



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CAUSE NO. 334 OF 2013

JOSEPH OMBAIRE ISABOKE.....PLAINTIFF

-VERSUS-

EVANS ONKOBA.....1ST DEFENDANT

KEMUMA ORURE.....2ND DEFENDANT

LINET ONKOBA.....3RD DEFENDANT

-AND-

P O A.....INTERESTED PARTY

JUDGEMENT

The Plaintiff commenced the suit herein by a Plaint dated 30th July, 2013 wherein the Plaintiff sought the reliefs of a Permanent Injunction against the Defendants from entering into, cultivating or constructing any structures on land Reference No. Central Kitutu/Bogetaorio/[particulars withheld]; an order of eviction directed against the Defendants or any person acting on their behalf from Land Reference No. Central Kitutu/Bogetaorio/[particulars withheld]; and the costs of the suit.

The Plaintiff contented that at all material times to the suit herein he was the registered owner of the suit land and that he acquired the same by way of purchase from the 1st Defendant sometimes in the year 2008 and he has enjoyed peaceful and quite enjoyment until sometimes on or about 26th July, 2013 when without the consent of the Plaintiff the Defendants entered into the suit land and started cultivating the same and as a result of this he filed the instant suit seeking the reliefs hereinabove mentioned.

The Defendants upon service of summons jointly entered appearance and filed a statement of defence and a counter claim. The Defendants contended that they were not aware that the Plaintiff was the registered owner of the suit land and if indeed he was he obtained the same by way of fraud. The Defendants further denied that the plaintiff ever purchased the suit land and they alleged that the suit land comprised of their matrimonial home and was registered as LR No. Central Kitutu/Bogetaorio /[particulars withheld]; and they never disposed off the same.

On their counter claim, the 4th Defendant avers that he was the registered owner of the Land Reference No. Kitutu/Bogetaorio 1/[particulars withheld] which has since been sub-divided and transferred to the name of the Plaintiff. He thus prayed that the Plaintiff's suit be dismissed and a declaration do issue that the 1st Defendant had no capacity to sale and transfer the suit land and a further order do issue for the cancellation and rectification of the register.

When the suit came up for hearing the Plaintiff testified on his own behalf that he stated had purchased the suit land and he produced a copy of the sale agreement dated 16th June, 2000 indicating that he purchased and that the same was witnessed by the 4th Defendant for a consideration of the sum of kshs. 50,000/-. He further testified that on 22nd December, 2003 he purchased another portion and the agreement signed by the 1st Defendant and witnessed by Kimaiga Magere Advocate.

The Plaintiff further stated that upon payment of the purchase price the 4th Defendant executed a transfer and a title issued in his name from a portion of the original title [particulars withheld] and registered as [particulars withheld].

The Defendant in 2013 entered the suit land and started cultivating the land without his consent and that he is currently in possession and occupation of the land.

On cross-examination he stated that he bought the suit land and the sale agreement was executed by the 4th Defendant who was the registered owner.

DW1 Evans Onkoba in his evidence stated that he never sold the land to anybody. He stated the 4th Defendant is his uncle who is mentally unstable and he did not know if he sold the land.

On Cross-examination he stated that he knows the Plaintiff who has been cultivating the suit land for 20 years and he has a title to the portion he cultivates.

DW2 F K testified that the 4th Defendant is her husband and he is sick and mentally unstable and she cant remember the suit land being sold and because of his state of mind he could not sale or transfer the suit land.

On cross examination DW2 stated she did not have any medical records she stated that they did not have any money and thus they never took him to hospital.

On the close of both the Plaintiff and the Defendants case, learned counsel representing the parties elected to file written submissions.

I have considered the pleadings in the case, the witness testimony and the submissions filed and the issues for determination are whether there was a valid sale of the land known as Central Kitutu/Bogetaorio/[particulars withheld] by the 4th Defendant to the Plaintiff and if there was fraud by the Plaintiff to have the suit land transferred into his name.

From the testimony of the Plaintiff he contended that he purchased the suit land from the 4th Defendant and the sale was witnessed by the 1st Defendant initially and later by an advocate. The Defendants have not called either of the witness to the sale agreement to rebut his evidence.

Secondly DW2 who is the wife of the 4th Defendant, stated that her husband has been sick for 18 years and couldn't transact the sale of the land and execution of transfer whereas, a person who is mentally unstable lacks the capacity to contract. The Defendant has not produced evidence to corroborate her evidence to show that the 4th Defendant was undergoing treatment for a mental illness.

On the above reason I do find that the Plaintiff has proved his case on a balance of probabilities.

On the counter claim the Defendants alleged fraud and misrepresentation, I must state that the Defendants have not tendered any shred of evidence to proof the allegation of fraud.

The Defendants have not discharged the burden of proof on fraud which is higher than that of a balance of probabilities and thus I dismiss the Defendants counter claim.

The upshot of the above is that I do enter judgement for the Plaintiff in the following terms:-

(1) A permanent injunction do issue against the Defendants by themselves, agents or whomsoever acting on those instructions from entering into, cultivating or erecting any structures on land parcel No. Central Kitutu/Bogetaorio/[particulars withheld].

(2) An order do issue for the Defendants to move out of the suit land and remove any structures thereon within 60 days from the date of this judgement and in default the Plaintiff be at liberty to apply for orders of eviction.

(3) Costs of the suit to the Plaintiff.

Orders accordingly.

DATED, SIGNED and DELIVERED in open court at KISII on this 23rd day of February, 2018.

Mohamed N. Kullow

Judge

23/2/18

In the presence of: