



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 598 OF 2017

(Formerly Kisii ELC No. 70 of 2011)

NELSON NYAMACHE OBUBA.....PLAINTIFF

VERSUS

ITIRA MOKONO NYAMBWATANIA ...DEFENDANT

JUDGMENT

1. On 15th May, 2013, by consent of plaintiff namely **NELSON N. OBUBA** and the defendant one **ITARA MOKONO NYAMBWATANIA** who are represented by learned counsel Mr, Bigogo Onderi and learned counsel, Mr, Kerario Marwa respectively, the court ordered that :-

a. The plaint dated 20th April 2011 was amended at paragraph 13 by adding paragraph (d) to read thus;-

“Special damages Kshs. 115,000/= being the value of trees seedlings destroyed by the defendant on 9/4/2010, 14/8/2010, 12/12/2010 and 20/4/2011. “

b. The defendant’s statement of defence dated 20th May, 2011 was amended by adding paragraph 6A which is basically the defendant’s denial of the contents of paragraph 13 (d) of the amended plaint.

2. By the amended plaint, the plaintiff has sued the defendant for the following reliefs;-

a. A permanent injunction restraining the defendant, his family members, servants and/or agents from invading/trespassing into Land titles number BUKIRA/BUHIRIMONONO/557 owned by the plaintiff herein with the aim of chasing away his (plaintiff’s) workers, servant and family members.

b. A mandatory order directed at the officer commanding. Isebania police station to criminally prosecute the defendant (his agent, family members and/or servants) the moment he continues to, unnecessarily, interfere with the plaintiff’s peaceful occupation and utilization of his parcel of land known as BUKIRA/BUHIRIMONONO/557. (the suit land)

c. Cost of the suit and interest thereon.

d. Special damages **Kshs. 115,000/=** being the value of trees seedlings destroyed by the defendant on 9/4/2010, 14/8/2010, 12/12/2010 and 20/4/2011.

3. Briefly the plaintiff claims that on 22nd February 2011, and 10th April, 2011 the defendant unlawfully invaded the suit land registered in the plaintiff’s name. He chased away the plaintiff’s two workers claiming that they were working on the defendant’s suit land without authority. The plaintiff reported the incident at Isebania police station, but police officers were reluctant to take criminal action against him. The area Land Registrar and Land Surveyor, visited the suit land, completed a report and warned the defendant against interfering with the plaintiff’s peaceful occupation and utilization of his parcel of land. The defendant failed to heed the warnings precipitating the present suit.

4. In the amended statement of defence and counter claim dated 20th May, 2011, the defendant denied the plaintiff’s claim. He stated that he was lawfully preventing the plaintiff and his workers from interfering with his land and that the matter has been dealt with at several Government agencies. Whereas he admitted that the plaintiff is the registered proprietor of the suit land, he denied that the registration is lawful.

5. The defendant stated in the counter claim that in or about January 2011, the plaintiff and his agents or servants encroached into the defendant's suit land. He then filed a boundary dispute claim at the District Land Registrar's office, whereby he discovered that the plaintiff had fraudulently and unlawfully acquired an extra 10.3 acres of the defendant's land. He pleaded particulars of fraud at paragraph 16 of the defence statement and counter claim. Therefore, he counter claimed against the plaintiff for ;-

I. A declaration that the acquisition by the plaintiff of 10.3 acres out of defendants land parcel No. BUKIRA/BUHIRIMONONO/107 was fraudulent and unlawful.

II. An order directing the plaintiff to re-transfer the 10.3 acres from BUKIRA/BUHIRIMONONO/557 (the suit land) to the defendant.

III. In the event of the refusal by plaintiff to sign or execute transfer documents, the honourable court does direct the executive officer of the court to sign them.

IV. Costs of the counter claim.

6. Initially, the suit was partly heard by S. Okongo J at Kisii Environment and Land Court whereby the plaintiff (PW1) testified on 15th May 2013. PW1 made reference to a mutation form dated 28th August 1986 (PEXhibit 1), Land transfer form (PEXhibit 2), land certificate (PEXhibit 3) land registrar's summons (PEXhibit 4), a demand letter (PEXhibit 5), crop damage assessment report (PMFI 6) and a certified copy of Survey map (PMFI 7), in support of his claim.

7. On 27th March 2017, the suit was transferred to this court for further hearing and determination. On 29th January 2018, the court directed that the case proceed to further hearing. Accordingly the defendant (DW1) testified and he relied on a demand letter dated 12th January 1982 by the late Marita Ondaba advocate (DEXhibit 1), a certificate of official search dated 6th January 2011 (DEXhibit 2) and an application dated 23rd October 1985 to the local land control board for consent for sub division of the suit land (DEXhibit 3).

8. Learned counsel for plaintiff filed submissions dated 24th July, 2018 and relied on the case of **John Njoronge and Michuki –v- Kenya Shell Ltd Court of Appeal, Civil Appeal No. 227 of 1993** and the case **Esther Njoki Rurigi –v- Patrick Gathenya** Court of Appeal Civil Appeal No. 128 of 2002 to buttress his submissions. It was his submissions that DW1 (defendant) voluntarily signed transfer documents including PEXhibits 1 and 2 in favour of PW1. That the evidence of DW1 has full of glaring contradictions, lies, malice, it is unreliable and made in bad faith. That he failed to understand why the defendant took 25 years to lay his claim, sought its dismissal and that judgment be entered in terms of the plaint.

9. Learned counsel for the defendant filed submissions dated 30th May, 2018 and analysed five (5) identified issues for determination, among them, whether PW1 bought land from DW1 and whether the parties are entitled to reliefs sought in their respective pleadings. Counsel cited Section 6(1) of the Land Control Act (Cap 302 Laws of Kenya), the case of **Peterson Gatu Ondieki –v- Daniel Njigua Gichohi Nairobi HCC No. 4018 of 1990 and Bamburi Portland Cement Co. Ltd –v- Imranali Chandbha Abdulhussein (1995).**

10. I have carefully studied the plaint, statement of defence and counter claim, the evidence of PW1 and DW1 as well as submission by counsel. The issues for determination generally in a suit are to be found on the pleadings or as framed by the parties, see **Galaxy Paints Ltd –v- Falcon Grounds Ltd (2000) 2 EA 385**, I note the issues framed by the defendant's counsel in submissions. Nonetheless I consider the issues for determination as hereunder;-

a. Whether PW1 is the registered proprietor of the suit land.

b. Whether the defendant has trespassed on the suit land.

c. Whether the PW1 and DW1 are entitled to the reliefs sought in their respective pleadings.

11. On proprietorship of the suit land, I am guided by the definition of “**proprietor**” under Section 2 of the Land Registration Act, 2012 (the LRA, 2012). It is quite clear that interest conferred by registration and rights of a proprietor are provided under Sections 24 and 25 of the LRA, 2012.

12. PW1 testified that he bought 4.92 hectares from DW1 and he obtained PEXhibit 3 thereof. He testified ,inter alia :-

“We both signed the transfer..... no issue, with the defendant.”

13. PEXhibit 3 is a certificate of title issued by the land registrar upon registration of the land and it is taken as prima facie evidence that PW1 is the absolute and indefeasible owner of the suit land as envisaged under Section 26 (1) of the LRA, 2012. Furthermore, it is noted that on 19th July, 2011, by a ruling delivered in respect of a notice of motion dated 24/5/2011, the court observed that PW1 was the 1st registered proprietor of the suit land.

14. In **Michael Githinji Kimotho –v- Nicholas Muratha Mugo** Civil Appeal No. 53 of 1995, the Court of Appeal held that the rights of proprietor under Section 28 of the Registered land Act (repealed) cannot be defeated except as it was provided in that Act and certainly not at the instance of a trespasser, see also **Sections 24 to 26 of the LRA 2012** (supra)

15. It was the testimony of DW1 that he sold only two acres to PW1 and they signed, PEXhibits 1 and 2 thereof. That he realized that PW1

had taken 12.5 acres in lieu of two (2) acres and that he did not take PW1 to the area land control board for consent. That PW1 trespassed into his ten (10) acres in the year 2011 and that he was illiterate.

16. The available evidence is abundantly clear that PW1 did not obtain consent from the land control board for the sale of the suit land as required under Section 6 (1) (supra) hence the transaction was rendered void; see **Kariuki –v- Kariuki (1983) KLR 227**.

17. Besides, in **Hussey –v- Palmer (1972) ALL ER 744** referred to in the case of **Macharis Mwangi Maina & 87 others –v- Davidson Mwangi Kagiri (2014)**

eKLR, it was held that a constructive trust is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. A written or oral agreement for the sale of property created an interest in the property and is enforceable based on a constructive trust and proprietary estoppel though void and unenforceable as a contract.

18. In the instant case, PW1 stated that he does not stay on the suit land. DW1 stated that PW1 trespassed into the land in the year 2011. Indeed since there was no evidence to show that PW1 is in open and notorious occupation and possession of the suit land, the existence of constructive trust does not arise or at all.

19. With regard to trespass, whereas PW1 contended that DW1 has refused to allow him free access to the suit land, DW1 termed PW1 a trespasser in the land; see **Kimotho (case supra)**. PW1 testified that DW1 chased away his workers from the land and uprooted seedlings of trees of PW1 on the land.

20. In cross examination, PW1 stated that he does not stay on the suit land that he did not personally find the defendant uprooting his seedlings. To that extend, PW1 has not established that DW1 is in unlawful occupation of the land as envisaged under Section 152 A of the Land Act, 2016 (2012).

21. As regards a mandatory order sought in the plaint, it is pretty clear that it is the same order sought in the notice of motion dated 24/5/2011. I endorse the observation by Sitati J who rendered herself on the motion inter alia;

“As to prayer C and E of the application, I note that it is not the duty of this court to direct the police on who to arrest or not to arrest and what charges the police may bring against any arrested person. The matter before this court is a civil dispute and the court can only deal with the matter in that respect.” (Emphasis added)

22. I note that the officer commanding Isebania police station referred to in the mandatory order sought, is the officer of the Kenya Police Service created under Article 239 (1) (c) of the Constitution of Kenya, 2010. Quite clearly, neither the officer nor any other officer in the Kenya Police Service is a party to this suit.

23. In that regard, I approve the legal stand point taken by Mativo J in the case of **National Gender and Equality Commission (NGEC) -v- IEBC and 3 others (2018) eKLR** whereby he rendered himself on legal right to defend and that a court cannot issue final orders adversely affecting persons or bodies that are not before the court. Therefore, I find that the mandatory order sought cannot be granted in this suit in the circumstances.

24. On special damages, the plaintiff pleaded the same at Kshs. 115,000/=. He attempted to prove special damages by way of FMFI 6. However, the same were not proved as PMFI 6 was not admitted as an exhibit see **Great Lakes Transport Co. Ltd –v- Kenya Revenue Authority (2009) KLR 720**.

25. DW1 claimed that PW1 defrauded him of the suit land measuring 10.5 acres and he pleaded particulars of fraud on the part of PW1 at paragraph 11 of his statement of defence and counterclaim. He was very categorical that he sold only 2 acres of the land to PW1 who hardly displaced that claim thus the counter claim is credible and the plaintiff claim fails.

26. In a nutshell, the plaintiff has failed to prove his claim against the defendant on a balance of probability. The defendant’s counter claim is built on a sound foundation and it has been proved against the plaintiff on a balance of probability.

27. A fortiori, I make the final orders as follows:-

a. The plaintiff’s claim by way of a plaint dated 20th April 2011, is dismissed with costs to the defendant.

b. Judgment be and is hereby entered for defendant/counter claimer against the plaintiff in terms of orders (a) (b) (c) and (e) in the defendants counter claim amended on 20th May 2011.

c. Costs of the counterclaim to be borne by the plaintiff.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of September 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Mwitia Kerario learned counsel for the defendant/counter claimer

Tom Maurice – Court assistant