



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 412 OF 2013

JAMES TONGI MIRUKA.....PLAINTIFF

VERSUS

GEORGE MAUTI OMBACHO.....DEFENDANT

J U D G M E N T

1. The plaintiff instituted the present suit vide a plaint dated 9th October 2013 filed in Court on 10th October 2013. The plaintiff averred that he was the owner of plot No.34 measuring 50 feet by 100 feet in Riosiri Market of Nyamarambe Town Council within Kisii County (**“the suit property”**). The plaintiff further averred that the defendant during the month of May 2013, unlawfully trespassed onto a portion of the suit property and erected some temporary structure thereon which the defendant has refused to remove in spite of demand from the plaintiff that he remove the same.

2. The plaintiff thus seeks an order of permanent injunction restraining the defendant his agents and/or servants from in any manner dealing with and/or interfering with the suit property. The plaintiff further seeks an order of eviction against the defendant and the cost of the suit.

3. The defendant filed a defence dated 6th December 2013 on the same date. The defendant vide the defence averred that the suit property was subdivided into two portions of 25 feet by 100 feet each and that he was the owner of one of the portions measuring 25 feet by 100 feet of plot No.34 Riosiri market. He averred the plaintiff's suit did not disclose any cause of action and contended the same was frivolous, vexatious and /or an abuse of the Court process and prayed that the same be struck out with costs.

4. The plaintiff testified as PW1 and called one Jason Nyanyemi Omweri (PW2) in support of his case. The plaintiff testified that he purchased the suit property from Jason Nyanyemi Omweri (PW2) under two separate agreements.

5. He stated he in 2005 purchased one half Portion of the suit property measuring 25 feet by 100 feet and later in 2008 he purchased the remaining half portion of the plot from the same PW2. The plaintiff produced the agreements of sale dated 5th July 2005 and 12th February 2008 as **“PEX1”** and **“PEX2”** respectively. The plaintiff testified that after he paid for the plots the two were combined and he was issued with a plot card for the full plot No.34 by Nyamarambe Town Council. He produced the plot card as **“PEX3”**. The plaintiff stated he developed a permanent Commercial building on one half of the plot where he operated a shop. On the other half he stated he had constructed some temporary structures on a portion thereof which he rents out. He further testified he had been paying rates for the plot and produced a bundle of payment receipts issued by Nyamarambe Town Council as **“PEX4”**.

6. The plaintiff further testified that he intended to construct a permanent building on the half portion of the plot where he had put up temporary structures and in that regard delivered building materials on site and hired some artisans (fundis) to carry out the works for him. He however stated that on 1st May 2013 when his workers were on site the defendant came and chased them away prompting him (the plaintiff) to report to the police whereupon the defendant was restrained by the police. The defendant did not however stop the interference and instead commenced construction of a temporary structure at one end of the plot as depicted in the set of 4 photographs annexed to the bundle of documents filed together with the plaint. The photographs were produced as **“PEX6”**.

7. The plaintiff stated at the time he purchased the suit property it was designated plot 34A and 34 B but was combined to become plot No.34 as indicated in the plot card issued to him. He asserted that the defendant entered onto the portion of his plot without his authority or permission. The plaintiff further stated he had put up his temporary structures on the undeveloped portion of the plot before the defendant came and commenced construction of his temporary structure.

8. PW2 Jason Nyanyemi Omweri testified that he was the one who sold the suit property to the plaintiff. He stated he initially sold the plaintiff half of the plot and retained the other half of the plot. He stated that he later sold the remaining half of the plot to the plaintiff. He acknowledged the agreements tendered in evidence as **“PEX1”** and **“PEX2”** as the instruments that effected the sale transactions. PW2 stated that he caused the full plot to be transferred to the plaintiff by Nyamarambe Town Council after the plaintiff paid him all the money.

He stated the plaintiff was issued with a plot card “PEX3” for the combined plot No.34. He stated the plaintiff took possession of the plot and he developed a permanent Commercial house on one part and erected some temporary structures on the other part.

9. PW2 stated that he did not know the defendant but he learnt that on 2nd May 2013 the defendant in the company of some other people came and started chasing the plaintiff away from the plot he had sold to him. He stated he had never dealt with the defendant in regard to the plot and asserted the defendant’s acts on the suit property were unlawful and amounted to trespass on the property.

10. Under cross examination PW2 maintained that the suit property belonged to him before he sold it to the plaintiff. He stated he had been given the plot by his father and he was the one who had been paying the rates for the same. He testified that he had been given the whole plot by his father before he died in 2002. He stated his brother Justus Omweri did not have a share in the plot and he could therefore not purport to sell any share to the defendant.

11. The defendant testified as DW1 and one Justus Omweri Omambia a brother of PW2 testified as DW2. The defendant in his evidence relied on the witness statement he had recorded dated 21st November 2013. It was his evidence that he was sold a portion of plot No.34 by Justus Omambia Omweri measuring 25 feet by 100 feet. He stated he constructed a temporary Mabati structure on the portion he purchased. He further stated that the plaintiff bought a portion of the same plot No.34A and his (defendant’s) portion was 34B. The defendant however stated he did not have a plot card for the portion he bought as the same had not been released to him by the Nyamarambe Town Council. The defendant produced the bundle of documents as per the list dated 6th December 2013 as “DEX1-9”

12. The defendant stated the plot belonged to the father of Justus Omambia Omweri, who sold the plot to him. In cross examination the defendant stated Justus Omambia Omweri had a copy of his deceased father’s plot card at the time he sold the plot to him. The defendant stated he knew the plot belonged to the father of Justus Omambia. He stated he was not aware whether the deceased had given the whole plot to PW2. The defendant stated he did not have a plot card and /or any council minute authorizing the issue of the plot card to him.

13. DW2 Justus Omweri Omambia testified that he sold to the defendant his plot No.34B. He stated that they had shared the plot which initially was 100 feet by 50 feet with his brother and that it was his portion measuring 25 feet by 100 feet that he sold to the defendant.

14. The witness in cross examination stated he had the original plot card which had been given to him by his father but he had returned the same, to Nyamarambe Town Council. He denied that his father had given the plot to his brother.

15. Following the closure of the trial the plaintiff and the defendant through their respective counsel filed their closing submissions. I have perused the filed submissions and they basically reiterate the evidence adduced by the parties at the trial which I have regurgitated herein above. Both the plaintiff and the defendant claim to have purchased plot 34 Riosiri Market or a portion thereof from the sons of the original allottee of the plot. The plaintiff claims to have purchased the entire plot through two separate agreements (each disposing half of the plot) while the defendant claims to have purchased half of the plot. The issues that rise for determination can be summed up as follows:-

(i) Whether the plaintiff’s purchase of plot 34 Riosiri market was valid.

(ii) Whether the defendant’s purchase of a portion of plot 34 Riosiri Market was valid?

(iii) Whether the plaintiff is entitled to the reliefs he seeks?

16. The plaintiff testified that he purchased one half portion of plot No.34 Riosiri market vide sale agreement dated 5th July 2005 (“PEX1”) from Jason Nyanyiemi Omweri. This agreement was not disputed and I hold that such transaction indeed took place. The plaintiff further testified that he once again on 12th February 2008 entered into another sale agreement (“PEX2”) with the same Jason Nyanyiemi Omweri to buy the remainder of plot 34 being plot 34B. Jason Nyanyiemi Omweri who testified as PW2 acknowledged this transaction and he stated once he was paid the full purchase price he caused the transfer of the combined plot to be processed in favour of the plaintiff. On the basis of the evidence I have to accept that indeed such a transaction took place. I have carefully scrutinized the bundle of receipts produced in evidence by the plaintiff as “PEX4” and it is clear the receipts are issued by Nyamarambe Town Council and they relate to payment of plot rent for plot 34 Riosiri and they cover the period from 2006 to 2013 and were all paid by the plaintiff. Notably Misc. Receipt No.12216 of 19th February 2008 for Kshs10,000/= refers to Transfer fees and plot rents for plot 34 Riosiri for 2006, 2007 and 2008. These transactions culminated with the plaintiff being issued a plot card for plot No.34 measuring 50 feet by 100 feet on 7th December 2009 which was pursuant to a minute of the Trades and Market Committee 07/TPC/09/2009 of 7th December 2009. In the premises and on the basis of the evidence adduced by the plaintiff, I am persuaded that he entered into valid sale transactions to purchase plot No.34 Riosiri Market with Janson Nyanyiemi Omweri (PW2) which translated into plot No. 34 Riosiri market being transferred to him.

17. On the issue whether the defendant had entered into a valid sale transaction to purchase a portion of land parcel plot No.34 Riosiri Market from DW2, the evidence tendered did not show DW2 had any interest in the suit property that he could have sold to the defendant. Although DW2 testified that plot No34 belonged to their late father and that the same was shared equally between him and his brother, PW2 he did not produce any evidence to that effect.

18. PW2 testified that is father gave him the whole plot No.34 when he was alive. There was no evidence produced to disprove this assertion. When the Nyamarambe Town Council effected the transfer of the plot in February 2008 to the plaintiff following the purchase from PW2 the transfer related to plot 34 and not a portion of it(See receipt : “PEX 4(iii)”. The plot card “PEX3” issued to the plaintiff on 7th December 2009 was in respect of the full plot measuring 50 feet by 100 feet and not half plot.

19. The memorandum of agreement dated 23rd June 2009 relied upon by the defendants to support his assertion that he purchased portion of the suit property from DW2 was after the plaintiff had purchased the property from PW2 and paid for the transfer as evidenced by the receipt issued by Nyamarambe Town Council on 19th February 2008. As at 23rd June 2009 DW2 had no interest in plot No.34 Riosiri Market

which he could have sold to the defendant. Dw2 held no ownership document for the suit property and it is not clear on what basis the defendant was transacting with him. Both DW2 and the defendant admitted in Court that they hold no plot card for the suit property only stating that the council had not issued the card to them. The plaintiff however demonstrated that after he purchased the plot from PW2, a transfer was effected to him and he was duly issued with a plot card for the property.

20. Although the defendant annexed some correspondence from the Town Council of Nyamarambe indicating they were investigating a dispute regarding the ownership of plot No.34 Riosiri Market there was no evidence that the plot ownership card issued to the plaintiff was cancelled and/or revoked. None of the parties called any witness from the County Government and in the absence of any evidence that the plot card held by the plaintiff was invalidated, I hold that it constitutes *prima facie* evidence that the plaintiff is the lawful owner of plot No.34 Riosiri Market.

21. In the circumstances I find and hold that the plaintiff has proved his case against the defendant on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff and make the following final orders:-

(a) That the plaintiff is the lawful owner of plot No.34 Riosiri Market Nyamarambe sub county Kisii county and the defendant is hereby ordered to vacate and deliver vacant possession of the portion of the same occupied by him within 30 days of this judgment failing which eviction to issue on application.

(b) An order of permanent injunction restraining the defendant by himself his agents and/or servants from damaging, wasting and/or in any manner interfering with the plaintiff's plot Number 34 Riosiri Market is hereby issued.

(c) The costs of the suit are awarded to the plaintiff.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 29th DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 7TH DAY OF NOVEMBER 2019.

J M ONYANGO

JUDGE