



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 237 OF 2015

S A O.....PLAINTIFF

VERSUS

J F.M. N & 3 OTHERS.....DEFENDANTS

JUDGMENT

1. S A O, the Plaintiff, commenced this suit through the plaint dated the 15th September 2015 against J F. M. N, Robert Stanley Kiama, Land Registrar, Kisumu and The Honourable Attorney General, the 1st to 4th Defendants respectively, seeking for the following;

- a) Permanent injunction restraining the 1st and 2nd Defendants, by themselves or their agents from “entering into, remaining in, trespassing upon or in any other manner, shape or form interfering with the Plaintiff’s peaceful user and occupation of Land Parcel No. Kisumu/Manyatta [particulars withheld]”, suit property.
- b) Revocation of the 2nd Defendant’s title to Land Parcel Kisumu/Manyatta [particulars withheld] by 3rd Defendant, cancelling the entries made on the said title on the 18th March 2015; restoring the title to 1st Defendant’s name; and registering the Plaintiff’s interest.
- c) Any other order the Court may deem just.
- d) The costs.

The Plaintiff avers that she is a beneficial owner of the suit property, as the Court has authorized her to occupy it and utilize the rental income arising therefrom. That she has lived on the land, which was then registered in the 1st Defendant’s name, since 1999. That the 1st Defendant got a child with her. That after the 1st Defendant failed to pay the maintenance ordered by the Court, she could not attach the suit land as he had charged it to the bank. That she registered her interest over the land with the 3rd Defendant on the 1st September 2010. That on or about 23rd June 2015, she learnt that the 1st Defendant had with the authorization of 3rd Defendant transferred the suit property to 2nd Defendant without her knowledge and consent. The Plaintiff avers that there was fraud attributed the 1st and 3rd Defendant, through which the 2nd Defendant was registered with the land.

2. The claim of the Plaintiff is denied by the 1st Defendant through the statement of defence dated 15th February 2016. He avers that he had charged the suit land on the 15th May 1991 and had a further charge on the 28th November 1991. That after the land was discharged, he sold and transferred it to the 2nd Defendant. That the Plaintiff had applied for and obtained four different execution orders in Kisumu Children Case No. 6 of 2006, the last dated 5th August 2014 begin to attach the rent. That there was no Court Order stopping him from selling the suit property by the time he sold it to the 2nd defendant, and therefore the suit should be dismissed with costs.

3. The 2nd Defendant also disputed the Plaintiff’s case through the statement of defence dated 8th December 2015 and the Amended statement of defence and Counterclaim dated 28th October 2016. The 2nd Defendant avers that he is an innocent purchaser of the Suit Property from the 1st Defendant. That the Plaintiff is a trespasser on the suit land and lacks capacity to sue over the land. That the Plaintiff has failed to give him vacant possession of the land or pay rent to him and her conduct is depriving him the opportunity to realize the fruits of his investment. The 2nd Defendant seeks for the Plaintiff’s suit to be dismissed with costs and that judgment be entered for him against the Plaintiff as follows;

- a) That the Plaintiff do compensate him for the unpaid rental income from the date he acquired ownership of the suit property.
- b) Mandatory injunction to issue compelling the Plaintiff to give vacant possession of the suit property to the 2nd Defendant.

- c) An Order of eviction to issue against the Plaintiff.
- d) A permanent injunction to issue against the Plaintiff.
- e) Costs of the suit and Counterclaim.

4. The 3rd and 4th Defendants filed their joint statement of defence dated 3rd March 2016 admitting that the 1st Defendant was issued with title deed for the suit land on the 12th April 1991 and that it was charged to Kenya Commercial Bank on the 15th May and 28th November 1991. They further averred that the 3rd Defendant do not authorize transfer of land but that processing of transfers is done with documents presented to the office. They seek for the Plaintiff's suit to be dismissed with costs.

5. The Plaintiff denied the 2nd Defendant's Counterclaim through her Reply and defence to the Counterclaim dated 15th February 2017. She denied that the 2nd Defendant is an innocent purchaser of the suit land as he ought to have noted that the Plaintiff had filed a caution against the title, which was withdrawn on the same date the 2nd Defendant was registered as proprietor. That the fact that the 1st and 2nd Defendants were able to obtain the land control board consent when the caution was in force and thereafter on the same day effect the withdrawal of the caution, and transfer the title to the 2nd defendant is amazing and is evidence of their illegal and fraudulent collusion calculated to defeat the Plaintiff's interests over the suit property. That the 2nd Defendant title to the suit property is not indefeasible. That the Plaintiff is not a trespasser on the suit land nor is she obligated to pay the 2nd Defendant rent. She prays for the 2nd Defendant's Counterclaim to be dismissed with costs.

6. Mr. Njuguna Advocate appeared for the 1st and 2nd Defendants while the Plaintiff was in person. The Litigation Counsel appeared for the 3rd and 4th Defendants. The suit was mentioned on the 12th June 2017 in the presence of the Plaintiff and Counsel for the 1st and 2nd Defendants and hearing date of the main suit set for 15th February 2018. That on that date, only the Plaintiff was in Court and on being satisfied that the Provincial Litigation Counsel had been served with hearing notice dated 12th June 2017 and affidavit of service sworn by Edward Victone Odhiambo on the 13th February 2018 filed, the Plaintiff was allowed to present her case. She testified as PW1.

7. The Plaintiff's case is that the 1st Defendant was her husband between 1999 to 2003. That she had filed Kisumu C.M. Children Magistrates Case No. 6 of 2006 against the 1st Defendant in which she was granted custody of their child and 1st Defendant ordered to be paying her Kshs. 10,000/=, as monthly maintenance for the child's upkeep on the 3rd February 2009. That the 1st Defendant filed Kisumu H. C. Miscellaneous Application No. 165 of 2009 where he was granted leave to appeal out of time on the 22nd January 2010, on condition he continues paying the Kshs. 10,000/= monthly maintenance and that the Plaintiff continue in occupation of Kisumu/Manyatta [particulars withheld] undisturbed. That after the 1st Defendant failed to pay the monthly maintenance ordered, the Plaintiff moved to Court for execution orders. That on 20th June 2011, she obtained an order in Kisumu C.M. Childrens Case No. 6 of 2006 to have the 1st "Defendant's property , notably a house on parcel of land number Kisumu/Manyatta [particulars withheld] be attached and sold in execution of the decree herein." That the attachment could not be done as the Plaintiff later found out that the 1st Defendant had charged the land to a bank. That she returned to the Court in the same Children's case and obtained an order on 5th August 2014 in which "the monthly rents due to the Defendant/Respondent herein J F. M. N, in execution of the Judgment/Decree herein, in respect of property situate on Land Parle No. Kisumu/Manyatta [particulars withheld]" was attached. The Court further ordered that the order be served on the "current tenant thereon, Naphtally Omollo Ogolla, for compliance purposes," and that "all rents so attached, be deposited in Court for onward transmission to the Applicant herein, S A O." The Plaintiff filed a caution against the title of the said land on the 1st September 2010. It is further the Plaintiff's testimony that she later learnt that the caution had been removed on the 18th March 2015 without notifying her and that on the same date a transfer in favour of the 2nd Defendant was registered and title deed issued. That the transfer of the suit property was done to defeat her claim on maintenance payment in respect of the Court order issued attaching rent over the suit property. The Plaintiff testified that the transfer was through fraud of the 1st and 2nd Defendants and collusion of the 3rd Defendant as the caution she had filed was removed without giving her a hearing. She prayed for the transaction transferring the land to the 2nd Defendant to be revoked as the child she got with 1st Defendant and herself stand to suffer as their home for the last 10 years is on that land. She also prayed for the 2nd Defendant's counterclaim to be dismissed with costs as he had got registered with the land when he knew of her claim over it. That as the Land Control Board is known to sit only ones in a month, it is strange, that the 1st and 2nd Defendant made the sale agreement over the land on the same date that they got the letter of consent dated 23rd February 2015 while her caution was subsisting. That the caution was lifted on the 18th March 2015 when the transfer to the 2nd Defendant was effected.

8. That after the Plaintiff closed her testimony she moved that the Defendants' case be closed after which today's date for judgment was fixed.

9. The following are the issues for determination;

- a) Whether the 1st Defendant's land parcel Kisumu/Manyatta [particulars withheld] was free for sale as of 18th March 2015 in view of the orders issued in Kisumu CM Children's Case No. 6 of 2006.
- b) Whether the 1st Defendant passed good title to the 2nd Defendant when he transferred the suit land to him on the 18th March 2015.
- c) Whether the 2nd Defendant's registration with title to the suit land conferred upon him absolute and indefeasible title of the land.
- d) Whether the removal of the caution filed by the Plaintiff against the title to the suit land was regularly and procedurally removed.

e) Who pays the costs of the suit and counterclaim.

10. The Court has carefully considered the pleadings filed by and on behalf of all the parties, the oral and documentary evidence tendered by the Plaintiff and come to the following findings:-

a) That from the copies of the Court orders produced by the Plaintiff issued in Kisumu CM Children's Case no. 6 of 2006 and Kisumu H.C. Misc. App. No. 165 of 2009, the custody of the child born out of the relationship between the Plaintiff and 1st Defendant was awarded to the Plaintiff under the Children's Court Order of 3rd February 2009. That in addition, the said Court ordered the 1st defendant to be paying the Plaintiff monthly maintenance of Kshs. 10,000/= (Ten thousands shillings).

b) That it is through the Court order issued in the said case on the 26th April 2007 that the Plaintiff re-entered the house situated at Migosi L.R. No. Kisumu/Manyatta [particulars withheld]. That order (b) issued by the High Court on the 26th January 2010 in the Miscellaneous application authorized the Plaintiff to remain in the house on the said land undisturbed, and finally vide the Children Court order of 5th August 2014, all the rent arising from the suit land was attached and ordered to be deposited with the Court for onward transmission to the Plaintiff in execution of the decree issued earlier therein.

c) That the Plaintiff had on the 1st September 2010 filed a caution against the title of the suit land to ensure the legal status of the land does not change without her knowledge. That the provision of Section 73 (2) of the Land Registration Act No. 3 of 2012 and previously Section 133 (2) of the Registration of Land Act Chapter 300 of Laws of Kenya (now repealed) obligated the 3rd Defendant to give the Plaintiff as the cautioner notice of the intention to remove the caution before it could be removed. The Plaintiff has pleaded and testified that she was not notified of the intention nor was she given an opportunity to be heard before it was removed. That though the 3rd and 4th Defendants had averred in the joint statement of defence that the transaction processed by the office was based on the documents produced by the other Defendants, there is no evidence availed to counter, or rebut the Plaintiff's evidence that she was not given notice and or hearing before the caution was removed. That the Court would have expected the 3rd Defendant to avail copies of the notice issued of the intention to remove the caution, evidence of its service upon the Plaintiff, and copy of the proceedings and finding that took place. That as none was tendered, the Court finds and holds that the 3rd Defendant removed the caution filed by the Plaintiff against the suit land title without giving her a notice and opportunity to be heard which is a contravention of Section 73 (2) of the Land Registration Act and Article 50 of the Constitution 2010.

d) That the finding in (b) and (c) above leads the Court to the conclusion that the suit land was not free for sale when the 1st Defendant entered into a sale agreement and transferred it to the 2nd defendant. That had the 2nd Defendant done due diligence by for example doing a search on the title at the time he entered into the sale agreement with the 1st Defendant, he would have noted the existence of the caution filed by the Plaintiff on the 1st September, 2010 and which remained in force until the 18th March 2015. That it is also strange that the 1st and 2nd Defendant were able to apply for and obtain the Land Control Board consent to transfer the suit land when the caution was still in force.

e) That in view of the finding in (d), the 2nd Defendant was not an innocent purchaser of the suit land for value, but an active participant in the 1st Defendant's machination to evade or avoid the attachment of the rental income arising from the suit land as ordered by the Children's Court on the 5th August 2015. The transfer of the suit land by the 1st Defendant to the 2nd Defendant was aimed at defeating the cause of justice and must be frowned upon by not only this Court but also all law abiding citizens and institutions.

f) That the 2nd Defendant did not avail any evidence in support of his counterclaim and on the evidence presented to this Court by the Plaintiff, the counterclaim must fail with costs to the Plaintiff.

11. That following from the foregoing, the Court finds that the Plaintiff has established her case against the Defendants on a balance of probabilities. That the Court enters judgment for the Plaintiff in the following terms:-

a) That the 3rd Defendant is hereby directed to rectify the register of Land Parcel Kisumu/Manyatta [particulars withheld] by revoking and cancelling the entries numbers 9, 10 and 11 made on the 18th March 2015 and revert the registration of the said land in the name J.F.M. N as in entry number 4. That accordingly the 2nd Defendant's title to the said land be recalled and cancelled.

b) That the caution filed by the Plaintiff against the title to the suit property on the 1st September 2010 under entry number 8 be reinstated forthwith and not to be withdrawn without compliance to Section 73 (2) of the Land Registration Act.

c) That the Defendants do meet the Plaintiff's cost in the suit.

d) The 2nd defendant's counter claim against the Plaintiff is hereby dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MAY 2018

In the presence of:

Plaintiff present

Defendants 1st & 2nd absent

Counsel M/s Orege for 3rd and 4th Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE