



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 91 OF 2017

JOHN MWANGI.....PLAINTIFF

VERSUS

JOAN NABANGALA MUSUNGU.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 17/5/2017 and filed in court on 18/5/2017 the plaintiff sought the following orders:

(a) **An order that the plaintiff is the lawful owner of an acre of land comprised in land parcel no. Kaisagat/Chepkoilel Block 3/Bwayi/13 in Trans-Nzoia County to the exclusion of the defendant and any other third parties.**

(b) **An order of permanent injunction restraining the defendant, her agents, servants and/or anybody acting for her or through her from ever trespassing upon the plaintiff's acre of land comprised in land parcel No. Kaisagat/Chepkoilel Block 3/Bwayi/13 in Trans-Nzoia County or burying the body of her deceased mother in the said plaintiff's land parcel.**

(c) **Any other relief this court may deem fit and just to grant.**

(d) **Costs of this suit with interest at court rates.**

The Plaintiff

2. According to the plaint the plaintiff is the lawful owner of one acre of the land comprised in land parcel No. **Kaisagat/Chepkoilel Block 3/Bwayi/13**, having purchased the same from one **Mark Simiyu Musungu** pursuant to land sale agreement dated 17/3/2014. He states that in September, 2015 the defendant trespassed on the plaintiff's land and harvested the plaintiff's maize and he was consequently charged with stealing farm produce vide **Kitale Chief Magistrate's court Criminal Case No. 4427 of 2015**; that since then the plaintiff enjoyed quiet possession of his said land until 13/5/2017 when the defendant in company of her agents forcefully trespassed on his land again and destroyed his maize after which she started constructing a house/or structure thereupon; that the plaintiff received reliable information that the defendant intended to forcefully bury the body of her late mother namely Ruth Naliaka Musungu upon the plaintiff's land; that the defendant's acts of forcefully trespassing onto the plaintiff's land are unlawful and as a result thereof, the plaintiff has suffered serious damage and mental anguish. The plaintiff states that unless the defendant was restrained by way of injunction she would bury the body of her deceased mother on the plaintiff's land which would occasion the plaintiff irreparable loss and damage. The issue of intended burial of remains of defendant's mother on the suit premises was dealt with in an application dated 17/5/2017 which was decided in favour of the plaintiff on 28/9/2017. The defendant was enjoined from burying the remains of her mother on the suit land pending the hearing and determination of this suit.

The Defendant's Defence and Counterclaim

3. The defendant filed a defence and counterclaim on 30/5/2017. The defendant denied that the plaintiff purchased the suit land and averred that a third party by the name Margaret Wanjiku had attempted to purchase the land; that the suit land belonged to her mother; that the dispute had been resolved by the County Commissioner with the conclusion that purchase price be refunded to one Margaret Wanjiku who had attempted to buy the land. In her counterclaim, the defendant sought an order of declaration that she is entitled to remain on the suit property as the same was set apart for her and her mother. She also sought a permanent injunction restraining the plaintiff from interfering in any manner therewith.

The Plaintiff's Reply to Defence and Counterclaim

4. In his reply to defence the plaintiff reiterates the averments in the amended plaint and denies the allegations in the defendant's statement of defence and counterclaim.

The Plaintiff's Evidence

5. The suit came up for hearing on **9/10/2018** when the plaintiff gave evidence. He reiterated the contents of the plaint and produced the original sale agreement that showed that he purchased the suit land for **Kshs.400,000/=** from **Mark Simiyu Musungu** on **17/3/2014**. The agreement was drawn by Esther Chege & Co. Advocates and is attested to by an advocate. He produced the original title deed in respect of **Kaisagat/Chepkoilel Block 3/Bwayi/13** as **P. Exhibit 2**. He maintained that he is still in possession of the land. His further evidence was that Mark Simiyu Musungu informed him that he had given the defendant and her mother a parcel of land measuring half an acre which they sold. He admitted that Margaret Wanjiku is his wife and that she signed the agreement. A look at the agreement (**P. Exhibit 1**) shows that she signed as a witness to the transaction. According to him the defendant's mother had not been living on the suit land and therefore sale thereof to him was not meant to dispossess her. He stated that he was in the process of securing a title deed in his name which the surveyor has indicated would have to be processed alongside those of the other buyers whom Mark Simiyu Musungu transacted with over the said land. According to him the agreement between him and Mark Simiyu Musungu has not been rescinded.

6. **PW2, Margaret Wanjiku** testified on the same date. Her evidence is that Mark Simiyu Musungu the father to the defendant sold her family the land and that she witnessed the agreement signed between her husband and the seller. According to her the entire land was $2 \frac{1}{2}$ acres but all of it has now been subdivided and sold to various people. She corroborated the plaintiff's evidence regarding the defendant's interference with the suit land. According to her, her family has held the original title (**P. Exhibit 2**) since the date of transaction.

7. **PW3 Mark Simiyu Musungu** testified on **11/3/2019**. He confirmed that he owned **Kaisagat/Chepkoilel Block 3/Bwayi/13** and that he sold a portion thereof to the plaintiff. He identified the agreement produced as **P. Exhibit 1** as the one executed between him and the plaintiff. He denied that the land he sold to the plaintiff was part of entitlement of the defendant and her mother, whom he indicated he had given half an acre of land elsewhere and which they sold and that he consented to that sale. He averred that after the sale the defendant and her mother intended to settle on the plaintiff's land. He corroborated the plaintiff's evidence regarding the defendant's interference with the plaintiff's land and maintained that the defendant has no right to the land. He confirmed that the original title to the land **Kaisagat/Chepkoilel Block 3/Bwayi/13** is held by the plaintiff. On cross examination he admitted that the defendant has a right to live with him on his land. However he also acknowledged that the defendant is a married woman.

8. **PW4, Wycliffe Wafula Musungu** son to **PW3** testified on **11/3/2019**. His evidence is that the defendant is his step sister; that his father had three wives including Norah his mother; that his father subdivided his land in 2015; that Norah got one acre whereas the defendant's mother got half an acre and the third wife got one acre. The defendant's mother had only one child that is the defendant. He acknowledged that the land that had been meant for Norah was sold to the plaintiff and identified the agreement marked as **P. Exhibit 1** as the instrument vide which it was sold without any objection from any of the family member. He maintained that after the sale he went out and purchased another parcel. The defendant and her mother also sold the half acre they had been allocated by the defendant's father. According to him the plaintiff is in possession of the land and has fenced it and constructed structures thereon. He corroborated the plaintiff's evidence regarding the defendant's interference with the land and added that the defendant was once arrested and arraigned in court.

9. On **21/3/2019** when suit came up for defence Ms. Arunga Counsel for the defendant applied to court to cease acting for the defendant. The defendant was personally present in court while the application was being made. Leave was granted to Ms. Arunga to file an application for leave to cease acting within 2 days and serve. The application was duly filed on **26/3/2019** and on the same date Ms. Arunga appeared in court and confirmed that she had served the application upon the defendant who was also in court. The defendant upon being questioned by the court confirmed that she intended to conduct her own defence henceforth and the court allowed the application to cease acting for her made by Ms. Arunga's firm. The matter was then scheduled for mention on **8/4/2019** to fix a hearing date which date the defendant appeared and in the absence of the plaintiff or his representative the matter was set down for hearing of the defence case on **29/7/2019**. On **29/7/2019** Mr. Okile for the plaintiff and the defendant representing for herself appeared in and but the matter could not be reached owing to four other suits confirmed for hearing on the same date and the hearing was adjourned to the next day, that is, **30/7/2019**. On **30/7/2019** the defendant was absent but Mr. Okile appeared for the plaintiff and applied for the defence case to be closed and the court obliged and ordered that submissions be filed and exchanged within 14 days and set **30/9/2019** as the judgment date.

Submissions

10. I have perused the court record and found no submissions filed on behalf any of the parties.

Determination

Issues for Determination

11. The issues that arise in this suit are as follows:

(1) Whether the plaintiff is the lawful owner of one acre of land comprised in Kaisagat/Chepkoilel Block 3/Bwayi/13 to the exclusion of the defendant and any other third parties.

(2) Whether an order of permanent injunction should issue restraining the defendant or her agents from trespassing onto the suit land or burying the remains of the defendant's mother on the suit land.

(3) Who should bear the costs?

12. The issues are addressed as hereunder:

(1) Whether the plaintiff is the lawful owner of one acre of land comprised in Kaisagat/Chepkoilel Block 3/Bwayi/13 to the exclusion of the defendant and any other third parties.

13. From the sale agreement **P. Exhibit 1** which was produced by the plaintiff and also identified by PW2 and PW3 I am convinced that the plaintiff has established that he bought one acre of plot No. **Kaisagat/Chepkoilel Block 3/Bwayi/13**. This fact is further buttressed by the plaintiff's production of the original title deed to **Kaisagat/Chepkoilel Block 3/Bwayi/13** which he had been holding since the execution of the agreement while awaiting transfer of the land into his name. He is also in possession of the suit land. I find that there is sufficient evidence the plaintiff is the owner of one acre of land out of **Kaisagat/Chepkoilel Block 3/Bwayi/13** to the exclusion of the defendant.

(2) Whether an order of permanent injunction should issue restraining the defendant or her agents from trespassing onto the suit land or burying the remains of the defendant's mother on the suit land

14. The defendant never controverted the plaintiff's evidence. She never appeared in court to produce any evidence showing that she was in any way entitled to the land. I therefore find that the plaintiff deserves an order of permanent injunction to restrain the defendant and her agents from trespassing onto the suit land or burying the remains of the defendant's mother on the suit land.

(3) Who should bear the costs of this suit?

15. The defendant trespassed onto the plaintiff's land while she knew or ought to have known she had no proper claim to it. She therefore must bear the costs of this suit.

16. The upshot of the foregoing is that the plaintiff has proved his claim against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant and I issue the following final orders:

(a) An order that the plaintiff is the lawful owner of one (1) acre of land located within land parcel no. Kaisagat/Chepkoilel Block 3/Bwayi/13 in Trans-Nzoia County to the exclusion of the defendant and her agents.

(b) An order of permanent injunction restraining the defendant, her agents, servants from ever trespassing upon the plaintiff's one (1) acre of land located within land parcel No. Kaisagat/Chepkoilel Block 3/Bwayi/13 in Trans-Nzoia County or burying the body of her deceased mother in the said plaintiff's land parcel.

(c) The defendant shall bear the costs of this suit with interest at court rates till paid in full.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGI

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bikunda for Defendant

Mr. Wanyama holding brief for Okile for Plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

30/9/2019