



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 376 OF 2017

(Formerly Kisii ELC case no. 15 of 2014)

HENRY OCHIENG ONGOLA.....PLAINTIFF

VERSUS

JENIPHER OUMA OCHIENG.....1ST DEFENDANT

KENNEDY OLALE.....2ND DEFENDANT

TERESA OLALE.....3RD DEFENDANT

JUDGMENT

1. At the heart of the instant dispute is a parcel of land measuring two (2) acres in area of land parcel number North Sakwa/Kamasoga/609 (hereinafter referred to as the suit land). It is situated within Migori County, Kenya.

2. The plaintiff, Henry Ochieng Ongola appears in person. The defendants are represented by learned counsel, Mr. Nyamori Nyasimi of Nyamori Nyasimi and Company Advocates.

3. By a plaint dated 20th January 2014 and filed in court on even date, the plaintiff has sued the defendants jointly and severally for;

a) Nullification of grant.

b) Declaration that the plaintiff is the right owner of the land LR No North Sakwa/Kamasago/609 measuring 0.8 hectares.

c) Injunction restraining defendants, agents, servants or in any manner to deal with land.

d) Costs of the suit.

4. The gist of the plaintiff's case is that the original owner of the suit land was Wauda Laja (Deceased). That on 15th May 2014 the said deceased sold the suit land to the plaintiff for eight (8) heads of cattle valued at Ksh 320,000/= being the agreed consideration thereof. That the said original owner died before transfer of the suit land. That in the year 2012, the first defendant took out a grant of letters of administration in respect of the estate of the deceased and transferred the land to the second defendant at a consideration of Ksh 340,000/= disregarding the agreement entered into between the deceased and the plaintiff.

5. The plaintiff further claims that he has developed the suit land and the value of the same stands at approximately Ksh two (2) million. That the area chief, District Officer, District Commissioner, Officer Commanding Police Station Awendo Police Station and County Land Registrar have attempted arbitration of the matter and ordered nullification of the subsequent agreements relating to the suit land. Consequently, the plaintiff has incurred damage, hence precipitating the instant suit.

6. In their statement of defence and counterclaim dated 26th June 2014 and filed in court on 8th July 2014, the defendants denied the plaintiff's claim and stated that the plaintiff has never been proprietor or purchaser of the suit land as alleged or at all. That the land belongs to the second and third defendants who validly purchased the same from the 1st defendant who is a daughter in law to Wauda Laja (Deceased). That the plaintiff's claim does not disclose any cause of action against them and that the same is an abuse of the process of the court hence sought its dismissal with costs.

7. The defendant's further claim that the 2nd and 3rd defendants are the sole owners of the suit land currently registered in the name of the 2nd defendant, a son of the 3rd defendant who legally purchased the same from the 1st defendant. That since April 2011, the plaintiff has been trespassing upon the suit land in spite of the intervention of land officials.

8. As a result, the defendants have counterclaimed against the plaintiff for the following reliefs;

i. An order of permanent injunction restraining the plaintiff by himself, his agents, workers or representatives or anyone acting upon his instructions from trespassing upon, continuing trespassing upon and/or in any other manner dealing with the suit Land Parcel Title No. North Sakwa/Kamasoga/609 or any part of it.

ii. Payment of mesne profits at Ksh 150,000 per year with effect from April 2011 till date of judgement or such other period court may fix.

iii. Costs of entire suit be borne by plaintiff.

iv. Any such further relief court may deem fit to grant.

9. The plaintiff filed a reply to the statement of defence and a defence to the counterclaim (cross reply a defence and counterclaim) dated 10th November, 2015. Essentially, he reiterated the averments in his plaint. He stated, inter alia, that upon the death of the deceased, the 1st defendant obtained a grant of letter of administration in respect of the estate of the deceased and started to sell the land of the deceased to several people including the 2nd and 3rd defendants. He denied the counterclaim. The plaintiff relied on the consent agreement and revocation of sale of the suit land. He sought orders including dismissal of the counterclaim, nullification of grant issued to 1st defendant, and costs in his (plaintiff) favour.

10. On 10th November 2015, the court (Mutungi J) ordered and directed the County Surveyor and the Land Registrar Migori to visit the suit land and point out and mark the boundaries and file a report in court within 90 days from that date. Consequently, the Land Registrar and County Surveyor, Migori filed their respective reports on 25th May 2016. However, the parties appeared to contest the reports thus the court issued summons to the County Surveyor and Land Registrar who were examined and produced their respective reports on 1st December 2016. This suit initially filed at Kisii ELC was then transferred to this court on 5th April 2017 for further hearing and determination.

11. During further hearing, the plaintiff (PW1) testified and relied on his list of documents dated 20th January 2016 (PEXhibits 1 to 6) and Migori County Surveyor's report dated 26th April 2016 (PEXh7). He called his witness, Yonah Fredrick Otieno (PW2) who produced his report dated 26th April 2016 (PEXh7).

12. The 3rd defendant (DW3) relied on her statement dated 26th July 2014 and list of documents dated 26th July 2014 (DEXh 1 to 4). She stated, inter alia, that she bought the suit land from the 1st defendant and it is registered in the name of her (DW1) son, the 2nd defendant.

13. The 1st defendant (DW2) gave evidence and relied on her statement dated 26th July 2014. She also made reference to DEXh1.

14. DW3, Mary Owino Okwach, chief Central Sakwa location, Awendo, relied on her statement dated 26th July 2014 in examination in chief. She stated in part that DW1 bought the suit land for the 2nd defendant.

15. On 18th March, 2019, this court directed the parties to file and exchange submissions within thirty (30) days from that date. Only the defendants' counsel complied with the directions by his written submissions dated 1st April 2019 and filed in court on 5th April 2019.

16. Learned counsel for the defendants analysed the plaintiff's case as well as the defendants' case in brief and framed the following four (4) issues for determination;

i. Who is the legal owner of LR. No. North Sakwa/Kamasoga/609?

ii. Whether the plaintiff has proved his claim against the defendants

iii. Whether defendants have proved their counterclaim against the

Plaintiff

iv. What reliefs should the court grant in this case?

17. Counsel submitted that it was common ground that the suit land is registered in the name of the 2nd defendant, Kennedy Olale. That PW1 did not produce any evidence to fortify his claim that he bought the suit land in 1974 from its original owner, Wauda Laja (Deceased). That if PW1 entered into an agreement of sale of the suit land which is agricultural land, then the same is void for all purposes under **section 6(1) (a) and (b) of the Land Control Act (Cap 302)**.

18. Counsel also cited **sections 6(2), 7, 22 of the Cap 302 (Ibid)** and **sections 25 and 26 of the Land Registration Act, 2016 (2012)**. He further cited **Article 40 of the Constitution of Kenya, 2010** and the case of **David Sironga Ole Tukai v Francis Arap Muge and 2 others**

(2014) eKLR, in support of his submissions.

19. I have anxiously considered the entire pleadings and the evidence including exhibits of the parties in their respective cases. I also take into account submissions herein. Being guided by the Court of Appeal decision in Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2000) 2EA 385, I embrace the issues for determination framed in the defendants' submissions and of course, the standard of proof in the respective cases should be on a balance of probabilities.

20. On the issue of proprietorship of the suit land, I bear in mind the definition of the term "proprietor" under section 2 of the **Land Registration Act, 2016, (2012)** which provides:

"Proprietor" means-

a) In relation to land or lease, the person named in the register as the proprietor

b) In relation to a charge of land...."

21. It was the testimony of PW1 that on 15th May 1974, he bought the suit land from the deceased, Wauda Laja and paid consideration equivalent of Ksh 320,000/=. In cross examination, he stated, interalia;

"I am aware that the land was sold to the defendants. I am also aware that the 2nd defendant is the registered owner of the suit land..." (emphasis added)

22. In the preamble of his report dated 26th May 2016 (PEXh7), PW2 stated in part that:

"The land parcel in question according to land records belongs to Kennedy Otieno Olale (2nd defendant herein)"

23. According to DW1, the suit land is registered in the name of her son, the 2nd defendant as shown in DEXhibit1. That she bought it from the 1st defendant (DW2) as revealed in DEXhibits 1 to 4.

24. DW2 testified that she sold the suit land to DW1 as per DEXh3. She confirmed that DW1 obtained DEXh1. She denied having sold the suit land to PW1.

25. In the words of DW3, she did attend to a dispute involving PW1, DW1, DW2 and the 2nd defendant relating to the suit land. That DW1 bought the land for her son, 2nd defendant. That PEXh3 authored by her (DW3) relates to LR No. North Sakwa/Kamsoga/1389 and not the suit land.

26. The suit land is registered in the name of the 2nd defendant under the Registered Land Act(repealed) as shown in DEXh1; see also Wainaina v Murai and others (1976-80) IKLR 283 at 289 and 290.

27. I must point out that interest conferred by registration, rights of a proprietor and certificate of title to be held as conclusive evidence of proprietorship are provided for under **sections 24, 25 and 26 of the Land Registration Act, 2016(2012)** respectively. I am also conscious of protection of the right to property under **Article 40 of the Constitution of Kenya, 2010**.

28. In the case of Kimani Ruchine and another v Swift Rutherford Company Limited (1976-80) IKLR 1500, Kneller J held that rights and registration can be challenged on the grounds of fraud, misrepresentation and adverse possession; see also an earlier decision in Tayebali Adamji Alibhai v Abdulhussein Adamji Alibhai (1938) 5 EACA applied therein.

29. PW1 contended that he bought the suit land on 15th May 1974 from the deceased and that he has carried out developments thereon valued at Ksh 2 million. That the owner of the suit land died before he could transfer the land to him (PW1).

30. Particulars of damages are pleaded at paragraph 9 of the plaint. In the case of Kariuki v Kariuki (1983) KLR 227, it was held that;

"No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. That the only remedy open to a party to transaction which has become void under the Land Control Act (supra) is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act."

31. In Hirani Ngaithe Githire v Wanjiku Munge(1979) KLR 50, it was stated that under **section 6 of the Land Control Act**, failure to obtain Land Control Board consent makes the sale agreement void for all intents and purposes and no principle of equity can soften or change this mandatory statutory provision. In the present scenario, PW1 was only entitled to recover the purchase price or consideration from the deceased or his estate.

32. It follows from the evidence on record that the 2nd defendant is the absolute proprietor of the suit land as recognized in Ole Tukai case (supra). Quite clearly, there is no sufficient evidence or at all to show any known element of equity in favour of the plaintiff as envisaged under **Article 10(2)(b) of the Constitution of Kenya, 2010** and the decision by Madan JA (as he then was) in the case of Chase International Investment Corporation and another v Laxman Keshra and others(1978)KLR 143 applied in Macharia Mwangi Maina

and 87 others v Davidson Mwangi Kagiri (2014)eKLR.

33. The plaintiff has sought, inter alia, nullification of the grant issued in respect of the estate of the deceased, Wauda Laja. **Section 76 of the Law of Succession (Cap 160)** provides for annulment or revocation of grants. In view of **Article 162(2)(b) of the Constitution of Kenya, 2010, section 13 of the ELC Act, 2015(2011)** and the decision of the Supreme Court in **Republic v Karisa Chengo and 2 others (2017) eKLR**, I find that this court is not seized of the jurisdiction to grant the order of nullification sought in the plaint.

34. The parties have sought injunctive reliefs in their respective pleadings. It is not clear from the plaint the type of injunction sought therein. Nonetheless, under **section 13(7) (a) of the ELC Act, 2015(2011)**, this court is mandated to grant interim and preservation orders including injunctions. Moreover, it is trite law that an injunction is an equitable and discretionary remedy. That the duration of an order of injunction is at the sole discretion of the trial judge and depends on the circumstances of each case; see **National Bank of Kenya Limited v Shimmers Plaza Limited (2009) KLR 278 at 283.**

35. The defendants are also seeking mesne profits, among other reliefs, in their counterclaim. I am guided by the definition of the term “mesne profits” under **section 2 of the Civil Procedure Act (Cap 21)** and the case of **Rioki Estate Company(1970) Limited v Kinuthia Njoroge (1977)KLR 146.** Mesne profits are a form of special damages which should be specifically pleaded and proved as observed M. Odero J in **Nakuru Industries Limited vs S.S. Mehta and sons (2016) eKLR** which I fully endorse. The defendants did not plead and prove mesne profits to the required standards hence that relief is not grantable in the circumstances.

36. The final position is that the plaintiff has failed to prove his case against the defendants jointly and severally on a balance of probabilities. On the other hand, the defendants have proved their counterclaim against the plaintiff on a balance of probabilities.

37. Wherefore, I render the following final orders:

a) Dismiss the plaintiff's suit originated by a plaint dated 20th January 2014.

b) Enter judgment for the defendants jointly and severally in respect of their counterclaim dated 26th June 2014 in terms of orders (a) and (c) sought therein only.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 18TH DAY OF SEPTEMBER 2019.

G.M.A ONGONDO

JUDGE

In the presence of:-

Ms. Apondi holding brief for learned counsel, Mr. Nyamori Nyasimi for the defendants.

Court Assistant – Tom Maurice