



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 118 OF 2015

(AS CONSOLIDATED WITH ELC NO. 87 of 2015)

SHEILA KABOLE MABWA.....PLAINTIFF

VERSUS

JOSHUA ANG'ELEI.....1ST DEFENDANT

ROBERT LOBUR ANGELEI.....2ND DEFENDANT

GEDION LOITALIM ANGELEI.....3RD DEFENDANT

ALLAN EGILAE ANGELEI.....4TH DEFENDANT

JUDGMENT

1. The plaintiff filed this suit on **21/9/2015** at Kitale High Court. The defendant filed a defence on **29/8/2016**. By consent of the parties this suit was consolidated with **ELC 87 of 2015 - Robert Lobur Angelei and 3 Others Vs Sheila Kabole Mabwa. ELC 118 of 2015** was made the lead file.

The Plaintiff's Claim

2. The plaintiff's claim is that she is the registered owner of **Trans Nzoia/Kaisagat/247** which was carved out of **Trans Nzoia/Kaisagat/201** (hereinafter called "the suit land"); that the defendant has cultivated the said land and planted on the land without the consent or the knowledge of the plaintiff; that the plaintiff should be declared the sole owner of the suit land and that an order of permanent injunction should issue against the defendant and his agents from entering cultivating or developing the land **Title Number Trans Nzoia/Kaisagat/ 247**.

The Defence

3. The defendant's defence is that the plaintiff's title documents were obtained fraudulently without disclosing vital information; that he purchased the land from the plaintiff's parents vide a sale agreement dated **3/6/88**; that he has been on the land since **1988** with the knowledge of the plaintiff; that he has right to occupy and cultivate it as he is the administrator of the late **Priscillah Yatich Angelei**, the original purchaser of the land and that the plaintiff has come to court with unclean hands. In his counterclaim he restated the matters in his defence and sought an order of declaration to the effect that he is the rightful owner of land **Title Number Trans Nzoia/ Kaisagat/201**; that the plaintiff's title has been extinguished and that he should be registered as the absolute owner of the suit land.

Reply to Defence and Defence to Counterclaim

4. The 1st plaintiff filed a reply to defence and a defence to counterclaim on the **29/8/2016**. She denied fraud and legal entitlement of the deceased **Priscilla Yatich Angelei** and stated that summonses or pleadings in respect of **Suit No. 87 of 2015** did not exist, that parcel number 247 having been registered on **22/1/2015** can not be the subject of orders of adverse possession; that **Parcel Number 201** first came into existence on **23/1/1996** and could not have been the subject of a sale agreement between her parents and the defendant's parents in **1988**; that without prejudice, such an agreement was without the consent of the land control board and therefore void *ab initio*; that there has never been any acknowledgement of the defendant's interest; that the plea of possession can not entitle the defendant to the land; that possession by the defendant was by use of force; that the **OS 87/2015** was an afterthought and filed after the instant suit; that the counterclaim is bad for want of use of the prescribed process in law and that the orders sought against **Parcel No. 201** are incapable of being granted as the said parcel is non-existent.

The Plaintiff's Evidence

5. The plaintiff testified on **12/4/2018**. She identified herself as the daughter of **Nancy Mabwa** and also the administrator of her estate; that there were two buyers of land belonging to the estate who had settled on the land and she ensured that they got titles to their portions; that she does not know the defendant; that parcel number 201 was closed on subdivision on **21/11/2014**; that new numbers issued, that she is now the registered owner of **Plot Number 247**, that afterwards when she went to the land she found the defendant working in it; that in **2012** she wrote a demand letter to the said person and he stopped farming, that that person was the brother to the defendant; that later in **2015** the defendant entered the land and she sued him. She averred that it took her time to assert herself in respect of the property because her parents died while she was still a minor. She also testified that she was not aware that the defendant has bought the land from her father.

The Defendant's Evidence.

6. The 1st defendant testified on **18/9/2018**. He adopted his written statement dated **2/10/2015** filed in court on **29/10/2015**. He produced the sale agreement executed on **3/6/88** and a booklet containing some acknowledgements of receipt and stated that his mother paid for the land. He also produced a copy of a land control board's consent in respect of **Plot Number 111**. He stated that the purchaser of the land parcel was his mother who later passed on after the agreement; that his family has been in possession of the suit land since 1988 till 2016; that in 2016 he was informed by his staff that someone had fenced off the land; that he reported to the police station; that plot 201 was hived off from **plot 111**; he produced a copy of a demand letter from his mother to **Nancy Mabwa** dated **3/4/1991**. He prayed that his originating summons be adopted and that this suit be dismissed. He stated that he is aware of the **Succession Cause Number 165 of 2016** at **Kakamega** and that he has filed summons for revocation of the grant which summons is still pending.

7. **DW2 Ekai Ekidor** testified on the same date as the defendant and adopted his witness statement dated **5/4/2018** filed in the record. He stated that he works under the defendant. His evidence is that he used to work for Priscillah Yatich Angelei; that Priscillah purchased the suit property from Reuben Mabwa; that by the time of purchase the family of Priscillah had been in occupation of the land and that in **2000** he was given a portion of the suit land to conduct subsistence farming which he surrendered back in **2006**;

8. **DW3 Samson Mabonga Wanjala** testified on the **18/9/2018** and adopted his written witness statement dated **5/4/18**. His evidence is that he used to work for **Peter Angelei** the father of the defendant and resided on his employer's farm; that the farm was adjacent to that of **Reuben Mabwa**; that Reuben Mabwa sold his parcel of land in **1988** to the defendant's mother; that the defendant's family has been partly working on and partly leasing the suit land to other persons and that all along he has known the land to be owned by the family of the defendant.

Submissions

9. The plaintiff filed her submissions on **5/10/18** and the defendant on **16/10/2018**. I have considered those submissions.

Determination

Issues for determination.

10. The issues for determination in this suit are as follows:-

(a) *Whether the defendant is entitled to be declared owner of plot number 201 by adverse possession.*

(b) *What orders should issue.*

11. It is not in doubt that the current registered owner of **Plot Number 247** is the plaintiff, the same having come to her by way of transmission from her deceased mother. The 1st defendant's claim is that his mother had bought **30 acres** from the plaintiff's mother in the year **1988** and that the 1st defendant and his other family members were in occupation of the suit land from **1988** up to **2016**. This evidence is corroborated by the defendant's witnesses.

12. There is documentary evidence that shows that there was such an agreement. The authenticity of the agreement produced as **DExh 2(a)** has not been put in doubt.

13. The agreement reads that Reuben Mabwa who was the plaintiff's father was to sell 15 acres out of **Plot Number 111 Kaisagat Settlement Scheme** to Priscillah Yatich Angelei the 1st defendant's mother.

14. The plaintiff's own **PEXh 7** shows that **Plot No. 111** was her father's land and it measured **23.0 ha**.

15. According to **PEXh 7** the plot was later subdivided under her mother's watch and the resultant plots were **plots Nos. 198,199, 200 and 201**.

16. Curiously that subdivision took place and a new register for **Plot Number 201** was opened on **23/1/1996** after the demand letter dated **3/4/1991** was written to Nancy Mabwa.

17. Nancy Mabwa, according to **PEXh 1** died on **11/10/1996**. A grant of letters of administration was not given to the plaintiff until **9/6/2010**, fourteen years later. The last plot measures **10.60 ha**. That translates into **26.19 acres**. The title to the land was issued to him on **30/1/92**.

18. The agreement provided that the purchaser was to take possession of the land immediately upon execution of the agreement. That was not all; the letter dated **3rd April 1991** from Kapten & Co Advocates restates some of the terms of the agreement dated **3/6/88** and adds that the

plaintiff's father had agreed to sell a further **15 acres** to the defendant's mother and calls for the plaintiff's mother to effect the survey. It offers to pay a balance of **Kshs. 43,000/=** being the balance outstanding on the sale of the additional **15 acres**.

19. The grant produced as **DExh 1** shows that Priscillah Yatich died on **22/4/2004** before transfer of the land to her. However it transpired that in **1988** a consent of the Land Control Board to transfer **30 acres** of land from Reuben Mabwa to Priscilla Yatich was granted by the Saboti Kwanza Land Control Board. The copy of that consent was produced as **DExh 4**. That consent was also not challenged.

20. It would appear that the plaintiff's mother proceeded with the transactions between the plaintiff's father and the 1st defendant's mother for there was produced in court a notebook containing acknowledgements of receipt of monies by Nancy Mabwa from Mr. Angelei. There is no other explanation for the presence of the plaintiff and other members of his family on the suit land.

21. I have considered the testimony of the plaintiff carefully. She stated as follows:

“When our parents died we were young. I was not an adult hence I took long and could not take legal action but when I became of age I took action. I am not aware that the defendant bought the land.”

22. My view is that if the plaintiff was still a minor at the time the land was being sold she may not have known that it was being sold at all.

23. She has not demonstrated to this court her age during the year **1988** to enable this court deduce that her perception that there was no sale agreement was well founded.

24. Without having laid a background of her age and mental orientation of those times she is in this court's view not able to testify competently regarding the happenings of the **1980s** and **1990s**. In fact her evidence on cross examination by Mr. Analo demonstrated her ignorance of those events. She stated:

“I don't know the agreement. I don't know if Priscillah paid for the land. “

25. Later on she stated as follows under further cross examination:

“I don't know that their mother had bought the land. I began using the shamba in 2016. I don't know if Advocate Kapten wrote to my mother over the land.”

26. This is not even a denial. It is a declaration that she was not in a position to know what happened. The plaintiff was the lone witness in her case. With the kind of confession above, then can she deny the defendants assertion that the land was purchased by his mother?

27. When cross examined by Mr. Analo she admitted that she first entered the land in **2016**. Her own evidence had established that as at **2012** the defendant's brother was on the land and that the defendant himself was on the land before **2016** after that was also on the land.

28. The plaintiff's evidence in that regard in my view lends credence to the defendant's claim that they were in possession of the land from **1988** up to **2016**. Besides the evidence of **DW2** and **DW3** which was not shaken in cross-examination established this fact.

29. **DW2's** testimony shows that he was one of the pioneer workers on the newly purchased Angelei farm. He testified that the first house on the land was built by Priscillah the 1st defendant's mother. **DW3** testified that even as late as **2014** he was still a worker on the Angelei land. He also established that Gideon, the son to Peter Angelei, had been leasing out the land to various persons over the years and that at one time **DW3** himself leased the land.

30. The evidence on the record has in my view established the defendant's long occupation of the land during their parents' lifetime and even after their death. There is no evidence that there was any interruption of their possession of the suit land until the year 2016 when the plaintiff took possession.

31. The plaintiff on the other hand has only succeeded in showing that she came into possession of the land in **2016** – and that is after the institution of proceedings by way of an originating summons on **19/6/2015**. By the time the defendants filed the originating summons they were still in possession of the suit land. In my view the defendants have established that the plaintiffs in **Kitale ELC Case No. 87/2015 (OS)** which was consolidated with this case, are entitled to be registered as the owners of the suit land by virtue of adverse possession.

32. The plaintiff's submission is that by the time the defendants filed the originating summons the **parcel 201** did not exist and therefore the orders sought can not be granted. **PExh 3** demonstrates that the said parcel was subdivided and title closed on **21/11/14**. The Originating Summons was instituted on **19/6/2015**. Is the subdivision, prior to the filing of the Originating Summons, of the parcel that the defendants had identified as having been occupied by their family for close to **28 years** without any demur on the part of the plaintiff and her family, be deemed fatal to the Originating Summons? I note that the defendants had attached an extract of title to their supporting affidavit to the Summons. That extract of title was certified by the registrar on **21/2/2013** while the parcel had not been subdivided. This court can not rule out the possibility that the plaintiff became aware of the defendant's plans and decided to pull the rug from under the defendants' feet. The deeming of the originating summons to be fatal for the reason of subsequent subdivision of the land may give room for mischief in many other cases involving other litigants out there. It is contrary to public policy encourage a loophole of this nature through which the plaintiff can technically avoid the defendants' rightful legal claim. For this reason I am of the view that the very fact that the land was subdivided is not fatal to the originating summons.

33. The pleading that the possession held by the defendants over the suit land came about by the use of force was not proved by the plaintiff. The misgivings of the plaintiff regarding the land control Board consent were dispelled by the production of **DExh 4** which I consider to be genuine. In any event the plaintiff did not demonstrate that the subdivision of the land was effected using any consent of the land board other than **DExh 4**.

34. The conclusion I have arrived at is that though the plaintiff obtained the title to the land by following a legal process that process never took into consideration the defendants' rights and interest in the suit land and it shut them out despite their lengthy occupation of the suit land.

35. For the foregoing reasons I am of the view that the plaintiff has not proved her claim against the defendants on a balance of probabilities.

36. On the other hand I find that the defendants have proved their counterclaim and the Originating Summons on a balance of probabilities. Since the parcel number 201 has been subdivided I must issue orders that reflect that subdivision.

37. I therefore enter judgment for the defendants against the plaintiff and I issue the following orders in respect of the consolidated suit and Originating Summons:

(a) A declaration that the subdivision of parcel number 201 into parcels numbers 247 248, 249 and 250 is illegal null and void;

(b) An order cancelling all the titles to plots numbers 247 248, 249 and 250 and reinstating plot number 201 as one undivided whole as was the case before subdivision;

(c) An order that the plaintiff's title to all that parcel known as 201 has been extinguished and that the defendants are the rightful owners of plot number 201;

(d) The defendants should be registered as the owners of plot number 201.

(e) An order that the plaintiff shall bear the costs of this suit and the counterclaim.

It is so ordered.

Dated, signed and delivered at Kitale on this 3rd day of December, 2018.

MWANGI NJOROGE

JUDGE

3/12/2018

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga holding brief for Mukabi for plaintiff

Mr. Bisonga for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

3/12/2018