



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. 18 OF 2017 [FORMERLY HCCC 45 OF 2012]

VIOLET INGADO KIMANANI.....PLAINTIFF

VERSUS

FRANCIS KIVATI KADASIRA.....DEFENDANT

JUDGMENT

1. Violet Ingado Kimanani, the Plaintiff, commenced this suit against Francis Kivati Kandasira and Hezron Ogaye, the Defendants, seeking for their eviction from Land Parcel 1286, Tiriki/Tigoi and costs. The Plaintiff avers that she is the registered owner of the said land. That the Defendants trespassed onto a portion of the land in May 2004 and erected structures thereon without her consent. That she took the matter with the Provincial Administration who asked the Defendants to vacate but they declined.

2. The Plaintiff withdrew the suit against Hezron Ogaye through the notice to withdraw dated 9th July 2012, and filed on the 10th July 2012.

3. The suit is opposed by Francis Kivati Kadasira, the Defendant, through his statement of defence and counterclaim dated and filed on the 19th July 2012. He avers that land parcel Tiriki/Tigoi/1286 belongs to the late Benjamin Okobo Mambo. That the said deceased subdivided the land into three portions and on the 25th May 1997 sold the first portion measuring 84 x 78 feet to Musa Kadasira Azuberi, the late father to the Defendant. That the Plaintiff then purchased the second portion of the land leaving the deceased in occupation of the third portion. That if the Plaintiff has been registered as proprietor of the said land, then the registration was obtained fraudulently as she had only purchased a portion. That his late father conducted an official search of the land in 2006 and found out that the Plaintiff had illegally and unlawfully registered the whole land to her name. That his late father lodged a case against the Plaintiff before Tiriki West Division Land Dispute Tribunal who ordered her to surrender the title and stay on her rightful share. That the Defendant occupies land parcel Tiriki/Tigoi/1285 and the neighbouring portion of Tiriki/Tigoi/1286 bought by his late father, to whose estate he has obtained grant of letters of administration Ad litem. That the late Benjamin Okobo Mambo, who died on the 17th August 2009 did not sell or transfer Tiriki/Tigoi/1286 to the Plaintiff. That the transfer of the land to the Plaintiff was fraudulently done. The Defendant prays for a declaration that the Plaintiff's registration with the land was fraudulent, null and void and that the land do revert to the name of the late Benjamin Okobo Mambo. That a portion of the land measuring 84 by 78 feet, occupied by the Defendant, be subdivided and registered with the late Musa Kadasira Azuberi. He also prays for costs.

4. The Plaintiff testified as PW1. She called Lucia Ayiro and Kavori Mwara Okwara as witnesses, who testified as PW2 and PW3. The Plaintiff's case is that she bought the land from Benjamin Okobo Mambo in 2001. That the land was subdivided from Tiriki/Tigoi/989, and the other portion had earlier been transferred to one Musa who had bought it. That the vendor had remained on that land until his death in 2009. That it was after the vendor's death that Defendant started encroaching onto the land and blocking her entrance. That in June 2012, the Defendant and others buried the body of Hezron Ogaye on the land and chased PW2 away after which they demolished PW1's toilet. PW3, the Land Registrar Vihiga, confirmed that Tiriki/Tigoi/1286 was registered in the Plaintiff's name on the 27th November 2001 following a transfer from Benjamin Okobo Mambo.

5. The Defendant testified as DW1. He called Wilbur Onyacha Mabomere, Kennedy Onzwere Zobi and Hezron Kilibwa as witnesses and they testified as DW2 to DW4 respectively. The Defendant's case is that his late father entered into a sale agreement with Benjamin to buy a portion of 84 by 78 feet of Tiriki/Tigoi/1286 on the 25th May 1997. That he took possession of the portion and in 2002 the Defendant was given that land by his father. That the same year, Plaintiff bought the lower portion of Tiriki/Tigoi/1286 and Benjamin remained on the portion in the middle. That in 2006, the Defendant and his father went to land office and discovered that the Plaintiff had transferred the whole Tiriki/Tigoi/1286 to her name on the 27th November 2001. That they took the matter to the tribunal who ruled that they should get their portion. That the Defendant's father died in 2009 and the Plaintiff filed this case in 2012. That Benjamin and his brother later died and were buried on the land. That the Defendant is using the portion that belonged to Benjamin and the one she had bought from him.

6. The learned Counsel for the Plaintiff and the Defendant filed their written submissions dated 18th December 2017 and 16th January 2017 (sic) respectively.

7. The following are the issues for determinations by the Court;

- a) **Who is the registered proprietor of land parcel Tiriki/Tigoi/1286 and whether the registration was regularly, procedurally and legally done.**
- b) **Whether the Defendant is entitled to a portion of the said land.**
- c) **Whether Defendant is in occupation of a portion of Tiriki/Tigoi/1286 and if so whether he should be evicted.**
- d) **Who pays the costs of the suit and counterclaim.**

8. The Court has carefully considered the pleadings by both parties, oral and documentary evidence tendered, written submissions by both counsel and come to the following findings;

- a) That from the documentary evidence, land parcel Tiriki/Tigoi/1286, the suit property, is a subdivision from Tiriki/Tigoi/989 which was first registered on the 9th July 1973 in the name of Odondo Mambo. That the said Odondo Mambo changed the name under entry No. 2, on the 6th January 1995 to Benjamin Okobo Mambo. That on the same date the title was closed upon being subdivided into parcel 1285 and 1286.
- b) That Tiriki/Tigoi/1285 was on 9th February 1995 transferred to Musa Kadasira Aziberi under entry number 2, while parcel Tiriki/Tigoi/1286 was transferred to the Plaintiff under entry number 2 of 27th November 2001. That the two transfers were reportedly made by the then registered proprietor of the two parcels namely, Benjamin Okobo Mambo, now deceased.
- c) That though the Defendant alleges that his father had bought a portion of the suit land in 1997, there is no evidence tendered that he had paid the whole purchase price to the vendor and that he had been placed in possession. That there is also no evidence availed that the consent of the Land Control Board was obtained in accordance with **Section 6 and 8 of Land Control Board Act Chapter 302 of Laws of Kenya**. That the evidence availed by PW1 and PW2 that the Defendant only took possession of a portion of the suit land after the death of Benjamin Okobo Mambo in 2009 finds favour with the Court. That indeed, if there was a sale transaction between the Defendant's late father and the late Benjamin Okobo Mambo in 1997, there is no explanation given why no legal steps were taken by the defendant's family to pursue their interest against the vendor who was alive in 2006. That the best the Defendant can do as the administrator of his father's estate is pursue for refund of the money paid from the estate of the vendor, Benjamin. The Plaintiff is not the legal representative of the estate of Benjamin and got her title during the lifetime of the said Benjamin.
- d) That as PW3, the Land Registrar confirmed that the Plaintiff's registration as proprietor of the suit land was procedurally done, and in the absence of any evidence adduced by the Defendant to prove fraud, misrepresentation or collusion on the part of the Plaintiff and the Land Registry, the Court finds and declares that the Plaintiff is the legally registered proprietor of land parcel Tiriki/Tigoi/1286.
- e) That the Plaintiff being the registered proprietor of the suit land is taken as the absolute and indefeasible owner of the land in accordance with **Section 26 of the Land Registration Act No. 3 of 2012** and hence entitled to the rights and privileges of a registered proprietor. That the evidence adduced shows that the Defendant is unlawfully in occupation of a portion of the suit land. The Plaintiff is therefore entitled to the prayers sought.
- f) That the Defendant's counterclaim against the Plaintiff is without merit and is dismissed with costs.

9. That the Court enters judgment for the Plaintiff against the Defendant in the following terms;

- a) **That the Land Registrar and Surveyor Vihiga visit Land Parcel Tiriki/Tigoi/1286 and confirm its ground boundaries and point them out to the parties.**
- b) **That upon the boundaries of the suit land being confirmed and pointed out to the parties, the defendant do give vacant possession of any portion of the suit land found to be under his possession in 90 (ninety) days and in default eviction order to issue.**
- c) **The Defendant pay the Plaintiff's costs of this suit and counterclaim.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30TH DAY OF MAY 2018

In the presence of:

Plaintiff

Absent

Defendant Absent

Counsel Mr. Juma for Odeny for Plaintiff

Mr. Abwa for Kouko for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE