



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 889 OF 2017

(Formerly Kisii ELC Case No. 758 of 2016 and Kisii HC CC No. 82 of 2012)

FLORENCE MUMBI NJINE.....PLAINTIFF

VERSUS

KEFA OKETCH MUINDE.....DEFENDANT

JUDGMENT

1. On 6th March 2012, the Plaintiff filed this suit against the defendant by way of a Plaint of the even date seeking the following orders:-

(i) Permanent Injunction restraining the Defendant by himself, his agents, servants and /or anyone claiming under the Defendant, from trespassing onto, interfering with and/or in any other manner, whatsoever, dealing with the suit land that is, LR NO. BUKIRA / BUHIRIMONONO / 2022.

(ii) An order of eviction to issue against the Defendant.

(iii) Costs of this suit be borne by the Defendant.

(iv) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

2. Briefly, the Plaintiff's case as stated in the Plaint is that she is the registered proprietor of the suit land, LR NO. BUKIRA/BUHIRIMONONO / 2022 with effect from 24th November, 2010. That on or about February, 2011 the defendant entered the suit land without the consent of the Plaintiff and erected temporary kiosks thereon. The Plaintiff averred, inter alia, that following the defendant's acts of trespass, she has not been able to occupy and develop the suit land hence suffered loss damages precipitating the instant suit.

3. By her Statement of defence and Counterclaim dated 21st March 2012, the defendant denied the plaintiff's claim and asserted that if the plaintiff is the registered proprietor of the suit land, the same was obtained by fraud. The defendant further asserted that she has been in occupation of the suit land since it's registration and that she did not consent to the plaintiff's registration as proprietor. In the Counterclaim, the defendant stated that the plaintiff was illegally and fraudulently registered as proprietor of the suit land. Therefore she has sought the following orders:-

a) A declaration that LR NO. BUKIRA / BUHIRIMONONO/2022 was fraudulently registered in the names of JAMES NJINE NDIGIRIGI and subsequently on the Plaintiff.

b) An Order of Cancellation and Rectification of the Register from BUKIRA / BUHIRIMONONO / 2022 to BUKIRA / BUHIRIMONONO/273.

c) Costs of the Counter claim and any other relief.

4. Initially, the plaintiff was represented by Kaburi Henry & Co Advocates. Currently, M/S Oguttu, Ochwangi, Ochwal and Co Advocates represent her. G. M. Nyambati & Co Advocates appear for the defendant.

5. On 25th January, 2013 Counsel for the respective parties to this suit, entered consent Order as hereunder:-

“By Consent, the documents attached to the Plaintiff list of documents filed herein be and are hereby admitted in evidence”.

6. The plaintiff (PW1) testified, inter alia, that her deceased husband James Njine Ndigirigi owned the suit land prior to his death in the year 2008. That she obtained a grant and a certificate of confirmation of grant in respect of the estate of her deceased's husband (PExhibits 1(a) and (b) and Kenya Gazette dated 21st November, 2008 (PExhibit 3). She then had the suit land transferred to her name as per copy of Title Deed and Official Search (PExhibits 4 and 5). The plaintiff gave the defendant a notice to vacate the suit land by a letter dated 11th February 2011 (PExhibit7). She could not tell how the defendant acquired the suit land on which he has erected temporary kiosks.

7. During cross -examination, PW1 maintained that she acquired title to the suit land (PExhibit 4) through transmission. That nobody resides on the land and that there are houses built thereon.

8. According to the defendant (DW1), the suit land is occupied by him and that PW1 has not entered thereunto. That PW1 got registered as proprietor of the suit land through fraud. He relied on documents which include sketch drawing of the land housing developments (DEXhibit 10), an objection in Kisii High Court Succession No. 391 of 2008 (DEXhibit 11) and in Kisii HC Succession Citation No. 591 of 2010 (DEXhibit 12).

9. DW1 also stated that PW1 is not the owner of the suit land which he occupies. That he had bought from one Nyamosi Oruongo. That the suit land was part of LR NO. Bukira / Buhirimonono/273. He relied on agreement of Sale dated 24/2/1976(DEXhibit 1) and another agreement of Sale dated 21/2/2003 (DEXhibit 2) in respect of the land. He stated that he has developments on the land as shown on the photos (DEXhibit 9). He told the court that his objection as shown on DEXhibit 11 is still pending determination by the court.

10. **DW2, ESTHER BOSIBORI MUNYONGA** stated that she sold the suit land to Nyamosi Oruongo who in turn sold it to DW1 by way of DEXhibit 2. This witness further stated that they realised that the land has been transferred to Simon Robi Marwa to whom she did not sell the land thus she lodged a caution thereof. She confirmed that DW1 stays on the land.

11. **DW3, JOSEPH CHACHA NYAMURIBA** testified that he was asked by **Simon Robi Marwa** to write a transfer form and he acted accordingly. He stated that the suit land is occupied by DW1 since 1976 and that PW1 does not stay thereon.

12. By submissions dated 24th September, 2018 learned Counsel for the plaintiff gave a summary of evidence and four (4) issues for determination which include whether the transfer and registration of the suit land in favour of PW1 was fraudulent and whether PW1 is entitled to the reliefs, sought in the plaint. Counsel analysed each issue as framed and relied on authorities, among them, **Virani t/a Kisumu Beach Resort =vs= Phoenix of East Africa Ltd (2004) 2KLR and Independent Electoral and Boundaries Commission & Another =vs= Stephen Mutinda Mule (2014) eKLR** on the requirement of a party to plead and supply particulars, inter alia, fraud, to the requisite standard and that parties are bound by the pleadings on record respectively. In conclusion, counsel urged the Court to allow the claims in the Plaint and dismiss the defendant's counterclaim with costs.

13. In his submissions dated 16th October, 2018, learned counsel for the defendant referred to the Orders sought in the Plaint and the counterclaim herein and summarised the evidence on record. Counsel identified seven (7) issues for determination which included whether the parties have right over the suit land. Counsel relied on the case of **Giella =vs= Cassman Brown (1973) at page 358** with regard to the three principles for grant of Injunction. He sought dismissal of the suit with costs and that Judgment be entered in terms of the Counterclaim in favour of the defendant.

14. I have carefully taken into account the entire pleadings, evidence and submissions in this matter. I also note the issues for determination framed by Counsel for the respective parties in the suit. Bearing in mind the Court of Appeal decision in the case of **Great Lakes Transport Co (U) Ltd =vs= Kenya Revenue Authority (2009) KLR 720**, on issues for determination in a suit, the issues herein are compressed to whether the parties have proved allegations against each other and whether they are entitled to the reliefs sought in their respective pleadings.

15. The plaintiff contends that she is the registered proprietor of the suit land. The defendant denies the plaintiff's claim and asserts that PW1 obtained registration of the suit land irregularly and fraudulently. Therefore, the fact of plaintiff's registration to the suit land is contested. PW1 testified that she obtained PEXhibit 4 through transmission as revealed in PEXhibits 1 (a) and (b) and 3 in respect of the estate of her deceased husband DW1 alleged that PW1 obtained PEXhibit 4 by fraud and contested that no particulars of fraud were supplied as required in mandatory terms; see ***Virani case (supra)***.

16. Be that as it may, DW1 stated in his statement of defence at paragraph 4 that PW1 fraudulently acquired registration as proprietor of the suit land without his consent. Moreover, at paragraphs 11, 12 and 13 of the Counterclaim, DW1 stated that the suit land was registered in the names of the deceased after having been fraudulently subdivided from LR No. Bukira / Buhirimonono / 273 to its current number. To that extent, I find that the defendant's statement of defence and Counterclaim contain necessary particulars of fraud, inter alia, registration, subdivision and acquisition of the suit land without consent of DW1. The said particulars also feature in evidence of DW1.

17. In the case of **Nkalubo =vs= Kibirige (1973) EA 102** Spry V. P while commenting on the decision in **Odd Jobs =vs= Mubia (1970) E.A. 476** observed that a trial Court may determine a point that is not covered by the pleadings but arises from the facts or evidence. In the instant matter, this Court has the discretion to determine an issue pleaded or arising from facts or evidence as revealed in the pleadings and evidence of the parties. I do so with regard to the allegations of fraud and any apparent omission is cured by Article 159 (2) (d) of the Constitution of Kenya, 2010.

18. The testimonies of DW1, DW2 and DW3 show that Simon Robi Marwa (deceased) subdivided LR No. Bukira/ Buhirimonono / 273 into the suit land, among others. DEXhibits 5 (a) 5(b), 5 (c), 6 and 7 clearly point to fraudulent subdivision of the original parcel of land LR NO.

273 and registration of the subdivisions including the suit land.

19. In that regard, the Plaintiff's registration to the suit land arose on account of a transfer by transmission arising from an alleged fraudulent purchase; see Court of Appeal decision in **Samuel Kamere =vs= Land Registrar, Kajiado (2015) eKLR.**

20. It is evident that DW1 bought the suit land from Nyamosi Oruongo, who had purchased it from DW2 who was its registered proprietor. He followed the prescribed procedure including sale agreements (Dexhibits 1 and 2), application for consent from the area Land Control Board (DExhibit 4) and transfer (DExhibit 5). Therefore he lawfully purchased the suit land; see **Kuria Greens Ltd =vs= Registrar of Titles and another 2011 eKLR.**

21. It is also evident that DW1 is in possession of the suit land. PExhibit 9 shows developments thereon. It is trite law that possession of a disputed land can take forms such as fencing and cultivation; see **Titus Ong'ang'a Nyachieo =vs= Martin Okioma Nyauma & 3 Others (2017) eKLR.**

22. It has emerged from the pleadings and evidence that ownership of the suit land changed hands from DW1 to PW1. There is no dispute that DW1 is in possession of the suit land and he has discontinued the plaintiff's possession of the land; see **Wambugu =vs= Njuguna (1983) KLR 172.**

23. In the circumstances, I find that the plaintiff is the registered as the owner of the suit land. However, the fact of registration is irregular and has been proved so by the defendant to the requisite standard as held in **Koinange & 3 Others =vs= Koinange (1956) KLR 23.** The plaintiff has failed to prove her claim against the defendant on a balance of probability.

24. Afortiori, the determination of the entire suit is as follows:-

(a) The plaintiff's suit by way of a Plaint dated 6th March 2012 be and is hereby dismissed with costs to the defendant.

(b) Judgment be and is hereby entered for the defendant against the plaintiff in terms of Orders (a) (b) and (c) sought in his Counterclaim dated 21st March 2012.

DELIVERED, SIGNED and DATED in open court at MIGORI this **18th** day of **December, 2018**

G. M. A. ONGONDO

JUDGE

In the presence of;

MS W. Ochwal learned counsel for the plaintiff.

Mr. G. Nyambati learned counsel for the defendant.

Tom, Court Assistant.