus:-

(1) The certificate of title issued by the Registrar upon registration, or to purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—(a)on the ground of fraud or misrepresentation to which the person is proved to be a party; or(b)where the certificate of title has been acquired illegally, procedurally through a corrupt scheme.(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

This court finds that the plaintiff has failed to prove his case that he is the lawfully registered proprietor of the suit land and therefore is not entitled to the prayers sought. The suit is dismissed with costs.

Dated and delivered at Eldoret this 18th day of July, 2019.

A. OMBWAYO

JUDGE