

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 228 OF 2012

ELIZABETH SARANGE B. ABENGA.....PLAINTIFF

VERSUS

MILKA MUSIMBI MAVIA.....1ST DEFENDANT

ALFRED MAGOTSI MAVIA.....2ND DEFENDANT

LIVINGSTONE ARUNGA MAVIA.....3RD DEFENDANT

BONIFACE WITIRA MAVIA.....4TH DEFENDANT

M'MBONE MAGOTSI.....5TH DEFENDANT

ESTHER MAGOTSI.....6TH DEFENDANT

CHRISTINE ARUNGA.....7TH DEFENDANT

ANNAH MWEELEMA.....8TH DEFENDANT

EVERLINE MAKUNGO.....9TH DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

Elizabeth Sarange B. Abenga, (hereinafter referred to as the plaintiff) has sued **Milka Musimbi Mavia, Alfred Magotsi Mavia, Livingstone Arunga Mavia, Boniface Witira Mavia, M'mbone Magotsi, Esther Magotsi, Christine Arunga, Annah Mweelema and Everline Makungo** claiming that the plaintiff is and was at all times after 9th December, 2005 the registered owner of land parcel No. UASIN GISHU/KIMUMU/1567. That being the registered owner of the said land, the plaintiff is entitled to the quiet possession and enjoyment of the said parcel of land to the exclusion of everyone else and that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and the 9th defendants have however entered upon the said land and wrongfully taken possession of the same and have thereby trespassed and are still trespassing thereon. The plaintiff has issued notice and severally required the defendants to vacate from the said land but the defendants have been adamant and have refused to vacate and that by reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said land and has thereby suffered loss and damage.

The plaintiff's claim against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and the 9th defendants is therefore for a declaration that the said defendants are not entitled to occupy and use land parcel No. Uasin Gishu/Kimumu/1567 and are therefore trespassers thereupon. The plaintiff's further claim against the defendants is for an order directing the 1st to the 9th defendants to vacate from the said land and also pull down and remove any structure from the land forthwith and in default the defendants be evicted therefrom and that upon the defendants vacating the land, the plaintiff prays for an order of permanent injunction restraining the defendants, their servants and/or agents from entering or otherwise trespassing into the plaintiff's parcel of land No. UASIN GISHU/KIMUMU/1567 and or in any other way interfering therewith. Costs and interest.

DEFENDANTS CASE

The defendants filed a joint statement of defense on 7.2.2006 which was amended on 25th September, 2013 by the order of the court made on 24.9.2013. The gist of the amended defense and counterclaim is that the defendants have been in actual occupation of the suit land as their family land long before any such title of the plaintiff came into being and now that the proprietor of the same is John Mabia Wetira who is the father of the 2nd to 9th defendants and husband to the 1st defendant.

In the alternative the defendants aver that if at all the plaintiff is the registered proprietor of the suit land as from 9.12.2005, she takes her title subject to their right to possess and actual occupation of the suit land under Section 30 (g) of the Registered Land Act, Cap.300 and that they are not trespassers on the suit land but have been in actual occupation of the suit land and more so for as long as they have been in such occupation the plaintiff or any other person has never come to enquire about their interests in the suit land and declined to divulge the same

and that if at all the plaintiff is the registered owner of the suit land then she must have obtained her title surreptitiously hence fraudulently and as such her title is nullity. The particulars of fraud on the part of the plaintiff; Failing to obtain the consent of the requisite Land Control Board, failing to enquire about the defendants' interests before obtaining title to the suit land, Purchasing suit land from initial proprietor in contemnors disregard for the defendants right of occupation.

The defendants admit having been given notice but aver that they are unable to comply with the same as the plaintiff's claims are subordinate to the overriding interests they have over the suit land. The defendants deny the contents of paragraph 13 of the Plaintiff and aver that there are two suits pending over the suit land namely Eldoret CMC Ltd. Case No. 23 of 2005 and Eldoret Hcc Misc. Application NO. 2 of 2006.

The jurisdiction of the court is denied as the plaintiff is claiming trespass to land which falls within the jurisdiction of the Land Disputes Tribunal under Section 3 of the Land Disputes Act No. 18 of 1990. Therefore, the suit is bad in law and does not comply with the rules of pleadings and preliminary point shall be taken up in *limine*.

PLAINTIFFS' REPLY

In the reply, the amended defence and defence to counterclaim, the plaintiff denies that the defendant is in possession of the suit land and denies that the defendants have overriding interests. She further denies that she got her title deed through fraud and the particulars of fraud as set out in paragraph 7 of the amended defence and counterclaim are denied in toto. The Plaintiff further denies that her title deed is null and void and reiterates paragraph 4 of the Plaintiff. The Defendants are therefore put to strict proof to the contrary. In reply to paragraph 12 of the amended defence and counterclaim, the Plaintiff denies that the suit is bad in law and further contents that the same raises triable issues hence puts the Defendants to strict proof thereof.

The Plaintiff avers that she is not and has never been a party to the suits and proceedings set out in paragraph 10 of the Defendants amended defence and counterclaim. The Plaintiff particularly denies having any knowledge of the alleged **ELDORET CMCC LTD CASE NO.28 OF 2005 or ELDORET HCC MISC APPLICATION NO.2 OF 2006**. The Plaintiff further denies that the Land Disputes Tribunal has jurisdiction to adjudicate on the present dispute which touches on registered land.

In reply to defense and defense to counterclaim, the Plaintiff reiterates her claim as set out in her Plaintiff in its entirety and states that the Defendants amended defence and counterclaim averments contained therein are mere denials with no triable issues. The Plaintiff denies the allegations and/or particulars of breach of an implied trust as she obtained ownership of suit parcel on the basis of a contract of sale. The Plaintiff invites the Defendants to strict proof of the contrary. The Plaintiff denies the allegations of fraud and or particulars of trust contained in paragraph 15 of the Defendants counterclaim. The Plaintiff vehemently denies that she obtained title through fraud and reiterates paragraph 4 of her Plaintiff. The plaintiff prays for dismissal of the defence and counterclaim.

PLAINTIFFS EVIDENCE

When the matter came for hearing, the plaintiff (**PW1**) **Elizabeth S.B Abenga** testified that in the year 2005, she was looking for a commercial plot to buy. She approached Robert Otieno an agent, who informed her that John Mabilia Watira had a plot he was selling. She later met John Mabilia Watira (now deceased) with an offer to purchase the parcel of land number **UASIN GISHU/KIMUMU/1567** and upon conducting a search on September, 2005 through the firm of Elijah Momanyi, it came to her attention that he was the registered proprietor of the said parcel. They kept in touch and after a couple meetings and discussion with the late John Watira, she agreed to purchase the piece of land. The sale was concluded vide a sale agreement on the 13th day of September, 2005 between the late and herself at a total value of Kshs.450,000/-, which agreement was attested to by one Elijah Momanyi, an advocate of the High Court of Kenya based in Eldoret.

She settled the entire sale price as per the terms of the sale agreement and the late John Mabilia acknowledged receipt of the last full and final payment as per the aforesaid agreement on 16th September, 2005 before the same advocate, Elijah Momanyi. On the same day when the last payment was made, the deceased signed a transfer of land from his name to hers and the transfer was thereafter filed at the office of the Land Registrar, Uasin Gishu by Elijah Momanyi. Once the deceased had received the full and final amount, his agent used it to acquire a bigger parcel of land measuring three acres to resettle his family.

On 9th December 2005, she was able to acquire a title deed indicating that she is currently registered as the sole proprietor of land parcel number **UASIN GISHU/KIMUMU/1567**. One of the terms of a sale agreement dated 13th September 2005 was that once the final and full purchase price of the parcel of land has been settled, the seller, now deceased, would transfer the land to the buyer but he be allowed to stay upto the end of November so that the children can close school then relocate. Unfortunately, the vendor passed away and the nine defendants in this suit have since declined to vacate from his rightful piece of land. Consequently, Elijah Momanyi served them with an order from court to vacate. As the legal and sole proprietor of the said land, she has not been able to enjoy quiet possession as the defendants herein have wrongfully taken possession of the same and trespassed and are still trespassing thereon. That all her attempts to ensure she can repossess the same have been unfruitful. She attempted to serve the defendants with a notice to vacate to no avail. She therefore seeks the court's assistance to order an eviction put her in repossession of her parcel of land and grant her all the other orders prayed for in the plaintiff.

(PW2) Robert Otieno states that in the year 2005, the plaintiff, Elizabeth Abenga sought to see him upon receiving communication from him as an Agent for the late John Mabilia Watira about parcel of land on sale. The deceased had informed his company, Asulu investment and general property consultants (no longer in operation) that he has a parcel of land he wishes to dispose situate along Iten road measuring 100m x100m but upon actual tabulation and measurement turned out to be about a quarter ($\frac{1}{4}$) an acre. He said he had many children and that small parcel of land was insufficient to cater for their needs in the future. He therefore suggested they sell it and purchase a larger piece even of located in the remote area.

The Plaintiff was informed and upon weighing her options settled for this parcel of land registration **UASIN GISHU/KIMUMU/1567** she proceeded to the law firm of Elijah Momanyi who conducted a search and verification of ownership. Upon confirmation of the same, a sale agreement was drafted to the effect between herself and John Mabilia Watira to the effect that the plaintiff was to pay a total of Kshs.450,000/-

(four hundred and fifty thousand only) which she paid in cash. On 16th September 2005, the late Mabilia acknowledged receipt of the full and final payment.

The deceased gave them a company a condition that he shall not retain the money but gave it to him on the very date of receipt to search and purchase another parcel of land for him. They searched in Kiplombe, Cherang'any, Kitale and Eldoret but could not find any favourable piece. They went to Kamagut near Moi Barracks on the way to Kitale where they found 3 acres and bought all of at Kshs.330,000/- only and the balance was remitted to him. The land ownership and title changed from the deceased to the plaintiff effective from date of having receiving final and full payment under the supervision of advocate Elijah Momanyi.

According to sale agreement the late John Mabilia had prayed for time upto the end of 30th November, 2005 to allow his family relocate and so that he could also collect rent from the inhabitants and thereafter vacate upon expiry of the time prayed for the family refused to vacate and the son to the late John Mabilia denied knowledge of the sale transaction over the said parcel of land. Their decline to vacate led to this suit and thereafter the seller was demised. The rightful owner of the said parcel is the plaintiff Elizabeth Abenga and the necessary procedure and documentation was followed accordingly.

DEFENDANTS' CASE

The defence called Milka Musimbi Mabilia (**DW1**) who states that the land parcel known as UASIN GISHU/KIMUMU/1567 measuring 0.07 Hectares arose of a sub-division of the land parcel known as UASIN GISHU/KIMUMU/474 which was acquired through a loan from the Settlement Fund Trustees. The acquisition of the land was done by the efforts of all the defendants as the family of the late John Mabilia Wetira and the deceased was merely a trustee for the family. The defendants have always been in occupation since the acquisition of the land and during the sub-division. That a claim was lodged with the Land Disputes Tribunal and a restriction entered on the register on 21.9.2005.

The dispute was resolved by the tribunal in favour of the family and the decision adopted vide **Eldoret Chief Magistrate Tribunal Case No. 25 of 2005 - Milka Musimbi Mabilia & Another —v- John Mabilia Wetira.** That by the decision of the tribunal which has been adopted as a judgment of the court and a decree issued the defendants are the lawful owners of the suit land and the decision has never been set aside.

The plaintiff if at all she purchased the land she did so with the full knowledge of the fact that the defendants were in occupation, also a dispute existed over the ownership before the tribunal and it was resolved in favour of the defendants. The plaintiff never obtained any valid consent from the Land Control Board before transfer of the land and in fact no consideration was ever paid as required to enable the plaintiff to be a purchaser for valuable consideration. The plaintiff was also aware that there was a dispute over the ownership of the land and the transfer if any was executed contrary to the principle of *les-pendens*. The plaintiff was all along aware of the defendants' interests on the land but did not bother to enquire from them. The plaintiff's transfer is irregular and fraudulent in any event as fundamental conveyancing procedures were not followed. That he does pray that judgment be entered on the counter-claim and the suit be dismissed.

Livingstone Arunga Mabilia (**DW2**) states that the land parcel known as UASIN GISHU/KIMUMU/1567 measuring 0.07 Hectares arose of sub-division of the land parcel known as UASIN GISHU/KIMUMU/474 which was acquired through a loan from the Settlement Fund Trustees. The acquisition of the land was done by the efforts of all the defendants as the family of the late John Mabilia Wetira and he was merely a trustee for the family. The defendants have always been in occupation since the acquisition of the land and during the sub-division. That issues over the management of the suit land arose within the family and that a claim was lodged with the Land Dispute Tribunal and a restriction entered on the register on 21.9.2005. The dispute was resolved by the tribunal in favour of the family and the decision adopted vide Eldoret Chief Magistrate Tribunal Case No. 25 of 2005- Milka Musimbi Mabilia & Another v John Mabilia Wetira. That by the decision of the tribunal which has been adopted as a judgment of the court and a decree issued the defendants are the lawful owners of the suit land and the decision has never been set aside.

The plaintiff if at all she purchased the land she did so with the full knowledge of the fact that the defendants were in occupation, also a dispute existed over the ownership before the tribunal and it was resolved in favour of the defendants. The plaintiff never obtained any valid consent from the Land Control Board before transfer of the land and in fact no consideration was ever paid as required to enable the plaintiff to be a purchaser for valuable consideration. The plaintiff was also aware that there was a dispute over the ownership of the land and the transfer if any was executed contrary to the principle of *lis-penden*. The plaintiff was all along aware of the defendant's interests on the land but did not bother to enquire from them. The plaintiff's transfer is irregular and fraudulent in any event as fundamental conveyancing procedures were not followed. That he does pray that judgement be entered on the counterclaim and the suit be dismissed.

SUBMISSIONS BY PLAINTIFF

The plaintiff submits that the plaintiff and the deceased obtained consent of the Land Control Board to sanction the agreement dated 13.9.2005. The consent according to both parties was obtained on the 5.8.2005. The consent was for the transfer of the parcel of land from John Mabilia Wetira to Elizabeth Sarange Abenga. The issue is whether the consent of the Land Control Board could be obtained before the agreement is executed. The plaintiff further submits that the agreement was valid as there was an offer, acceptance and consideration of Kshs. 450,000 being the total sale amount of the suit land. The plaintiff further submits that her title is valid as there is no proof of fraud. The certificate of title was issued to the plaintiff upon transfer and therefore, the plaintiff is the absolute and indefeasible owner thereof as per the provisions of section 26 of the Land Registration Act, 2012.

SUBMISSIONS BY DEFENDANT

The defendant on his part submits that the plaintiff is not a purchaser for valuable consideration and that it is unclear as to whether she paid the vendor the agreed value as the land instructed does not contain the consideration. The Minutes of the Land Control Board indicate that the plaintiff paid Kshs.50,000 as consideration for the transfer. Moreover, that she acquired the land with the knowledge that the defendants were in possession. The defendants rely on section 30(g) of the Registered Land Act, Cap. 300, Laws of Kenya (repealed), which provided for overriding interests and was applicable at the time the cause of action arose. The defendants further argue that there is lack of valid consent from the Land Control Board. The application or consent of the Land Control Board was undated and that the nature of

consideration was not indicated. The defendant further submits that the title held by the plaintiff was not valid as the consent of the Land Control Board was not obtained. The defendants further argue that the registration of the 1st and 3rd defendants is that of trustee on behalf of the defendants as beneficiaries.

ANALYSIS AND DISPOSITION

I have considered the pleadings, evidence on record and the submissions of both counsels and do find that the facts of the case are that the suit parcel of land is Uasin Gishu/Kimumu/1567 which was created from the subdivision of plot no UASIN GISHU/KIMUMU/474.

According to the original green card, the first registered proprietor of the original parcel of land, UASIN GISHU/KIMUMU/284 was settlement fund trustees having been registered on 12th May 1986, who transferred the property to John Mabilia Wetira and title deed was issued on the same day on the 17th of November 1988. The property was subdivided and Uasin Gishu/Kimumu/474 was created on 5.11.1990 and registered in the names of John Mabilia Wetira. The title deed was issued to John Mabilia Wetira on 20.3.1991. Uasin Gishu/Kimumu/474 was further subdivided and Uasin Gishu/Kimumu/1567– 1572. The register for the parcel of land Uasin Gishu/Kimumu/1567 was opened on 9.7.1999 after subdivision of parcel of land No. Uasin Gishu/Kimumu/474 and the parcel registered in the names of John Mabilia Wetira and title deed issued on 26.7.1999.

On the 21.9.2005, dealings in the parcel of land were restricted by the Land Disputes Tribunal but the restriction was removed on 8.12.2005 without a proper explanation opening the same for any dealing. On the 9.12.2005, the same was registered in the names of Elizabeth Sarange B. Abenga and title deed issuance to 17.1.2007, it is indicated that there was a court order registered. The import of the court order is that the sale was nullified in respect of Uasin Gishu/Kimumu/1567 and the land was to be transferred to Milka Musimbi Mavia and Livingstone Arunga Mavia on behalf of themselves and the rest of the children. John Mabilia Wetira was restrained from interfering with the said parcels of land and was ordered to facilitate transfers to the plaintiff smoothly and immediately. John Mabilia Wetira was given 30 days to appeal. There is no evidence that the said John Mabilia Wetira appealed. However, the plaintiff was not a party to the proceedings and the judgment made never referred to the plaintiff's interest. Before the court order, the property had been transferred to the plaintiff after a sale agreement entered into between the plaintiff and John Mabilia Wetira. The whole purchase was paid in two instalments of KShs. 270,000 and KShs. 180,000 respectively. The transfer of land was executed on 16th of September, 2005 and received at the Land register on 9.12.2005. There is no evidence that the transfer was registered by the Land Registrar.

The application for consent of the Land Control Board was executed by purchaser and owner of the parcel of land but the same does not show the nature of the transaction.

The letter of consent issued to John Mabilia Wetira on 5.8.2005 refers to the application dated 5.8.2005 and meeting held on 5.8.2005 which was in respect of transfer of 0.07 Ha from John Mabilia Wetira to the plaintiff. The title deed was issued to the plaintiff on 9.12.2005 after the land was registered in her name on the same date. The said John Mabilia Wetira passed on before giving the plaintiff vacant possession. It is a fact that the defendants are in occupation of the suit land and have been in occupation as a family since 1986. It is a fact that the plaintiff is now the registered owner of the same parcel of land and now prays that the defendants be evicted from the parcel of land. The 1st defendant is wife to the vendor whilst the 2nd – 9th defendants are his children.

The main issue the court considers is the import of the decision of the Land Disputes Tribunal in Award No. 28 of 2005. This dispute was between the 1st defendant and 3rd defendants with their father, the plaintiff was not a party to the dispute before the land disputes tribunal. The decision of the Tribunal was made after the registration of the plaintiff as the proprietor of the suit land as absolute proprietor however the dispute was pending before the tribunal when the registration was done. and therefore, the doctrine of *lis pendens* applies.

Lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, **section 3 (1)** of the **Judicature Act Cap 8** stipulates that,

“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

a. the Constitution;

b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Black's Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Turner L. J, in ***Bellamy vs Sabine [1857]*** 1 De J 566 held as follows: -

“It is a doctrine of common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of *Mawji vs US International University & another [1976] KLR 185*, Madan, J.A. stated thus: -

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that: -

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

I do find that the application for consent of the Land Control Board was not dated and therefore, the same is suspect and it is not possible to tell when it was made. But probably when the dispute was pending in the tribunal. The nature of transaction, the consent was sought was not disclosed. The purchase price was not disclosed in the application form and therefore, the application form was devoid of the required information. I do find that the plaintiff and the vendor did not make full disclosure to the Land Control board on the status of the land and therefore, the consent obtained was based on non-disclosure of material facts to the Land Control Board. It is worth noting that the consent was obtained on 5.8.2005 before the agreement was made on 13th September 2005 and on the 21.9.2005, there was a restriction by the Land Disputes Tribunal and the restriction was removed on 8.12.2005 claiming that the Land Disputes Tribunal was resolved.

I have looked at the Award of the Tribunal and do find that it was resolved on 14.10.2005 in favor of the defendants and therefore, the District Land Registrar was bound to register the decision of the Land Disputes Tribunal as it awarded the land to the defendants but instead the Land registrar went ahead to register the land in the names of the plaintiff. The Land Registrar should have looked at the decision of the Land Disputes Tribunal before registering the transfer, but appears to have registered the land in the names of the plaintiff to pre-empt the adoption of the award. I do find that the lifting of the restriction and registration of the property in the names of the plaintiff was illegal as the Tribunal had ordered that the property be registered in the names of the defendants. The plaintiff therefore obtained the title illegally and contrary to the award of the Tribunal which was adopted on 15th December 2005 and when the dispute was pending before the court therefore in breach of the doctrine of *lis-pendens*.

Ultimately, this court does find that the registration of the plaintiff as the proprietor of the land parcel known as Uasin Gishu/Kimumu/1567 is a nullity, having been obtained illegally and contrary to a court order. I do direct that the register relating to land parcel Uasin Gishu/Kimumu/1567 be rectified by cancelling the registration of the plaintiff as proprietor and that the 1st and 3rd defendants be registered as trustees for the 2nd, 4th, 5th, 6th, 7th, 8th and Estate of the 9th defendants. Costs to the defendants.

Dated and delivered at Eldoret this 18th day of April, 2018.

A. OMBWAYO

JUDGE