



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 260 OF 2012

JAMES THEURI WAMBUGU PLAINTIFF

VERSUS

MELLEN MBERA DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 2nd July 2012 filed in court on 3rd July 2012 asserts that he is the registered owner of land parcel **Transmara/Ololchani/ 863** (hereinafter referred to as “the suit property”) following a process of land adjudication. The plaintiff claims that the defendant during the month of March 2010 unlawfully entered upon, trespassed onto and/or encroached upon the suit property and erected structures thereon without the authority and/or consent of the plaintiff. The plaintiff contends the actions by the defendant have denied him the right of use and enjoyment of the suit property thus occasioning him loss and damage. The plaintiff states the defendant has persisted with the offensive activities despite demand to cease the activities being made rendering the institution of the instant suit necessary.

2. The plaintiff in the premises prays for judgment against the defendant for:-

(a) An order of eviction from the suit property;

(b) Permanent injunction restraining the defendant either by herself, agents, servants and/or anyone claiming under the defendant from entering, trespassing onto, interfering with and/or in any other manner whatsoever dealing with the suit property known as Transmara/Ololchani/863 whatsoever;

(c) Costs of the suit;

(d) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

The defendant filed a statement of defence dated 26th July 2012 on 30th July 2012. By the said defence the defendant avers the plaintiff’s registration as the owner of the suit property was a sham and denies the plaintiff was awarded the land through any adjudication process. The defendant further denies she has trespassed and/or encroached onto the plaintiff’s land and claims that the land she has constructed structures on and was cultivating belonged to her deceased father and that the plaintiff had no claim and/or right to the same and that the plaintiff had fraudulently obtained title to the same. The defendant prayed that the plaintiff’s suit be dismissed.

3. The suit was heard before Okong'o J. on 26th February 2015 and 15th June 2015. The plaintiff testified as the sole witness in support of his case while the defendant testified as DW1 and called her brother one Robert Ntengere Mochama as DW2.

4. The plaintiff's case:

The plaintiff testified that he occupied the suit property in 1980 and that when adjudication in the area was carried out in the 1980's he was awarded the suit property as evidenced by the letter from the District Land Adjudication and Settlement Officer dated 1st February 2006 produced and marked as **PEx.1**. The letter confirmed that Plot No. 863 Ololchani Adjudication Section of Transmara had been adjudicated in favour of the plaintiff. Following the completion of the adjudication process the plaintiff testified that he was issued with a title deed to the suit property on 19th October, 2010. The title was produced in evidence and marked as **"PEx.4"**. The plaintiff also produced a copy of certificate of official search in regard to the suit property dated 4th October 2010 (though the receipt for payment for the search is dated 4th November 2010). The search shows the plaintiff was registered as owner on 30th September 2010 and issued title on 19th October 2010. The copy of search was produced as **"PEx.5"**. The plaintiff further testified that the survey department verified the location of the suit property and that he in this regard paid for the sketch plan for the suit property vide receipt B0376078 produced as **"PEx.2 (a)"** on 9th November 2010 and the copy of the certified sketch plan for the suit property was issued on 18th November 2010 (**"PEx.3"**). Earlier the plaintiff had paid the boundary fee and inspection fee vide receipt Nos. 6224165 issued on 15th August 2006 and 6224173 issued on 24th August 2006 produced **PEx.2'b'** and **'c'** respectively.

5. The plaintiff stated in evidence that the defendant entered onto the suit property on 23rd March 2010 and when the plaintiff asked her to leave she refused. The plaintiff made a report to the adjudication officer but the defendant declined to attend before the adjudication officer which prompted the plaintiff to report the matter to Kilgoris Police Station whereupon the defendant was arrested and charged with the offence of forcible detainer contrary to Section 91 of the Penal Code. The defendant after trial was found guilty and convicted of the offence and sentenced to pay a fine of kshs. 10,000/= or 3 months imprisonment in default. The copy of the charge sheet and proceedings and judgment were produced as **PEx.6** and **7** respectively. The defendant despite the conviction did not vacate the suit property but continued to occupy the plaintiff's land. The plaintiff stated that the defendant occupies and resides in a different parcel of land but she has put structures on the suit property which her workers stay in and she cultivates a portion of the property. In cross examination the plaintiff maintained that he properly obtained title to the suit property through a valid adjudication process and denied that he took land that belonged to the defendant's deceased father.

6. The defendant's case:

The defendant in her evidence testified that the plot in dispute with the plaintiff belonged to her deceased father, Mochama Ongondo. She stated that the parcel of land she was occupying was **Plot No. 2/58** Kilgoris Town. She stated that she has a house, a pit latrine and a vegetable farm on the plot and she produced a set of Photographs as **"DEx3"** to illustrate the nature of developments on the plot (vegetables and a house). The defendant stated that she did not require the authority of the plaintiff to occupy her father's plot. The defendant stated that the rates payment request from the Transmara County Council for **Plot No. 2/58** in the name of her deceased father were sent to her family and produced as **"DEx.4"** a rates payment request dated 5th October 2012 in the name of Muchama Ongochi (defendant's deceased father). The defendant admitted she was charged at the Kilgoris Magistrates Court with the offence of forcible detainer for being in possession of land parcel **No. Transmara/Ololchani /863** without lawful authority of the owner. The defendant was convicted of the offence and fined kshs. 10,000/= which she paid. The defendant did not appeal the conviction and sentence and/or if she appealed no decision has been rendered on the appeal.

7. The defendant called her brother Robert Ntengere Mochama as DW2 who testified that the defendant

stays on **Plot No. 2/58** which was owned by his deceased father. He testified there is a house, trees and vegetables on the Plot and that he only learnt recently that the plaintiff was laying claim to Plot No. 2/58 and that the plaintiff had obtained a title to the plot. The witness further stated that their father died in 1990 and that it is their mother who has obtained a limited grant of letters of administration to his estate. According to the witness their father only had **Plot No. 2/58** in Kilgoris but he did not know when or how the plot was allocated to their father. He affirmed he had not seen a plot card for the plot and further that he was aware the defendant and his mother had been charged at Kilgoris Magistrates Court on allegation of occupying land belonging to the plaintiff.

8. Submissions by the parties;

The parties filed written submissions in summation of their respective cases. The plaintiff's submissions dated 30th September 2015 were filed in court on 6th October 2015 while the defendant's submissions dated 25th November 2015 were filed in court on the same date. The parties through their submissions reiterate the facts of the case as presented by the parties in evidence. The defendant in his submission avers that the evidence adduced before the Kilgoris Magistrates Criminal Case No. 263 of 2010 where the defendant had been charged with being in unlawful occupation of the plaintiff's property indicated there was a boundary dispute respecting the adjudicated parcels of land and the parcels of land allocated by the Transmara County Council. The defendant thus submitted the dispute between the defendant and the plaintiff being a boundary dispute ought to be determined under the provisions of Section 18 of the Land Registration Act, 2012. The defendant further submitted she was not the personal legal representative of her late father's estate but her mother and thus she was not properly sued as she had no locus standi to represent her late father's estate. The defendant further submitted that her deceased father was the owner of **land parcel 2/58** and that she was occupying the land as a beneficiary and had been in occupation of the same over a long period of time. The defendant contended that the plaintiff obtained title to the suit property fraudulently and his title was thus null and void.

9. The plaintiff for his part submitted that he is the registered proprietor of the suit property having acquired title through the process of land adjudication as attested by the letter from the Land Adjudication and Settlement Officer ("**PEx1**"), the copy of the title (**PEx.4**) and copy of the official search (**PEx.5**). The plaintiff in his submissions asserts that as such registered proprietor of the suit land he is vested with absolute rights of ownership in terms of Section 24 (a) of the Land Registration Act, 2012 and that his title is indefeasible and can only be challenged on account of fraud or misrepresentation and/or if it is shown the title was illegally and/or unprocedurally acquired as provided under Section 26 (1) of the Land Registration Act, 2012. The plaintiff contends that the defendant has not adduced any evidence of fraud on the part of the plaintiff and that no particulars of fraud were proved to the required standard. The plaintiff cited the Court of Appeal decision in the case **Nyangate Guto alias Watson Mogere Mogoko – vs- Maxwell Okemwa Mogoro & National Bank of Kenya Ltd (C.A No. 165 of 2011 Nairobi)** to illustrate the standard of proof required in instances where fraud is alleged. The Court of Appeal in the case stated thus:-

"8. As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this court in Central Bank of Kenya Ltd –vs- Trust Bank Limited & 4 Others [1991] eKLR (Civil Appeal No. 215 of 1996) as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:-

"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

10. The plaintiff further submits that the defendant was in unlawful occupation of the suit property and pointed to the fact that the defendant was arraigned in the Kilgoris Senior Resident Magistrates court in Criminal Case No. 263 of 2010 where he was tried and found guilty of the offence of forcible detainer as evidenced by **PEx6** and **PEx.7** and that the judgment remains valid the same having not been set aside on appeal. The plaintiff asserts that he has been denied access to and use of his property and on that account

he claims to be entitled to general damages for trespass.

11. Having reviewed the pleadings, the evidence and the submissions made by the parties the issues that arise for determination are as follows:

(i) Whether the plaintiff is the registered proprietor of land parcel LR Transmara/Olochani/863 and if so whether such registration was fraudulently acquired.

(ii) Whether the defendant is in occupation of the suit property LR Transmara/Olochani/863 as a beneficiary of her deceased father and whether therefore she has been properly sued;

(iii) Whether the defendant has trespassed onto the suit property;

(iv) What reliefs should the court grant.

12. The evidence adduced by the plaintiff establishes that he is indeed presently the registered owner of land parcel **Transmara/Olochani/863**. The plaintiff tendered as evidence copy of title for land parcel **Transmara/Olochani/863** dated 19th October 2010 which shows he is the registered owner. The copy of certificate of official search dated 4th October 2010 confirms the plaintiff to be the registered owner having been registered on 30th September 2010. The certificate of official search shows no encumbrances are registered against the title. The plaintiff in his evidence stated that he was awarded the land during the adjudication process during the 1980s and he produced a letter from the District Land Adjudication and Settlement Officer dated 1st February 2006 which confirmed that **Plot No. 863** was registered in the plaintiff's name (**PEX1**). The plaintiff also produced a copy of a certified sketch plan showing the delineation of **land parcel Transmara/Olochani/ 863 (PEX.3)**. On the basis of the evidence adduced by the plaintiff, I am satisfied the plaintiff is the registered proprietor of the suit property.

13. Upon registration of a person as proprietor of land, such person is vested absolute ownership of such land with all rights and privileges belonging or appurtenant thereto as per Section 24 (a) of the Land Registration Act, 2012. The title issued to such person is prima facie evidence that the person is the absolute and indefeasible owner and the title can only be liable to challenge on the limited grounds set out under Section 26 (1) (a) and (b) of the Land Registration Act, 2012 which provides thus:

26. (1) 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 contained or endorsed in the certificate and the title of that person shall not be subject to challenge, except-

(a) The ground 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.

14. As per the evidence adduced it is clear that the suit land was registered in favour of the plaintiff pursuant to an adjudication process. The proceedings before the Kilgoris Principal Magistrate's Court Criminal Case No. 263 of 2010 produced by the plaintiff as **PEX.7** show that one Betha Akinyi, a Senior Land Adjudication Officer, Kilgoris testified in the case as PW9 and she confirmed that land parcel 863 fell within Ololchani Adjudication Area and that the same was recorded in favour of the plaintiff. The adjudication officer also produced a sketch plan delineating **land parcel 863** before the Magistrate's court.

15. The suit land having been registered in favour of the plaintiff following an adjudication process under the Land Adjudication Act, Cap 284 of the Laws of Kenya constituted a first registration. The process of

Land Adjudication under the Land Adjudication Act is elaborate and once the process is completed in terms thereof it is final. The Land Adjudication Act, Cap 284 Laws of Kenya makes provision for resolution of any disputes that arise during the process and every affected party is required to have his interest and/or right adjudicated in accordance with the provisions of the Act. A party aggrieved by any decision of the adjudication committee is required to file an objection to the adjudication officer under Section 26 of the Act and any party aggrieved by the decision of the Adjudication Officer is required to within 60 days from the date of the decision to file an appeal to the Minister, under Section 29 of the Act and the decision of the Minister once given is final.

16. I have made reference to the Adjudication Act, Cap 284 Laws of Kenya to illustrate the fact that disputes arising from Land that is subject to adjudication under the Act have to be resolved under the provisions of the Land Adjudication Act. There is no evidence that the defendant and/or indeed the defendant's deceased father participated in the adjudication process and to the extent no objection was raised against the plaintiff being awarded **land parcel 863** Ololchani puts to question the defendant's alleged claim to the parcel of land. The defendant has claimed that her deceased father's plot was No. 2/58 Kilgoris Town but no evidence was led by the defendant to show how or when this plot was allocated to the defendant's deceased father. The plaintiff has no claim to **Plot No. 2/58** and his claim is restricted to **land parcel 863** which he states he had been in occupation of until 2010 when he moved out as he intended to develop the same but then the defendant moved into the plot and has remained in occupation since 2010. The plaintiff asserts the defendant was occupying an adjacent plot before moving into the plaintiff's plot.

17. Having evaluated the evidence it is my holding and finding that the plaintiff is the validly registered owner of land parcel number **Transmara/Ololchani/ 863** and that the defendant did not adduce any evidence to show that the plaintiff was fraudulently registered as owner. I therefore hold and find that the plaintiff holds a valid title to the suit property and is therefore entitled to have unrestricted access and use of the suit property. I accept the evidence of the plaintiff that the defendant is unlawfully in occupation of the plaintiff's parcel of land. The defendant has not shown that she is in occupation of the suit land as a beneficiary of her deceased father. There is absolutely no evidence pointing to the defendant's deceased father having been the owner of **Plot No. 863 Ololchani**. The evidence by the defendant is that her father owned **Plot No. 2/58 Kilgoris Town** which cannot be the same as **Plot No. 863 Ololchani** which the plaintiff acquired through the process of land adjudication.

18. The claim by the defendant that she has been wrongly sued since she is not the personal legal representative of her deceased father is farfetched. As I have understood the plaintiff's claim, he is not making a claim against the estate of the defendant's deceased father but is claiming against the defendant who has trespassed onto and is in unlawful occupation of Plot No. 863 that belongs to the plaintiff. The allegation that the defendant has been wrongly sued is baseless and I dismiss the same.

19. On the issue whether or not the defendant has trespassed onto the plaintiff's parcel No. 863 I hold that the court has on the evidence found that the plaintiff is the registered proprietor of land parcels **Transmara/ Ololchani/863** which the defendant does not deny occupying save that her contention is that she is occupying **Plot No. 2/58** Kilgoris Town which she avers is owned by her deceased father. The **Plot No. 2/58** that the defendant claims to belong to her father is not delineated on any survey map. The plaintiff produced a certified sketch map "**PEx.3**" which sketch was also produced by the Land Adjudication Officer before the Magistrates Court. When the Magistrates court moved to the locus in quo during the Criminal Trial the Land Registrar (page 12 of proceedings produced as **PEx.7**) identified the **Plot as No. 863** belonging to the plaintiff. The Kilgoris Magistrates Court after hearing the evidence found the defendant guilty of the offence of forcible detainer and convicted and sentenced her to pay a fine of kshs. 10,000/= . The conviction and sentence have not been set aside on appeal. On the basis of the evidence, even without relying on the conviction in the Kilgoris Magistrate's Court, I am satisfied the defendant has unlawfully occupied the plaintiff's land parcel 863 and she has no justification for doing so.

20. The plaintiff has sought an award of damages for trespass and in his submissions has urged the court to award a sum of kshs. 1,000,000/= relying on the case of **Paul Audi Ochuodho –vs- Joshua Ombura Orwa [2014] eKLR** where the court awarded the plaintiff kshs. 500,000/= as general damages for

trespass. The plaintiff's evidence in support of the claim for general damages is that he has been prevented from developing his property where he wanted to build a permanent house. Instead the defendant has put up temporary structures which are occupied by her workers as she herself does not reside on the Plot but stays on her deceased father's plot. I am not satisfied that any proper basis has been laid for any award of general damages and I will decline to award any in the circumstances of this case. The plaintiff has for instance not tendered any evidence of the developments he wished to effect on the land e.g building plans for the house he states he wanted to construct on the suit property.

21. The net result is that I find and hold that the plaintiff has proved his case on balance of probabilities against the defendant. I accordingly enter judgment in favour of the plaintiff on the following terms:-

(i) That the defendant shall vacate and deliver vacant possession of Land Parcel Number, Transmara/Ololchani/863 within sixty (60) days of being served with the decree herein.

(ii) In the event the defendant fails to vacate and deliver vacant possession to the plaintiff as in (i) above an eviction order against the defendant shall issue on application by the plaintiff.

(iii) A permanent injunction shall issue restraining the defendant either by herself, agents, servants and/or anyone claiming under the defendant from entering, trespassing onto, interfering with and/or in any other manner whatsoever dealing with the suit property known as Transmara/Ololchani/863 whatsoever.

(iv) The costs of the suit are awarded to the plaintiff.

Judgment dated, signed and delivered at Kisii this 30th day of September, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Nduhukire for Otieno for the plaintiff

Ms. Moguche for Nyambati for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE