



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 50 OF 2015**

**ERICK AKIVAGA MUGATSIA.....PLAINTIFF**

**VERSUS**

**ALFRED ESHIPAI OMUREFU.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff commenced these proceedings by a plaint dated 8/4/2015 which was filed on 9/4/2015. He sought the following orders:

- a. Eviction from LR Kapomboi/Kolongolo Block 1/Kiriita/266 measuring 1.690 ha;
- b. A permanent injunction restraining the defendant from in any manner interfering with the plaintiff's possession and occupation of the suit land;
- c. Costs of this suit with interests at court rates.

2. The defendant filed his defence on the 25<sup>th</sup> June 2015. The plaintiff replied to that defence on 28<sup>th</sup> July 2015. By an application dated 16<sup>th</sup> August 2017 the defendant applied for leave to issue a third party notice to one James Miringu Manji who was alleged to have sold the suit land on behalf of the deceased Manji Gaiho. However by the time of the hearing of the suit such Third Party Notice as had been applied for had not been served on the intended third party and the suit proceeded principally between the plaintiff and the defendant.

**THE PLEADINGS**

**The Plaintiff's Case**

3. The plaintiffs' case is that he is the absolute registered owner of Land Reference Number **LR Kapomboi/Kolongolo Block 1/Kiriita/266** which the defendant is occupying without any colour of right. The plaintiff states that the defendant's occupation of the suit land has occasioned him loss and damage.

**The Defendant's Defence.**

4. The defendant denied the plaintiff's claim. He averred that he is not in illegal occupation of the suit land having bought it from the deceased Manji Gaiho and his son Muringu (which I believe is the same as "Miringu" mentioned elsewhere in the documents), and taken possession thereof on 6<sup>th</sup> September 2010. He denies that he has occasioned the plaintiff any loss or damage. He also points out that there is an application for revocation of grant in **Nairobi Milimani Succession Cause No 82 of 2015** where the defendant has had the estate of the deceased and the plaintiff herein joined as interested parties. The defendant avers that there is another suit in which this dispute can be addressed and therefore seeks that this suit be dismissed with costs.

**The Plaintiff's Reply to Defence.**

5. The plaintiff in reply to the defence of the defendant averred that he bought the suit land from one Rachel Nyambura Ndungu a beneficiary of the estate of the late Manji Gaiho after succession proceedings in respect of his estate had been completed and that all legal procedures had been complied with.

**THE EVIDENCE OF THE PARTIES.**

### **The Plaintiff's Evidence**

6. PW I the plaintiff, testified that Rachel Nyambura Ndungu, a beneficiary of the estate of the late Manji Gaitho, sold him the land which measures 4 acres for Kshs. 1,200,000/= and produced the agreement dated 27/8/2014. He also produced a copy of the Certificate of Confirmation of Grant in **Succession Cause No. 137 of 2010** which showed that Rachel Nyambura Ndungu the seller obtained registration over the suit land as a sole proprietor through that Confirmation of Grant.

7. He produced copy of the transfer of the suit land to Racheal Nyambura Ndungu by personal representatives of the estate of the deceased Manji Gaitho. It is dated 27<sup>th</sup> August, 2014. He then produced a copy of an application to be registered as proprietors by transmission dated 27<sup>th</sup> August 2014 by which the personal representatives of the deceased were registered as proprietors and a copy of a stamp duty declaration and pay-in slip dated 28/8/2014. The copy of the title in the name of Racheal Nyambura Ndungu dated 8<sup>th</sup> September 2014 was produced as P.Exh 6.

8. A copy of the title in the plaintiff's name dated 10/11/2014 was also produced as P.Exh 7 as well as a copy of the green card. Finally a certified copy of the certificate of death was produced showing that Manji Gaitho died on the 21/7/2006.

9. After the purchase the plaintiff went to the land with a surveyor to verify the land and before they were through with the task the defendant appeared and claimed that the land belonged to him. They discovered that some of his structures were on the suit land. The matter was escalated to the Chief who summoned the parties and asked them to come with their documents and the plaintiff and Racheal Nyambura the seller attended before the Chief. After looking at the defendant's documents the Chief advised the defendant to cede the land to the plaintiff but the defendant remained on the land and became very hostile. Attempts to involve the police were unsuccessful hence the suit. The plaintiff testified that the alleged agreement with the deceased upon which the defendant relies is dated sometime in the year 2010 while the deceased died on 21/7/2006, and, according to him the agreement is not genuine. He prayed for the defendant's structures on his land to be demolished and the defendant evicted.

### **The Defendant's Evidence**

10. The defendant adopted his statement that was filed in court on the 24/6/2015 as his evidence-in-chief. He testified that he met James Miringu Manji on 6/9/2010 and the latter wanted to sell land on behalf of the family of Gaitho Manji while in the settlement office they met a clerk called Pepela. The clerk asked Miringu if he wanted to sell land and asked for his documents. James produced a letter from the Chief, two passport photos of Gaitho Manji and the identity card of Gaitho Manji; Pepela then assured them that the documents would be effective at the Land Control Board. He then sent the two to a nearby advocate called Onditi. There an agreement was written down and James signed on behalf of Manji Gaitho. Two witnesses were present at the execution of the agreement but only one of them signed. Pepela then asked for Kshs. 30,000/= to take the documents to the Land Control Board. Then the defendant and James went to Kenya Commercial Bank where the defendant withdrew and transferred to James Miringu's account some Kshs. 320,000/=. After payment was made to James, James instructed the then caretaker to the land, one Tenai to go and show the defendant the land. Tenai took the defendant to the land the next day. Tenai told the defendant that the maize growing thereon belonged to a lessee and the defendant would be free to take possession of the land once it was harvested. The maize was removed from the land in November 2010. The defendant produced a Valuation Report in respect of the suit land as D.Exh 2. He also produced the agreement between him and Miringu as D.Exh 3. It was dated 6/9/2010. It showed Manji Gaitho as the seller. The defendant, on cross examination was shown P.Exh 11, the certificate of death and he agreed that Manji Gaitho was dead at the time his D.Exh 3 was purported to have been executed. James Miringu did not feature in that agreement. The defendant admitted that he came to realise that the agreement was a forgery and James had sold him land that was not his and the defendant was given legal advice to the effect that the said Miringu be enjoined as a third party. The defendant stated that he came to know that the plaintiff had obtained title to the land while at the Chief's office on 29/12/2014. However he averred that he had not vacated the land at the time of the suit as he had bought it. He did not see any reason why he should vacate the land.

### **The Parties' Submissions**

11. At the end of his evidence which was given in the absence of his advocate the defendant was cross examined by Ms. Arunga for the plaintiff and the suit was adjourned to 14/3/2018 in his presence. On that latter date neither the defendant or his counsel appeared and the court upon the plaintiff's counsel's application deemed the defendant's case closed and ordered both parties to file their submissions within 7 days. Only the plaintiff filed submissions on the 20<sup>th</sup> March 2018.

### **DETERMINATION**

#### **Issues for Determination**

12. The issues that arise in this suit are as follows:

- a. **Whether the plaintiff is entitled to orders of eviction of the defendant from the suit land;**
  - b. **Whether the plaintiff is entitled to orders of injunction restraining the defendant from interfering with the suit land?**
  - c. **What orders should issue?**
- (a) **Whether the plaintiff is entitled to orders of eviction of the defendant from the suit land**

13. The plaintiff has by way of documentary evidence produced in court demonstrated that the person that he purchased the suit land from had authority to sell the land to him. The defendant on the other hand has produced an agreement that bears a date that came long after the

demise of the purported seller, has shown that he never dealt with the deceased, has admitted that he is now aware that the agreement is a forgery but is still unwilling to give up the land on the basis that he purchased the same. I find the defendant's position unreasonable. The only consequence of his admission that his agreement was forged and that he dealt with a person who had no authority to sell the land to him is that the agreement was invalid and cannot be honoured. He also must have realized that he had been deceived for he made an application and obtained orders that the person who sold the land to him be enjoined as a third party in these proceedings but sadly that third party notice was never served upon the intermeddler and he was not made an interested party to this suit. And there ended the defendant's hopes of being indemnified by a confirmed intermeddler in this case.

14. As the plaintiff has produced the title documents and demonstrated that he is the rightful owner of the land, he is entitled to orders of eviction of the defendant and removal of the defendant's property from the land so that he may take vacant possession thereof.

**(b) Whether the plaintiff is entitled to orders of injunction restraining the defendant from interfering with the suit land?**

15. The plaintiff has proved that he is the registered proprietor of the suit land. By the provisions of **Section 24** of the Land Registration Act he is entitled to the land and all that is appurtenant thereto. **Section 24** states as follows:

**“Subject to this Act-**

**(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.**

16. **Section 25** of the Land Registration Act states as follows:

**“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.**

17. The defendant has not demonstrated that any of the matters mentioned in **Section 25** which would inhibit the absolute enjoyment of the proprietary rights of the plaintiff in respect of the suit land exist. Therefore I find that the plaintiff should enjoy all the rights to the land as stipulated in **Section 24** of the Act. For this reason I find that the defendant should be enjoined from interfering with the plaintiff's full enjoyment of the suit land.

**CONCLUSION.**

**(c) What orders should issue?**

18. I therefore find that the plaintiff's claim has merit and I hereby enter judgment in favour of the plaintiff against the defendant in the terms of the **prayers (a), (b) and (c)** of the plaint dated **8<sup>th</sup> April, 2015** in this suit.

19. It is so ordered.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of May, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**30/5/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyamu holding brief for Arunga for the plaintiff

Defendant in person absent

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**30/5/2018**