



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1244 OF 2016

(FORMERLY HCC NO. 131 OF 2008)

EVANS NYACHIENGAPLAINTIFF

VERSUS

JACKSON NYANGAU KIAGE 1ST DEFENDANT

DISTRICT LAND REGISTRAR, NYAMIRA DISTRICT.... 2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

J U D G M E N T

1. The plaintiff commenced the instant suit by way of a plaint dated 14th October 2008 filed in court on the same date. The plaintiff vide the plaint avers that he was at all material times the registered owner of land parcel **Central Kitutu/Mwabosire/452** measuring 3.0Ha approximately (hereinafter referred to as “**the suit property**”). The plaintiff avers that in the year 1976 he informally agreed with the 1st defendant to allow the 1st defendant to cultivate and plant trees for commercial purposes on a portion of approximately 1 acre out of the suit property. The arrangement was that the 1st defendant would utilize the portion of land for approximately 10 years being the period it takes the trees to mature and be harvested. The term was renewable depending on the relationship between the plaintiff and the 1st defendant.

2. The plaintiff avers that the relationship between him and the 1st defendant was that of licensor and licensee and that the same worked well upto January 1976 when the 1st defendant started to engage with acts that were inconsistent with the terms of the licence. The 1st defendant started planting tea bushes and constructed a temporary residential structure thereon. As a consequence of these acts the plaintiff terminated the licence arrangement and demanded that the 1st defendant vacates from his land. The 1st defendant did not adhere to the request to vacate and the plaintiff upon making inquiries at the lands office respecting the status of the suit property was surprised to discover that the suit property had been fraudulently subdivided without his knowledge and/or involvement to create land parcels **Central Kitutu/Mwabosire/1360** and **1361**. The plaintiff averred that the land parcel **452** was fraudulently subdivided and he attributed the fraudulent acts to the 1st defendant and the land registry officials and has pleaded the particulars of fraud under paragraph 17 of the plaint.

3. The plaintiff prays for judgment against the defendants for:-

(a) A declaration that the plaintiff is the sole and exclusive owner of LR No. Central Kitutu/Mwabosire/452 now subdivided into LR No. Central Kitutu/Mwabosire/1360 and 1361.

(b) An order of cancellation of the titles and rectification of the register in respect of LR No. Central Kitutu/Mwabosire/1360 and 1361 currently registered in the name of the 1st defendant and a fictitious person known as Nyabanga Mbusire, and restoration of the same into the name of the plaintiff.

(c) Eviction of the 1st defendant from the portion of land he currently occupies.

(d) Costs of the suit.

4. The 1st defendant filed a defence on 18th November 2008 dated on the same date. The 1st defendant averred that he purchased a portion of 1 acre from the plaintiff vide an agreement of sale dated 9th March 1975. He stated that the consent of land control board was obtained for the subdivision of the suit property. The suit property was subdivided into land parcels **1360** and **1361** respectively and as the plaintiff refused to execute the necessary instruments, the 1st defendant filed Kisii PMCC No. 88 of 1980 where he obtained orders for the executive officer to execute the necessary documents and ultimately the 1st defendant was registered and issued with a title deed for **Central**

Kitutu/Mwabosire/1361 on 23rd June, 1993. The plaintiff filed a reply to the 1st defendant's defence on 26th November 2008 joining issue with the 1st defendant on the averments contained in the defence.

5. The 2nd and 3rd defendants filed a statement of defence on 21st November 2008 denying all the plaintiff's averments contained in the plaint and in particular the fraud allegations pleaded in paragraph 17 of the plaint. The 2nd defendant contended that any action taken by them in regard to the suit property was lawful and procedural and denied there was any irregularities and illegalities as alleged.

6. The suit was part heard before Okong'o J. who took the evidence of one Evans Onyari Nyachienga (PW1), the son of the plaintiff who testified on the basis of a Power of Attorney on behalf of his father who was sickly and elderly. The plaintiff died in the course of trial and was substituted by PW1 for purposes of the suit. PW1 filed a witness statement dated 17th July 2011 on 18th July 2011 and testified in court on 5th June 2013. His evidence was to the effect that the 1st defendant had leased a portion of his father's land parcel **Central Kitutu/Mwabosire/452** to plant trees and that the 1st defendant was to vacate after a period of 10 years but the lease was renewed until 2006 when the 1st defendant started engaging in activities on the land that were inconsistent with the terms of the lease. The 1st defendant was given notice to vacate ("**PEX.3**") but he refused to vacate. In 2008, PW1 stated that they carried out searches which revealed contrasting results. A certificate of official search dated 4th March 2008 ("**PEX.5**") showed that the suit property land parcel **Central Kitutu/Mwabosire/ 452** measured 3.0Hectares, was registered in the name of Nyachieng'a Morube and had not been subdivided. An abstract of title (green card) for land parcel **452** ("**PEX.6**") showed that the land parcel 452 was first registered on 14th February 1969 in the name of Nyachieng'a Morumbe and that a change of name was registered against the title on 5th February 1976 changing the name of owner to Nyabanga Mbusire **ID/K.Nku.14024** (alias Nyachienga Morumbe). The land is also shown to have been subdivided on 13th January 1993 to create new titles numbers 1360 and 1361.

7. The plaintiff contended that his father had never sold any portion of his land parcel to the 1st defendant and that his father has never been known by the name of Nyabanga Mbusire. He stated that they never knew anybody by that name and that the ID number shown against the name did not belong to his father. PW1 stated that his father's identity card No. was [particulars withheld]. PW1 further stated that he was not aware of any suit where the 1st defendant had sued his father and denied any knowledge of Kisii PMCC No. 99 of 1990. He maintained that their land parcel had never been subdivided. The witness stated that they have always resided on the suit property and denied that the 1st defendant resides on the suit property.

8. PW2 Eshimendi Nyachienga was the wife of the plaintiff. She testified that her husband in 1976 leased to the 1st defendant a portion of his land where the 1st defendant planted trees. The lease was for a term of 10 years. The witness denied that her husband sold any land to the 1st defendant maintaining that the 1st defendant was only a tenant but he refused to vacate their land after the expiry of the lease term. She stated that her husband was not known by the name of Nyabanga Mbusire insisting that her husband's name was Nyachienga Morumbe as shown in his ID No. [particulars withheld] issued on 27th March 1996. PW2 further stated the 1st defendant remains in occupation of a portion of the land as he has refused to vacate from therefrom. She stated the 1st defendant recently put up a small house though he does not reside therein.

9. In cross examination, the witness affirmed she was present when her husband discussed the issue of the lease with the 1st defendant. She stated the 1st defendant had planted trees on the land and had put a kiosk by the road side while the small house the 1st defendant had constructed was unoccupied. She stated the plaintiff (her husband) did not have an ID prior to 1996.

10. PW3 Nyankiora Ongondi was the plaintiff's brother and in his evidence he reiterated the evidence given by PW1 and PW2 basically stating that he was aware that the plaintiff leased his land to the 1st defendant. He maintained the plaintiff had no other name other than Nyachienga Morumbe. He stated he did not know Nyabanga Mbusire and that the plaintiff was not known by that name.

11. The defendant testified as DW1 and called 2 other witnesses. The defendant testified that the plaintiff had no sons and as he wanted to marry a second wife he approached the defendant to buy a parcel of land that he wanted to sell. He showed the defendant the parcel of land and they mutually agreed to meet again in the presence of their respective relatives for negotiations respecting the purchase. The defendant stated they met in 1975 at the suit land in the presence of elders and relatives and agreed on the purchase price of the land as kshs.2,800/=. The defendant stated that he paid the plaintiff 14 cows in lieu of cash and each cow was priced at kshs. 200/=. The defendant stated that after he paid the cows the plaintiff took him to the land control board and as he was only buying a portion of the plaintiff's land, the plaintiff's land parcel was subdivided into two portions namely **Central Kitutu/Mwabosire/1360** and **1361**. Land parcel **1361** was to be transferred to the defendant but the plaintiff refused to execute the transfer prompting the defendant to sue the plaintiff in Kisii PMCC No. 88 of 1990. The defendant stated that the court ordered that he be issued with a title to the portion he had purchased and it executed a transfer in his favour and he was ultimately issued a title for land parcel **1361**.

12. The defendant stated he occupied the subject land, planted trees and has constructed two houses and a latrine on the land parcel. The defendant stated he acquired the parcel of land lawfully from the plaintiff. The defendant produced a bundle of documents including a copy of the title, letter of consent dated 17th June 1975, transfer of land dated 10th February 1992, application for consent dated 12th June 1975, transfer of land dated 12th June 1975, mutation form dated 2nd February 1976 and court order dated 12th November 1991 as "**DEX.1-7**" respectively.

13. The defendant in cross examination stated that the transfer was signed by Nyabanga Mbusire and it is the name he claimed was changed to Nyachienga Bosire whom he sued in Kisii PMCC No. 88 of 1990. The defendant stated that the plaintiff had not signed but had thumb printed the agreement for sale. He reiterated that he had occupied the land since 1975 after purchasing the same and had put up two houses and has planted tea on the plot.

14. DW2 Johnson Achenji Kiage testified that he was present when the plaintiff and the defendant entered into the agreement and that he acted as the secretary whereof he recorded the agreement in Ekegusii and made a note of all the witnesses who were present. The witness

stated that the 1st defendant gave one (1) cow and kshs. 1,200/= and left a balance of kshs. 1,600/=. In cross examination however, the witness contradicted himself stating that the 1st defendant on 9th March 1975 gave out two (2) cows which were valued at kshs. 1,200/=. The witness affirmed that he did not know Nyabanga Mbusire.

15. DW3 Joseph Nyandwaro Kiage testified that he knew the plaintiff who was his neighbour. He stated that the 1st defendant was his brother and that he (1st defendant) purchased land from the plaintiff's deceased father as per the agreement dated 9th March 1975. The witness denied that the 1st defendant only leased the land. The witness admitted the agreement does not identify the land the subject of the sale. The witness further stated he only knew the deceased by the name Nyachienga Murumbe and did not know anybody by the name Nyabanga Mbusire.

16. Following the conclusion of the trial, the parties filed written submissions. I have reviewed and considered the pleadings, the evidence and the parties submissions and the following are the issues that present themselves for determination.

(i) Whether the plaintiff sold a portion of one acre to the 1st defendant out of land parcel Central Kitutu/Mwabosire/ 452 and/or the 1st defendant was a licensee/lessee of the portion of land.

(ii) Whether the transfer of land parcel Central Kitutu/ Mwabosire/1361 (subdivision from parcel 452) was validly effected to the 1st defendant by the plaintiff.

(iii) Whether the plaintiff is entitled to the reliefs sought.

17. The evidence on record establishes that the plaintiff was registered as owner of land parcel **Central Kitutu/Mwabosire/452** on 14th February 1969 as a first registration under the name of Nyachienga Morumbe and as per the abstract of title (green card) **"DEX.6"** this land measured 3.0 acres. It was the plaintiff's evidence that he only leased a portion of the land to the 1st defendant and that he never sold the land. The plaintiff denied subdividing the land to create parcels **1360** and **1361**. The plaintiff specifically denied he was also known as Nyabanga Mbusire in effect denying he was instrumental in having the ownership of the land parcel **452** changed to Nyabanga Mbusire on 5th February 1976 as the abstract of title shows. The plaintiff denied he ever attended the land control board for purposes of obtaining consent for the subdivision and transfer of the portion of one acre of the 1st defendant.

18. The copy of the letter of consent dated 17th June 1975 (**"DEX.2"**) shows that one Nyabanga Mbusire was the one transferring the land parcel **Central Kitutu/Mwabosire/452** to Jackson Nyangau Kiage the 1st defendant herein. The consent as is apparent on the face of it was for the transfer of the whole of the land parcel for the consideration of kshs.1,500/=. The application for consent of land control board dated 12th June 1975 (date altered from 13th June 1975) as per **"DEX.4"** was made by Nyabanga Mbusire as registered owner. Although the mutation form for the subdivision of land parcel **Central Kitutu/ Mwabosire/452** is dated 2nd February 1976 (**"DEX.6"**), the transfer of land parcel **Central Kitutu/Mwabosire/1361** (**"DEX.5"**) a resultant subdivision from land parcel **452** to the 1st defendant is shown to have been presented for registration at the lands office on 28th June 1975 (**"DEX.5"**), although another transfer dated 10th February 1992 executed on behalf of Nyabanga Bosire (**"DEX.3"**) is the one that ultimately effected the transfer.

19. The alleged agreement entered into between the 1st defendant and the plaintiff clearly indicated the name of the plaintiff as Nyachienga Morube. The plaintiff has vehemently denied that the name Nyabanga Mbusire was his name. the witnesses who testified also stated they knew the plaintiff as Nyachieng'a Morube and not as Nyabanga Mbusire. The plaintiff's National Identity Card is in the name of Nyachienga Morube and that was the name under which the suit land was initially registered. Who then was this Nyabanga Mbusire who transacted in regard to land parcel **Central Kitutu/Mwabosire/452** and got the same subdivided and a portion thereof transferred to the 1st defendant? There was no evidence tendered to show that the plaintiff had applied to change and/or correct his name on the register. In the present case, the change of the name of the registered owner of the suit property from Nyachieng'a Morumbe to Nyabanga Mbusire was to in effect have the name of the registered owner changed. In practice, the change of name in regard to property subject to the Land Control Act, Cap 302 Laws of Kenya would require the sanction of the land board. There was no evidence to show that the plaintiff applied to change his name on the land register. It is also apparent that in June 1975 when the consent to transfer was given, land parcel **Central Kitutu/Mwabosire/452** was in the name of Nyachienga Morumbe yet the transfer was issued in the name of Nyabanga Mbusire who did not own the land. The purported change of name on 5th February 1976 was unsupported and in my view could not sanitize the irregular consent that was given on 17th June 1975 by the Land Control Board as Nyabanga Mbusire was not the owner of land parcel **Mwabosire/452** in respect of which he obtained consent to transfer.

20. The 1st defendant in his pleadings states that he filed a suit in Kisii Principal Magistrate's Court Civil Case No. 88 of 1980 but in his evidence he stated he filed the suit in 1990. The court order he produced that allowed the executive officer to execute the transfer in place of the plaintiff dated 12th November, 1991 indicates the case as Kisii PMCC No. 88 of 1990. The 1st defendant did not produce any copies of the pleadings but the court order indicates Nyachienga Bosire to have been the defendant in the suit. The plaintiff denied he was also known as Nyachienga Bosire (Bosire) and on the basis of the evidence on record, I cannot hold that it was established that he was also known by that name. The court order in my view was at variance with the other documents produced by 1st defendant. The letter of consent dated 17th June 1975, the application to the Land Control Board dated 12th June 1975, the mutation form dated 2nd February 1976 and the transfer dated 12th June 1975 all bear the name Nyabanga Mbusire attributed to the plaintiff while the court order issued on 12th November 1991 in Kisii PMCC No. 88 of 1990 indicate the name of Nyachienga Bosire. The court order did not relate to Nyabanga Mbusire who had on 5th February 1976 subdivided land parcel **452** to create parcels **1360** and **1361**. **Who was Nyachienga Bosire?** It was not the plaintiff who in any event denied having been aware of the suit.

21. In the premises therefore, I find it more probable that the plaintiff had merely allowed the 1st defendant to use a portion of his (plaintiff's) land to plant trees and there was no intention to sell and transfer. It is my view that the defendant after having been let into occupation and

possession of a portion of the suit property hatched the idea to wrestle the land from the plaintiff and that explains how the various documents I have discussed hereinabove came about. It possible that a person describing himself as Nyabanga Mbusire may have held himself out as the plaintiff and caused the “**manufacture**” of the various documents that have been presented before this court in support of the 1st defendant’s case. The court in the exercise of its mandate is guided by evidence and the law and in the present case I am not satisfied the 1st defendant acquired title to land parcel **Central Kitutu/Mwabosire** lawfully and validly. It is my holding and finding that the subdivision of land parcel **Central Kitutu/Mwabosire/452** to create land parcels **1360** and **1361** was not validly and lawfully done. It follows therefore that the transfer of land parcel **LR No. Central Kitutu/Mwabosire/1361** to the 1st defendant was null and void.

22. On the basis of evidence presented before the court and the foregoing evaluation and analysis of the evidence and the documents produced in evidence, I am satisfied the plaintiff’s suit is proved on a balance of probabilities. In my analysis above, I have disposed of issues (i) and (ii) above as framed. It is my holding that there was no evidence of sale and that even if there was such a sale, the transaction became null and void as no appropriate consent of the Land Control Board was sought and obtained. The person who purported to apply for the consent of the Land Control Board was not the registered owner of land parcel **LR No. Central Kitutu/Mwabosire/452** and the consent granted was infact not for the transfer of land parcel **LR No. Central Kitutu/Mwabosire/1361** but for the whole of land parcel **452**. Accordingly, there was no valid transfer effected to the 1st defendant in regard to land parcel **LR No. central Kitutu/Mwabosire/1361**.

23. In the final result, I enter judgment in favour of the plaintiff in the following terms:-

(i) A declaration be and is hereby issued that the plaintiff is the owner of LR No. Central Kitutu/Mwabosire/452 and that the subdivision of the same into LR Nos Central Kitutu/Mwabosire/ 1360 and 1361 was unlawfully and illegally carried out.

(ii) An order be and is hereby issued for the cancellation of land titles LR No. central Kitutu/Mwabosire/1360 and 1361 and the register to be rectified to restore land parcel LR No. Central Kitutu/Mwabosire/452 in the plaintiff’s name, Yachienga Morube.

(iii) The 1st defendant is hereby ordered to vacate from the portion of LR No. Central Kitutu/Mwabosire/452 that he occupies within 30 days of being served with the decree herein failing which an eviction order to issue on application by the plaintiff.

(iv) The costs of the suit are awarded to the plaintiff.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 28TH DAY of SEPTEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ollando for O. M. Otieno for the plaintiff

Mr. Okenye for Kaburi for the 1st defendant

N/A for the 2nd and 3rd defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE