



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 80 OF 2016

JOSEPH KAZUNGU MWANGI.....PLAINTIFF

VERSUS

JOSEPH ODERO OBWORE.....1ST DEFENDANT

CHARLES OTIENO OBARE.....2ND DEFENDANT

VINCENT WAMALWA.....3RD DEFENDANT

MARTIN BARASA..... 4TH DEFENDANT

MAXWEL ODUOR.....5TH DEFENDANT

JOSEPH KHAEMBA.....6TH DEFENDANT

JOHN WESONGA.....7TH DEFENDANT

MICHAEL NDEGE.....8TH DEFENDANT

JAMES JUMA.....9TH DEFENDANT

GODFREY OYOGO.....10TH DEFENDANT

ZABLON ASTUA.....11TH DEFENDANT

ABDRIHIM MUSUNGU.....12TH DEFENDANT

JUDGMENT

1. By a plaint dated 5/5/2016 the plaintiff sought the following orders against the defendants jointly and severally:-

(a) An order of declaration that the plaintiff is the rightful owner of the leasehold interest contained in all that land known as KITALE MUNICIPALITY BLOCK 4/437 measuring approximately Nought Decimal Nought Three Seven Five (0.375) Hectares or thereabouts and situated within Kitale Municipality in Trans-Nzoia County.

(b) An order of eviction do issue against the defendants jointly and severally, their agents,

servants, employees and/or any other persons claiming through them from the plaintiff's land known as Land Title No. KITALE MUNICIPALITY BLOCK 4/437 measuring approximately measuring approximately Nought Decimal Nought Three Seven Five (0.375) Hectares or thereabouts

(c) Costs of the suit.

(d) Any other relief this Honourable court may deem just to fit to grant. The Plaintiff's Case

2. According to the plaint the plaintiff is the registered proprietor of the leasehold interest in all that land parcel known as **Kitale Municipality Block 4/437** which the defendants have without any justifiable cause whatsoever encroached onto and erected illegal structures on which they are carrying on their business from. Despite all efforts by the plaintiff to get the defendants to vacate the said land, they have continued to trespass on the said land and caused suffering and loss of the plaintiff.

The Defendant's Defence

3. The defendants filed a joint defence and counterclaim dated 3rd June, 2016. Their defence is that they deny the validity of the plaintiff's title to the land and that they have no structures on the suit land, but they have structures on the road reserves abutting the suit land. They accuse the plaintiff of intending to encroach on the road reserves they occupy, and aver that they only occupy the suit land as a show ground for their wares. In the same breath they deny that there is no plot known as **Kitale Municipality Block 4/437** and aver that the site on which it is alleged to be located is public land.

4. In their counterclaim, the defendants reiterate the claim that the site on which the suit land is said to be located is public land and add that the purported allotment of the Lease Certificate to one Sebastian Kubai M'Mairutha who is said to have sold the leasehold to the plaintiff, was null and void for contravening the provisions of the ***Physical Planning Act Cap 286 of the Laws of Kenya***. They plead that the Lease Certificate for the suit land is in contravention of the rights of the residents of Trans-Nzoia County to "access and benefit of public land".

5. In addition, the defendants aver that the valid and existing plan for the area does not designate the area as private land and the acts leading to the issuance of the lease and the subsequent transfer to the plaintiff are null and void. They also claim that in the event the said lease is valid then they will raise a claim of rights by virtue of ***Section 28(h) of the Land Registration Act 2012*** so as to nullify the plaintiff's claim of title to the suit land as the plaintiff's predecessor in title never claimed the land within 12 years of obtaining the Certificate of Lease, yet the defendants aver they have been in peaceful occupation of the suit land for over 12 years.

The Plaintiff's Reply to Defence and Counterclaim

6. In his reply to defence the plaintiff reiterates the averments in the plaint and that he was issued with a Certificate of Lease on 11/3/2015. His view is that his sale agreement dated 7/3/2015 with the original leaseholder was valid as the earlier holder held a valid lease granted by the Government of Kenya. He terms the defendants' occupation of the suit land as "illegal and unlawful". He denies that the suit land is public land.

7. The plaintiff also denies the contents of the defendants' counterclaim against him and disputes the defendants' locus to raise the allegations of contravention of existing plans.

The Plaintiff's Evidence

8. The suit came up for hearing on 31/10/2017. The plaintiff gave evidence. He reiterated the matters in the plaint and the reply to defence and counterclaim. He adopted his statement filed in this suit as his evidence-in-chief. He produced the agreement he made with the person who sold him the land, one Sebastian Kubai M'Mairutha dated 7/3/2015 as *P. Exhibit 1* and a copy of the lease in the seller's name

marked as *P. Exhibit 2*. The copy of transfer of lease in favour of the plaintiff was produced as *P. Exhibit 3*. The copy of lease that resulted from the registration of that transfer was produced as *P. Exhibit 4* and an original Certificate of Official Search was produced as *P. Exhibit 5*. The Certificate of Official Search shows the plaintiff owns the land and that it has been charged to the Chase Bank Kenya Ltd to secure a loan facility of Kshs.15,000,000/=

9. Further documentary evidence showing that charge exists is contained in *P. Exhibit 6* (conditional letter of offer of a banking facility from Chase Bank to the plaintiff) *P. Exhibit 7* (schedule of contract details from Chase Bank) and *P. Exhibit 8* (a statement of account, showing the plaintiff's repayments to the lender. *P. Exhibit 6, 7 and 8* are certified as true copies by the lender's office.

10. The plaintiff denied that the suit land is on a road reserve or that the person who it sold to him had no valid title. The plaintiff stated that he conducted an Official Search before purchasing the suit land and visited the suit land with the seller before the agreement, and the seller informed him that the persons on the suit land would leave and that he had informed them that he had sold the suit land. According to his evidence the seller also informed the plaintiff that he had no agreement with the persons on the suit land. The plaintiff avers that he found beacons on the plot.

The Defendants' Evidence

11. The defendants were represented by one Joseph Adero Obwore in the matter of giving evidence in this suit after which evidence they closed their case. The witness averred that he is a carpenter and conducts his business at Laini Moja-Msikiti-Chamuka area. He claimed to have been operating on the suit land for about 20 years. He stated that he knew Sebastian Kubai M'Mairutha who sold the plaintiff the land, and that Sebastian had allowed him on the land. He averred that he pays fees to the "Municipal" (which I presume to mean County Government in the current setup) and that Sebastian has never informed him that the plot was his. He averred that though the whole area he and his co-defendants occupy is about 1 acre, the plot claimed by the plaintiff is smaller. He claimed to be working from inside that plot's boundaries together with Maxwell Oduor (5th Defendant), and Godfrey Oyogo (10th defendant) while the other defendants did not occupy the plot. He did not exhibit any business licence though he claimed to be paying the County Government levies on a weekly basis. According to him the levies he pays are, referred to as tax and not Land Rent or land Rates.

12. He averred that the only reason why he believed the land is public land is that the defendants have worked thereon for a long time. Upon cross examination, he seemed not to know with certainty whether he and his colleagues were inside or outside the suit land as, according to him, he had never had any survey of the land done.

Submissions

13. The plaintiff filed his submissions on 4/12/2017 and the defendant filed his on 22/1/2018. I have considered those submissions. The issues that arise in this suit are as follows:

(1) Is the plaintiff the legally registered owner of the suit land or is the suit public land?

(2) Have the defendants established any rights by way of adverse possession in regard to the land?

(3) What orders should issue?

(1) Whether the plaintiff is the legally registered owner of the suit land or it is public land.

14. The plaintiff's evidence leaves no doubt that the land was originally registered in the name of one Sebastian Kubai M'Mairutha before he bought it. The land thereafter existed as private land, registered in the government records even before the plaintiff purchased the same.

15. The Official Search Certificate he produced showed that he is the registered owner, having become so registered on 11/3/2015. Despite the defendants' claims that the lease issued to Sebastian K. M'Mairutha which was subsequently transferred to the plaintiff was invalid, they never presented any evidence to that effect.

16. The provisions of **Section 24 of the Land Registration Act** provides that the rights of a proprietor of a lease conferred upon him by registration shall vest in the person the leasehold interest described in the lease together with all the implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

17. **Section 26** of the **Land Registration Act** states as follows:

26. (1) 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.

18. The section gives grounds upon which a title can be impeached. A litigant must therefore present evidence before court to support his claim. Nothing should be left to conjecture on the part of the court while it is giving its judgment in the suit.

19. After the hearing of all the parties' evidence, a document was introduced into this matter by the defendants which the plaintiffs did not object to. It is entitled "*Feasibility Study, Environmental And Social Economic Impact Study Preliminary And Detailed Engineering Design For Kitale -Endebess - Suam Road.*" However, this court did not have the benefit of any direct evidence from the defendants or any expert on the content of that document, and if it was meant to aid any limb of the defendant's case- and I believe it is the claim that the suit land is public land- then the said attempt was unsuccessful for that reason.

20. In this case, no fraud has been particularized and no evidence of any fraud was given at the hearing. I find that the defendants have not proved that the process by which the lease was issued to Sebastian K. M'Mairutha was invalid.

21. Consequently the transfer of the lease to the plaintiff cannot be faulted, and I find that the plaintiff has a validly registered lease over the suit land.

(2) Have the defendants established their claim for adverse possession?

22. The defendants lodged an alternative claim of adverse possession. This is evident in their counterclaim when they stated that **in the event** the said lease is valid then they will raise a claim of rights by virtue of **Section 28(h) of the Land Registration Act 2012** so as to nullify the plaintiff's claim of title to the suit land.

23. Adverse Possession is method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by the law. The Period prescribed by the **Limitation of Actions Act, Cap. 22** for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years.

24. In the instant case, the basis of the claim for accrual of rights by way of adverse possession is alleged to be that the plaintiff's predecessor in title never claimed the land within 12 years of obtaining the Certificate of Lease, yet the defendants aver they have been in peaceful occupation of the suit land for over 12 years.

25. However, in the instant case the defendant's claim for rights through the law of limitations is preceded by the claim by the same defendants of invalidity of the plaintiff's title to the same land. Perchance this court finds that the plaintiff's title was invalid, the defendant's case for adverse possession against him would collapse. The question that arises is if a person who is uncertain of another's legal title to land, and who in fact actively challenges the validity of that title, may maintain a claim for adverse possession to the same land. I find those two claims to be inconsistent and that it is improper to include both of them in the same pleading.

26. The defendants failed to establish the length of time they have been on the suit land. Their claim of right to title to the suit land by way of limitation has not been supported by evidence. They have also not demonstrated that the plaintiff allowed them to be on the suit land. Under cross examination, DW1 stated that he did not have *"any search certificate, or survey plan or town map."*

27. Besides, **DW1** acknowledged that only himself and two others are on the land. However, even in respect of those who purport to be on the land, he was not able to present evidence of how they came to be on the land or that they have any legal right to occupy the suit land or operate therefrom.

28. In the case of **Pricilla Gaceri Mugambi v Richard Karl Zips & 2 others [2013] eKLR Malindi Hccc No. 2 Of 2012 (OS) (Formerly Mombasa Hccc No. 173 Of 2008 (OS))** the court stated as follows:

"If indeed the Plaintiff has been operating her businesses on the suit property since 1989, nothing would have been easier than for her to produce in evidence the licenses for the said businesses which are ordinarily issued annually by the Municipal Council. Such licenses or permits would have shown the time when she took possession of the structures on the suit premises for the purpose of computing time."

29. There was no evidence on the part of the defendants that they had stayed on the suit land for more than 12 years. Their claim to title to the land by way of limitation as roughly alluded to in **paragraphs 29 - 32** of their counterclaim cannot stand.

30. I find the defendants have not demonstrated there to be any implied or expressed agreements, liabilities or incidents of the lease in favour of the defendants recognized by law. They have therefore not demonstrated any legal right to be on the suit land. I therefore find that their claim for adverse possession fails and that they are trespassers on the land.

(3) What orders should issue?

31. The plaintiff has prayed for a declaration that he owns the leasehold interest and I have found nothing to fault this position. He has also sought an eviction order against the defendants and costs of the suit. With all due regard to the issues and the parties before this court, I have found that the plaintiff owns the land and that the defendants do not have any right to be on the suit land. Consequently, the prayers in the plaint are merited while the prayers in the defendants' counterclaim are not.

32. I therefore enter judgment in favour of the plaintiff as prayed in prayer No. **(a), (b)** and **(c)** of the plaint dated **5/5/2016**. I also dismiss the defendants' counterclaim dated **3/6/2016** with costs to the plaintiff in the main suit.

Dated, signed and delivered at Kitale on this **20th** day of **March, 2018**.

MWANGI NJOROGI

JUDGE

20/3/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wambura for the defendants

Mr. Wanyama for the plaintiff

COURT

Judgement read in open court.

MWANGI NJOROGE

JUDGE

20/3/2018