



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 444 OF 2016

SAMWEL RATEMO ARAKA.....PLAINTIFF

VERSUS

CHAIRMAN RAMASHA FCS.....DEFENDANT

J U D G M E N T

1. The plaintiff vide a plaint dated 22nd February 2011 filed in court on 18th May 2011 averred that he was the registered owner of land parcel Nyaribari Masaba/Bonyakoni/937 which he claimed initially measured 5.6hectares or thereabouts. The plaintiff averred that the Defendant, during the period that the plaintiff was resident in Tanzania, encroached into a portion of the Plaintiff's land and curved off a portion measuring about 2.0hectares or thereabouts. He stated that the defendant caused the portion they had encroached upon to be hived off from the plaintiff's land and to be registered as owners of land parcel Nyaribari Masaba/ Bonyakoni/942. The Plaintiff in the premises contended that the defendant was holding land parcel Nyaribari Masaba/Bonyakoni/942 in trust for the plaintiff. The plaintiff sought orders against the defendant for:-

(a) A declaration that LR Nyaribari Masaba/Bonyakoni/ 942 is held by the Defendant on behalf of the Plaintiff and in the alternative the Defendant do transfer the same into the name of the Plaintiff and in default the executive officer of the Honourable Court to do so.

(b) Costs.

2. The defendant vide a statement of defence dated 17th June 2011 and filed on the same date contended that the Plaintiff's instant suit was res judicata on account of there having been previous court proceedings on the same subject matter vide Kisumu CM Land Case No. 19 of 2009, where the issues were adjudicated upon. The Defendant averred that land parcels Nyaribari Masaba/Bonyakoni/942 and 943 referred to in the Plaintiff's plaint were non existent and thus there could be no constructive trust in regard to land that did not exist.

3. The Plaintiff testified as the sole witness in support of the Plaintiff's case while one David Mwanja Manduku, chairman of the Defendant Co-operative Society was the sole witness for the defence.

4. The Plaintiff in his evidence reiterated the contents of the plaint. It was his evidence that his deceased father Araka Mang'ong'o Keronya owned land parcel Nyaribari Masaba/ Bonyakoni/931 which he stated measured 5.6Hectares. After the death of his father, the Plaintiff was appointed as the administrator of the estate of his late father. He stated that while he and his late father were in Tanzania, the Defendant acting in collusion with the lands office caused the subdivision of their family land to be undertaken and excised therefrom 2.0hectares which are now registered as LR Nyaribari Masaba/Bonyakoni/942. The plaintiff stated he wanted this land which was unlawfully hived off from their land returned to them. The Plaintiff produced a copy of title deed for LR Nyaribari Masaba/Bonyakoni/937 together with a copy of official search as exhibits. The Plaintiff stated the Defendant was registered as the owner of LR No. Nyaribari Masaba/ Bonyakoni/942 but offered no evidence.

5. DW1 in his evidence denied that the defendant had encroached onto and/or had occupied the plaintiff's land. The witness (DW1) stated that the Defendant's land parcel is **LR Nyaribari Masaba/Bonyakoni/1437** and the same was separated from the Plaintiff's land parcel LR Nyaribari Masaba/ Bonyakoni/937 by a road. The witness stated in his evidence that the Defendant had occupied the suit land since 1965 and had put up permanent structures on the land including a cattle dip and a chief's camp. The witness further testified that the Plaintiff's father had previously instituted a dispute before the Land Disputes Tribunal and the dispute had been determined in favour of the defendant and the subsequent appeal by the Plaintiff had been dismissed.

6. The court upon review of the pleadings and the evidence adduced by the parties finds that the pleadings and the evidence are clearly at variance. The evidence adduced by the plaintiff does not support his assertion that the defendant is the registered owner of LR Nyaribari Masaba/Bonyakoni/942. The plaintiff's claim that the defendant had **"grabbed"** and/or had encroached onto land parcel Nyaribari

Masaba/Bonyakoni/942 which was then hived from the Plaintiff's land parcel Nyaribari Masaba/Bonyakoni/937 and registered in the defendant's name was not proved. The Plaintiff did not adduce any evidence to prove that there was indeed a parcel of land known as LR Nyaribari Masaba/Bonyakoni/942 registered in the name of the defendant and/or if there was such land the same was hived off from land parcel 937 owned by the plaintiff. Without proof of the existence of land parcel LR Nyaribari Masaba/Bonyakoni/942 and/or in whose name the land was registered, the plaintiff's suit simply cannot stand. Once a party makes an allegation and/or asserts the existence of a fact they have the burden to prove the allegation and/or existence of the fact.

7. It is not understandable why the plaintiff could not obtain the records of land parcel LR Nyaribari Masaba/Bonyakoni/ 942 from the lands office. The Plaintiff produced a copy of his title in respect of land parcel Nyaribari Masaba/ Bonyakoni/937 registered in his name and a copy of the official search in respect of the same. Why was it so difficult to obtain records for land parcel 942? The court has no evidence of the existence of such land and cannot make a presumption that it does exist.

8. The defendant for their part affirmed their parcel of land in respect of which they are registered as owners was LR Nyaribari Masaba/Bonyakoni/1437. DW1 produced a copy of the title and a copy of the certificate of official search in regard to this property. The plaintiff is not making a claim on this land. His plaint is clear that he seeks a declaration that the defendants hold land parcel Nyaribari Masaba/Bonyakoni/942 in trust for the Plaintiff. The plaintiff never sought any amendment of his plaint and it is trite law that parties are bound by their pleadings. A party cannot plead one thing and offer evidence to prove another thing. In the present case, the defendant denied at the outset that it was the registered owner of LR Nyaribari Masaba/Bonyakoni/942 and yet the plaintiff did nothing to rectify the situation.

9. On the basis of my analysis and evaluation of the evidence, I am not persuaded that the plaintiff has proved his case on a balance of probability. The plaintiff's suit is misconceived and constitutes an abuse of the court process. I order the same dismissed with costs to the defendant.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 9th DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 23RD DAY OF OCTOBER 2019.

J ONYANGO

JUDGE