



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC CASE NO. 119 OF 2008

KILONZO KALIMU NTHONGOI Alias

KILONZO KALIMU.....1ST PLAINTIFF

KALUKI MUSAU.....2ND PLAINTIFF

VERSUS

MUTISYA MBWII KALIMU alias

MUTISYA MBWII.....DEFENDANT

JUDGEMENT

By a Plaint filed on 4th June, 2008, the Plaintiff seeks judgement against the Defendant for:

- a. A declaration Order that the 1st Plaintiff, through the 2nd Plaintiff, is entitled to half share (4.3 hectares) of land parcel number MBIUNI/ULAANI/886;
- b. An Order that the Defendant do forthwith transfer the said portion of land measuring 4.3 hectares out of land parcel number MBIUNI/ULAANI/886 to the 1st Plaintiff and in default the Deputy Registrar of this Honourable Court do execute the transfer forms on the part of the Defendant to effect the said transfer;
- c. A permanent injunction order restraining the Defendant, his agents/or servants or any other person claiming under him from evicting the 1st Plaintiff from the half portion of land parcel number MBIUNI/ULAANI/886 or interfering with the 1st Plaintiff's use and occupation thereof in any manner whatsoever
- d. Mesne profits;
- e. Costs and interests

The Defendant never entered appearance and interlocutory judgement was entered against him on 22nd December 2012 after which the matter was fixed for formal proof. The matter proceeded on 25th May, 2017 and Plaintiff only had one witness.

Evidence of Plaintiff

PW1 KALUKI MUSAU who is the 2nd Plaintiff stated in her examination in chief that she hails from Ithanga, Mavoloni, Machakos County and knows the 1st Plaintiff KILONZO KALIMU. Further that land parcel number MBIUNI/ILAANI/886 belonged to her father in law and she was given four (4) hectares of the same which she sold to the 1st Plaintiff KILONZO KALIMU for a cost of Kshs. 41,000/=. She said that the 1st Plaintiff paid the full purchase price but she never gave him the title because after the land had been divided between herself and NDETO KALIMU, MUTISYA MBUU bought Ndeto's share and thereafter took Ndeto's full parcel including the portion she sold to KILONZO. She instituted proceedings at the Mwala Land Disputes Tribunal vide case no.71 of 2002 where Mutisya was advised that the land should have two title deeds and not one. She however intimated that she cannot remember the date she went to the Mwala Land Disputes Tribunal nor when the matter was deliberated upon but the proceedings therefrom were adopted at the Machakos Chief Magistrates Court Miscellaneous Cause No. 20 of 2003. She produced the proceedings from the Tribunal as Plaintiff exhibit '1'.

She affirms that she wants KILONZO the 1st Plaintiff herein to be issued with his title deed because he bought land from her.

The Plaintiffs' Counsel Mr. Nzioki thereafter closed the Plaintiffs' case and filed written submission, which I have considered.

Analysis and Determination

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

- Whether the 2nd Plaintiff is the legal proprietor of half portion comprising 4.3 hectares of land parcel number MBIUNI/ULAANI/886.
- Whether the Defendant has unlawfully and illegally taken over half of the portion comprising 4.3 hectares of land parcel number MBIUNI/ULAANI/886 that belongs to the 1st Plaintiff which he bought from 2nd Plaintiff.
- Whether the Defendant and or his agents/servants should be permanently restrained from evicting the 1st Plaintiff from the half portion of land parcel number MBIUNI/ULAANI/886 or interfering with his use and occupation thereof.
- Whether the Plaintiffs are entitled to mesne profits
- Who should be awarded costs

Evidence presented by the 2nd Plaintiff was not controverted as the matter proceeded for formal proof. It is hence not in dispute that the Defendant illegally and unproceduarally got registered as the proprietor of land parcel number MBIUNI/ULAANI/886 which half portion belonged to the 2nd Plaintiff who had in turn sold it to the 1st Plaintiff.

I note from Plaintiffs' exhibit '1' that the Land Disputes Tribunal vide Case No. 71/2002 made the following judgement: *' This Tribunal today 19th July, 2002 has ruled without any reasonable doubt that MUTISYA MBWII should surrender KALUKI MUSAU's portion because he obtained (combined) KALUKI's portion illegally. He should obtain the Title Deed for only the portion he bought from NDETO. KALUKI MUSAU can go ahead and transfer her portion to KILONZO KALIMU because KILONZO bought KALUKI's portion at Kshs. 41,000. If MUTISYA MBWII has anything to complain about, he should ask NDETO KALIMU and stop interfering with KALUKI's portion because KALUKI did not sell her portion to MUTISYA MBWII. In view of the above therefore, MUTISYA MBWII should surrender title deed MBIUNI/ULAANI/886 so that NDETO KALIMU can transfer KALUKI's portion to her and thereafter KALUKI transfer the same portion to KILONZO KALIMU.'*

This Judgement was adopted by the Machakos District Magistrate as a Judgement of the Court on 22nd November, 2002. I note the said Judgement was not appealed from and hence still stands as the Judgment of the Court.

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. '

Based on the evidence presented by the Plaintiffs and the Judgement which was already entered on 22nd November, 2002, I take cognizance of the fact that there is already a Decree that allowed the 2nd Plaintiff ownership of half of the suit land. Further, the evidence presented by the Plaintiffs was not controverted by the Defendant who never even filed a Defence. I note however that the 2nd Plaintiff did not provide any evidence to prove the mesne profits that she had lost due to failure by the Defendant to transfer a half portion of the suit land to her. In the case of Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR where P. Nyamweya J. held:-

"...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass"

In so far as the Plaintiff did not provide evidence on the mesne profits they had lost due to the Defendant's failure to transfer half of the suit land to them, but in relying on the above case, I find that the Plaintiff suffered damages as a result of the Defendant's actions and will award her Kshs. 100,000 as mesne profits.

In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and enter judgement in their favour as

prayed. I further make the following order:

- a. The 1st Plaintiff, through the 2nd Plaintiff, is entitled to half share (4.3 hectares) of land parcel number MBIUNI/ULAANI/886;
- b. The Defendant do forthwith transfer the said portion of land measuring 4.3 hectares out of land parcel number MBIUNI/ULAANI/886 to the 1st Plaintiff within 30 days from the date hereof, and in default the Deputy Registrar of this Honourable Court do execute the transfer forms on the part of the Defendant to effect the said transfer;
- c. The Defendant, his agents/or servants or any other person claiming under him is permanently restrained from evicting the 1st Plaintiff from the half portion of land parcel number MBIUNI/ULAANI/886 or interfering with the 1st Plaintiff's use and occupation thereof in any manner whatsoever
- d. The Plaintiffs are awarded mesne profits amounting to Kshs. 100,000
- e. The Plaintiffs are awarded costs of the suit
- f. Interest on (d) and (e) above to apply at court rates.

Date signed and delivered in open court at Kajiado this 13th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Parties - absent