



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC. 218 OF 2017

(Formerly Kisii Elcc no. 461 of 2010)

ELISHAPHAN OMOLLO NYASITA.....PLAINTIFF

-versus-

GRADUS ATIENO OTHIM.....1ST DEFENDANT

KENNEDY OCHIENG ATIENO.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 16th February 2010, and filed on 17th February, 2010, the plaintiff Elishaphan Omollo Nyasita has sued the 1st and 2nd defendant namely Gradus Atieno Othim and Kennedy Ochieng Atieno respectively for declaration that he is the registered proprietor of the suit land, LR NO. KAMAGAMBO/KWANWONGO/1115, an order of eviction of the defendants, permanent injunction, general damages for trespass and costs of the suit. The plaintiff is represented by M/s Oguttu Mboya and Company Advocates. The defendants are presented by S.M. Sagwe and Company Advocates, with effect from 23rd December, 2016.

2. The gist of the plaintiff's claim is that on 8th October, 1988 he bought the suit land from one Mathew Opiyo Othim (deceased), who was a brother to the 1st and 2nd defendants. That he is the absolute registered proprietor of the suit land as per title deed issued on 19th October 1988 (PEXhibit 1), a certificate of official search dated 8/2/2008 (PEXhibit 2) and green card (PEXhibit 3).

3. The plaintiff further claims that on or about 15th April, 2004, the defendants trespassed upon the suit land and destroyed common boundary features between the suit land and LR NO. **KAMAGAMBO/KAMWONGO/198** owned and registered in the name of the 1st defendant. The plaintiff lodged a complaint with Rongo Police Station whereby the defendants were arrested and charged of malicious damage to property in Rongo Senior Resident Magistrate's Court Criminal case no. 1122 of 2004, as shown on the proceedings (PEXhibit 4). However, the defendants were acquitted under **Section 210 of the Criminal Procedure Code (Cap 75)**.

4. On 14th October 2009, the District Land Registrar and Surveyor of Migori and Rongo Districts respectively ascertained and demarcated the boundary further to a complainant lodged by the plaintiff. In spite of the decisions of the Land Registrar, Surveyor and the area Chief, the defendants continued to trespass upon the suit land hence precipitating the instant suit.

5. In their statement of defence date 20th July, 2010, the defendants denied the plaintiff's claim. They stated that the plaintiff obtained registration to the suit land through fraud and pleaded particulars of fraud on the part of the plaintiff.

6. The defendants further stated that they were born on the suit land and that they have had uninterrupted and continuous occupation and use of the land. That the plaintiff has never occupied any portion of the suit land. They sought the dismissal of the suit with costs.

7. In his reply to defence dated 22nd July 2010, the plaintiff stated that he lawfully bought the suit land from the deceased, Mathew Opiyo Othim, who lawfully transferred the land to him by execution of all the necessary and attendant transfer instruments and obtained consent from the area land control board. That the defendants have no locus standi to question the sale, transfer and registration of the suit land in his name.

8. On 15th April 2013, 2nd January 2014 and 30th April 2014, the plaintiff (PW1) Edward Kennedy Bosire Mose (PW2) and John Agaro (PW3) adduced evidence before Hon. S. Okongo J, at the Environment and Land Court, Kisii. PW1 and his witnesses referred to PEXhibits 1 to 3, consent to subdivide LR NO. KAMAGAMBO/KAMWONGO/199 (PEXhibit 6), mutation form (Exhibit 7), letter of consent in favour of the deceased (PEXhibit 8), among others exhibits. This suit was transferred from Environment and Land Court Kisii to this court and on 29/5/2017, it proceeded to further hearing whereby the 2nd defendant (DW1) adduced evidence.

9. Learned counsel for the plaintiff filed submissions dated 30th May, 2018 and identified the following four issues for determination,

- a. Whether the plaintiff is the registered proprietor of LR NO. KAMAGAMBO/KAMWONGO/1115, (hereinafter referred to as the suit land).**
- b. Whether the title in respect of the suit land was acquired by fraud**
- c. Whether the defendant have trespassed onto the suit land belonging to and registered in the name of the plaintiff.**
- d. Whether the plaintiff is entitled to the orders sought.**

10. Counsel analysed the issues for determination and cited supporting authorities which include; **Sections 24,25 and 26 of the Land Registration Act, 2012 Virani t/a Kisumu Beach Resort –vs- Phonewing of E.A Ltd (2004) 2 KLR 269 and Sections 107 and 108 of the Evidence Act (Cap 80)**. Therefore counsel submitted that the plaintiff is entitled to the orders sought in the plaint.

11. Learned counsel for the defendants filed submissions dated 23rd July, 2018 wherein he contended that the area of the suit land and signature of the deceased, do not appear on documents, among them, the sale agreement and transfer of the land. The purported transaction is disputed as the defendants asserted that the plaintiff obtained registration of the suit land in his name by fraudulent means.

12. I have carefully considered the entire pleadings, evidence of PW1, PW2, PW3 and DW1 and submissions by counsel for the respective parties. This court is guided by the decision in **Galaxy Paints Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** regarding issues for determination in a suit. Having noted a statement of agreed issues (plaintiff's version) dated 23rd November 2012 and issues (i) to (iv) identified in the submissions of the plaintiff's counsel, I find that the issues for determination herein boil down to whether:-

- a) The plaintiff is the lawful registered proprietor of the suit land.**
- b) The defendants have trespassed into the suit land**
- c) The plaintiff is entitled to the relief sought in the plaint.**

13. On the 1st issue, I bear in mind that under **Section 2(a) of the Land Registration Act 2012 (the LRA,2012)**, the term “**proprietor**” means:-

“(a) in relation to land or a lease, the person named in the register as the proprietor;

14. The suit land was registered **under Sections 27 and 28 of the Registered Land Act (Cap 300 repealed)** which provided for absolute and indefeasible title to land. Currently, **Sections 24 (a) and 25 of the Land Registrar Act 2012** provide that interest conferred by registration by a person as the proprietor of the land shall be absolute and the rights of that proprietor are free from all other interest and claims whatsoever but subject to, inter alia, rights under **Section 28 of the Act**.

15. The plaintiff (PW1) testified that he bought 1.5 acres being the suit land which was originally part of LR. NO.KAMAGAMBO/KAMWONGO/199 (the original land) from the deceased at Kshs. 300,000/=. That the deceased signed agreement and mutation form (PExhibit 7) before he passed on in the year 2002. He testified, inter alia:-

“I know Mathew Opiyo Othim sold to me a portion of land. This was Kamagambo/Kamwongo/199. I bought a portion of this land measuring 1.5 acres. Our agreement for sale was in writing..... I was issued with a title deed for the suit property.....”

16. PW2, Land Registrar Migori County confirmed that the suit land was procedurally registered in the name of PW1. He made reference to transfer documents and boundary dispute determination report (PExhibit 4) including PExhibits 3,5, 6 and 9. He stated in part:

“ I confirm that all the procedures were followed before the transfer of the suit property in favour of the plaintiff was registered.”

17. PW3, the area chief stated that he received a complaint with regard to boundary dispute concerning the suit land and LR NO. KAMAGAMBO/KAMWONGO/198. He visited the site and prepared letters (PExhibit 10 and 11) showing that the boundary had been interfered with. He also stated that whereas the suit land belongs to PW1, the activities thereon were being carried out by the defendants.

18. On his part, DW1 testified that he is not the registered owner of the suit land. That PW1 holds title to the land. DW1 to a great extent, confirmed that PW1 is the registered owner of the suit land.

19. It is evident that PW1 followed laid down procedure including PExhibits 6 to 8, in the purchase of the suit land from the deceased. He obtained PExhibit 1 which is held as conclusive evidence of proprietorship in respect of the suit land by virtue of **Sections 26 and 30 of the Land Registrar Act, 2012**.

20. In the case of **Lepore Ole Maito-v- Letwat Kortom and 2 others (2016) eKLR**, Hon J. Mutungi,J held thus:-

“ The plaintiff in my view was validly registered as owner of land parcel 31.8 following a lawful process.....” (Emphasis added)

21. In the instant suit, DW1 stated that the deceased was his uncle while the 1st defendant is his father. That he cultivated the whole of the suit land. He admitted that PExhibits 5, 6 and 8 are with regard to the sub-division of the suit land.

22. During cross-examination, DW 1 stated, inter alia:-

“It was registered in the name of my uncle Opiyo Mathew Othim. He is deceased. I have not obtained any letter of administration regarding the estate of Opiyo Mathew Othim.”

23. To that extent, I am of the considered view that PW1 is the registered owner of the suit land. Since neither the 1st defendant nor DW1 is an appointed administrator of the estate of the deceased or grant thereof probate as envisaged under **Sections 79 and 82 of the Laws of Succession Act (Cap 160 Laws of Kenya**, they have no locus standi with regard to the estate of the deceased; see **Omari Kaburu –v- Industrial and Commercial Development Corporation (2007) eKLR, Charles Nyambati case (supra)**.

24. Was PW1 registered as owner of the suit land through lawful process? PW1 relied on land transfer instruments, among them PExhibits 4,5, 6,8 and 9, in obtaining PEXhibit1 as revealed in PEXhibits 2 and 3 which show that he is the lawful registered owner of the suit land.

25. The defendants alleged fraud on the part of PW 1 in obtaining PExhibit 1. In **Virani case (supra)**,the Court of Appeal considered the issue of fraud as follows;-

“Mere exaggeration, however, is not conclusive evidence of fraud, for value is often a matter of opinion, though such exaggeration will amount to fraud if it is dishonestly made or so greatly in excess of the true amount as to be incompatible with good faith.”

26. PW1 denied the allegations of fraud against him. The material placed before this court fails to thwart the evidence of PW1 to the effect that he obtained PExhibit 1 by lawful process. The defendants have failed to prove the allegations of fraud against him on a balance higher than a balance of probabilities ; see **Paul Kimani Njuguna –v- Pius Kariuki Kiguni & another (2009) eKLR and Raila Odinga & 2 others –v- Independent Electrol and Boundary Commission (2017) eKLR**.

27. Regarding trespass, PW1 stated that the defendants are his neighbours and that they removed boundary beacons of the suit land. PExhibit 4 shows that boundaries between the suit and LR NO.KAMAGAMBO/KAMWONGO/198 were determined. DW1 admitted that the 1st defendant owns the latter land and that he (DW1) is in cultivation of the suit land.

28. The term **“trespass”** has been defined as any unjustified intrusion of one person upon the land in possession of another; see **Zachariah Onsongo Momanyi –v- Evans Omurwa Onchangwa (2014) eKLR**.

29. Unlawful occupation of land is prohibited under **Section 152 A of the Land Act 2016 (2012)** which reads;-

“A person shall not unlawfully occupy private community or public land.”

30. The plaintiff has demonstrated that he is the lawful owner of the suit land. Therefore, the defendants are in unlawful occupation of the land. I take into account the principles that guide the court, whether or not to award general damages. I am of the view that since the tort of trespass is actionable per se, PW1 is entitled to general damages and a sum of **Kshs. 75,000/=** could be appropriate in the circumstances of the case.

31. In the premises, I find that PW1 is the absolute lawful owner of the suit land upon which the defendants are trespassers. The plaintiff has proved his case against the defendants on a balance of probability.

32. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally for a declaration and a permanent injunction as sought in his plaint dated 16th February 2010 as well as general damages of **Kshs. 75,000/=** and costs of the suit.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of November 2018.

G. ONGONDO

JUDGE

In presence of :-

Mr. Oguttu Mboya learned counsel for the 2nd defendant- Present

