



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 245 OF 2013

CONREL ODUOR AMAM.....PLAINTIFF

VERSUS

DAN ODHIAMBO ONGANY.....DEFENDANT

JUDGEMENT

1. Cornel Oduor Amam, the Plaintiff, commenced his suit against Dan Odhiambo Ogany, the Defendant, through the plaint dated 20th September 2013, seeking for permanent injunction restraining the Defendant either by himself, agents, servants and/or assignees from occupying, alienating and/or in any other way interfering with the Plaintiff's user and occupation of the parcel Kisumu/Korando/742; costs and interests. The Plaintiff avers that he is the sole registered proprietor of Kisumu/Korando/742, suit land, and that on or about 15th September 2013, the Defendant had through agents, assignees and or servants encroached on the suit land and started cultivating without permission or any colour of right.

2. The Plaintiff's claim is opposed by the Defendant through the defence dated 6th November 2013 in which he inter alia avers that the suit land is their family land and that the Plaintiff illegally acquired title from a third party. That the Plaintiff has never had possession of the suit land as it is used by the Defendant's family. That the suit should be dismissed with costs.

3. The hearing commenced on the 6th February 2018 when Cornel Oduor Amam, the Plaintiff, and Dan Odhiambo Ongany, the Defendant, testified as PW1 and DW1 respectively before closing their cases. The following is a summary of their case:-

A: PLAINTIFF'S CASE:

- That one Trevor Ndede visited him in his office and offered to sell the suit land to him.
- That Trevor gave him a copy of the suit land's parcel number, which he used to conduct a search at the lands office. He produced a copy of the certificate of official search dated 17th April 2013 indicating that Boniface Trevor Ndede became the registered proprietor of the suit land under entry No. 2 of 17th April 2013.
- That he contacted the Chief and Assistant Chief of the area where the suit land is situated and they confirmed that Trevor was the owner of the land. That he then contacted Trevor and they recorded the sale agreement dated 11th May 2013. He produced a copy of agreement as exhibit. He paid the purchase price of Kshs. 750,000/=.
- That they then went to the Land Control Board with Trevor and Trevor's wife. He produced a copy of the application for consent as exhibit.
- That he then presented the transfer documents to the Land Registry and the land was transferred to his name and title deed issued on the 16th May 2013.
- That when he went to the suit land, he found the Defendant's agents who resisted. He reported to the Chief but the agents continued resisting. That he got his advocate to write a demand letter to the defendant dated 12th September 2013, but the Defendant continued ploughing the land. That he then filed this suit and though he obtained a temporary order of injunction on the 23rd September 2013, the Defendant has continued trespassing on the land insisting that they will wait for the main suit to be heard.
- That during cross-examination, the Plaintiff indicated that he did not obtain a copy of the suit land's register (green card). That though he applied for the Land Control Board consent, he did not obtain a letter of consent to transfer the suit land to his name. That he did not establish the date Trevor got registered with the suit land. That he did not know that the person from whom Trevor obtained the land from had died long before the transfer.
- That during re-examination, the Plaintiff informed the court that he had been issued with a letter of consent but had not included it in his list of document.

B: DEFENDANT'S CASE

- That he has been residing in Voi at Taita Taveta County since 1996.
 - That the suit land was first registered with his late mother, Yuanita Modi, on the 13th March 1990. He produced a copy of the register (green card) for the suit land to confirm as exhibit. That Yuanita Modi was also known as Dosiria Modi Osir and produced a copy of a statutory declaration made by her on the 24th August 1982 before a Commissioner of Oaths as exhibit.
 - That Yuanita Modi died on the 25th August 1992 and produced a copy of the certificate of death No. 270689 issued on the 29th March 1996 as exhibit.
 - That the Plaintiff got registered with the suit land on the 16th May 2013 after a transfer from one Trevor who had become the registered proprietor on the 17th April 2013, which was about 21 (twenty one) years from the death of the previous first registered proprietor, namely Yuanita Modi, and without a confirmed grant as no Succession Cause for her estate had been filed.
 - That the suit land is used by Truvena, who is his step mother from the time his late mother passed on. That Trevor, who transferred the land to the Plaintiff, is his nephew as he is a son to his late elder brother, and that he has never used the suit land.
 - That as Trevor never obtained good title to the suit land, he could not pass good title to the Plaintiff and the suit should be dismissed with costs.
 - That during cross-examination, the Defendant stated that he has never used the suit land from the date his mother died. That his wife and children stay with him at Voi and that he has no authority over his stepmother's use of the suit land. That he does not know the persons listed in the sale agreement as witnesses and that he cannot confirm whether Trevor received the purchase price of Kshs. 750,000/=.
4. That the learned counsel for the Plaintiff and Defendant filed their written submissions dated 21st February 2018 and 26th March 2018 respectively.
5. The following are the issues for the court's determinations;
- a) Whether the Plaintiff obtained good title to the suit land upon it being transferred to his name.**
 - b) Whether the Defendant and or his agents took possession of the suit land before or after it was registered in the Plaintiff's name.**
 - c) Whether the Plaintiff has made a case for issuance of permanent injunction against the Defendant.**
 - d) Who pays the costs.**
6. The court has carefully considered the pleadings, oral and documentary evidence by both parties, the written submissions by counsel and come to the following findings;
- a) That from the copy of the register (green card) for Land Parcel Kisumu/Korando/742, the suit land, was first registered on the 13th March 1990 in the name of Yuanita Modi. That the uncontroverted evidence adduced by the Defendant in the form of statutory declaration made on the 24th August 1982, and certificate of death dated 29th March 1996 shows that the said Yuanita Modi alias Dorsilia Modi Osir, passed on the 25th August 1992.
 - b) That further to the finding in (a) above, the testimony of the Defendant that there has been no Succession Cause filed in respect of the estate of the late Yuanita Modi has not been challenged or rebutted. That in terms of **Section 2 of the Law Of Succession Act Chapter 160 of Laws of Kenya**, the transfer (distribution) of the suit land from the name of the deceased could only be lawfully, regularly and procedurally done by a legal representative appointed by the Succession court and duly issued with a confirmed grant.
 - c) That the Plaintiff disclosed during his testimony that he did not obtain a copy of the suit land's register (green card) and therefore did not know who had been the registered proprietor of the land before Trevor, who sold and transferred it to him. That had he obtained a copy of the register, he definitely would have seen the name of Yuanita Modi in entry No. 1 as the first registered owner. That he would also have noted that the land was only transferred and registered in the name of Bornface Trevor Ndede on the 17th April 2013 which is the same date he obtained the certificate of official search he produced as exhibit. That the court believes that had he obtained it, the Plaintiff would have wanted to know why Trevor was offering the land that had just been registered in his name for sale so soon.
 - d) That it is apparent from the pleadings and oral evidence tendered before the court that the Defendant has not been farming, using or residing on the land for many years. That the Defendant's case is that he and his family have been living at Voi, in Taita Taveta County, which is hundred of kilometers away from the suit land since 1996. That evidence has not been controverted. That even if the court was to find for the Plaintiff, an order of permanent injunction directed at the Defendant would definitely not affect Truvena, his stepmother, who is the person who reportedly has been, and continues to be in occupation of the suit land. That the said Truvena was not enjoined in this proceeding and the court cannot therefore issue an order of permanent injunction against her without giving her a hearing.
 - e) That in view of the fact that Yuanita Modi, the first registered proprietor of the suit land died on the 25th August 1992, she could therefore not have been the one who signed the transfer forms upon which Bornface Trevor Ndede obtained proprietorship of the suit land on the 17th April 2013. That as there was no confirmed grant obtained from a Succession Court upon which the registration

of the suit land in the name of Bornface Trevor Ndede could have been derived from, his registration may not have been lawful, regular and procedural. That as the said Bornface Trevor Ndede may not have obtained good title to the suit land, he lacked the capacity to pass a good title to the Plaintiff.

f) That in addition to the finding in (e) above, it is doubtful as to whether the Plaintiff obtained the Land Control Board consent before transferring the suit land to his name. That had he obtained the letter of consent, he would not have failed to annex a copy in the same way he annexed a copy of the application dated 2nd May 2013, which the court has noted is not signed by the Plaintiff as the purchaser.

7. That flowing from the foregoing, the court finds that the Plaintiff has failed to prove, on a balance of probability, that the Defendant has encroached onto the suit land on the date alleged. He has further failed to prove that the person or persons using the land are agents, servants or assignees of the Defendant and as they have been using the suit land even before he obtained registrations as proprietor, he ought to have enjoined them in this suit. That accordingly, the Plaintiff's claim against the Defendant fails, and the suit is hereby dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31st DAY OF OCTOBER 2018

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE