



REPUBLIC OF KENYA.

IN THE ENVIRONMENT & LAND COURT AT KITALE.

LAND CASE NO. 93 OF 2007.

BILLIA M. MURUNGA ::: PLAINTIFF.

VERSUS

SIMON SIMIYU MUTEBO)

CONCEPTA NASIMIYU SIMIYU) ::: DEFENDANTS.

J U D G M E N T.

1. The plaintiff is the registered owner of LR. No. Kaplamai/Sirende Block 5/Yuya/326 which is approximately 0.4452 hectares (suit land). The plaintiff filed this suit against the defendants seeking a permanent injunction against the defendants, their servants, agents or any person acting under their authority from interfering with the suit land. She also sought orders of eviction against the defendants from the suit land as well as costs of the suit.
2. The second defendant filed a counter-claim in which she seeks orders of cancellation of title held by the plaintiff and that the same be registered in her name. She also prayed for costs of the counter-claim.
3. The first and second defendants are said to be husband and wife but in their evidence, they denied being so.

PLAINTIFF'S CASE.

4. The plaintiff testified that she bought the suit land from one James Lumbasi Ngeywa on 14/11/2001 at Ksh. 275,000/=. She subsequently went before the land Control Board where consent was given. She took possession of the suit land in 2001. She remained in possession until 2005 when the first defendant came and demolished a house she had put up on the suit property. The first defendant then started utilising the suit property by cultivating it upto now.
5. The plaintiff later processed and obtained title to the suit land on 5/3/2007. She testified that there was no suit in respect of the suit land when she bought it and that she is not aware of any suit in respect of the same property.

FIRST DEFENDANT'S CASE.

6. The first defendant testified that he entered the suit land in his capacity as a member of Yuya Farmers Co-operative Society which is now defunct. He paid Ksh. 4,000/= and was allocated 2 acres. In 2003 surveyors came to survey the farm. When the survey process was over, he realised that his land had been given to James Ngeywa and John Wanyonyi who were not members of the society. James Ngeywa started cutting down the trees which he had planted. He lodged a complaint with the police. James Ngeywa was arraigned in court vide Kitale chief Magistrates Criminal Case No. 1254 of 1996 charged with the offence of malicious damage to property. He

later filed Civil Case No. 199 of 1996 against James Ngeywa where he sought compensation for the damage caused by the said James Ngeywa. He was awarded Ksh. 30,000/=. He obtained warrants of attachment. He went and sold the suit land. The court later gave him an order of eviction against James Ngeywa. The suit land was sold in a public auction where it was bought by the second defendant.

SECOND DEFENDANT'S CASE.

7. The second defendant testified that she has been residing on the suit land since 1984. On 25/6/2004 she bought the suit land at a public auction. The suit land had been auctioned as a result of a decree in Civil Case No. 199 of 1996. She testified that she bought the suit land for Ksh. 80,000/=. She testified that she was in possession of the suit land when the plaintiff obtained title to the suit land. She contended that James Ngeiywa had no land to sell to the plaintiff when he purported to do so.

ISSUES FOR DETERMINATION.

8. The counsel for the parties herein agreed on the following issues for determination.

(i) Whether the plaintiff purchased land parcel No. Sirende/Block 5/Yuya/326 from James Lumbasi Ngeywa.

(ii) Whether the defendants legally purchased Sirende/Block 5/Yuya/326 in a public Auction.

(iii) Whether the purchase is null and void.

(iv) Who has been in occupation and since when?

(v) Who is the registered proprietor of Sirende/Block 5/Yuya/326?

(vi) Whether the registration is valid and whether there was any fraud.

(vii) Whether the plaintiff is entitled to the prayers sought.

ANALYSIS OF EVIDENCE.

9. As regards the first issue on whether the plaintiff purchased the suit land from James Lumbasi Ngeywa, there is evidence from the plaintiff that she purchased the suit land from James Lumbasi Ngeywa on 14/11/2001. She produced a sale agreement [Exhibit 1]. It is clear from the agreement that the plaintiff was to take possession of the land upon execution of the agreement. The plaintiff testified that she remained in possession until 2005 when the first defendant came and demolished the house she had erected on the suit land. The plaintiff's evidence is confirmed by an order which was produced by the second defendant [Defence exhibit 3]. This was an eviction order arising from Kitale Senior Principal Magistrate's Court in Civil Case No. 199 of 1996 between the first defendant herein and James Ngeywa. This eviction order was given on 16/2/2005. This is the order which the first defendant used to evict the plaintiff in this case. The plaintiff had already bought the suit land in 2001 from the registered owner. It is therefore clear that it is the plaintiff who was in possession of the suit land as at 2005. She was on the suit land based on a valid sale agreement. The first and second defendant's claim that they were on the suit land from 1981 and 1984 respectively has no basis. If the first defendant was in possession of the suit land as he claims, why was he then seeking an eviction order against James Lumbasi Ngeywa? The first defendant's claim that it is the surveyor who gave his land (suit land) to two people where James Lumbasi Ngeywa is one of them is not true. If indeed the first defendant was convinced that the suit land was his, why was he selling it to recover damages which James Lumbasi Ngeiywa caused on his property? The truth of the matter is that the suit property belonged to James Lumbasi Ngeywa who legally sold it to the plaintiff. The plaintiff remained in

possession of the suit land upto 2005 when she was evicted by the first defendant. The first and second defendants have since been in occupation of the suit land to date. This finding settles issues number (I) and (iv) hereinabove.

10. I now move on to issue number (ii) on whether the second defendant purchased the suit land legally through a public auction. The second defendant's evidence is that she bought the suit land in a public auction on 25/6/2004 she produced a memorandum of sale [defendant exhibit 4], certificate of sale [defence exhibit 5] and a receipt for Ksh. 80,000/= [defence exhibit 6].

The alleged auction if it ever occurred was not done in accordance with the rules of the Civil Procedure Rules. If she had bought the suit land as she claims, then there was no delivery of possession made as per the Civil Procedure Rules. The property was already in possession of the plaintiff who bought it in 2001. There was no notice given to her to deliver the property. There was no evidence at all given to show that the first defendant had warrants to sell the suit property. The eviction order which was given in favour of the first defendant was not in furtherance of giving up possession or delivery to the second defendant. Though the defendants claimed in their defence that they are not a couple, it was pleaded in the plaint that they are husband and wife a fact which they did not deny in their pleadings. The purported auction was made in a bid to wrest the suit land from James Lumbasi Ngeywa who had already sold it to the plaintiff. There was no evidence adduced to show if the sale was ever advertised as required. I therefore find that there was no valid auction conducted and that the suit property had not passed to the second defendant.

11. On issue number (iii) as to whether the purchase is null and void, there is nothing to vitiate the sale between the plaintiff and James Lumbasi Ngeywa and the subsequent transfer. The property has already been registered in the name of the plaintiff. There was no evidence of fraud tabled by the second defendant. She listed four particulars of fraud on the part of the plaintiff. She never proved any of those allegations of fraud. The plaintiff purchased the land on 14/11/2001. The second defendant purported to buy the same land on 25/6/2005. The second defendant cannot therefore claim that the plaintiff bought the land when she had already bought it. The second defendant's demeanour was wanting. At one stage she claimed that she had no husband. When her counsel prayed for adjournment to enable her talk to her, she later came and changed her story that she had a husband who was away in Bungoma. She had testified that she bought the land from a neighbour and that she was in possession of the suit land since 1984. How could she buy her own land at a public auction in 2004 if she had bought the same land from a neighbour earlier on? The second defendant was in the same confusion as the first defendant who testified that the suit land was his having acquired it by virtue of his membership at Yuya Farmers Co-operative Society, yet he went ahead to "sell" the same land to get what James Lumbasi Ngeywa owed him. The analysis of the evidence in paragraph 11 disposes of issues No. (V) and (VI). The plaintiff is the registered owner of the suit property. She was never involved in any fraudulent scheme in the course of the transfer and registration.

12. The counsel for the defendants raised the issue of consent of the Land Control Board. This is an issue which is being raised belatedly. This is an issue which should have been raised by James Lumbasi Ngeywa who sold the land to the plaintiff. If the defendants wanted to fault the registration and transfer they should have brought forth evidence to show that there was no consent of the Land Control Board. The plaintiff has been registered as proprietor of the suit land. The defendants have no basis of remaining on the suit land.

DETERMINATION.

13. I find that the plaintiff has proved her case against the defendants on a balance of probabilities. On the other hand, I find that the second defendant has failed to prove her counter-claim. The same is hereby dismissed with costs to the plaintiff. I issue an order of eviction of the defendants from the suit land. A permanent injunction is hereby issued restraining the defendants or their agents from interfering with the suit land. The plaintiff shall have costs of the suit.

[Dated, signed and delivered at Kitale on this 27th day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of M/s. Bett for plaintiff and M/s. Munialo for 2nd defendant who is also holding brief for Mr. Wafula for 1st defendant.

Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

27/1/2015.