



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 287 OF 2013

ARHENDT MUTSANZI MONDI.....
PLAINTIFF

VERSUS

LAWRENCE JUMBA.....
DEFENDANT

JUDGMENT

Arhendt Mutsanzi Mondi (*hereinafter referred to as the plaintiff*) has sued **Lawrence Jumba (*hereinafter referred to as the defendant*)** claiming that defendant claiming that he is the registered owner of the whole of the parcel of land No. Nandi/Kapgangani/Kaimosi/326 measuring 1.28 Ha or thereabouts by way of transfer from his father, Richard Busaka. The plaintiff's claim against the defendant is that the said defendant has trespassed and continues to trespass into his said Nandi/Kapgangani/Kaimosi/326 without his consent and authority. The plaintiff further avers that the defendant without any cause or reason and on several threatened, harassed and assaulted verbally and plaintiff solely on the reason that he is now the registered owner of the whole of parcel Nandi/Kapgangani/Kaimosi/326 and has in fact cut down several trees for sale from his land thereby occasioning the plaintiff loss and damage.

The plaintiff's prayer is for an order of eviction removing the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instructions from parcel Nandi/Kapgangani/Kaimosi/326, failing which the defendant be removed and forcefully evicted from the suit property by an order in this court. The plaintiff further prays for an order of permanent injunction restraining the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instructions from moving into parcel Nandi/Kapgangani/Kaimosi/326 and doing anything or act detrimental to the plaintiff's rights and interests.

The defendant filed a defence and counterclaim admitting that the title to the land parcel number Nandi/Kapgangari/Kaimosi/326 is registered in the name of the plaintiff but denied that the plaintiff acquired the land by way of transfer from the alleged father by the name of Richard Busaka. He claimed that the parcel was fraudulently transferred to the plaintiff. The defendant denied having trespassed in the land and having cut down trees for sale. He claims that 0.5 acres belong to the defendant and his family having lived on it, developed it and also planted trees which are now mature. The defendant claims that he has been in occupation of the land with his family for a period of 35 years and that the plaintiff has not raised any issue with him till the filing of the suit. He prays that the suit be dismissed with costs.

In the counterclaim, the defendant states that he is the lawful owner of the 0.5 acres of land parcel Nandi/Kapgangani/Kaimosi/326, having inherited the same from his mother, Mama Rasoha Kaveza (deceased) who acquired the same from Ephraim Azenga Mudidi. The defendant with his mother have

been in the said parcel for the last 35 years and know it as their only home and have had vacant and quiet possession of the suit property and have planted several trees on it. That upon the demise of his mother, Mama Rasoha Kaveza, the plaintiff has started unlawfully laying claim of their portion of the land parcel in question without any right. The defendant therefore claims adverse possession of 0.5 acres being part of the entire piece of land. That the possession was open, peaceful and without use of force. According to the defendant, the plaintiff has fraudulently transferred the whole of the said land parcel ignoring the rights of the defendant in part of the parcel of the defendant in a part of the parcel which he legally deserves. Particulars of fraud being the defendant secretly transferred the whole of the land parcel without the knowledge of the defendant and his family without due regard to their interest.

Reasons wherefore, the plaintiff claims for nullification of the current title in land parcel Nandi/Kap Kangani/Kaimosi/326. Survey, sub-division and transfer of land parcel Nandi/Kap Kangani/Kaimosi/326 to live out 0.5 acres in the parcel to the defendant. Permanent injunction restraining the plaintiff whether by himself or through his agents, servants or assign or nominees or any person acting on his instruction from interfering with the defendant's rights in Nandi/Kap Kangani/Kaimosi/326.

In a reply to defence and defence to counterclaim, the plaintiff states that it is not true that the defendant has been in possession of the land for 35 years and further denies being a brother of the defendant. The plaintiff further denies having acquired the land from Rasoha Kaveza and avers that the land was acquired from Ephraim Mudidi. Further, the plaintiff avers that the counterclaim is defective as it is not brought by way of originating summons and that no particulars of fraud is pleaded hence should be struck out. The occupation of the 0.5 acres has been by force and with threats of violence. There is no verifying affidavit to the counterclaim hence the same should be struck out.

PW1, Solomon Kikuyu Kigwegwe testified that the plaintiff is his grandchild. He resides about 50 kilometres in Sabatia, Vihiga County and the plaintiff dwells in the land which is in Chepsoit, Nandi County. According to PW1, the land in dispute belongs to the plaintiff and not the defendant as he was registered as the proprietor on 6.9.2012 having been given as a gift by his father. The consent of the Land Control Board was obtained prior to the transfer. On cross examination by the defendant, he states that he did not see the title deed in respect of the land. He does not know the previous owner of the land. On re-examination, he states that he has known the plaintiff since 2010.

The plaintiff who testified as PW2 stated that he lives in Tindinyo sub-location, Kapsabet Division, Nandi County. He has sued the defendant because he stays in his parcel of land without his permission being Nandi/Kap Kangani/Kaimosi/326. He has the title deed in the name of Arhendt Mutsanzi issued on 12.9.2012 which indicates that the land measures 1.29 ha. The land was transferred to the plaintiff by his father Ephraim Azenga Mudidi after the consent of the Land Control Board. He produced the application for consent of the Land Control Board, the payment receipts, the consent and the transfer and the title deed. His father was the first to be registered as proprietor. The second to be registered is the plaintiff. He cautioned the title to protect the property from being given out to a 3rd party.

Later, they went to the Lands office to register the land in his name and therefore, he removed the caution. He paid stamp duty of Kshs.10,000 on 12.9.2012. He paid the registration fee and has lived on the parcel of land since 1999. Mr. Lawrence Jumba has been staying in the parcel of land illegally and therefore, he prays that he be evicted. He occupies a portion of land whilst Mr. Jumba is occupying the other portion. The plaintiff's mother was buried on the parcel of land whereas the defendant is not his relative. The plaintiff has never constructed on the land and has another parcel of land one kilometer from the suit land. There is a house constructed by Rasoha Kavetza to defendant's mother.

On cross examination by the defendant, the plaintiff states that when he was carrying on the transaction, he knew that the defendant was in occupation of the land. The defendant's mother was placed on the land as a worker but was a labourer elsewhere. He does not know when the defendant's mother entered the land. He claims that the defendant's mother entered through a sister. The defendant's mother was told to vacate on 23.7.2001 but refused to do so.

The defendant took advantage of the fact that the plaintiff's father and mother had a marital problem. Initially, the conflict was between the plaintiff's mother and the defendant's mother. He does not know the relationship between Rasoha and his father. Very importantly, he states that when the land was bought by his father, initially, his said father and grandfather were tilling it, however, his auntie Esther asked for permission to till the land. The defendant's mother was a caretaker.

On re-examination, he states that the defendant entered the land in 2006 when his mother died. The plaintiff was registered on 12.9.2012 and there was no case in court. The defendant's mother was buried on a separate parcel of land where the defendant lives to-date.

PW3, Ephraim Azenga Mudidi, a farmer, states that he resides at Vihiga County. He is aged approximately 77 years. In the year 1978, he purchased land parcel No. L. R. No. Nandi/Kapkangani/Kaimosi/326 measuring 1.28 Ha from one Catholic Sister/Nun by the name Johan Mary for a total sum of Kshs.21,000/=, which he paid in full and planted a live fence and sisal trees around the boundary and took possession immediately.

He later allowed some of his cousins, Esther and her sister Rasoha Kaveza to till and harvest seasonal crops on the same. That after a long wait, he was registered as the proprietor of the said parcel of land and issued with a title deed for the same on 27.7.2007. He transferred the land to plaintiff Arhendt Mutsanzi Mond, his first-born son as a gift after applying and getting consent. The land was ultimately transferred to his son and he became the registered owner on 12.9.2012 and issued with the title deed and has been occupying the same to-date. The defendant's mother was his cousin who passed on in 2008 and that prior to her death, he had allowed her to occupy the land. She was not buried on the land but was buried elsewhere. He is opinioned that the defendant ought to be evicted.

On cross examination by the defendant, he states that he bought the land in 1981 for Kshs.21,000/= and gave it out as nobody was claiming it. He allowed Esther to use the land but Esther brought in the defendant's mother who brought in the defendant. He states that he allowed the defendant's mother to stay in the land as a caretaker.

The plaintiff closed his case on the aforementioned note. The defendant called DW1, **Mr. Aggrey Matayo Masavakwa** who states that he does not know the plaintiff but knows the defendant and further states that on 11.7.2004, Rasoha Kaveza complained that Josephine Mideva was chasing her from the land and yet Ephraim Azenga Michali had given her the said land. The village elder known as Mr. Shikuye wrote to Mr. Azenga requesting information as the nature of the dispute. Mr. Azenga wrote a letter indicating that Rasoha Khaveza was his caretaker. He was asked to pay Rasoha Khaveza her dues as his caretaker, however, he was unable to and decided to code 0.5 acre to the said Rasoha Kaveza. They signed documents before a crowd of 40 people.

On cross examination by Mr. Komen, learned counsel for the plaintiff, he states that he used to be a village elder. He lives at Kuyua at Chepmook village, Vihiga County. He refers to the land in dispute as parcel No. 326. He does not know the acreage. He does not know who occupies the land. He has never stopped on the land since 18.8.2001. He has never seen the title deed.

DW2 was Mr. Wilson Kiprono Busienei who states that on 11.7.2001, there was a complaint from Rasoha Khaveza which attracted all villagers that a lady known as Josephine Mideva had cheated Rasoha Khaveza to construct a house on the suit land and now wanted the latter to vacate the land. This formed elders to write to Ephraim Azenga inquiring on the status of land. Ephraim Azenga wrote stating that Rasoha Kaveza was a caretaker. On the 19.7.2001, the said Ephraim went to the Assistant chief office to prove that he was the owner of the land and that Rasoha was the caretaker and therefore, it was resolved that Azenga pays Rasoha her salary for 20 years. He was unable to do so and therefore, it was agreed that he cedes 0.5 acre in lieu of salary. However, it was not done as agreed. On cross examination, he states that the plaintiff's father bought the land from one Matilda. He does not know who lives on the land. The agreement between Mr. Ephraim Azenga and Rasoha Kavetza was not subjected to the Land Control Board.

The defendant was the last to testify as DW3. He states that his mother was the caretaker of Ephraim Azenga Mudidi and Josephine Azenga's shamba from 1980 until her death. IN the year 2001, Mrs. Josphine Azenga went back home from Nairobi and constructed a house and demanded that his mother vacates the land. His mother reported the matter to the village elder, Mr. John Shikuyu who wrote to Mr. Azenga to explain. Mr. Azenga promised to visit home and solve the dispute and true to his word visited home on 13.7.2001. Mr. Azenga confessed that he had no money to pay the defendant's mother as his caretaker and therefore, substituted the pay with 0.5 acre of the land in dispute. However, he failed to comply and therefore, on 18.8.2001, the chief ordered the neighbours to give the defendant's mother land. The defendant has developed the land since the year 2001. He has tried to request Ibrahim to transfer the title to him in vain. He was shocked to learn that the land was transferred into the plaintiff's name. He prays that the current title be nullified. He has stayed in the land for 36 years. On cross examination, he states that he is 62 years old. His mother died in 2010. He has no grant in respect of the estate. His name is not in the Minutes referred to. His son stays on the disputed parcel of land.

The plaintiff submits that he has a reasonable cause of action as when PW3 transferred the suit property to the plaintiff he had a valid title. The nature of transfer was a gift and therefore, the plaintiff has a good title. The plaintiff title has no encumbrances, no restriction and no inhibition.

On the claim of adverse possession, the plaintiff argues that the same cannot be sustained as the plaintiff was not in possession of the property but his mother was until the year 2010. Moreover, the defendant does not occupy the property. In conclusion, the plaintiff submits that being the absolute proprietor of the parcel of land known as Kapkangani/Kaimosi/326 measuring 1.26 Ha and being in exclusive possession of much of the said land has proved his case on a balance of probabilities as against the defendant. The counterclaim has not been proved and should be dismissed with costs.

The defendant on his part submits that his claim cannot be defeated for want of letters of administration as the suit was brought against him and not the estate of his deceased mother. Moreover, the defendant argues that there is a valid agreement between his mother and Ephraim Azenga Mudidi.

On the issue of adverse possession, the defendant argues that he is not seeking adverse possession but what is rightfully his mother's. He has all along been in the parcel of land with his mother until her demise in 2010 and therefore, he cannot be a trespasser. In conclusion, the defendant argues that the defence raises triable issues.

I have considered the pleadings on record, evidence on record and submissions by both parties and do find that the plaintiff's claim is for an order of eviction removing the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instruction from the parcel of land known as Nandi/Kapkangani/Kaimosi/346. He also prays for a permanent injunction restraining the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instruction from moving into the said parcel of land and doing anything or act detrimental to the plaintiff's rights and interests.

The plaintiff's interest is based on the fact that he is the registered absolute owner of the said parcel of land. As the absolute owner, he has all rights and privileges to the parcel of land. The plaintiff referred to the law, thus, the Land Registration Act.

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: - "The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

The registration of the plaintiffs as proprietors of the suit land, gives the plaintiffs absolute proprietorship for those parcels. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) "The right of a Proprietor, whether acquired on first registration or subsequently for valuable

consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The plaintiff is the registered owner of the suit land and therefore has an indefeasible right over the property. The plaintiff's rights as proprietor of the land is clearly protected in law and the defendant has no reason to trespass thereon and the law allows the Defendants to challenge the plaintiffs' ownership on grounds of illegality, unprocedural acquisition or corrupt scheme. The defendant on his part argues that he is the lawful owner of the land due to a valid agreement. On this issue, I do find that the plaintiff has a valid cause of action that can be tried within the law. The plaintiff has proved that he is the registered owner of the parcel of land. He has produced the title deed as evidence that he is the legal owner of the land. The title deed proves that the plaintiff should enjoy all the rights and privileges appointment to the land.

The defendant on the other hand has produced documents that do not assist him such as Minutes of a meeting before the District Officer in which the matter was referred to court and an agreement which does not meet the provisions of section 3 of the Law of Contract Act that provides for the agreement in respect to sale of land. Moreover, the defendant's mother did not obtain the consent of the Land Control Board within six months of the agreement and therefore, the same become voidable under Section 6, Cap. 303, Laws of Kenya.

On the issue of adverse possession, I do find that the defendant himself submits contrary to his pleadings that he is not claiming adverse possession but claims the land because it lawfully belonged to his mother. Even if the defendant was to claim adverse possession, the same would not succeed as the land was registered in the names of Ephraim Azenga in 2007 and therefore, time began running in 2007 whilst the counterclaim was filed on 06.10.2014 before the expiry of 12 years. Most importantly the plaintiff was brought to the suit land by his mother who was a caretaker on the farm and therefore was occupying the land with the permission of the owner.

The argument by the defendant that he is claiming what lawfully belonged to his mother justifies the argument by the plaintiff that the defendant cannot succeed in the counterclaim as he has no locus standi as he has not demonstrated that he is the legal representative of the estate of his deceased mother.

In conclusion, this court finds that the plaintiff has demonstrated on a balance of probabilities that he is the registered as the absolute proprietor of the land comprised in title number Nandi/Kapkangani/Kaimosi/326, measuring approximately 1.28 Ha in registry map sheet No. 5 subject to the entries in the register relating to the land and to such overriding interests sent out in the section 30 of the Registered Land Act (repealed).

Being the registered owner, the plaintiff is entitled to protection under the law. Ultimately, the plaintiff's claim is allowed and an order of eviction removing the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instructions from parcel Nandi/Kapkangani/Kaimosi/326, after the expiry of 60 days from the date of judgment. Furthermore, the court grants a permanent injunction restraining the defendant whether by himself or through his agents, servants, assigns or nominees or any person acting on his instructions from moving into parcel Nandi/Kapkangani/Kaimosi/326 and doing anything or act detrimental to the plaintiff's rights and interests. Costs and interests of the suit to the plaintiff. The counterclaim is dismissed with costs and interest. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY, 2017.

A. OMBWAYO

JUDGE