



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND COURT

ELC CASE NO. 307 of 2017

(FORMELY KISII ELCC NO. 480 Of 2013

ISAAC OMONDI OTIENO.....PLAINTIFF

VERSUS

BENSON NGALA OSII.....DEFENDANT

JUDGMENT

1. By a plaint dated 2nd December 2013 and filed in court on 3rd December, 2013, the plaintiff through Oguttu Mboya & Co. Advocates currently Ogutu , Ochwangi, Ochwal & Co. Advocates, sued the defendant. He is seeking the following :-

- i. An order of eviction against the defendant, his agents and/or servants from LR NO. Kanyamkago /Kawere 1/220.**
- ii. Permanent injunction restraining the defendant, either by himself, agents, servants and/or anyone claiming under the defendant, from re-entering, trespassing onto ,cultivating, planting sugar cane, building onto, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is LR.NO. Kanyamkago/Kawere 1/220.**
- iii. An order directing and/or compelling the District Land Registrar, Migori to remove and/or vacate the caution entered and/or endorse in the registered of LR NO. Kanyamkago/Kawere 1/220 on the 17th June 2013.**
- iv. General damages for trespass.**
- v. Interest on (iv) hereof at court rates.**
- vi. Costs of the suit be borne by the defendant.**
- vii. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.**

2. The plaintiff's case is that in or about June/July 2013, the defendant unlawfully laid claim to land parcel No. Kanyamkago/Kawere 1/220 measuring 1.5 hectares or approximately 3.5 acres (herein after referred to as the suit land). On 17th June, 2013 the defendant registered a caution on the title of the suit land claiming purchaser's interest. The defendant commenced cultivation in readiness for planting sugar cane and other crops on the suit land.

3. On 10th June 2013, the plaintiff was registered as the proprietor of the suit land and a title deed issued accordingly. The registration followed succession proceedings in Rongo PMCC Succession Cause No.49 of 2011 in respect of the estate of Elijah Otiemo Alwala (Deceased), who was originally registered as the proprietor of the suit land. As a result, the plaintiff was issued with a grant of letters of administration on 19th September, 2012 and confirmed on 22nd April, 2013. The defendant's entry onto the suit land and his activities thereon provoked the instant suit.

4. The defendant through learned counsel Sam Onyango filed his statement of defence and counter claim dated 14th January 2014. He denied the plaintiff's claim and termed the alleged succession proceedings and subsequent registration of the suit land in the name of the plaintiff, a nullity. He stated that he has been in open, peaceful, quiet and un interrupted possession and occupation of a portion of the suit land measuring 1.5 ha which portion is duly and permanently demarcated using trees for a continuous period of 15 years. He further stated that his rights and interest over the portion of the suit land is an overriding interest incapable of being defeated by the fact of registration.

5. The defendant counter claimed that by an agreement dated 16th April 2014, he bought a portion of the suit land from the plaintiff at a consideration of Kshs. 34,000/= which he paid in full to the plaintiff and took actual possession of the portion since then hence the plaintiff's rights to claim the portion of land has been extinguished by effluxion of time and is statute barred. The defendant/counter claimer has sought the following orders:-

- a) **A declaration that the defendant has acquired a portion of land parcel No Kanyamkago/Kawere 1/220 measuring 1.5 ha by virtue of adverse possession.**
- b) **An order that the land parcel No. Kanyamkago/Kawere 1/220 be sub-divided into portions in accordance with the existing boundaries and the defendant be registered as the proprietor of the portion he occupies measuring 1.5 ha.**
- c) **Permanent injunction restraining the plaintiff from interfering with defendant's occupation of the portion aforesaid.**
- d) **Costs of this suit.**
- e) **Interest on (d) above at court rates.**
- f) **Any other relief the court may deem appropriate.**

6. Initially Okongo, J sitting at Kisii Environment and Land Court, partly heard the suit whereby the plaintiff (PW1) adduced evidence in support of his claim. On 14th March 2017, the court (Mutungi, J) transferred the suit to this court upon its establishment, for hearing and determination.

7. On 19th July, 2017, I heard the testimonies of the defendant (DW1) and JOTHAM HENRY KABASA (DW2). Immediately the court directed the parties to exchange written submissions and their respective counsel complied accordingly.

8. In their submissions dated 27th November 2017, and filed on 30th November 2017, the plaintiff's learned counsel set out the case background analysed evidence adduced and four issues for determination. He relied on authorities which include **Mrao Ltd -v- First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, **Aikman -Vs. Muchoki (1984) KLR 353-361** and **Kariuki - V- Kariuki (1982) KLR 225- 228**.

9. By his submission dated 6th April 2018, and filed on even date, learned counsel for the defendant termed the plaintiff's submissions irrelevant and out of context. He submitted that there was no dispute that the plaintiff was the registered proprietor of the suit land, identified and analysed issues for determination. Counsel cited authorities among them, **Public Trustee -v- Wanduru (1984) KLR 314** and **Chevron (K) Ltd -v- Harrison Charo Wa shutu (2016) eKLR**, and submitted that the defendant has proved his counter claim to the required standard hence the court to allow it with costs.

10. I have carefully considered the pleadings, the evidence of PW1, DW1, DW 2 and submissions. The parties signed joint statement of agreed issues dated 14th January, 2014 and filed in court on 15th January 2014 for the court's determination, see **Great Lakes Transport Co. Ltd -v- Kenya Revenue Authority (2009) KLR 720**. I embrace the issues therein and distil them in the terms as follows:-

- a. **The proprietorship of the suit land**
- b. **The defendant's entry onto and or occupation of the suit land and an acquisition of interest thereon.**
- c. **Trespass by the defendant or adverse possession by him in respect of the suit land.**
- d. **Are the parties entitled to reliefs sought in their respective pleadings?**

11. There is no dispute that the plaintiff (PW1) is the registered proprietor of the suit land. This is manifest in the parties' pleadings, evidence and submissions. His evidence including a copy of title deed dated 10th /6/2013 (Pexhibit 3) prove that he is the proprietor of the suit land. His rights and interests thereon are secured under Section 24 and 25 of the Land Registration Act, 2012. DW 1 referred to green card of 26/3/2014, (DEXhibit 3) and stated that PW1 was the owner of the suit land.

12. On the legality of transfer and registration of the suit land in favour of the suit land, PW1 testified that the deceased was his father who used to own the suit land. PW1 obtained a grant and confirmation of letters of administration (PExhibit 2&3) in regard to the estate of his deceased father and had the suit land transferred to his name. Admittedly Exhibit 5 is certificate of title to the suit land to be held as conclusive evidence of his proprietorship of the suit land ,save for exceptions under **Section 26(1) of the Land Registration Act, 2012** which states:-

“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 the proprietor shall not be challenged, 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, procedurally or through a corrupt scheme.”

13. PW1 stated that he is not in use of the land and that DW 1 cultivated the land. He produced PExhibits 1 to 12 and further stated that whereas he is the registered owner of the suit land since 10th June, 2013, it is DW 1 who cultivated the land. He testified that:-

“the suit property was transferred to me.....I have not started using the suit property. The defendant placed a caution on the title of the suit property..... the defendant has planted sugarcane on the whole parcel of land.”

14. DW 1 testified that PW1 sold to him ½ acres of the suit land on 16/4/99 at kshs.34,000/= as per sale agreement (DExhibit 1) which he produced as evidence together with demand letter dated 14/6/2014 by the counsel for PW1 (DExhibit 2) as well as DExhibit 3. In cross examination,DW1 maintained that he bought the land from the PW1 on 16/4/1999 and that he is in occupation of the same since that time. He stated that ;-

“ I planted trees,sugarcane and maize on the land. I am in occupation of the suit land.”

15. According to DW2, there was DExhibit 1 between PW1 and DW1 and that the latter ploughed the suit land and planted maize and sugarcane thereon. That after PW1 sold the land to DW1 as per DExhibit 1, the land was fenced with sisal plants and that DW1 has continuously used it since the year 1999.

16. It is common ground that DW1 entered the suit land in the year 1999. He is in possession of the land since he fenced it and cultivates the same. In **Kimani Ruchine & Another –v- Swift Rutherford Company Ltd & Another (1976-80) 1 KLR 1500**, the court of Appeal held that possession can take different forms such as fencing or cultivation of the land in dispute.

17. It was the evidence of PW1 that DW1 has been in cultivation of the suit land since year 1999. He maintained so during cross examination by counsel for the defendant on 7th July, 2012. Both DW1 and DW2 confirmed that DW1 has been in continuous and open occupation of the suit land from that point in time.

18. In **Gatimu Kinguru –v- Muya Gathangi (1976) KLR 253**,Madan,J (as he then was) stated, inter alia;

“The defendant’s possession was open and notorious ---- there is also no evidence of entry in the plaintiff upon the portion occupied by the defendant during all this period. There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant.”(Emphasis added)

19. In the present case, DExhibit 1 reveals that DW1 paid Kshs. 34,000/= as purchase price for the suit land. I am of the considered view that the transaction in terms of DExhibit 1 between the parties created a constructive trust in favour of DW 1 and it is not subject to consent of the area Land Control Board as observed in **Kariuki case** (supra). In the circumstances DEXhibit 1 is enforceable; See **Macharia Mwangi Maina & 87 Others –v- Davidson Mwangi Kagiri (2014) eKLR**

20. I bear in mind **Sections 71 to 75 and Section 76 to 78 of the Land Registration Act, 2012** in respect of cautions and restrictions respectively. PW1 produced PExhibits 8 and 9 in relation to the caution entered on 17th June 2013. In favour of DW1 as shown on PExhibit 6. Nonetheless as already noted PW1 created a constructive trust in favour of DW 1 as per DExhibit 1.

21. On the plaintiff’s claim for general damages for trespass, no foundation was laid for the same. This court cannot grant even minimum amount in the circumstances, see **Erick Adome & Another –v- Pauline Kasumba Osebe & Anor (2014) eKLR**.

22. From the available evidence, DW1 has been in open, peaceful and un interrupted possession and occupation of the suit land for a continuous period in excess of 15 years. His rights and interest in respect of the suit land amount to an overriding interest incapable of defeat by the fact of registration as observed in **Macharia Mwangi Maina case** (supra). The plaintiff’s registration as the proprietor of the suit land is thereby extinguished see **Chevron case** (supra).

23. As PW1 has been declared dispossessed of ownership and possession of the suit land, DW1 cannot be termed as a trespasser. The defendant (DW1) has demonstrated to bring and proved conditions for grant of injunctive relief as laid down in **Giella –v- Cassman Brown Co. Ltd (1973) EA 358** and as restated in the case of **Mrao (supra) and Ngurumani Ltd –v- Jan Bonde Nielsen & 2 others (2014) eKLR**

24. In the result, I find that the plaintiff’s case has not been proved against the defendant on a balance of probability. However the defendant/courter claimer has proved his counter claim against the plaintiff on a balance of probability.

25. A fortiori,

(a) I dismiss the plaintiff’s suit with costs.

(b) I enter Judgment in favour of the defendant against the plaintiff in terms of orders (a),(b), (c) sought in the defendant’s counter claim dated 16th April, 2014 together with costs of the counter claim.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of MAY 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Ombachi holding brief for Oguttu Mboya for plaintiff

Mr. Mwita Kerario holding brief for Sam onyango for the defendant.

Tom Maurice – Court Assistant.