



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 780 of 2017

(formerly Nairobi ELC No. 601 of 2014)

ISAAC KAMAU KARIMI.....PLAINTIFF

VERSUS

OSCAR SIMS.....1ST DEFENDANT

REGISTRAR OF LAND, NGONG LAND REGISTRY.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 15th May, 2014 and filed on 16th May, 2014, the Plaintiff prays for judgement against the defendants in the following terms:

- a) Orders that the 1st Defendant to cease and desist from trespassing on the Plaintiff's land.
- b) Orders that the 2nd Defendant processes the Plaintiff's Title Deeds for subdivided parcels of land or in the alternative to cancel the subdivision and return the original Title Deed to the Plaintiff.
- c) An order of permanent injunction restraining the 1st Defendant from any further dealing/transaction in the subject property.
- d) Any other order that this Honourable Court may see necessary to grant.

All the Defendants were served with summons to enter appearance and filed their respective Defences.

The 1st Defendant filed his Defence dated 9th June, 2014 including a Counterclaim. He denied the averments in the Plaint and stated that he is the legitimate administrator of all that land known as KAJIADO/OLE KASASI/771 hereinafter referred to as the 'suit land' and has enjoyed uninterrupted possession of the land until the Plaintiff encroached on it. He contends that the Plaintiff never purchased the suit land from Ilona Simms and if any transaction occurred leading to obtaining authentic title, it was wrongful as well as fraudulent. Further that as an administrator, he has lawfully been on the suit land.

In the counterclaim filed on 9th June, 2014, the 1st Defendant prays for judgement against the Plaintiff in the following terms:

- i) A declaration that KAJIADO/OLE KASASI/ 771 belongs to Ilona Simms.
- ii) A declaration revoking any subdivision that may have been made on KAJIADO/ OLE KASASI/ 771.
- iii) An order directing the District Land Registrar, Ngong to revoke any illegal resultant subdivisions in respect of KAJIADO/ OLE KASASI/ 771 and reinstate the original title KAJIADO/ OLE KASASI/ 771 in the name of Ilona Simms or the administrators of her estate.
- iv) A permanent injunction restraining the Plaintiff by himself, his agents assigns or any other person from entering, selling, disposing and/or dealing with the suit property in any manner or interfering with the 1st Defendant's and co – administrators' quiet enjoyment of KAJIADO/ OLE KASASI/ 771.

v) Special Damages in the sum of Kshs. 63,000.00

vi) General Damages

vii) Costs and Interest at Court rates.

The 2nd Defendant also filed a Defence dated the 12th June, 2014 where he denied that the Plaintiff was the registered owner of the suit land and averred that the Plaintiff actually forged the Sale Agreement as well as obtained a forged title to which, hence he has never been a registered owner. The 2nd Defendant states that the original title was confiscated by the Land Registrar after a hearing on 10th April, 2014 in the presence of the 1st Defendant, 1st Defendant's witness Elvira Simms, Plaintiff's friend Stanley Konana including the Plaintiff, upon scrutiny of the documents as well as the Sale Agreement allegedly signed between the Plaintiff and the 1st Defendant's mother, the same was found to be a forgery. The 2nd Defendant contends that on 30th April, 2012 an application for official Search was made to the office by one Earnest N Nadome with a copy of the title in the name of Isaac Kamau Karimu. Further that upon checking the copy of the title presented, the Applicant was sent to bring the owner with the original title. He avers that on 4th September, 2012, the Plaintiff appeared with the original title and upon scrutiny, it appeared suspicious but investigations were launched and upon several site visits, the said title was validated on 3rd October, 2013. He claims on 8th April, 2014, the 1st Defendant who is the administrator of the estate of Ilona Simms came to complain that their mother's land was being invaded and he brought with him an original title deed to the suit land. Further, on 10th April, 2014 the 2nd Defendant convened a meeting where the Plaintiff and 1st Defendant attended, the Plaintiff could not identify that person who sold him the suit land and it was also established that the alleged signature of Ilona Simms was a forgery. He confirms that Plaintiff surrendered his title deed which was cancelled and the register amended to reflect the bona fide owner one Ilona Simms. He insists it is the Plaintiff trespassing on the 1st Defendant's land.

The matter proceeded for hearing on 21st November, 2017. The Plaintiff did not attend court, although he was served vide substituted service through the Nation Newspaper.

Evidence of 1st Defendant/Plaintiff in the Counterclaim

DW1 – Oscar Simms

DW1 stated in his examination in chief that he first met the Plaintiff on 9th April, 2014 at the Ngong Land Registry when he was following up his mother's property Plot No. 771 Ole Kasasi, (suit land) with the Land Registrar. He averred that the suit land belonged to his mother who passed away in 2010. Further that the mother had bought the suit land from one Musa Pasha and there was a Sale Agreement dated the 18th April, 2005 to that effect. He confirmed they applied for Letters of Administration Intestate over the estate of their late mother and received a Certificate for Confirmation of Grant on 27th March, 2012. Further, that he has a plot adjacent to the suit land and on 3rd April, 2014 he was informed by the caretaker about developments in the suit land. He sought the intervention of the Land Registrar, who invited the Plaintiff and himself to discuss the discrepancies over ownership of the suit land. The Plaintiff claims he bought the suit land on 18th October, 2005. He presented the original title deed but the Plaintiff presented a photocopy. He contended that the Plaintiff claimed he bought suit land from their late mother but could not respond to simple questions about her. The Land Registrar cancelled the Plaintiff's title to the suit land as he found it fake. He reiterates that the Land Registrar a Mr. Kalama wrote a letter stating that the Plaintiff had acquired his title fraudulently. He avers that the Plaintiff interfered with the suit land by removing the fence that he had put thereon and one time knocking down the concrete poles. DW1 contended that there is no way his late mother sold the suit land to the Plaintiff because on 10th July, 2007 she has applied to the Local County Council for approval of building plans she intended to construct thereon. He reiterates that they applied for an injunction pending the outcome of the suit, and after they got it, the Plaintiff sold the suit land to a Chinese who brought in building materials thereon. He sought Court's intervention to be declared owners of the suit land, the Plaintiff to be restrained from interfering with it and to be paid costs of the suit.

DW2 Elvira Simms

She stated during her examination in chief that the alleged Sale Agreement dated 19th October, 2005 between her mother and the Plaintiff was fake as the signature appended thereon was not her mother's. She claimed that she got as confirmation from the Law Society of Kenya that the lawyer Evans Makonge who witnessed the said Sale Agreement was not registered with them as he was disbarred and not allowed to practice. She produced a letter from the Law Society of Kenya dated the 6th June, 2013 to prove this. She insisted the date on the said Sale Agreement was not plausible since her mother applied for approval of building plans in 2007.

The 1st Defendant thereafter closed their case but the 2nd Defendant did not testify in court.

The 1st Defendant filed his submissions that I have considered.

Analysis and Determination

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

- Whether Land Parcel Number KAJIADO/OLE KASASI /771 belongs to the estate of the late ILONA SIMMS
- Whether the Plaintiff has trespassed on the suit land
- Whether the Plaintiff, his agents, assigns, employees and/or servants should be permanently restrained from entering, selling,

disposing and/or dealing with land parcel number KAJIADO/ OLE KASASI/ 771 any manner or interfering with the 1st Defendant's and co – administrators' quiet enjoyment of.

- Whether the 1st Defendant is entitled to Special Damages in the sum of Kshs. 63,000.00 and General Damages.
- Who should bear the costs of the suit?

On the first issue as to whether the suit land belongs to the estate of the late ILONA SIMMS it is the contention of DW1 and DW2 that their late mother of its proprietor since 2005 when she bought the said land from Musa Pasha. In so far as the Plaintiff claimed in his Plaint that he bought the land from her in 2005, this could not have been possible as she applied to the Local County Council for approval of the building plans in 2007. DW1 and DW2 furnished court with the title deed and Sale Agreement to prove their claim. The 2nd Defendant did not testify in court but averred in its Defence that the Plaintiff is not the registered owner of the suit land as he obtained a forged title which the 2nd Defendant confiscated after a hearing on 10th April, 2014 when the Plaintiff could not identify that person who sold him the suit land with the alleged signature of Ilona Simms being found to be a forged one. The 2nd Defendant confirmed in his Defence that the Plaintiff's title was thereafter cancelled and the register amended to reflect the bona fide owner as one Ilona Simms. He filed an extract of the Green Card to prove this.

Except for the averments in the Plaint, the Plaintiff never filed a reply to the Defences including the Counterclaim. All the evidence provided by the Defendants were uncontroverted since the Plaintiff failed to testify in court nor file a reply to the Defences. In the case of **Janet Kaphiphe Ouma Vs Marie Stopes International (Kenya) HCCC No. 68 of 2007** Justice Ali Aroni held that: ' **In this matter, apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in their Defence therefore remains mere allegations.... Section 107 and 108 of the Evidence Act are clear that he who asserts or plead must support the same by way of evidence.**'

It is against the foregoing that I find that the 1st Defendant has indeed proved that the suit land belongs to the estate of Ilona Simms.

As to whether the Plaintiff has trespassed on the suit land and should be permanently restrained including his assigns, employees and/or servants from entering, selling, disposing and/or dealing with the said land or in any manner or interfering with the 1st Defendant's and co – administrators' quiet enjoyment of the same. I note the 2nd Defendant already admitted in his Defence that he has cancelled the Plaintiff's title and restored the suit land in the name of Ilona Simms. This is evident in the Green Card filed in Court. It is the 1st Defendant's contention that the Plaintiff has severally sent people to the suit land who interfered with the fence and also put building materials thereon. All these actions point to trespass by the Plaintiff since he does not have a valid title to the suit land.

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 relying on the legal provisions above and facts, I find that the plaintiff has indeed trespassed on the 1st defendant's family land.

As to whether the 1st Defendant is entitled to special damages, I find receipts DW1 presented amounting to Kshs. 63, 000 which he used to fence the suit land, was not controverted. It is against the foregoing that I award the amount of Kshs. 63, 000 as special damages to the 1st Defendant as pleaded.

As for general damages, I find that the persistence of the Plaintiff in trespassing on the suit land despite the 2nd Defendant revoking his title, had caused the 1st Defendant and his family anxiety. It is noted from the evidence presented by DW1 that they were at one time harassed by the Police to stop fencing the suit land. Further, they had to go for several meetings at the 2nd Defendant's office before the issue of the title to the suit land was resolved. I find that the issue of forgery of their mother's title by the Plaintiff indeed caused them mental anguish and torture and will proceed to award them nominal damages amounting to Kshs. 500,000.

Since the Plaintiff failed to controvert the allegations of fraud levelled against him by the Defendants and based on the evidence of DW1 and DW2, I find that the Plaintiff has indeed trespassed on the suit land and even sold it to a third party, knowing fully well he did not have capacity to do so. I am further persuaded by the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**' I find that it would be proper if the Plaintiff and his agents or assigns were restrained from claiming ownership and or interfering with the 1st Defendant's family's quiet possession of the suit land.

Who should bear the Costs of the suit?

Costs generally follow the event, and in this instant case I do award the Defendants the costs of this suit.

In the circumstances, I find that the 1st Defendant has proved his case on a balance of probability and proceed to dismiss the Plaintiff's case and enter judgment in favour of the 1st Defendant in accordance with the Counterclaim and make the following final orders :-

- a) That land parcel number KAJIADO/OLE KASASI/ 771 be and is hereby declared to belong to the estate of Ilona Simms.
- b) A permanent injunction be and is hereby issued restraining the Plaintiff by himself, his agents assigns or any other person from entering, selling, disposing and/or dealing with land parcel number KAJIADO/OLE KASASI/771 in any manner whatsoever or interfering with it to the detriment of the beneficiaries of the estate of ILONA SIMMS
- c) Special Damages be and is hereby awarded to the 1st Defendant amounting to Kshs. 63,000.00
- d) General Damages be and is hereby awarded to the 1st Defendant amounting to Kshs. 500,000
- e) The costs of the suit are awarded to the Defendants
- f) Interest at Court rates on (c) and (d) above until payment in full.

Dated signed and delivered in open court at Kajiado this 27th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present :

Cc Mpoye

Ms Miano for 2nd Defendant

N/A for Plaintiff

N/A for 1st Defendant