



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT MIGORI
ELC CASE NO. 80 OF 2017
(FORMERLY KISII ELC CASE NO. 1114 OF 2016)

SAMUEL OUMA OMORO.....PLAINTIFF/APPLICANT

VERSUS

MICHAEL OKINYI OTIENO.....DEFENDANT/RESPONDENT

ELISHAPHAN OBURA OTIENO.....DEFENDANT/RESPONDENT

OYUGI NUNDU.....DEFENDANT/RESPONDENT

DANISH OBUGO OTIENODEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff namely **Samuel Ouma Omoro** filed a suit by way of Plaint dated 19th July 2017 against the Defendants; **Michael Okinyi Otieno, Elishaphan Obura Otieno, Oyugi Nundu and Danish Obugo Otieno**, for the following orders:-

(i) Declaration that the Plaintiff is the registered and/or lawful owner of LR NO. LAMBWE WEST 'A'/95

(ii) An order of Eviction directed against the Defendants, their agents and/or servants, from LR NO. LAMBWE WEST 'A'/95

(iii) Permanent Injunction restraining the Defendants either by themselves, agents, servants and / or anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land that is LR NO. LAMBWE WEST 'A'/95 and/or any portion thereof.

(iv) General Damages for trespass.

(v) Interest on (iv) hereof at Court rates.

(vi) Costs of this suit be borne by the Defendant

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

2. The gist of the Plaintiff's claim is that he is the registered proprietor of all that parcel of land L.R. No. Lambwe West "A"/95 measuring approximately 5.6 Ha (the suit land), with effect from 31st May 2011. He avers that he is entitled to exclusive and/ or absolute rights over and in respect of the suit land to the exclusive of all and sundry. The Plaintiff further claims that on or about May / June 2011, the Defendants jointly and/or severally trespassed onto the suit land, commenced erection of temporary structures and cultivation of substantial portion of the suit land. The Plaintiff filed a suit namely Homa Bay SRMCCC NO. 83 of 2011 which involved the same parties and the same subject matter. However, on 12th September, 2011, the suit was withdrawn rendering the instant suit necessary.

3. The Defendants, in their joint statement of defence and counter claim dated 7th November, 2011, deny the Plaintiff's claim. They challenge the legality of ownership of the suit land by the Plaintiff and that the rights claimed by the Plaintiff have accrued through fraudulent manner. They further deny that they moved into the suit land in the period alleged and that the plaintiff is in occupation of the land. They term the orders sought untenable and that the Defendants are and have been in actual possession of the suit land.

4. In the counterclaim, the Defendants counter-claimers reiterate the contents of their joint statement of defence. They claim actual occupation and/or use of the suit land which the plaintiff recklessly bought from a third party without regard to the circumstances of the suit land. They have pleaded particulars of recklessness of the plaintiff vis-à-vis the circumstances of the suit land.

5. The defendants seek dismissal of the suit. They further seek orders as hereunder:-

(a) An order of declaration that any title passed over to the plaintiff with respect to land parcel number LAMBWE WEST 'A'/95 is null and void.

(b) An order of nullification and rectification of the register, nullifying the plaintiff as the registered owner over land parcel number LAMBWE WEST 'A'/95 and thereby substituting the names of the defendants/counter claimers as the owners of the said parcel of land .

(c) Costs of this suit and interest thereon at court rates as from the date of filing this counter claim until payment in full.

6. The plaintiff's counsel in his submissions, drew the attention of this court to the background of the suit and evidence of the plaintiff during trial. He analyzed the evidence adduced, issues for determination and their respective determination. He submitted that the plaintiff has satisfied that he has a prima facie case with overwhelming chances of success against the defendants. He requested the court to grant him the prayers sought in the plaint. The counsel enumerated supporting authorities on each issue for determination as follows:

a) On prima facie case by the plaintiff against the defendants;

i. **Mrao Ltd –vs—Kirst American Bank of Kenya Ltd and 2 others (2003) KLR 125** where the court, inter alia, defined the meaning and extent of a prima facie case;

ii. **Elishapan Omollo Nyasita –vs—Gradus Otien Othim and Anor Kisii HLCC No. 46 of 2010 (UR)** on the rights and privileges attendant to registration and issuance of title and manner of challenging a lawful instrument.

b) Whether the plaintiff would suffer irreparable loss;

i. **Akiman—vs—Muchoki (1984) KLR 353** that equity does not assist law breakers, among others.

ii. **George Orango Orago –vs—George Liewa Jagalo and 3 others CA Civil Appeal No.02 of 2009 (UR)** on a prima facie case.

c) On whether the defendants have a right to or claim over the suit land;

i. **Elishapan Omollo Nyasita case** (supra)

d) Whether to grant the prayers sought in the plaint;

i. **Aikman case** (supra)

ii. **Omollo Nyasita case** (supra)

7. The Defendants' counsel filed submissions dated 21st June 2017 in which he stated the factual background of the suit and issues for determination. He urged the court to enter judgment for the plaintiff. He cited the case of **Elijah Makeri Nyangwara=vs=Stephen Mungai Njunguna and Another (2013) eKLR** where S Munyao J cancelled an irregularly acquired title and directed the title to be registered in favour of the Plaintiff.

8. I have studiously looked at the plaintiff's case, the defendants' case as well as the evidence of the plaintiff (PW1) and testimony of 1st Defendant (DW1) together with written submissions by each counsel. In **Great Lakes Transport Co Ltd –vs—Kenya Revenue authority (2009) KLR 720**, it was held that issues for determination in a suit generally flow the pleadings or such issue as the parties have framed for the court's determination. It is noted from the submissions, to some extent, that the parties, to the suit have common ground issues which they have framed for determination by this court. These issues are;

a) Who between the Plaintiff and the defendants has a right and or claim over the suit land?

b) Has the plaintiff satisfied the laid down principles in the case of **Giella-vs-Cassman Brown and Co. Ltd (1973) EA 358** for grant of the orders sought in the plaint?

c) Are the parties to this suit entitled to the orders sought in their respective pleadings?

d) Who is to bear the costs of this suit?

9. On 5/5/2014 at Kisii Environment and Land Court, Mutungi J heard the evidence PW1. On 29/5/2017, I heard the testimony of DW1. I consider the testimonies of PW1 and DW1 in this matter.

10. The evidence of PW1 was that he owns the suit parcel of land which he bought from one Wycliffe Duncan Omondi Maranda ("Omondi") who then transferred the land to him. He testified that the defendants unlawfully entered his land, erected temporary structures thereon and are in cultivation of it

11. During hearing, by consent of the parties represented by counsel, all the documents annexed to the plaint /bundle of documents, were produced in evidence. The documents are :

a) Copy of sale agreement dated 10/2/2010 PEX 1

b) Copy of duly filed application for consent—PEX 2

c) Copy of letter of Consent –PEX 3

d) Copy of transfer instrument – PEX4

e) Copy of certificate of title—PEX5

f) Copy of certificate of official search—PEX 6

g) Copy of notice of withdrawal of suit –PEX7

h) Copy of demand letter –PEX 8

i) pleadings, Affidavits and Other documents –PEX9

12. In cross examination by Nyauke counsel for the defendants, PW1 stuck to his testimony. He further stated, inter alia;

“...the suit property was first registered in the name of Omondi’s father Samuel Maranda... Thereafter, on 11/5/2010, a restriction was placed by the land registrar because the owner had died. The owner was Samuel Maranda. Entry No. 7 was made on 7/12/2010. On this entry, Omondi was registered as the owner of the suit property. On 31/5/2011, I was registered as the owner of the suit property...” (Emphasis supplied)

13. According to DW1, the suit land belonged to his (DW1) parents and that he and other defendants, have lived on the land since his birth in 1977. He stated that they are not related to Samuel Maranda who allegedly sold the suit parcel of land to the plaintiff/ PW1. On cross examination, DW1 stated, among others, as summarized below;;

a) He has lived on the suit parcel of land for 40 years

b) Maranda Duncan W. Omondi is a stranger to him.

c) He is not a trespasser on the suit parcel of land

d) He was not able to register the suit parcel of land in his name since his seniors who were his parents were unable to do so under Luo culture.

14. PEXH 1 reveals that the plaintiff bought the suit land from Duncan Wycliffe Omondi who was the legal administrator of Samuel Maranda (deceased) who lawfully transferred the land to PW1 by way of PEXH 2, 3 and 4. The land is registered in the name of PW1. There is no evidence of guilty of fraud, misrepresentation, illegality or corrupt scheme in acquisition of certificate of title (PEXH 5) on the part of the plaintiff. He is the absolute and indefeasible owner of the suit land. **Section 26(1) Land Registration Act, 2012 (LRA)**, reads:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;

a) on the grounds of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (emphasis added)

15. The plaintiff was a bona fide purchaser for value in the circumstances. He acquired same rights that accrued and/or inherited from the 1st registered proprietor; see **Omollo Nyasita Case (supra)**. Moreover, the plaintiff has the right to acquire and own the suit parcel of land as provided for under **Article 40 (1) of the Constitution of Kenya, 2010**

16. DW1 claims that he together with the other defendants have been staying on the suit parcel of land since 1977. His claim that his (DW1) parents were also born there and that he was not privy to the transaction shown on PEXH 1, stand to flop because the claim is unsupported by any evidence. I am conscious of **Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya)** regarding actions to recover land and **Section 28 of the LRA** on overriding interests including customary trusts. However, the Plaintiffs have failed to establish or at all, the existence of adverse possession and or any customary trust

in respect of the suit land. I find that PW1 is the absolute owner of the suit land with rights as envisaged under **Sections 24 and 25 of the LRA.**

17. The Plaintiff/PW1 seeks remedies, among them, a permanent injunction against the defendant. In **Njenga vs= Njenga (1991) KLR 404**, it was held that an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. In an application for an injunction, it is required of an applicant to make a full and frank disclosure of all relevant facts to the just determination of the application and to show that one has a right, legal or equitable, which requires protection by injunction as judicially recognized in the case of **Paul Gitonga Wanjau –vs—Gathuthi Tea Factory Co. Limited and 2-others (2016) eKLR**. This type of remedy is granted, among others, where the injury would not be adequately vindicated by damages; see **Halsbury’s laws of England 3rd Edition Vol.21 para 739 page 352**

18. In that regard, I consider the very character of this case. The Plaintiff has established that he is the proprietor of the suit land upon which the defendants have trespassed. He is entitled to a permanent restraint order against intruders including the defendants to enable him exercise quiet enjoyment of his property. The plaintiff has suffered injury for he has been deprived of opportunity to use the suit land. General damages are recoverable and awardable within the discretion of the court. In the circumstances. I would assess general damages for trespass at a nominal sum of Ksh. 100, 0000 in favour of the Plaintiff against the defendants.

19. In the upshot, the plaintiff has proved his case on a balance of probability against the defendants. The defence and the counter claim by the defendants fail and I dismiss them accordingly.

20. A fortiori, I enter judgment for the Plaintiff against the defendants jointly and severally for a declaration, an eviction order, a permanent injunction and general damages being orders (i) to (iv) respectively sought in the plaint. General damages awarded at Ksh, 100,000/= together with interest at court rates from the date of this judgment.

21. Order (ii) being an order of Eviction against the Defendants, their agents and or servants from the suit land, shall be executed in accordance with **Sections 152 A to 152 I of the Land Act, Revised Edition 2016 (2012)**.

22. By dint of the proviso to **Section 27 of the Civil Procedure Act (Cap 21 Laws of Kenya)** and the holding in **Rai-vs- Rai (2014) eKLR**, costs of this suit shall be borne by the Defendants.

Dated, signed and Delivered at Migori this 31st day of July, 2017

G M A ONGONDO

JUDGE

In the presence of;

Mr P Ochwangi counsel instructed by Oguttu Mboya for the Plaintiff

Tom Otieno, court assistant/clerk

G M A ONGONDO

JUDGE