



**Kombe v Simba (Environment & Land Case E014 of 2020)
[2024] KEELC 4320 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E014 OF 2020**

TW MURIGI, J

MAY 23, 2024

BETWEEN

CHRISTINE KITHI KOMBE PLAINTIFF

AND

BENARD NZYUKO SIMBA DEFENDANT

JUDGMENT

1. By a Plaint dated 7th December, 2020, the Plaintiff prays for judgment against the Defendant for: -
 - a. An order of permanent injunction stopping the Defendant by himself, his agents and/or servants or licensees from trespassing and/or encroaching on land Parcel Mbooni/Itetani/183.
 - b. A declaration that land Parcel Mbooni/Itetani/183 belongs to the Plaintiff.
 - c. An order directing the District Surveyor – Makueni to visit land Parcel Mbooni/Itetani/183 and fix beacons of the land.
 - d. Costs and interest of the suit.
2. The Defendant filed a Defence and Counterclaim on 19th January, 2021 denying the Plaintiffs' claim. In his counterclaim, the Defendant prays for judgment against the Plaintiff for: -
 - a. A declaration that the Defendant is the beneficial owner of a portion of land measuring 4.25 acres comprised in land Parcel No. Mbooni/Itetani/183.
 - b. In the alternative, an order do issue that the Defendant has acquired prescriptive rights over a portion of land measuring 4.25 acres comprised in land Parcel No. Mbooni/Itetani/183 by virtue of adverse possession and a title deed do issue in his name.
 - c. An order do issue compelling the Plaintiff to excise the Defendant's portion measuring 4.25 acres, execute the forms for application of consent of the Land Control Board and Land



Transfer Forms in favour of the Defendant and in default the Deputy Registrar execute the same on her behalf.

- d. An order of permanent injunction restraining the Plaintiff either by herself, her agents, servants or anybody acting through her or under her instructions from entering upon, remaining therein, obstructing, trespassing or in any other manner from interfering with the Defendant's portion of land measuring 4.25 acres comprised in land Parcel No. Mbooni/Itetani/183.
 - e. Costs of the suit.
3. The Plaintiff filed a reply to the defence and counterclaim on 27th April, 2021 denying the Defendant's claim.

The Plaintiff's Case

4. The Plaintiff called two witnesses in support of her case. The Plaintiff Christine Kithi Kombe testified as PW1. She adopted her witness statement dated 27th April, 2021 as her in chief. She also produced the documents in the list of documents dated 7th December, 2020 as PEX 1 – 4 respectively.
5. She informed the court that the suit property was initially registered in the name of her late father Raphael Kavuti Simba (Deceased) but was subsequently registered in her name through transmission.
6. She further testified that when she went to place beacons on the suit property, the Defendant claimed a Portion of the land on the basis of having purchased the same from her late father. She stated her late father's brothers denied the allegations that her father had sold a portion of the suit property to the Defendant.
7. She urged the court to grant the orders as sought in the Plaintiff.
8. On cross-examination by Mr. Sila, she testified that the suit property is ancestral land which initially belonged to her late father. She denied the allegations that her late father sold a portion of the suit property to the Defendant. She testified that her late father sold a portion of the suit property in the year 1985 to Pius Jimmy Musyoki. It was her testimony that her father passed away in the year 1995 and was buried in his land in Nzukini, Taita Taveta. She stated that the title indicates that she holds the suit property in trust for herself and for other beneficiaries. She further stated that the portion of the suit property claimed by the Defendant is adjacent to his ancestral land.
9. She stated that she was given authority to file the suit herein by her mother and her siblings.
10. PW2, Peter Mativo Simba, adopted his witness statement dated 27th April, 2021 as his evidence in chief. It was his testimony that Raphael Kavuti Simba and Benard Nzyuko Simba are his brothers. He further testified that his late brother did not sell a portion of the suit property to the Defendant.
11. In cross-examination, he testified that he signed the agreement dated 28th March, 1985 between Raphael Kavuti and Pius Jimmy. He stated that Raphael Kavuti did not inform him that he was selling his land to the Defendant. He further stated that the late Raphael Kavuti does not have a home in Mbooni and that he was buried in his land in Taita Taveta.
12. He stated that his late brother could not sell land to the Defendant without informing him first.
13. PW3, Josephat Kisilu Simba, adopted his witness statement dated 19th October, 2021 as his evidence in chief. He informed the court that the Defendant and the late Raphael Kavuti Simba are his brothers. He stated that his late brother did not sell a portion of the suit property to the Defendant.



14. In cross-examination, he testified that his late brother purchased land in Taita Taveta and was buried thereon. He denied the allegations that Raphael sold the suit property to Pius Jimmy and the Defendant so that he could purchase land in Taita Taveta. He asserted that he witnessed the sale agreement dated 28th August 1985 between Raphael Kavuti and Pius Jimmy in respect of the suit property.
15. He contended that he would not know the contents of the agreement dated 28th March, 1996 as he did not witness the same.
16. On re-examination, he testified that Raphael sold half of his land to Pius Jimmy and that he signed the sale agreement between Raphael and Pius Jimmy and not the sale agreement between Raphael and the Defendant. It was his testimony that the late Raphael Kavuti Simba does not have a home in Mbooni.

The Defence Case

17. The Defendant Benard Nzyuko Simba testified as DW1 and called one witness in support of his case. He adopted his witness statement filed in court on 19th January, 2021 as his evidence in chief. He also produced the documents in the list of documents dated 19th January, 2021 and the supplementary list of documents filed in court on 4th May, 2021 as DEX 1- 4 respectively.
18. DW1 testified that the Plaintiff is his niece. He informed the court that he purchased half portion of the suit property from his late brother Raphael Kavuti Simba and that the remaining portion was sold to Pius Musyoki. He further testified that his late brother migrated to Taita Taveta where he had purchased land and was buried thereon.
19. It was his testimony that the clan minutes clearly show that the late Raphael Kavuti sold to him half portion of the suit property though he had not transferred the same to him at the time of his demise. He urged the court to grant the orders as sought in the counterclaim.
20. On cross-examination by Mr. Hassan, he testified that his brother Kisilu Simba witnessed the sale agreement dated 28th March, 1985 between himself and the late Raphael Kavuti. He testified that he purchased 4¼ acres though the same was not captured in the sale agreement. He further testified that Raphael used to reside in Dar es Salaam and that he used to pay the purchase price in instalments whenever he visited their parents.
21. He further testified that the boundary was marked on 4/8/1985 when the witnesses signed the sale agreement. DW1 stated that he did not apply to revoke the grant issued in favour of the Plaintiff.
22. DW2, Peter Ngumbi Mwalyo, adopted his witness statement dated 18th October, 2021 as his evidence in chief. He informed the court that he witnessed the sale agreement dated 28th March, 1985 between Raphael Kavuti and Benard Nzyuko Simba for the sale of 4¼ acres comprised in the suit property. He added that Pius Musyoki purchased the remaining portion of the suit property. He stated that on 4th August, 1985, they planted sisal plants to mark the boundary. It was his testimony that the late Raphael Kavuti purchased land in Taita Taveta where he settled and was buried thereon. He testified that the late Raphael Kavuti does not have any land in Mbooni since it is now occupied by Benard Simba and Pius Jimmy. He stated that the Plaintiff has never resided on the suit property.
23. In cross-examination, he stated that the Defendant purchased half of the suit property on 28th March, 1985 even though they signed the sale agreement and marked the boundary on 4th August, 1985.
24. In re-examination, DW2 testified that they did not sign the sale agreement on 28th March, 1985 because the Defendant had not paid the purchase price in full.



25. After the close of the hearing, the parties agreed to file and exchange their written submissions.
27. As at the time of writing this judgment, the Plaintiff had not filed her written submissions.

The Defendant's Submissions

28. The Defendant's submissions were filed on 11th October 2023. On his behalf, Counsel submitted that PW3 admitted during cross-examination that the signature in the sale agreement dated 28/3/1985 was his. Counsel further submitted that PW3's allegation that his signature was in respect of Pius Jimmy's agreement was not accurate because he did not produce the said agreement and neither was Pius called as a witness even though he was listed amongst the Plaintiff's witnesses.
29. Counsel further submitted that PW2 was only responsible for the subdivision of their ancestral land amongst his brothers and therefore any sale of land by Raphael Kavuti to Benard Simba was not within his knowledge. Counsel submitted that the evidence of sale of the suit property to DW1 was corroborated by DW2 who attested the sale agreement. Counsel further submitted that the authenticity of the sale agreement was not shaken even during cross-examination.
30. Counsel submitted that even after selling Plot No. 146 Mandavu, the Plaintiff's mother Anastasia Katina, confirmed through the sale agreement dated 28th April, 1996 that none of her children should come back to Mbooni to demand for land. Counsel submitted that it is on the strength of the above that neither the Plaintiff's siblings nor her mother returned back to reclaim land in Mbooni.
31. Counsel further submitted that the Plaintiff was not present when her late father was selling a portion of the suit property to the Defendant in the year 1985 and as such, the suit herein is driven by her greed for land.
32. Counsel submitted that the Defendant fulfilled the terms of the sale agreement dated 28th March, 1985 and is therefore entitled to an order of specific performance.
33. Counsel further submitted that the Defendant has acquired prescriptive rights over the portion of land measuring 4.25 acres by virtue of adverse possession as he took possession immediately after the sale and has remained in continuous, uninterrupted and exclusive use and occupation of the land for more than twelve years.
34. To buttress his submissions, Counsel relied on the following authorities: -
 - i. Joel Wambugu & another v Ndegwa Ndingui Nairobi Civil Appeal No. 40 of 2003
 - ii. James Maina Kinya v Gerald Kwendaka [2018] eKLR

Analysis And Determination

35. Having considered the pleading, the evidence on record and the Defendants written submissions, the following issues arise for determination:-
 - i. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
 - ii. Whether the Defendant is entitled to the orders sought in the counterclaim
36. From the pleadings and the evidence on record, it is not in dispute that: -
 - i. The Plaintiff is the registered proprietor of the suit property and holds the same in trust for her co-beneficiaries Anastasia Katina Kavuti, Josephine Ruisia Raphael and Pius Mulinge Kavuti.
 - ii. The title deed for the suit property was issued on 4/12/2019.



iii. Raphael Kavuti Simba sold half of the suit property to Pius Jimmy Musyoki .

37. Whether The Plaintiff Is Entitled To The Orders Sought In The Plaint

38. The Plaintiff contended that the suit property is ancestral land and initially belonged to her late father but upon his demise, it was registered in her name through transmission to hold in trust for herself and on behalf of other beneficiaries.
39. In this regard the Plaintiff produced a copy of the title deed (PEX 1) and the certificate of confirmation of grant issued on 8th November 2019 in Mombasa Succession Cause No 141 of 2017 (PEX2) She stated that her late father did not sell to the Defendant half the portion of the suit property.
40. On the other hand, the Defendant is claiming ownership over half portion of the suit property on the basis of having purchased the same from his late brother Raphael Kavuti Simba. It was his testimony that he purchased 4.25 acres from his late brother while Pius Musyoki purchased the remaining portion of the suit property. He stated that the sale agreement was witnessed by his brother Kisilu. The Defendant called DW2 who testified that he witnessed the sale agreement. In this regard, he produced a sale agreement dated 28th March 1985 (DEX1).
41. The Plaintiff and her witnesses who happen to be the brothers to her late father denied that the allegations that her late father sold half portion of the suit property to the Defendant herein.
42. From the evidence adduced by the parties herein, it is clear that both parties are claiming ownership over the suit property.
43. The Plaintiff produced the certificate of confirmation of grant issued on 8th November 2019 in respect of the Estate of Raphael Kavuti Simba. The certificate of confirmation of grant clearly shows that the grant was confirmed in favour of the Plaintiff. The suit property was to be held by the Plaintiff in trust for herself and on behalf of the other beneficiaries. Pursuant to the confirmed grant, the Plaintiff was subsequently issued with a title deed on 4/12/2019 through transmission. No evidence was adduced to show that the grant confirmed in favour of the Plaintiff has been challenged or revoked. From the foregoing, I find that the Plaintiff is the registered proprietor of the suit property.
44. The Plaintiff sought for an order of permanent injunction restraining the Defendant from trespassing on the suit property. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides as follows;
- Subject to this Act;
- The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. ..
45. Having established that the Plaintiff is the registered proprietor of the suit property, I find that she is entitled to all the rights, interest and privileges belonging thereto. The Plaintiff is therefore entitled to an order of permanent injunction restraining the Defendant by himself, his servants and/or agents from trespassing and/or encroaching on the suit property.
46. The Plaintiff also sought for an order directing the District Surveyor to visit the suit property to fix the beacons on the land. The Plaintiff did not adduce any evidence to show that there is a boundary dispute to warrant the grant of the order sought and I therefore decline to grant the same.



Whether The Defendant Is Entitled To The Orders Sought.

47. The Defendant is seeking a declaration that he is the beneficial owner of a portion of land measuring 4.25 acres comprised in the suit property or in the alternative that he has acquired the same by virtue of adverse possession. DW1 informed the court that he purchased half portion of the suit property from his late brother Raphael Kavuti Simba. He further testified that the clan resolved that the late Raphael Kavuti had sold to him half of the suit property and informed the Plaintiff as much. In this regard, he produced a sale agreement dated 28th March, 1985 (DEX1) and the clan minutes dated 20/02/2014 (DEX2). His evidence was corroborated by DW2 who confirmed that he witnessed the sale agreement dated 28th March 1985 between Raphael Kavuti Simba and the Defendant herein.

48. The Plaintiff and her witness denied the allegations that her late father sold half portion of the suit property to the Defendant. The record shows that the Defendant did not challenge the grant issued in favour of the Plaintiff. Although the Plaintiff denied that her father sold half portion of the suit property to the Defendant, she did not adduce any evidence to show that the sale agreement dated 28th March 1985 is a forgery. The Plaintiff and her witnesses merely denied that her late father sold half portion of the suit property to the Defendant.

49. The sale agreement dated 28th March 1985 meets the requirement of Section 3 of the [Law of Contract Act](#) which provides that:-

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. The contract upon which the suit is founded -
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

50. The Defendant testified that his brother passed on before he could transfer to him his portion of the suit property. Having purchased half portion of the suit property from his late brother, this court finds and holds that his claim lies with his estate and not with the Plaintiff.

51. On the basis of the forgoing, I find that the Defendant is not entitled to the orders sought in the counterclaim.

52. In the end, I find that the Plaintiff has proved her case against the Defendant on a balance of probabilities as required. I also find that the Defendant has not proved his counterclaim against the Plaintiff on a balance of probabilities as required and as such the same is hereby dismissed.

53. The upshot of the forgoing is that I enter judgment for the Plaintiff against the Defendant in the following terms:-

- a. An order of permanent injunction be and is hereby issued stopping the Defendant by himself, his agents and/or servants or licensees from trespassing and/or encroaching on land parcel Mbooni/Itetani/183.
- b. A declaration be and is hereby issued that land Parcel No. Mbooni/Itetani/183 belongs to the Plaintiff.

On the issue of costs I note that the parties are closely related. I hereby direct that each party to bear its own costs.



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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY, 2024.

IN THE PRESENCE OF:

Sila for the Defendant

Hassan for the Plaintiff

Court assistant Alfred.

