



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC. CASE NO. 743 OF 2017

(Formerly Kisii Elcc no. 188 of 2008)

MARIA ANYANGO OJWANG.....PLAINTIFF

-versus-

CHAIRMAN, B.O.G PINY OWACHO PRI. SCHOOL.....1ST DEFENDANT

JAPHETH MWANGA.....2ND DEFENDANT

MORRIS GANDA.....3RD DEFENDANT

LEO GANDA.....4TH DEFENDANT

THOMAS KABEDUKA.....5TH DEFENDANT

JOHN OKELLO JUNGA.....6TH DEFENDANT

DANIEL MMOYL.....7TH DEFENDANT

BONIFACE OTIENO.....8TH DEFENDANT

JOSEPH OWINO.....9TH DEFENDANT

MARY AOKO OWINO.....10TH DEFENDANT

SAMUEL OWIDI OWINO.....11TH DEFENDANT

GERALD ODHIAMBO OWINO.....12TH DEFENDANT

PAUL JUMA OWINO.....13TH DEFENDANT

JUDGMENT

1. On 17th September, 2013, the plaintiff filed a plaint amended on 1st August 2013 pursuant to leave of the court granted on 27th July, 2013. She has sued the defendants for the following reliefs:-

a) A declaration that the plaintiff is entitled to exclusive and unimpeded right of ownership, possession and occupation of all the six (6) suit parcels of land namely;-

i. Kanyamkago/Kawere I/1608 (the 1st suit parcel of land)

ii. Kanyamkago/Kawere I/1611 (the 2nd suit parcel of land)

iii. Kanyamkago/Kawere I/1603 (the 3rd suit parcel of land)

iv. **Kanyamkago/Kawere I/1607** (the 4th suit parcel of land)

v. **Kanyamkago/Kawere I/1602** (the 5th suit parcel of land)

vi. **Kanyamkago /Kawere I/1604** (the 6th suit parcel of land)

b) A declaration that the defendant whether by themselves or their servants or agents or otherwise howsoever are wrongfully in occupation of the suit parcels of land and are accordingly trespassers on the same.

c) A declaration that the defendants whether by themselves or their servants or agents or otherwise howsoever are not entitled to remain on the suit parcels of land.

d) An order of permanent injunction restraining the defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit parcels of land.

e) The defendants be evicted from the suit parcels of land.

f) General damages for trespass be payable to the plaintiff.

g) Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.

h) Any such or further reliefs as this honourable court may deem appropriate.

2. The gist of the plaintiff's claim is that the plaintiff is the sole registered owner of the 1st to 6th suit parcels of land while Piny Owacho Primary School is the registered owner of LR NO. KANYAMKAGO/KAWERE/752 neighbouring the suit parcels of land. That in the year 2004, the 2nd and 5th defendants trespassed into the 5th suit parcel of land and took possession of the land. That in the year 2005, the 9th to 12th defendants trespassed into the 3rd suit parcel of land and assumed occupation of the same. That in the same year (2005), the 5th, 6th and 7th defendants did trespass into the 2nd suit parcel of land and occupied it. That one Olango Ojwang while the head teacher of Piny Owacho Primary School unlawfully entered and occupied the 4th suit parcel of land.

3. The plaintiff further claims that the defendants continued to use poor husbandry methods on the suit parcels of land thereby hastened environmental destruction. She has pleaded particulars of trespass and damages at paragraphs 10 and 11 of the plaint respectively. In spite of the plaintiff requests including written eviction notice to vacate the suit parcels of land, the defendants have refused to vacate the land. The plaintiff continues to suffer loss and damage due to the acts of the defendants thus provoking the instant suit.

4. In their further amended defence dated 16th December 2013 and filed on the even date, the 1st to 6th defendants and 9th to 11th defendants denied the plaintiff's claim. They stated that the plaintiff's husband Dominic Ojwang Okiri (Deceased 1) sold the original parcel of land LR NO. KANYAMKANGO/KAWERE/155 to the 1st, 2nd, 3rd, 4th and 6th defendants while the 9th, 10th, 11th and 12th defendants inherited the same and they were to equitably share the land through succession as listed in the statement of defence.

5. The 1st to 6th and 9th to 12th defendants further stated that they have lived on their respective portions of land pursuant to court order dated 6th October 1990. That deceased 1 who was the administrator of the estate of one Okiri (deceased 1), Chuwe (deceased 2) was to subdivide the original parcel of land in accordance with the court order as hereunder:-

i. Joseph Owino 8 acres 3.2 ha

ii. Dalmas J. Chuowe 8 acres 3.2 ha

iii. Joseph Akoth 8 acres 3.2 ha

iv. Boniface Nyaundi Agak 6 acres 2.2 ha

v. Walter Okoyo Obuya 5 acres 2.0 ha

vi. Japheth B. Mamera 10 acres 4.0 ha

vii. Odero Akida 1 acre 0.4 ha

viii. John Aliet 2 acres 0.8 ha

ix. Njoga Odero 3 acres 1.2 ha

x. Piny Owacho Pri. School 5 acres 2.0 ha

6. The 5th to 6th and 9th to 12th defendants also stated that deceased 1 passed on before effecting distribution as per paragraph 5 hereinabove thus the plaintiff carried out succession and a massed all the suit parcels of land in her name to the exclusion of the said defendants. That in previous suits namely Kisii High Court Succession number 166 of 1987, Rapogi Land Disputes Tribunal case No. 206 of 2007 and Rongo Senior Resident Magistrate's Court Civil case number 33 of 2008, it was decreed on 4th December 2009 that the plaintiff transfer the suit parcels of land to the defendants. That the plaintiff concealed material facts relating to the previous proceedings on the same subject hence he is guilty of perjury and the defendants seek dismissal of the suit, general damages and other reliefs.

7. The plaintiff is represented by Asati, Anyona and Company Advocates. The 1st to 6th and 9th to 12th defendants are represented by M/s Agure Odera and Company Advocates. The other defendants (7th & 8th) did not enter appearance and or file statement of defence.

8. On 22nd July, 2015 and 12th March 2015, Hon. S. Okongo, J sitting at Kisii Environment and Land Court heard the evidence of plaintiff (PW1) and Jared Onyango Kortom (PW2) respectively. PW1 referred to and produced the following documents:-

- a) A grant of letters of administration dated 7th February 2000 in respect of the estate of Dominicus Ojwang Okiri (Deceased 1)
- b) A ruling in Kisii High Court Misc. Civil Application number 22 of 2009- JR (PEXhibit 2).
- c) Copies of registers for the 3rd, 2nd, 6th, 5th, 1st and 4th suit parcels of land (PEXhibit 3 (a) to (f)).
- d) Letter dated 4/5/2011 by Map zone Company – Surveyor's report (PEXhibit 4).

9. Before the suit was transferred to this court on 11th July, 2017, DW1, Japheth Busollo Manyera (2nd defendant) also testified on 14th April 2015. He produced a copy of sale agreement dated 22/3/1988, in respect of 5th suit parcel of land, a receipt, court file for Kisii High Court succession cause number 106 of 1987, mutation dated 22nd October 1991 showing sub division of the original parcel of land, proceedings in Rongo Resident Magistrate's Court Misc. Civil Application number 33 of 2008 which adopted an award by Migori District Land Disputes Tribunal and a decree thereof as DEXhibits 1 (a), 1(b), 2,3,4(a) and 4 (b) respectively.

10. Learned counsel for the plaintiff filed submissions dated 26th September 2018 whereby he briefly stated the orders sought in the plaint, the plaintiff's case as well as the defendant's case. Counsel identified issues for determination including whether or not the plaintiff is the sole registered owner of the suit parcels of land.

11. Counsel further submitted that the rights of the plaintiff over the suit parcels of land are protected by the law and that the defendant's entry thereon was unlawful. That the 7th and 8th defendants did not challenge the plaintiff's claim. That in the absence of the consent of the land control board to DEXhibit1, the same was rendered null and void. He cited **Article 40 of the Constitution of Kenya, 2010, Sections 24 (a) and 25(1) of the Land Registration Act, 2012, the Land Act and the Land Control Act (Cap 302 Laws of Kenya)**.

12. Learned counsel for the 1st to 6th and 9th to 12th defendants filed submissions dated 12th November 2018 wherein he referred to the orders sought in the plaint, DEXhibit 2, PEXhibit 1 and that PW1 sold the suit parcels of land belonging to the defendants. That DEXhibit 2 has not been challenged or reviewed or set aside and this court should take judicial notice of the same.

13. Counsel further submitted that PW1 failed to include the defendants in PEXhibit 1. That therefore PW1 failed to disclose to this court that there had been previous proceedings and orders relating to the current dispute. Counsel urged the court to implement orders in DEXhibit 2 and grant the orders sought in the further amended statement of defence.

14. I have carefully read and considered the entire pleadings, evidence of PW1, PW2 and DW1 as well as submission by counsel in this matter. In the case of **Great Lakes Transport Company (U) Ltd –V- Kenya Revenue Authority (2009) KLR 720**, the Court of Appeal held that it is trite law that issues for determination in a suit generally flow from the pleadings or as the parties have framed for the courts' determination. I note issues (a) to (f) in the submissions by the plaintiffs' counsel and find that the issue for determination herein boil down to:

- i. Whether or not the plaintiff is the sole registered owner of the suit parcels of land.
- ii. Whether or not the defendants have unlawfully entered and occupied the suit parcels of land.
- iii. Whether or not the plaintiff is entitled to the reliefs sought.

15. PW1 stated that she inherited the suit parcels of land from her husband (deceased 1) who died in year 1998 as revealed in PEXhibits 1 and 3 (i) to (f). That deceased 1 did not inform her that he had sold land to any of the defendants otherwise she would have sued them. She stated that deceased 1, did not sell any parcel of the land to any of the defendants.

16. PW1 further stated that the defendants did trespass into the suit parcels of land. That the defendants sued her at Rongo Land Disputes Tribunal which ruled in their favour but the verdict was quashed by the High Court as demonstrated by PEXhibit 2. She also stated that PEXhibit 4 shows that the defendants are in occupation of the suit parcels of land.

17. PW2, told the court that he is a neighbor to PW1, who holds title to the suit parcels of land. That deceased 1 who was husband of PW1 died in the year 1998. He stated that deceased 1 owned the original parcel of land and that the defendants have divided the land among themselves.

18. DW1, (the 2nd defendant) stated that deceased 1 sold suit parcels of land to the defendants. That deceased 1 had obtained a grant of letters of administration in respect of the estate of deceased 2, as per DExhibit 2. He further stated that deceased 1 sold the 5th suit parcel of land as shown on DExhibits 1 (a) and (b) and that he did prepare DExhibit 3 regarding subdivision of the original parcel of land prior to his death in 1998.

19. According to DW1, the defendants have not trespassed into the suit parcels of land and that they are entitled to the land. He stated that :-

“It is not true that I have trespassed on plot No. 1607. It is my prayer that the court do adopt the order that was made in succession cause No. 106 of 1987. We are occupying our respective parcels of land. We are not in occupation of the plaintiff’s parcel of land. We are entitled to the land which we are occupying by virtue of the court order made by Justice Patel that I have referred to.” (Emphasis supplied)

20. The order referred to by DW1 is in DExhibit 2 which was made on 16th October,1990 and reveals that deceased 1 was to divide the original parcel of land, among DW1, the 1st defendant and others. DExhibit 2 further reads;-

“..... and subdivide it as stated hereinabove, give the parcel new numbers and register them separately in the respective names. (Emphasis added)

21. PW1 obtained PExhibit 1 on 4th March 1999 and it shows that she is the sole administrator of, inter alia, the 1st to 6th suit parcels of land. Deceased 1 had obtained DExhibit 2 and sub divided the original parcel of land as expressed in DExhibit 3.

22. It is not in dispute that deceased 1 died in year 1998 as shown on PExhibit 1. He sold the 5th suit parcel of land to DW1, in 1988 as per DExhibit 1 (a) and subdivided the original parcel of land in 1991 as reflected in DEXhibits 2 and 3. He subdivided and distributed the land out of his own free will and during his lifetime.

23. In **Marigi –v- Muriuki (2008) 1 KLR (G&F) 1073 at 1077 and 1078**, it was held that property of a registered owner who is still alive is not yet available for subdivision and distribution. The exception is where that owner personally on his own free will decides to subdivide and distribute the property.

24. In the present case, upon the death of deceased 1, it is clear that DW1 and other beneficiaries of the estate of deceased 2 did not obtain title to the suit parcels of land upon their transfer as expressed in DExhibit 3 or at all. DExhibit 1 (a) was entered into between DW1 and deceased 1 in 1988. Quite clearly, a constructive trust which is enforceable in favour of DW1 and other defendants, was created in the circumstances; see **Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri (2014) eKLR.**

25. More fundamentally, the court apportioned the original parcel of land among DW1, deceased 1 and others as revealed in DExhibit 2 and as reflected at paragraphs 6 (a) and 15 (a) of the defendants, further amended defence. I find that PW1 ignored DExhibit 2 when she obtained PExhibit 1 because some of the beneficiaries including the 1st defendant and DW1 of the estate of deceased 2, were left out of its distribution. To that end, the titles to the suit parcels of land held by PW1 were acquired through unprocedural process as envisaged under section 26 (1) of the Land Registration Act, 2012.

26. It follows that plaintiff’s suit cannot be allowed to stand. The 1st to 6th and 9th to 12th defendants are entitled to the orders sought in their further amended defence. The plaintiff has not proved her case against the defendants on a balance of probability.

27. In the result and for the above reasons, I make final orders as set out below;-

a) The plaintiff’s suit filed by way of an amended plaint dated 1st August 2013 is hereby dismissed.

b) The outcome of the suit parcels of land as per order dated 16th October, 1990 in Kisii High Court Succession cause number 106 of 1987 (DExhibit 2) is endorsed accordingly.

c) The plaintiff shall bear the costs of this suit.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of November 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Agure Odera learned counsel for the 1st to 6th and 9th to 12th defendants.

The plaintiff- Present

Tom Maurice – Court Assistant

G.M.A. ONGONDO

JUDGE