



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 61 OF 2014

DENNIS MATIESI OURU.....PLAINTIFF

VERSUS

MIRRIAM NYABOKE.....DEFENDANT

JUDGMENT

1. In a plaint dated 14th February, 2014, the Plaintiff namely DENNIS MATIESI OURU has sued the Defendant namely MIRRIAM NYABOKE for:-

a. A Permanent injunction to restrain the Defendant whether by herself, her servants or agents or otherwise howsoever from continuing in occupation of the said land NO. CENTRAL KITUTU/MWAMOSIOMA/1194 and to deliver peaceful and vacant possession of the said land to the Plaintiff.

b. General damages

c. Costs

d. Interest

2. The Plaintiff is represented by Ombachi advocate. The Defendant is represented by B N Ogari advocate.

3. Briefly the claim by the Plaintiff (hereinafter referred to as PW1) is that he is the registered proprietor of land parcel number Central Kitutu/Mwamosioma/1194 (hereinafter referred to as the suit land) and that he was given the land by his late grandmother Clemencia Moraa Ondieki. On or about 18th January, 2012, the Defendant (hereinafter referred to as DW1) wrongfully and unlawfully entered the suit land and took wrongful possession of it. DW1 continues to be a trespasser on the suit land. In consequent thereof, the Plaintiff has been deprived of the use and enjoyment of the suit land hence he has suffered loss and damages.

4. The Defendant/DW1 filed a statement of defence with a counter claim dated 20th May, 2014. In her defence, she denied the claim by PW1. She claimed that she would beseech the court to make a declaration that she is the rightful beneficiary of the suit land and that registration of the land in the name of PW1 be cancelled and the same be registered in her names by virtue of adverse possession.

5. In the counterclaim, DW1 is seeking against PW1, orders as hereunder;

a. A declaration that the transfer and registered of land parcel known as CENTRAL KITUTU/MWAMOSIOMA/11/94 is fraudulent and illegal.

b. An order of acquiring title by adverse possession and cancellation of the register and title thereof be registered in the names of the defendant and in default of signing, the Executive officer of the court to sign transfer document.

c. Costs of the counter-claim.

d. Such other relief as the court may deem fit to grant.

6. DW1 stated that her husband the late Andrew Osano Getugi purchased the suit land from one Job Nyaega (1st purchaser) sometime in the year 1992 after the 1st purchaser failed to clear Kshs 18,000/= being the outstanding balance of the purchase price. She further counter-claimed that she has been in occupation of the suit land for the last 23 years and she is not aware of any succession cause done since the original owner died in the year 1992. DW1 also counter-claimed that PW1 fraudulently registered the suit land in his (PW1) names. She has

pleaded in the counter-claim, the following particulars of fraud;

- a. **Purporting to acquire title by way of transfer from the deceased who has passed on in early 1990s.**
- b. **Presenting himself as the beneficiary of land parcel known as CENTRAL KITUTTU/MWAMOSIOMA/1194 and getting himself registered.**
- c. **Acquiring title to the suit property fraudulently.**

7. On 18th May, 2017, both parties represented by respective counsel, did enter into a consent order in the terms that;

- a. Grant of letters of Administration intestate issued on 13th May, 1994 in Kisii High court Succession cause No. 58 of 1993 be produced as PExhibit 5.
- b. A record extract of green card/register in respect of the suit land with entries 1 to 7 be produced as DExhibit 4 .

8. I have carefully considered the case for PW1 and defence together with the counter-claim of DW1 in brief. In ***Great Lakes Transport CO (UR) Ltd-vs-Kenya Revenue Authority (2009) KLR 720 at 732***, it was held that it is trite law that issues for determination in a suit generally flow from pleadings and the trial court may only pronounce judgment on issues arising from the pleadings or such issues as the parties have framed for the court's determination. On one hand, the Plaintiff's counsel framed five issues for determination in his submissions dated 15th August, 2017. On the other hand , the Defendant's counsel framed nine issues for determination by this court in his submissions dated 11th September, 2017. Most of those issues are common ground to the parties in this matter. Therefore, the issues for determination by the court are;

- a. Is PW1 the proprietor of the suit land?
- b. Was there unlawful entry and occupation (trespass) of the suit land since 2012 by DW1?
- c. Was the transfer and registration of the suit land by PW1 fraudulent and illegal?
- d. Has DW1 acquired adverse possession to the suit land?
- e. The issue of succession in respect of the estate of the registered proprietor to the suit land
- f. Is PW1 entitled to the reliefs sought in the plaint or is DW1 entitled to the reliefs in the counterclaim
- g. Who is to bear costs of the suit and of the counterclaim?

9. PW1 told the court that the suit land belongs to him having obtained it from his late grandmother Clemencia Moraa Ogari. He identified and produced in evidence, Title deed issued on 24th August, 2011 (PExhibit 1), a certificate of official search dated 3rd January, 2014 (PExhibit 2), a demand letter dated 3rd February, 2014 (PExhibit 3) and a certificate of official search dated 4th February, 2014 in respect of land belonging to DW1 which borders the suit land (PExhibit 4).

10. It was also the testimony of PW1 that he is the proprietor of the suit land.

He stated that on 18th January, 2012, DW1 wrongfully and unlawfully entered the suit land and wrongfully took possession of it which she occupied as at the time of hearing the matter. PW1 further stated, inter alia;

“...I did obtain it's title deed by lawful means. I hold the land in trust for others and myself....”

11. In cross examination, PW1 told the court that he obtained the title deed to the suit land from his late grand-mother who gave him the suit land. He maintained that he holds it in trust for others. He stated in part that;

“...Entry No. 3 shows that title deed issued to me in 1991. I collected title deed on 24/8/2011. I hold the suit land in trust of my mother and siblings namely Douglas Ouru and Dickson Ouru. My brothers are young to me...”

12. The evidence of DW1 was that her late husband Andrew Osano Getugi bought land from 1st purchaser in 1992. This happened as the 1st purchaser failed to pay the balance of the purchase price. She (DW1), testified in examination in chief, among others;

“..My husband paid Ksh. 10,000/= to Job Nyaega and the balance Ksh. 18,000/= to Clemencia Moraa Ondieki, who in turn married (woman to woman) the mother to Plaintiff in 1992...” (Emphasis supplied)

13. DW1 further testified that the mother to PW1 was to process title to DW1 and her late husband. However, PW1 refused her to do the process. She stated that PW1 disappeared for three years, has never occupied or used the suit land and has refused to process title deed for her. In cross examination, this witness stated ;

“...I want PW1 to give me title deed because he obtained title deed by fraud and I have stayed on the suit land for a long period. The land belongs to him and myself. Clemencia Moraa Ondieki did not get a grant of letters of administration in respect of the land. My husband and Clemencia Moraa Ondieki prepared sale of land agreement, but it got burnt in the house. Job Nyaega was refunded his money by my late husband. I did not witness the sale and refund...”

14. DW2 testified that the 1st purchaser bought the suit land from Ouru Ongeti son of of Ongweti Ondieki. Both the seller and his father died before full payment of the purchase price by the 1st purchaser. Clemencia Moraa Ondieki wife of the late Ongweti Ondieki married the mother to PW1 under Gusii customary law and she sold the suit land to Andrew Osano Getugi, husband who paid Ksh. 18,000/= to her. This witness stated that he was a link between Clemencia Moraa Ondieki and the mother of PW1. He also stated that PW1 never followed succession process in obtaining title deed to the suit land.

15. DW3 was a cousin to husband to DW1. His evidence was a confirmation of the evidence of DW1 in most aspects. He stated that DW1 uses and cultivates the land. DW3 told the court that DW1 and her late husband were not able to get title deed to the suit land which they bought in 1992 as the seller passed on.

16. The Plaintiff's counsel filed submissions dated 15th August, 2017 whereby he briefly stated the case for PW1, the case for DW1 and the following five (5) issues for determination;

a. Whether the plaintiff is the registered proprietor of the suit land title No. CENTRAL KITUTU MWAMOSIOMA/1194.

b. Whether the defendant purchased the suit land.

c. Whether the defendant has acquired any adverse possess to the land.

d. Whether the plaintiff is entitled to relief bought.

e. Who bear the costs of the suit.

17. The counsel submitted on evaluation of evidence, stated that DW1 did not produce sale of land agreement, there are no letters of administration in respect of the estate of the husband to DW1 and that the 1st purchaser was not called as a witness. He relied on **Section 3 (3) of the Law of Contract Cap 23** Laws of Kenya, **Section 45 of the Law of Succession Act (Cap 160 Laws of Kenya)**, **Act (Cap Section 20** of the Limitation of Actions 22 Laws of Kenya) and cited the case of **Gitau and 2 others-vs-Wandai and 5 others (1989) KLR 231** in respect of intermeddling with the estate of a deceased person.

18. Submissions by counsel for DW1 are dated 11th September and filed in court on 12th September, 2017. He summarized case for PW1 and case for DW1, referred to PExhibits 1, 2 and 3 and nine (9) issues for determination. He submitted that DW1 has acquired the suit land by adverse possession and he cited **Article 159 of the Constitution, 2010** that outlaws technicalities. He also submitted that **Section 3 (3) of the Law of contract Act Cap 23 LOK and Section 45 of the Law of Succession Act Cap 161** (I think he meant Cap 160 LOK) are not applicable. He relied on the case of **Gulam Miriam Noordin -vs-Julius Charo Karisa (2015) eKLR** on, among others, adverse possession and transfer of suit property by the applicant to the respondent to the latter's expense.

19. PExhibits 1 and 2 point to the fact that the suit land is in the name of PW1, who claimed that DW1 has trespassed to the suit land. DW1 confirmed that she cultivates the land. I am conscious of exceptions under **Section 26 of the Land Registration Act, 2012** relating to certificate of title to be held as conclusive evidence of proprietorship. DW1 to DW3, were all firmly in agreement to the effect that PW1 obtained PExhibit 1 by fraud as he did not follow the succession process.

20. The suit land is for cultivation hence agricultural land. Consent to transfer the suit land to PW1 and it's documents issued to PW1 in 1994 are not in evidence. In **Mwangi and Anor-vs-Mwangi (1986) KLR 328**, it was observed that trust over agricultural land was not subject to Section 6 (1) (a) of the Land Control Act (Cap 302 Laws of Kenya) for which consent of the local land control board is required. PW1 claimed that he obtained the suit land from his late grandmother, Clemencia Moraa Ondieki in trust for others and himself. His claim was disputed by DW1 to DW3 who gave clear and consistent testimonies including the history of the matter.

21. I note from the evidence and submissions. No letters of administration obtained by PW1 were produced in evidence. The 1st purchaser did not testify in this matter. Nonetheless adverse possession by DW1 is disclosed. There is no dispute that DW1 has cultivated the suit land since 1992. There was open and uninterrupted possession of it by DW1 for 22 years as the date of filing this suit; See **Sections 7 and 9 of the Limitation of Actions Act (Cap 22)**. The claim of fraud against PW1 coupled with adverse possession as claimed by DW1 holds water.

22. In sum, the Plaintiff has not proved his claim against the Defendant on a balance of probability

23. I find the counter claim by the Defendant against the Plaintiff proved on a balance of probability.

24. I accordingly make the following orders:

a. I hereby dismiss the Plaintiff's claim against the Defendant.

b. I enter judgment for the Defendant against the Plaintiff in the counter claim dated 20th May, 2014 in terms of orders(i) to(iii) sought therein.

c. By dint of the proviso to **Section 27 of the Civil Procedure Act (Cap 21 Laws of Kenya)**, costs follow the event within the discretion of the court. I am guided by the decision in **Samwel Kamau Macharia and another –vs-Kenya Commercial Bank and two others (2012) eKLR** on costs and the character of the suit. The parties shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF DECEMBER, 2017.

G.M. A. ONGONDO

JUDGE

In the presence of:

- 1. Mr. Mbeche counsel holding brief for Mr Ogari counsel for the Defendant (DW1)**
- 2. Mr Edwin Mong'are and Ruth Moraa, court assistants**

G M A ONGONDO

JUDGE