



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 76 OF 2017

(formerly Machakos ELC Case No. 183 of 2011)

ERICKLYNE MBUGAH OMANWA.....1ST PLAINTIFF

JACKLINE MANTEI KOMENDA

FESTUS KOMENDA OGATO (Deceased).....2ND PLAINTIFF

VERSUS

EDWARD PETER NJOROGI.....DEFENDANT

JUDGEMENT

By a Plaint dated the 20th June, 2011 and filed on 19th July, 2011 the Plaintiffs pray for judgement against the defendant in the following terms:

- a) A declaration that the Defendant is a trespasser upon land parcel number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746.
- b) An order for eviction and a permanent injunction restraining the Defendant, his agents, employees and/or servants from trespassing unto the suit parcels.
- c) Costs of the suit and interest thereon from the date of filing till payment in full.
- d) Other and better relief which the Honourable Court may deem just to grant in the circumstances.

The Defendant filed his Defence dated the 26th July, 2011 and filed on 28th July, 2011 where he denied all the averments in the Plaint except for the descriptive section and the jurisdiction of the court.

Plaintiff's Evidence

PW1 who is the 1st Plaintiff herein confirmed in his examination in chief that he bought land parcel number KAJIADO/KITENGELA/19474 in 2004 and has a title deed to that effect. He stated that the Defendant has trespassed on his land and he is seeking injunctive orders to bar him from doing so.

During cross examination he reiterated that he bought the land in 2004 and that he confirmed the land was vacant before he purchased it. He averred that he had a Sale Agreement and participated in putting beacons on the land when the Surveyor was present. Further that the Sale Agreement did not indicate the number of his land as it was still subject to subdivision. He produced the Sale Agreement including the Title Deed as his exhibits and contended that the Defendant trespassed on the land after he had bought it.

PW2 who is the 2nd Plaintiff stated during her examination in chief that it is her husband who is deceased that bought the suit land in 2004. She took out Letters of Administration Intestate to enable her institute this suit. She produced the Title deed, Sale Agreement, and Certificate of Official Search as exhibits. She confirmed the Defendant has trespassed on the suit land and sought the Court's intervention to restrain him from doing so.

During cross-examination PW2 reiterated that she went to the suit land with her deceased husband and it was unfenced. Further that her late husband bought the suit land and gave her the title deed. She confirmed that it is her husband who took her to the suit land which at that time was vacant and that it is her husband who executed the Sale Agreement. She reiterated that she had sued the Defendant for encroaching on

her land.

PW3 Ibrahim Lei Elsunde confirmed he sold the Plaintiff and the late Festus Ogeto the suit land which measured one (1) acre at the place where he resides, which they subdivided into two equal parts with each one getting a title deed of his own. He averred that the Plaintiffs' do not reside on the suit land but the Defendant has encroached thereon. Further that he sold land to the Plaintiffs when the Defendant was not there. He confirmed the Defendant encroached on the suit lands, started building thereon and when he asked him to stop, he said he had bought the land through a lawyer. He asked the Defendant to come execute a Sale Agreement with him but he declined. He sought the intervention of the local chief but the Defendant failed to stop encroaching on the Plaintiffs' land. He denied selling land to the Defendant in 1986 nor entering into an agreement dated the 12th February, 1996 and that the signature on the Sale Agreement is not his. Further, that he did not receive Kshs. 200,000 as purchase price from the Defendant. He contends that the Defendant sued him at the Kibera Law Courts claiming he was a purchaser of the suit land but he was not convicted since the CIDs found the signature on the Agreement was not his. Further that the land now belongs to his son.

During cross examination he denied selling the Defendant land and that the Agreement is fake. He confirmed selling to the Plaintiffs the suit land as he had a big portion and accused the Defendant of interfering with the beacons. He reiterated that the Defendant will have to deal with owners of the land as he was not on it.

The Plaintiff thereafter closed their case.

Defense Evidence

DW1 who is the Defendant herein contended that he bought ten (10) acres of land from Ibrahim Lei El Sunde who is PW3 and they executed a Sale Agreement dated 12th February, 1996 which his wife witnessed. He confirmed that the land was part of KAJIADO/OLOITIKOSHI/3036 which had not been subdivided and he bought it for Kshs. 20,000 per acre, with the total purchase price being Kshs. 200,000 which he fully paid. He insisted it is PW3's children who fenced the land for him and he paid Kshs. 10,000 for survey. Further, that he was shown the ten (10) acres he purchased and allowed to take actual possession of the same. He did not go to the Land Control Board as the PW3 kept telling him that he was unwell. He realized PW3 sold the land to a third party and at Kibera Law Courts he was advised to institute a civil case at the Machakos Law Courts. Further that in Machakos, PW3 was ordered to transfer the ten (10) acres to him and pay the costs of the suit.

During cross examination, he confirmed he was with one Peter Kinyanjui who signed the Sale Agreement and the signature on it, was for PW3. He stated that at the second page of the Sale Agreement it is PW3 who signed but the signature is not the same. He contends that he got the mutation form from PW3 who was with the surveyor who was subdividing the land where he got his ten (10) acres. He insisted PW3 signed the agreement but his wife did not and he received the purchase price that he gave to his wife. He confirmed he did not have title to his land as he has never gone to the Land Control Board. He reiterated he sued PW3 at Machakos Law Courts vide Civil Suit No. 583 of 2011 where judgement was entered against PW3 and he has a Decree which was served upon PW3. Further that the Machakos case did not relate to the instant suit where he has been sued for trespass.

DW2 ANNE WANJIKU NJOROGI confirmed she carried Kshs. 170,000 being the purchase price which was paid to PW3. She contends that PW3 showed them the suit land, a Sale Agreement was prepared, which was signed by DW1 including PW3 and witnessed by herself together with Peter Kinyanjui.

During cross examination, she reiterated that they were purchasing land parcel number 13577 which was ten (10) acres. Further, that they were shown a title deed but did not take it. She contended that they sued PW3 at the Machakos Law Courts which court ordered him to transfer the ten (10) acres of land to them and pay costs of the suit. She insists they bought the land in 1996 and started building in 1998 and have resided thereon to date. Further that PW3 has never given them title and neither has he evicted them. She reiterates that she has never seen anybody claim the suit land.

The Defendant thereafter closed his case.

Both parties filed their respective written submissions which I have considered.

Analysis and Determination

After perusal of the pleadings including documents and witness statements filed and upon hearing the testimony of PW1, DW1 and DW2, I find that the following are the issues for determination:

- Whether the Plaintiffs are the proprietors of Land Parcels Numbers KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746.
- Whether the Defendant, his agents, employees and/or servants have trespassed on the suit lands and should be evicted therefrom as well as permanently restrained from it.
- Who should bear the costs of the suit?

On the first issue as whether the Plaintiffs are proprietors of land parcel number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 respectively, it is the contention of PW1 and PW2 that they bought the suit lands in 2004. This evidence was corroborated by PW3 who confirmed that he sold the suit lands to PW1 and the husband of PW2 who is deceased. Further that they bought one acre which they subdivided equally. PW1 and PW2 produced their respective title deeds as evidence of ownership of the suit lands.

Section 26(1) of the Land Registration Act, which provides that:

'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 the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that **'the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

Based on the evidence presented, I note that DW1 and DW2 confirmed they did not have title to their land and neither did they state that the Plaintiffs obtained their titles illegally as well as fraudulently. DW1 further stated that PW3 had never taken him to the land control board so as to effect the transfer of the suit land to him despite having bought the same in 1996. It is trite law that for consent of the land control board should be obtained within six (6) months of the transaction and failure of which renders the sale void. I note DW1 has never gone to the land control board from 1996 but insists the suit land is his. Even if DW1 bought the suit land from PW3, he did have the same transferred to him and does not have the legal proof that the land indeed belongs to him as claimed. DW3 further admitted in court that the Machakos suit did not relate to this suit where he had been sued for trespass. It is against the foregoing and relying on the case above that I find that the Plaintiffs are indeed the absolute proprietors of land parcels number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 and hence entitled to the protection of the law.

As to whether the Defendant, his agents, employees and/or servants have trespassed on the suit lands and should be evicted therefrom as well as permanently restrained from it. Based on my findings above, I note the Defendant is not the owner of the suit land. PW3 denied selling him the suit land. PW1, PW2 and PW3 all stated that at the time of purchasing the suit lands, it was vacant. PW3 further confirmed in court that he asked the Defendant to stop encroaching on the suit land but he persisted to do so, and even ignored summons from the chief. DW1 insisted he bought the suit land, with DW2 claiming they commenced construction thereon in 1996 and moved to reside on it from 1998 to date. I note DW1 and DW2 are residing on the suit without documents of title. All these point to an element of encroachment and trespass.

Section 24(a) of the Land Registration Act provides that **'the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..'**

It is against the foregoing that I find that the Defendant has indeed trespassed on the suit lands which belong to the Plaintiffs and should hence be evicted and permanently restrained therefrom.

Who should pay the costs of the suit.

Since the Plaintiffs have been inconvenienced as they purchased the suit land for value and obtained title, I find that they are entitled to costs and will award them the costs of this suit.

In the circumstances I find that the Plaintiffs have proved their case on a balance of probability and proceed to make the following order:

- a) The Plaintiffs be and are hereby declared the absolute proprietors of land parcels number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 respectively.
- b) The Defendant be and is hereby evicted from Land parcels number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 respectively.
- c) Permanent injunction be and is hereby issued restraining the Defendant by himself or through his agents and/or servants from in any way whatsoever interfering with land parcels numbers KAJIADO /KITENGELA /19747 and KAJIADO /KITENGELA /19746 respectively.
- d) The costs of the suit are awarded to the Plaintiffs

Dated signed and delivered in open court at Kajiado this 26th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Odoyo holding brief for Moseti for Plaintiff

Defendant in person