



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 36 OF 2014

EBEI KORODI CLOPRITA.....PLAINTIFF

VERSUS

MARGARET NALIKA.....1ST DEFENDANT

BONFACE MATERE.....2ND DEFENDANT

BABU NDUNG’U.....3RD DEFENDANT

JUDGMENT

1. In the plaint dated 21/2/2014 which was filed on the same date the plaintiff seeks the following orders against the defendants:-

(a) A declaration that the plaintiff and beneficiaries of the estate of the late Sudo Korodi Ngichwae are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Maridadi Settlement Scheme Plot No. 113 (“the suit property”) and the defendants whether by themselves or their servants or agents or any other person otherwise claiming through them are wrongfully in occupation of part thereof and are accordingly, trespassers thereon and are not entitled to remain on the suit property which they should give vacant possession thereof.

(b) General damages for trespass.

(c) Costs of this suit together with interest thereon.

(d) Any such other or further relief as this Honourable Court may deem appropriate.

THE PARTIES PLEADINGS

The Plaintiff’s Case

2. According to the plaint the plaintiff is bona fide proprietor and beneficial owner of all that parcel of land known as **Maridadi Settlement Scheme Plot No. 112** measuring **five (5) acres** or thereabouts situate within Maridadi the same having been transmitted to him and the beneficiaries of the estate of the late **Sudo Korodi Ngichwae** vide **Kitale High Court Succession Cause No. 264 of 2011**. The plaintiff states that he has therefore been granted and is entitled to possession of the suit property as well as all other incidental rights thereto.

3. The plaintiff states that the defendants have wrongfully entered and taken possession of three **(3) acres** forming part of the suit property and wrongfully remained in possession thereof. He further states that the defendants are fencing and erecting developments or putting up structures of a permanent nature on the three acres without the express knowledge, consent and authority of the plaintiff.

4. The plaintiff further avers that the defendants utilize the resources of the suit property and keep livestock thereon yet they have not acquired any or any exclusive occupation rights of occupation or possession thereto.

5. The plaintiff further states that the defendants herein are trespassers who though having defied the plaintiff’s demands to vacate the suit land, have never enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit property as their occupation has led to constant confrontations over the suit land; accordingly, none of them has or can claim any colour of right to the suit property.

6. The particulars of loss and damage said to have been sustained by the plaintiff are pleaded in the plaint. They include the allegation that the defendants' houses and fences on the suit property are an eyesore and have defaced the beauty of the property.

The Defendants' Case

7. The 1st defendant filed his amended defence dated **19/1/2018** on the same date; it denies each and every allegation in the plaint. She states that she is the lawful wife and the administrator of the estate of **Geoffrey Wekesa Waminila** (deceased) who died on **30/12/1997** and avers that her husband Geoffrey Wekesa Waminila (deceased) purchased two (2) acres from **Ngichwae Korodi** (deceased) to be hived off from **Plot No. 113 Maridadi Settlement Scheme** at the sum of **Kshs.43,000/=** and took possession thereof.

8. The 1st defendant further avers that her husband Geoffrey Wekesa Waminila (deceased) purchased another one (1) acre from Ngichwae Korodi (deceased) at the sum of **Kshs.21,500/=** which he also took possession upon execution thereof and she has lawfully been in quiet possession and occupation of the three (3) acres of land and has undertaken considerable development thereon with the full knowledge of the plaintiff.

9. The 1st defendant denied being issued with a demand and notice of intention to sue as alleged.

The 1st Defendant's Counterclaim

10. The 1st defendant has also filed a counterclaim based on the allegations in the defence. She states that her deceased husband took up possession of the suit land with the knowledge of the deceased Ngichwae Korodi, who was bound by the terms of the agreement to apply for the consent of the Land Control Board to subdivide and transfer the suit land in favour of her husband. However her husband died before the consent to transfer the suit land was issued and subsequently the said Ngichwae Korodi adamantly refused to subdivide and transfer the suit land to the 1st defendant.

11. On the basis of the foregoing the 1st defendant prays for a declaration that the both sale agreements dated **30/4/1991** and **21/11/1996** are valid and for an order compelling the plaintiff to transfer the suit land measuring **3 acres** to be hived off **Plot No. 113 Maridadi Settlement Scheme** to the 1st defendant among other prayers.

12. The plaintiff filed a reply to amended defence and counterclaim on **2/2/2018** and therein denied the sale agreements between Geoffrey and Ngichwae or any sum was paid as consideration for any land.

13. In the alternative he pleaded that the want of Land Control Board consent rendered such agreements null and void for all purposes and that therefore the 1st defendant is illegally in occupation of the suit land. He prayed for the counterclaim to be dismissed.

The 2nd and 3rd Defendants.

14. The 2nd and 3rd defendants did not file any appearance or defence in this suit despite having been served with plaint and summons as described in the affidavit of service filed by one Peter Orwaru on **3/3/2015**.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

15. The plaintiff testified on **5/7/2018** he identified the deceased Korodi Ngichwae as his brother whose estate he was an administrator of and he produced the Grant of Letters of Administration dated **28/9/2012** and a rectified Certificate Of Confirmation of Grant dated **22/5/2014** in which all the land comprised of **Plot No. 113 Maridadi Settlement Scheme** measuring 5 acres was vested in the name of the plaintiff for his benefit and for the benefit of the beneficiaries of the deceased's estate. He also produced a **Gazette Notice No. 89 of 6/2/2012** in respect of **Kitale Succession Cause No. 264 of 2011** notifying all and sundry that he had applied for letters of administration to the estate of Ngichwae Korodi.

16. He adopted his statement filed in court on **21/2/2014** as his evidence-in-chief and averred that the 1st defendant never bought any land. He stated that the 1st defendant came and asked for land and produced small amount of money whereupon Ngichwae Korodi, now deceased, told her to "*go to Lodwar*". He further testified that Ngichwae Korodi sold 2 acres to another person, Ekhai Achelai Todoo, who still owes balance of consideration amounting to Kshs.40,000/=. His evidence is that the land was transmitted to him to hold for his benefit and for the benefit of the beneficiaries of Ngichwae Korodi. He denied that the 2nd and 3rd defendant were ever sold any land or allowed into the suit land and prays for their eviction.

17. Upon cross examination he admitted that the 1st defendant is in occupation of **3 acres** and that she was residing on those 3 acres by the time his brother died.

The Defendants' Evidence

18. The 1st defendant reiterates the matters contained in her defence and adopted her statement dated **19/1/2018** as her evidence-in-chief. She produced a limited grant to her late husband's estate as **D. Exhibit 1**. She also produced two sale agreements one dated **30/4/1991** between **Ngichwae Korodi** and **Geoffrey Wekesa Waminila** and a 2nd agreement dated **21/11/1996** between **Ngichwae Korodi** and **Geoffrey**

Waminila.

19. The first agreement shows that Ngichwae sold two acres to Geoffrey for **Kshs.43,000/=**. It states that the land sold was in vacant position and the vendor agreed to execute the transfer documents both at the Settlement Office and the Land Control Board. It was drawn and witnessed by P.N. Gadhre Advocate of P.O. Box 589 Kitale.

20. The 2nd agreement is handwritten and is for the sale of one (1) acre of land for **Kshs.21,500/=**. The first agreement is recognized in the 2nd agreement and the total sum of consideration payable for the three acres is fixed at an aggregate sum of **Kshs.64,500/=** of which as at **21/11/1996**, that being the day of execution of the 2nd agreement only a balance of **Kshs.1600/=** was said to be outstanding. In that agreement that balance was said to be payable while the parties were attending the Land Control Board for consent.

21. The 2nd agreement is also signed by the vendor and purchaser and witnessed by three other persons. I have examined the written statement of the 1st defendant filed on **19/1/2018**. She testified that after Ngichwae sold the land he went to Lodwar, never to come back; it is said that he met his demise there in **2004**; thereafter, the plaintiff then came and sued the 1st defendant in the year **2007**. She testified that there was another case in **2007** which ended before this case began; she gave no further particulars. She also testified that there is another purchaser on the land by the name Peter Wafula whom the plaintiff does not bother.

22. The 1st defendant further testified that in the year 2016 the plaintiff came and demolished her house and damaged her property; that she had been living on the land since **1991**. While under cross examination she admitted the balance of the purchase being Kshs.1600/= has not been paid yet as the land control board consent has not been obtained.

23. On the difference between the names "Waminila" and "Waninila" in the sale agreement she averred that they referred to one and the same person and that is her deceased husband.

The Parties' Submissions

24. On **17/9/2018** Mr. Ingosi counsel for the plaintiff informed the court he did not intend to file any submissions on behalf of the plaintiff. The 1st defendant filed her submissions on **3/8/2018**. I have considered those submissions.

DETERMINATION

Issues for Determination

25. The issues that arise in this suit are as follows:

a. Whether the agreements dated 30/4/1991 and 21/11/1996 respectively are valid.

b. Whether are null and void for want of Land Control Board consent.

c. What orders should issue?

a) Whether the agreements dated 30/4/1991 and 21/11/1996 respectively are valid.

26. The 1st defendant submits that there is no dispute that both parties to the suit are the respective administrators of the estate of the deceased vendor and purchaser. It is also not in dispute that the suit land was owned by Ngichwae Korodi. The plaintiff has produced two sale agreements. She testified that she has lived on the land since **1991** during the lifetime of the deceased allottee, Ngichwae Korodi, and that it was only after allottee's demise that the plaintiff began exerting efforts to evict her from the suit land.

27. It should be recalled that in his evidence the plaintiff admitted that the 1st defendant is in occupation of 3 acres and that she was residing on the land by the time Ngichwae Korodi died. In my view there is no good explanation from the plaintiff as to why the 1st defendant should be in possession of the land for so long if there was no transaction regarding the land that happened between Ngichwae and Geoffrey.

28. I agree with the 1st defendant's submissions that no evidence was adduced by the plaintiff to show that the agreements were forged or that they were procured by duress or undue influence. The only conclusion this court can arrive at on the basis on the above facts is that the agreements were genuine and are valid and that the 1st defendant entered into possession on the basis thereof.

(b) Whether are null and void for want of Land Control Board consent

29. It was a term of the agreements that the deceased Ngichwae Korodi would execute documents needed to apply for consent from the land control board. It appears that he died before this happened. However there is no evidence tabled before the court to effect that he ever executed the same.

30. The 1st defendant's defence and counter claim alleged that Ngichwae Korodi adamantly refused to subdivide and transfer the suit land to her until his death on **7/1/2004**. However before this her husband had died on **30/12/2009** soon after the 2nd sale agreement was entered into. That evidence is corroborated by the contents of the limited grant of letter of administration *ad litem* issued on **14/12/2016** to the 1st

defendant.

31. It is true that **Section 8** of the **Land Control Act** required the seeking of consent of the Land Control Board within 6 months of the making of the agreement in respect of a controlled transaction. However recent decisions have frowned upon the defence of “*null and void for want of Land Control Board consent*” where the purchase price has been received by a vendor who in return put the purchaser into possession of the suit land. The most recent of these is the Court of Appeal decision in **Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR** in which it was held that want of the Land Control Board consent is not fatal to the transaction in that matter.

32. Another is **Joseph Mathenge Kamutu –vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others –vs- Davidson Kagiri (2014) eKLR** where the court held that the appellant’s action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant’s claim and granted an order of specific performance in favour of the respondent.

33. It is therefore clear that recent jurisprudence in Kenya has moved away from the strict and subservient application of the provision of the Land Control Act in favour of a more lenient approach that accord a purchaser some breathing space especially where the obligation to apply for land control board consent had been placed on the shoulder of the seller, the purchaser has paid the consideration and has been put into possession.

34. For that reason I find that in the instant case the agreements dated entered into between the plaintiff’s father and the deceased are not null and void for want of Land Control Board consent and that they are enforceable; the plaintiff is in the shoes of the deceased Ngichwae Korodi as an administrator of his estate and he should execute all documents that are required to effect the transfer into the 1st defendant’s name as the administrator of the estate of the deceased Geoffrey Waminila the buyer.

CONCLUSION

(c) What orders should issue?

35. Consequently, I therefore issue the following orders:-

(a) A declaration that the both sale agreements dated 30/4/1991 and 21/11/1996 are valid.

(b) The plaintiff Ebei Korodi Cloprita shall execute all the documents necessary to effect the subdivision of Plot No. 113 Maridadi settlement scheme so that an area of 3 acres which is to include the area occupied by the 1st defendant is excised therefrom.

(c) The plaintiff Ebei Korodi Cloprita shall execute all the documents necessary to effect the transfer of the 3 acres excised from Plot No. 113 Maridadi settlement scheme as described in (b) above to the 1st defendant.

(d) In default the Deputy Registrar of this Court shall execute all necessary subdivision and transfer and envisaged in (b) and (c) above.

(e) The plaintiff Ebei Korodi Cloprita shall bear the cost of the main suit and the counterclaim herein.

It is so ordered.

Dated, signed and delivered at Kitale on this 11th day of **October, 2018.**

MWANGI NJOROGE

JUDGE

11/10/2018

Coram: Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Waweru for defendant

Ms. Mufutu holding brief for Ingosi for plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

11/10/2018