



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 326 OF 2016

RONALD SAGWE MAGERE.....1ST PLAINTIFF

ALFRED MATINI MAGERE.....2ND PLAINTIFF

VERSUS

MARGARET NYANG'ARA.....DEFENDANT

R U L I N G

1. The plaintiffs filed the instant suit vide a plaint dated 12th October 2016. They claim to be the registered owners of land parcels **Nyaribari Chache/B/B/Boburia/2833** and **2661** respectively. They further aver that the defendant on or about the month of August 2016 started encroaching onto the suit properties and obstructing the plaintiffs from accessing and utilizing their said properties. The plaintiffs seek judgment against the defendant for:-

(a) A declaration that the plaintiffs are the legally registered owners of LR No. Nyaribari Chache/B/B/Boburia/2933 and 2661 respectively.

(b) An order of permanent injunction directed against the defendant, her agents and servants and an order of eviction from the suit properties.

(c) Costs of the suit.

2. Simultaneously with the plaint the plaintiffs filed a notice of motion application under a certificate of urgency praying for an order of temporary injunction restraining the defendant, her agents, servants, employees or anybody claiming through her from entering, encroaching and doing anything on **LR No. Nyaribari Chache/ Keumbu/2933** and **2661** respectively.

3. The defendant filed a defence and counterclaim dated 23rd January 2017 on 7th February 2017 where other than admitting the plaintiffs are the registered owners of the suit premises, she denied all the other averments contained in the plaint. The defendant under paragraphs 4 and 5 of the counterclaim aver that she has built her home on land parcel **Nyaribari Chache/Boburia/2933** and has tilled and utilized land parcel **Nyaribari Chache/B/B/Boburia/2661** for over a period of 20 years. She asserts that the plaintiffs are registered owners as trustees of the defendant. The defendant seeks judgment as per the counter claim for a declaration that the plaintiffs are registered as owners of the suit properties as trustees of the defendant.

4. The defendant filed a replying affidavit in opposition to the plaintiffs' application for injunction. The defendant avers in the replying affidavit that she was the wife of the late Pius Mauti Magere (deceased) who was also the father of the plaintiffs through her co-wives. She asserted that she occupied the suit lands in her capacity as wife of the deceased with whom she bore 7 children as listed under paragraph 2.3 of the replying affidavit. She averred that following the death of her husband, her co-wives and the plaintiffs sought to exclude her from participating in the burial arrangements culminating in filing of Kisii CMCC No. 514 of 2016 where a consent order was made acknowledging that the plaintiff had a home on the suit properties and she was allowed to continue in occupation thereof and to continue utilizing the same. The defendant denies that he encroached onto the suit land when her late husband was being buried stating that she has her home on the land and has resided there and utilized the land for over 25 years.

5. The court given the rival assertions by the parties on 8th February 2017 gave directions that the chief of the area visits the suit properties and ascertain the occupancies during the period 2015/2016. The court further on 3rd May 2017 requested the parties to consider availing a surveyor's report which would verify the status on the ground particularly because another parcel of land **Nyaribari Chache/B/B/Boburia/2932** had featured in the proceedings although the same was not in the pleadings. In the report filed by the chief on 4th April 2017 the same stated that the plaintiffs were the ones who were in occupation of land parcels 2933 and 2661 and that the defendant returned to her matrimonial home after a long separation in August 2016.

6. The report by the land registrar and the surveyor dated 31st October 2017 was filed in court on 16th November 2017 and made the following observations and findings:

- i. Land parcel Nyaribari Chache/B/B/Boburia/2932 is registered in name of Teresia Bonareri Mariba who is the plaintiffs' mother.**
- ii. Land parcel Nyaribari Chache/B/B/Boburia/2933 is registered in the 1st plaintiff's name.**
- iii. The two parcels 2932 and 2933 border each other and a road passes through the two parcels.**
- iv. The lower part of both parcels from the road to the stream there is nappier grass and coffee and this portion is underutilization by the plaintiffs.**
- v. The upper part from the road the two parcels are under the utilization of the defendant.**
- vi. Inside parcel 2933 is an old house in which the defendant is residing. A pit latrine has been dug in one corner of the parcel and in parcel 2932 there is a new house built by the defendant's son.**

7. Having perused and reviewed the pleadings, the annexures and the reports by the chief and the land registrar/surveyor it is evident the plaintiffs and the defendant have a relationship. The defendant asserts she is the wife of Pius Mauti Magere (deceased) who was also the father of the plaintiffs. That the plaintiffs are the registered owners of the suit properties is not disputed. What is in issue is whether the plaintiffs were registered subject to the defendant's overriding interests which under Section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed) and now Section 28 of the Land Registration Act, 2012 does not require to be registered. Are the plaintiffs registered owners subject to trust in favour of the defendant? These are not issues that can be determined at this interlocutory stage. A full trial would be necessary to determine the issues. What is clear and apparent from the report filed by the land registrar and the surveyor is that the defendant distinctively occupies the upper part of parcel **2932** and **2933** which is separated from the lower part occupied by the plaintiffs by a road that cuts through the two parcels of land. This status ought to be preserved until the suit is heard and determined on its merits. It is not lost to the court that the plaintiffs' mother was registered as owner of land parcel **Nyaribari Chache/B/B/Boburia/ 2932** on 21st September 2017 as per the copy of the search dated 16th October 2017 whereas previously the land was registered on 16th November 1973 in the name of Magere Mauti who the defendant claims was her husband. This registration was during the pendency of this suit and raises questions as to how it was procured.

8. In the result, I am persuaded the appropriate order in the circumstances of this matter is to require and it is so ordered that the parties shall observe and maintain the status quo as captured in the report by the land registrar and the surveyor where the plaintiff shall continue utilization and occupation of the lower portions of parcels **2932** and **2933** while the defendant shall continue occupation and utilization of the upper portion from the road until the suit is heard and determined. The parties are directed to complete compliance with Order 11 Civil Procedure Rules within the next 45 days from the date of this ruling and thereafter to list the matter for pretrial directions. All the interlocutory applications are hereby ordered dispensed with and costs thereof will abide the outcome of the suit.

9. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 29TH DAY of JUNE 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Dahukire for the 1st and 2nd plaintiffs

Ms. Kebungo for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE