



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC NO. 67 OF 2013

TABITHA MORDEKAI MWITA.....PLAINTIFF

VERSUS

JOSEPH WAMBURA JOHN.....DEFENDANT

JUDGMENT

The plaintiff filed this suit against the defendant on 19th February 2013 seeking the following reliefs:-

- a. An order of eviction.
- b. Mesne profits at the rate of Kshs 5,000/- per month from July 2009.
- c. A permanent injunction restraining the defendant by himself, his servants, agents, family members or anybody under his authority from entering or in any manner whatsoever from interfering with land parcel No. Bwirege/Buhirisenye/325.
- d. Costs of the suit.
- e. Interest at court rates.

In his plaint dated 11th February 2013, the plaintiff averred that she is and was at all material times the registered proprietor of all that parcel of land known as Bwirege/Buhirisenye/325 (hereinafter referred to as the "**suit property**"). The Plaintiff averred that the defendant without her permission or authority entered the suit property and put up a homestead thereon. The defendant has since then been cultivating and committing other acts of waste on the property. The plaintiff averred that she lodged a criminal complaint against the defendant for the said acts of trespass. The defendant was arrested, charged and convicted in Kehancha Criminal Case No. 1107 of 2009. The plaintiff averred that a demand has been made upon the defendant to demolish his homestead on the suit property and hand over vacant possession thereof but he has refused to comply thereby leaving the plaintiff with no alternative but to file this suit.

The defendant filed a statement of defence and counter-claim on 4th November 2013. The defendant admitted that the plaintiff is the registered owner of the suit property. He contended however that the plaintiff's registration as the owner of the said property was procured by fraud. In his counterclaim, the defendant averred that at all material times he has been and still is in occupation of the suit property with members of his family. The defendant averred further that sometimes in the year 2008, he learnt with surprise that the suit property which is family land was registered in the name of the plaintiff who was

said to have acquired the same through succession.

The defendant averred that the registration of the plaintiff as the owner of the suit property was unlawful and fraudulent. The defendant averred that following the said unlawful and illegal registration of the suit property in the name of the plaintiff as the owner, he has been unlawfully deprived of the suit property and has thereby suffered loss and damage for which he holds the plaintiff liable. The defendant sought the following reliefs in the counterclaim:-

- a. A declaration that the defendant is the rightful owner of the suit property.
- b. An order for the rectification of the register of the suit property by the cancellation of the name of the plaintiff and the transfer and registration of the suit property in the name of the defendant.
- c. Permanent injunction to restrain the plaintiff either by herself, her agents or servants from entering upon, trespassing onto or otherwise interfering or dealing howsoever with the suit property.
- d. A declaration that the plaintiff is holding the suit property in trust for the defendant.
- e. Such further and/or other relief as the court may deem fit and expedient to grant.
- f. Costs of the suit.

The plaintiff filed a defence to the counter-claim on 13th January 2014 in which she denied the defendant's counter-claim against her in its entirety. When the suit came up for hearing, the plaintiff gave evidence and called no witness while the defendant gave evidence and called one witness. In her testimony, the plaintiff stated as follows. The suit property was initially registered in the name of her deceased husband, Mordekai Mwita Mwita (hereinafter referred to only as "the deceased"). After the death of the deceased, she applied for grant of letters of administration in respect of the estate of the deceased. After obtaining the said grant, she was registered as proprietor of the suit property in the year 2000. She produced as exhibit a copy of the title deed for the suit property that was issued to her on 3rd February 2000.

She has been unable since she was registered as the owner of the suit property to develop the same because her attempts to enter the suit property have been thwarted by the defendant who has all along been chasing her away. The defendant had been directed by the area chief to vacate the suit property which direction he ignored. She reported the matter to the District Officer of the area and the defendant was arrested and charged at Kehancha in Criminal Case No. 1107 of 2009 with the offence of forcible detainer. The defendant was convicted and fined Kshs 10,000/- in default of payment of which he was to serve 6 months imprisonment. She produced as exhibit the proceedings of the said criminal case.

The plaintiff told the court further that the defendant refused to vacate the suit property despite his conviction. She stated that her deceased husband bought the suit property from one, John Sawe Chacha (Chacha), deceased, who was the father of the defendant. She stated that during their life time, her deceased husband had no dispute with Chacha. She denied the allegations that she acquired the suit property fraudulently. She stated that when the deceased bought the suit property, the defendant was staying with his family in Tanzania and that the suit property was vacant. She stated that the defendant started committing acts of trespass complained of after the death of her deceased husband and Chacha.

In cross-examination, the plaintiff stated as follows. She got married to the deceased in 1983 while the deceased purchased the suit property in March 1989. The deceased purchased the suit property at Kshs 182,000/- which he paid in full to Chacha before the suit property was registered in his name on 28th April 1989. She stated that she cultivated the suit property for the last time in the year 1994.

In his testimony, the defendant (DW1) stated as follows. The suit property was not known to him. He was only aware of the land parcel number Bwirege/Buhirisenye/135 (hereinafter referred to as Plot No. 135).

He became aware of the existence of the suit property after he was arrested and charged. He did not know the circumstances under which the plaintiff acquired the suit property. According to him, Plot No. 135 was registered in the name of his father, Chacha and one, Mwita Chacha(DW2) who were brothers. Chacha never told him that he had sold any land. He produced as exhibit a letter dated 22nd October 2013 which his advocates on record wrote to the land registrar Migori requesting to be furnished with documents relating to the disputed sale transaction. He produced as exhibits copies of a number of documents that his advocates obtained from the land registrar following the request mentioned above. Among the documents that he produced include, a copy of the register for the suit property, a copy of the instrument of transfer through which the suit property was transferred to the deceased, a copy of the application for partition of Plot No.135 and a copy of the mutation form through which Plot No.135 was sub-divided. He denied that the signature appearing in the instrument of transfer was that of his deceased father, Chacha. He contended that Chacha used to sign using thumb print. He contended further that the application for partition of Plot No. 135 and the mutation form although said to be signed by Chacha, the same was not signed by Mwita Chacha (DW2) who was the co-proprietor of Plot No.135.

He pointed out that the signatures of his deceased father, Chacha on the application for partition, instrument of transfer and mutation form differed. He stated that he is occupying the suit property with his three brothers and that they have been in occupation of the property since they were born. He stated that they have no other parcel of land apart from the suit property. He produced a copy of Chacha's death certificate as exhibit 5. He urged the court to cancel the plaintiff's title so that the suit property can revert to him since it had been acquired by the plaintiff fraudulently.

In cross-examination, the defendant stated that he was about 14 years old in 1989 when Chacha is said to have sold the suit property to the deceased. He stated that he was the second born in the family and that his mother predeceased his father, Chacha.

He told the court that he could not recall how the signature of his father looked like and reiterated that his father used to sign using a thumb print. He stated that his father died in 1999 and that he had not applied for grant of letters of administration in respect of his estate. He denied having prevented the plaintiff from accessing the suit property and contended that he went back to the suit property after serving the jail term because that was his home.

Upon examination by the court, he stated that his father had no dispute with the plaintiff's deceased husband when he was alive. He contended that the plaintiff had never developed the suit property and denied the plaintiff's claim that she had cultivated the said property until the year 1994. He also denied that his family lived in Tanzania and averred that his father was buried on the suit property.

The defendant's witness was Mwita Chacha Makori (DW2). DW 2 was a brother to the defendant's deceased father, Chacha with whom they co-owned Plot No.135. He told the court that he was aged 98 years old and that he was not aware that Plot No. 135 had been partitioned. He denied executing any document concerning the partition of Plot No. 135. He told the court that he was also not aware that his brother, Chacha had partitioned the said plot and sold a portion thereof to the plaintiff's deceased husband.

He told the court that he was in occupation of Plot No. 135 with four of his deceased brother's (Chacha) sons. He corroborated the evidence of the defendant that the plaintiff was not in occupation of the suit property and had not developed any portion of Plot No. 135. In cross examination, DW2 denied that Chacha lived in Tanzania. He stated that his brother, Chacha was buried on the suit property.

At the close of the defence case, the parties were directed to make closing submissions in writing. The plaintiff filed her submissions on 30th June 2015 while the defendant did so on 21st July, 2015. I have considered the parties respective cases as pleaded and the evidence that was adduced in proof thereof. I have also considered the closing submissions by both parties. From the material before me, the issues that arise for determination in this suit are the following;-

- (i) Whether the plaintiff acquired the suit property fraudulently?

- (ii) Whether the defendant is a trespasser on the suit property?
- (iii) Whether the plaintiff is entitled to the reliefs sought in the plaint?
- (iv) Whether the defendant is entitled to the reliefs sought in the counter-claim?
- (v) Who is liable for the costs of the suit and counter-claim?

According to a copy of the register for the suit property that was produced in evidence as Defence Exhibit 1, the suit property was registered in the name of John Sawe Chacha (Chacha) on 19th September 1988. The property was thereafter transferred to Mordekai Mwita Mwita(deceased) by Chacha on 28th April 1989. The defendant produced as Defence Exhibits 2 and 3 respectively a copy of an instrument of transfer of land dated 26th April 1989 through which Chacha is said to have transferred the suit property to the deceased and a copy of a letter of consent of the land control board dated 26th April 1989 through which the said transfer was approved. There is no iota of evidence before me showing that the deceased acquired the suit property irregularly or fraudulently as claimed by the defendant. All indications point to the fact that the deceased acquired the suit property lawfully after following the due process. There is no evidence that Chacha did not execute the instrument of transfer aforesaid or that he never appeared before the land control board for the consent. I am of the view that since Chacha was the registered owner of the suit property as at the time he sold and transferred the suit property to the deceased, the deceased was not under any obligation to inquire under what circumstances Chacha became registered as the owner of the suit property. The contention that the process through which the suit property came to be registered in the name of Chacha was irregular cannot therefore have any effect on the validity of the title which the deceased acquired from Chacha in the circumstances of this case. The suit property was registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). Section 39(1)(a) of the said Act provides as follows;

“No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered;”

There is no dispute that the plaintiff acquired the suit property from the deceased through transmission. If the deceased held a valid title to the suit property, the plaintiff's title that she acquired from the deceased cannot be impeached. It is my finding that the allegations of fraud and illegalities which have been levelled against the plaintiff by the defendant in the manner in which the plaintiff acquired the suit property have not been established to the required standard. The law is now settled that allegations of fraud must be specifically pleaded and strictly proved on a standard which is higher than a balance of probabilities. See **Koinange & 13 others vs. Koinange (1986) KLR 23** and **Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & Another (1979) KLR 76**. Although the defendant pleaded fraud against the plaintiff and particularized the same, the defendant did not lead any evidence to support his contention that the plaintiff's deceased husband used fraud, coercion or inducement to cause his father, Chacha to transfer the suit property to him.

In the Court of Appeal case of **Eva Kimea & another vs. Nawal Abdulrahman Adballa Mombasa CA No. 52 of 2014**, the court stated that;

“Thus although the appellants had pleaded the particulars of fraud against the respondent, in order to succeed in their defence and counterclaim, the appellants had to discharge that burden of proof...No evidence at all was led by the appellants to support their claim that the respondent in acquiring the suit premises was fraudulent as pleaded and particularized in their defences and counterclaims. There was absolutely no evidence at all that the respondent secretly and dubiously had herself registered as the proprietor of the suit premises...”

The disposal of that issue takes me to the second issue, namely, whether the plaintiff has proved that the defendant is a trespasser on the suit property. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, **Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01.** It is not in dispute that the plaintiff is the registered owner of the suit property. It is also not in dispute that the defendant entered the suit property and is in occupation thereof. The plaintiff having established her ownership of the suit property and the defendant's entry and occupation thereof, the onus was upon the defendant to justify his occupation of the said property.

The defendant's contention is that he was born and brought up on the suit property. This fact was not proved in my view and in any event, I don't think that even if that was the case, it would justify the defendant's occupation of the suit property in respect of which he has no title. In the absence of any justification for the defendant's entry and occupation of the suit property, the irresistible conclusion is that the defendant is a trespasser on the property.

For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities and that she is entitled to the reliefs sought in the plaint save for mesne profits which is not proved. In the same breath, it is my finding that the defendant's counter-claim is not proved and as such the defendant is not entitled the reliefs sought therein. In conclusion, I hereby enter judgment for the plaintiff against the defendant on the following terms;

1. The defendant shall vacate and hand over possession of the suit property namely, LR No. Bwirege/ Buhirisenye/325 to the plaintiff within the next one hundred and eighty (180) days from the date hereof failure to which the plaintiff shall be at liberty to apply for his forceful eviction from the suit property.
2. There shall be an injunction restraining the defendant by himself or through his agents or servants from entering or in any manner whatsoever interfering with the plaintiff's occupation of LR No. Bwirege/ Buhirisenye/325 after the expiry of 180 days aforesaid.
3. The plaintiff shall have the costs of the suit and the counter-claim.

Signed at Nairobi this.....Day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this **8th** day of **April** 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendant**