



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 1135 OF 2016**

**(FORMERLY HCC NO. 167 OF 2010)**

**KIRAITA MANGA ..... PLAINTIFF**

**VERSUS**

**JOSEPH OMBAIRE ISABOKE ..... DEFENDANT**

**J U D G M E N T**

1. By a plaint dated 15<sup>th</sup> June 2010 the plaintiff filed in court on 17<sup>th</sup> June 2010, the plaintiff claims to be the registered proprietor of land parcel **Central Kitutu/Bogetaorio/2437** measuring 8.794 hectares (hereinafter referred to as the **“suit property”**). The plaintiff claims that on 9<sup>th</sup> June 2010 the defendant in the company of his agents, servants and/or employees trespassed into the plaintiff’s property and deposited posts and barbed wire and dug out holes with the intention of fencing off approximately one quarter acre portion of the plaintiff’s land. In so doing, the plaintiff further claims the defendant destroyed a wall of a house in the said portion of land thereby causing damage to it.

2. In the premises, the plaintiff prays for judgment against the defendant for:-

**1. An order of permanent and mandatory injunction respectively directing the eviction of the defendant, his agents or servants from land parcel No. Central Kitutu/Bogetaorio/2437 and thereafter restraining them from trespassing into and/or in any way interfering with the plaintiff’s use occupation and ownership of the said parcel of land and general damages.**

**2. Costs of the suit.**

**3. Interest at court rates.**

**4. Any other further relief that the Honourable court will deem fit and just to grant.**

3. The defendant filed a defence and counterclaim on 10<sup>th</sup> August 2010. By the defence, the defendant denied that he at all trespassed onto the plaintiff’s parcel of land as alleged by the plaintiff in the plaint. The defendant vide the counterclaim named the plaintiff as the 1<sup>st</sup> defendant and one Selly Ngeny Ombaire as the 2<sup>nd</sup> defendant. By the counterclaim the defendant averred the defendants to the counterclaim jointly and severally unlawfully and fraudulently misrepresented to the defendant (plaintiff) that they had a portion of land measuring 75feet by 118 feet which the 2<sup>nd</sup> defendant offered to sell to the defendant/counterclamer with the consent and permission of the 1<sup>st</sup> defendant/plaintiff. The defendant/counterclamer states that relying on the misrepresentation by the defendants he entered into an

agreement with the 2<sup>nd</sup> defendant for the sale of a portion of land measuring 75feet by 118feet out of land parcel **Central Kitutu/Bogetaorio/1617** then registered in the name of the plaintiff/1<sup>st</sup> defendant. The defendant/counterclaimant states that he paid to the 2<sup>nd</sup> defendant kshs.450,000/= being part of the purchase price whereupon the 2<sup>nd</sup> defendant showed him the portion of the land sold to him.

4. The defendant/counterclaimant states that the defendants subsequently denied him access to the portion he had purchased alleging land parcel **Central Kitutu/Bogetaorio/1617** did not exist at the time of the sale agreement as the same had been closed on 24<sup>th</sup> May 2000 upon subdivision. The defendant/counterclaimant states he discovered on 28<sup>th</sup> July 2010 that land parcel known as **Central Kitutu/Bogetaorio /1617** did not exist as at time of entering the agreement of sale on 23<sup>rd</sup> February 2010. The defendant/counterclaimant prays for judgment in the counterclaim for:-

**(a) Specific performance of the agreement dated 23<sup>rd</sup> February 2010.**

**(b) Or in the alternative to (a) above, a refund of the purchase price paid together with interest thereon at court rates from 23<sup>rd</sup> February 2010 till payment in full.**

**(c) General damages for fraud.**

**(d) Costs of the suit**

**(e) Interest on (b), (c) and (d) hereinabove at court rates.**

**(f) Further or other relief deemed just.**

5. The plaintiff/1<sup>st</sup> defendant to the counterclaim filed a defence to the counterclaim on 23<sup>rd</sup> August 2010. He denied the particulars of fraud attributed to him and specifically denied selling any portion of land parcel **Central Kitutu/ Bogetaorio/1617** to the defendant/counterclaimant as alleged. He denied receipt of any money and/or that he showed the defendant/ counterclaimant any portion of land on the ground pursuant to any sale. The plaintiff/1<sup>st</sup> defendant to the counterclaim contends that the counterclaim is incompetent and bad in law and does not disclose any cause of action against him and thus the same ought to be struck out.

6. The 2<sup>nd</sup> defendant to the counterclaim did not file any pleadings upon being served with the counterclaim.

7. The suit was part heard before Hon. Justice Okong'o before whom the plaintiff testified as the sole witness in support of the plaintiff's suit and in defence of the defendant's counterclaim as against him as the 1<sup>st</sup> defendant in the counterclaim. The defendant/counterclaimant also testified as DW1 before Okongo, J. while one Elijah Kipngeno Ombaire testified as DW2 before me after directions were taken that the suit proceeds for hearing before me from where Okongo, J. had left.

8. The plaintiff in his evidence reiterated the contents contained in his plaint. He stated he was the registered owner of **LR No. Central Kitutu/Bogetaorio/2437** and produced a copy of the title deed dated 12<sup>th</sup> March 2009 and a certificate of official search dated 10<sup>th</sup> June 2010 as "**PEx.1**" and "**PEx.2**" respectively which showed he was indeed the registered owner of the suit property. The plaintiff stated that the defendant on 9<sup>th</sup> June 2010 unlawfully entered into the suit property and started fencing off a portion thereof without the plaintiff's permission. The plaintiff further stated that the defendant and his workers damaged part of his house and that he stopped them from continuing with the exercise they were undertaking. He denied having sold the defendant any portion of his land and further denied that he knew the 2<sup>nd</sup> defendant to the counterclaim and/or that he had authorized her (2<sup>nd</sup> defendant to the counterclaim) to sell any portion of his land. The plaintiff denied that he received any money from the defendant and/or that he had defrauded the defendant as alleged in the counterclaim.

9. In cross examination, the plaintiff explained that his father was the original owner of **LR No. Central Kitutu/Bogetaorio/446** which was subsequently subdivided by his mother who remained with parcel number **Central Kitutu/Bogetaorio/1617** which was further subdivided to create Plot Nos. **2055 to 2063**. The plaintiff stated that the suit property is a resultant subdivision of Plot No. **2055**. The plaintiff further stated that the 2<sup>nd</sup> defendant to the counterclaim had been brought to his place by his son Ombaire who had died over 10 years earlier. He explained that the 2<sup>nd</sup> defendant had left together with the children she had come with. He maintained that he had not authorized the 2<sup>nd</sup> defendant to sell any portion of his land and denied that he had signed the agreement dated 23<sup>rd</sup> February 2010 shown to him by the advocate for the defendant counterclaim. He denied receiving any money from the defendant as purchase price.

10. The defendant/counterclaimant who testified as DW1 denied that he had trespassed onto the plaintiff's parcel of land **LR No. Central Kitutu/ Bogetaorio/2437**. He stated that the plaintiff's son's wife, Sethy Ngeny Ombaire (2<sup>nd</sup> defendant in the counterclaim) sold to him a portion of **LR No. Central Kitutu/Bogetaorio/1617** measuring 75feet by 118feet for the consideration of kshs. 470,000/- and that he paid a sum of kshs.450,000/= leaving a balance of kshs.20,000/=. The defendant stated that he entered into an agreement of sale dated 23<sup>rd</sup> February 2010 ("**DEx.1**") and the 2<sup>nd</sup> defendant in the counterclaim was the seller and that the plaintiff signed the agreement as a witness. The defendant stated that the 2<sup>nd</sup> defendant in the counterclaim sold the land with the permission and authority of the plaintiff.

11. The defendant further testified that when he went to fence the land after about 3 months the plaintiff prevented him and chased him away stating that he had not sold any land to him. The defendant stated that the agreement he entered related to land parcel number **1617** which was registered in the plaintiff's mother as per the abstract of title (green card) produced as "**DEx.2**". The defendant stated that the plaintiff had informed him that it was part of his land that was being sold to him. He further stated that the son of the 2<sup>nd</sup> defendant to the counterclaim, one Elijah Ombaire also signed the agreement as a witness.

12. The defendant/counterclaimant stated that the defendants to the counterclaim may have defrauded him as they entered into the agreement for sale of a portion of parcel number **1617** when it did not exist the same having been closed by then following subdivision. The defendant affirmed that he never carried out an official search at the lands office to verify the ownership as the plaintiff had assured him the property was in his name. The defendant stated that as per the abstract of title ("**DEx.2**") the register for **1617** was closed on 24<sup>th</sup> May 2000 following subdivision into parcel Nos. **2055 to 2063**.

13. The defendant under cross examination by Mr. Abobo advocate for the plaintiff confirmed that the agreement of sale did not indicate the plaintiff was the owner of Plot No. **1617**. The defendant stated he never knew parcel No. **1617** was nonexistent. The defendant nevertheless stated he wanted the land transferred to him and if the land was unavailable to have the money he paid for the purchase refunded to him by the defendants in the counterclaim.

14. DW2, Elijah Kipngeno Ombaire in his brief testimony stated that he knew that the defendant bought a shamba from the plaintiff who was his grandfather. He however stated he was not present when the defendant and the plaintiff transacted. In cross examination, the witness insisted it was the plaintiff who sold the land to the defendant and not his mother. He denied being a witness to the agreement of sale and stated he did not know the particulars of the land the subject of the sale.

15. The parties filed their written closing submissions following the closure of the hearing. The plaintiff's submissions dated 28<sup>th</sup> June 2017 were filed on the same date while the defendant/counterclaimant's submissions dated 20<sup>th</sup> July, 2017 were filed on 21<sup>st</sup> July 2017. Having reviewed and considered the pleadings, the evidence and written submissions the issues for determination are as follows:-

**(i) Whether the plaintiff is the registered proprietor of land parcel Central**

**Kitutu/Bogetaorio/2437 and if so whether the defendant trespassed thereon?**

**(ii) If the defendant did trespass onto the plaintiff's said property, whether any general damages are payable to the plaintiff?**

**(iii) Whether the defendant/counterclaimant purchased any portion of land parcel Central Kitutu/Bogetaorio/1617 from the plaintiff as alleged.**

**(iv) Whether the agreement of sale dated 23<sup>rd</sup> February 2010 is capable of being enforced by way of specific performance?**

**(v) Whether any fraud is established against the plaintiff and the 2<sup>nd</sup> defendant to the counterclaim and if so whether damages are payable to the defendant?**

**(vi) By whom are the costs payable?**

16. The evidence tendered by the plaintiff that he is the registered proprietor of land parcel **Central Kitutu/Bogetaorio/2437** was not contravened. The plaintiff produced in evidence a copy of the title deed dated 12<sup>th</sup> February 2009 which is in his name ("**PEX.1**") and a certificate of official search dated 10<sup>th</sup> June 2010 which confirm that the suit property is registered in his name and there are no encumbrances registered against the title. The defendant's alleged agreement of sale dated 23<sup>rd</sup> February 2010 did not relate to this property. On the basis of the certificate of official search, I have no hesitation in finding and holding that the plaintiff is the registered proprietor of the suit property in terms of Section 26(2) of the **Land Registration Act, 2012** which provides thus:-

**26(2) A certified copy of any registered instrument signed by the land registrar and sealed with the seal of the Registrar, shall be received in the same manner as the original.**

17. The certificate of official search dated 10<sup>th</sup> June 2010 tendered in evidence is duly signed and sealed by the Land Registrar. It shows the plaintiff was registered as proprietor of the suit property on 10<sup>th</sup> February 2009 and issued with a title deed on 12<sup>th</sup> February 2009.

18. As to whether the defendant counterclaimant trespassed onto the plaintiff's land parcel **2437** it is the plaintiff's evidence that the defendant in the company of other people entered his land on 9<sup>th</sup> June 2010 with the intention of fencing a portion thereof and in the process damaged a portion of his house. The defendant counterclaimant in answer did not deny he had gone to the site but stated he had gone to fence the portion that had been sold to him by the 2<sup>nd</sup> defendant in the counterclaim and which sale he claimed the plaintiff had given permission for. The defendant claimed the plaintiff was a witness to the alleged sale and so was the 2<sup>nd</sup> defendant's son who testified as DW2. The plaintiff denied having witnessed the agreement as alleged and incredibly also, DW2 equally denied having been present when the transaction took place.

19. In the face of the denial of the agreement dated 23<sup>rd</sup> February 2010 by the plaintiff and DW2 the court has no basis to uphold the agreement. The plaintiff stated he never signed the agreement and DW2 as well stated he was not a witness to the agreement. A scrutiny of the agreement shows that the plaintiff and DW2 allegedly thumb printed the agreement as witnesses yet the plaintiff executed the verifying affidavit accompanying the plaint by signing while DW2 equally signed his filed witness statement dated 3<sup>rd</sup> March 2011. In the premises, one is driven to ask why they did not sign the agreement yet they had ability to put a written signature? The agreement is shown to have been attested by one, Charles Mogire Ayienda advocate who the plaintiff denied appearing before. The defendant counterclaimant did not see it fit to call the advocate as a witness to testify and thus the matter rested with the defendant/counterclaimant claiming there was a sale agreement but which was denied by the plaintiff. He who alleges has the burden of proving the existence of the fact. I am not satisfied that the defendant/counterclaimant proved the existence and validity of the agreement dated 23<sup>rd</sup> February 2010.

20. Even if I had held the agreement dated 23<sup>rd</sup> February 2010 did exist and was validly entered into, the same related to a nonexistent parcel of land namely **LR No. Central Kitutu/Bogetaorio/1617** and was therefore incapable of being performed. The abstract of title for land parcel **No. Central Kitutu/Bogetaorio/1617** produced by the defendant as “**DEx.2**” shows the parcel of land was a subdivision of land parcel **446** and was registered in the name of Samuel Mangaa Onkoba on 15<sup>th</sup> March 1993 and later through transmission to Kemunto Mangaa on 6<sup>th</sup> May 1999 and was closed on subdivision on 24<sup>th</sup> May 2000 to create land parcel **2055-2063**. Consequently, land parcel **1617** ceased to exist on 24<sup>th</sup> May 2000 and could not therefore be available for a portion thereof to be sold to the defendant on 23<sup>rd</sup> February 2010. The defendant stated he did not know land parcel **1617** did not exist and stated he relied on the plaintiff who said that was his land and on that account he averred the plaintiff misrepresented to him that he was the owner and thereby defrauded him. The plaintiff denied he at any time offered or agreed to sell any land to the defendant and hence denied the allegations of misrepresentation and/or fraud.

21. It is the purchaser’s duty and obligation to verify the particulars of the land he wishes to buy. The defendant stated that he never did any official search before entering into the agreement of sale. The agreement he entered into related to a nonexistent parcel of land which definitely renders the same null and void as it is incapable of enforcement. Transactions relating to a disposition of any interest in land have to satisfy the set criteria under the provisions of Section 3 of the **Law of Contract Act**, Cap 23 of the Laws of Kenya which requires such agreements to be in writing and appropriately executed and attested and if the transaction relates to a controlled transaction under the provisions of Section 6 of the **Land Control Act**, Cap 302 of the Laws of Kenya, consent for the transaction must be sought and obtained from the relevant Land Control Board. The alleged agreement between the defendant as purchaser and the 2<sup>nd</sup> defendant in the counterclaim as vendor was doomed to fail from inception as the 2<sup>nd</sup> defendant in the counterclaim was not the owner of the property the subject of the sale and she had no authority to execute the agreement on behalf of the alleged owner.

22. I have held that the defendant did not prove the existence of any agreement for sale between him and the plaintiff. Consequently the defendant would have had no right to enter onto the plaintiff’s land parcel **Central Kitutu/Bogetaorio/2437** and purport to fence a portion thereof. If it is true the defendant intended to purchase a portion of land from the plaintiff he failed to undertake the necessary due diligence before committing himself to the sale. He only has himself to blame for any loss he may have suffered. The 2<sup>nd</sup> defendant to the counterclaim who purportedly was selling the land to the defendant was not the owner of the land. How was she to complete the transaction?

23. On the basis of the evidence adduced, there is no evidence to prove that the plaintiff acted fraudulently. I have held that there is no evidence he was party to the alleged agreement dated 23<sup>rd</sup> February 2010 which he denied signing. Discounting the agreement there is absolutely no evidence to connect the plaintiff with the alleged sale transaction. DW2 who the defendant stated was a witness to the said agreement denied signing the agreement as a witness and stated further that he was not present when the defendant and the plaintiff transacted. I therefore hold no fraud has been established as against the plaintiff to call for an award of damages against the plaintiff for fraud as I am invited to do by the defendant.

24. My foregoing discussion and analysis of the evidence disposes of the issues framed for determination. On issue number (i) the answer is in the affirmative that the plaintiff is the registered owner of the suit property and that there was an instance of trespass by the defendant/counterclaimant when he entered and attempted to fence off a portion of the same.

25. On the issue number (ii), the evidence is clear that after the plaintiff intervened and stopped the defendant from fencing, he left and never went back. In those circumstances, I see no basis upon which damages for trespass can be assessed and I will decline to award any. I am cognizant that in cases of trespass once trespass is proved there is no requirement to prove loss before damages can be awarded. Nonetheless, I am not persuaded that I should award any damages for trespass as the defendant never resisted when confronted by the plaintiff.

26. Issues (iii), (iv) and (v) are answered in the negative. There was no property known as **Central Kitutu/Bogetaorio/1617** at the time the defendant counterclaimant purported to buy a portion thereof. The agreement of sale dated 23<sup>rd</sup> February 2010 is incapable of being specifically performed and finally no fraud has been established as against the plaintiff.

27. Accordingly, upon evaluation and analysis of the evidence, I am satisfied that the plaintiff has proved his case on a balance of probabilities. I enter judgment in his favour on the terms that a permanent injunction is hereby issued against the defendant restraining him, his servants and/or agents from entering into or interfering with the plaintiff's occupation, use and enjoyment of land parcel number **Central Kitutu/Bogetaorio/2437**.

28. The defendant/counterclaimant has failed to prove his counterclaim on a balance of probabilities. The same is hereby ordered dismissed. The costs of the suit and counterclaim are awarded to the plaintiff.

**Judgment dated, signed and delivered at Kisii this 13<sup>th</sup> day of October, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Okioma for Abobo for the plaintiff

N/A for the defendant

Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**