



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 93 OF 1993

CHACHA.....APPLICANT

VERSUS

MWITA MANINIDEFENDANT

JUDGMENT

The plaintiff's claim against the defendant is for:

- (a) Permanent injunction be issued against the defendants agents, workers or servants, restraining them from interfering with the plaintiff's plot.
- (b) Commissioner of Lands be ordered to cancel land certificate number Bukira/ Bwisaboka/675 and fresh certificate under the name of the plaintiff issued in respect of this plot.
- (c) The defendant be ordered to sign transfer forms to transfer plot parcel know as Bukira/ Bwisaboka/675 to the plaintiff failure to do so an executive of this Court be authorized to sign on his behalf.
- (d) Costs of this suit be condemned upon the defendant and any other relief this Honourable Court may deem fit to grant.

Against these prayers the defendant has filed a defence in which he has denied the plaintiff's allegations and the prayers sought and together with the said defence a counterclaim has been lodged in which the defendant wants the plaintiff to be evicted from the said parcel of land and an order of injunction issued barring him from interfering with the defendant's peaceful occupation and enjoyment of the said parcel of land and further prays for mesne profits from the date of trespass to the date of delivery plus costs and interest.

The plaintiff who is unrepresented gave evidence in this Court and stated that he had sued the defendant to return to him his grandfather's land. He says in 1965 his grandfathers' wife got sick and the grandfather had to take her to Tanzania for treatment. She however succumbed to the sickness and died there in Tanzania.

The plaintiff's grandfather then came back and built on the disputed land but then he found the defendant had registered himself against the title to that land and on making that discovery; the grandfather took the matter to the Area Chief in the year 1975.

At that time the defendant is alleged to have bought the land but had no papers to show for it.

The plaintiff's grandfather however died before the dispute could be resolved. The plaintiff (PW1) then took the matter to demand the land and although he is living on the land he is not able to cultivate crops on it.

When the plaintiff PW1 was cross-examined by Mr Soire, counsel for the defendant he stated that he was born in the year 1973 at Kericho and his own father called Joseph Mwita Futwa died in the year 2000 while his grandfather died in the year 1985. He put the year of their coming back from Kericho to be year 1980.

He is not aware that the Land Adjudication exercise took place in the year 1975 and neither does he know whether his grandfather had sold the land in question in the year 1965 before he moved to Tanzania.

PW2 Joseph Marwa testified and confirmed that in the year 1985, the plaintiff's grandfather came back and went to his office complaining that the defendant had illegally registered his land in his own name. On receiving this complaint PW2 then summoned the defendant and the plaintiff's grandfather to appear before his (PW2's) panel of Elders when the defendant on being questioned said he had an agreement to show how he purchased the land but never availed the same until the plaintiff's grandfather passed away.

On being cross-examined, PW 2 said he was the chief of Bukira East Location since 1984 but currently he is a retired man. That if the land in question was sold in 1965, he was not in a position to know.

Zablon Mwita Manini DW1, the defendant herein testified and said that the land in question Bukira/Bwisaboka/675 – Exhibit P1 was his and was registered in his name since April 1976.

He has also produced three receipts Exhibits P2 (a) (b) (c) issued to him on 2.4.76 by the Land Adjudication Department in his name.

He traced his ownership to his having purchased the land from one Mugesi Ezenkwera before the later migrated to Tanzania but now the plaintiff who claims to be the grandson of the said Mugesi Ezenkwera.

He also produced the proceedings from Rijngo Sub Kuria African Court in Land Case No 22 of 1966 where one Gureta Nyasoko had made a claim against the said land, but his claim was thrown out when the original owner appeared before that Tribunal and testified saying he was the one who had sold the land to the defendant in this case.

He stated that he had been cultivating the land until the present chief brought the plaintiff to the land by force with his uncle.

The issue therefore to be resolved in this case is to whom does the land belong to and if it does belong to the plaintiff is he entitled to be registered as the new owner of the land.

On the other hand if the land belongs to the defendant does his counterclaim succeed and should the plaintiff be evicted from the said parcel of land and permanently enjoined from interfering with it.

It is not in dispute that the said piece or parcel of land know as Bukira/ BwisabokaA/675 is registered in the name of the defendant herein Mwita Manini and he was given the land certificate on 2nd April 1976.

It is also not in dispute that during the Land Adjudication process in the year 1974, the land in question was processed into his name.

The defendant is therefore the registered owner by virtue of first registration; and under the provisions of section 143 of the Registered Land Act his rights cannot be defeated.

That section provides:-

143 (1) "Subject to subsection 2, the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

That section expounds the sanctity of first registration of a title that the same cannot be vitiated even on the face of fraud.

That section and its efficacy has been given judicial interpretation and recognition by the Court of Appeal for Kenya in the case of *Joseph Marisin v Joseph Kibilat S. Bargalliet NKR* Civil Appeal No 306 of 1997 where in a judgment of the court; that court stated after quoting the provisions of section 143 (1) of the Registered Land Act:

"Quite clearly this section envisages that the title by way of a first registration is indefeasible even if obtained by fraud. This must be of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down."

In this case the plaintiff wants to overturn the process that had been exhausted before the title was issued to the defendant on the ground that the defendant got himself registered against the title unlawfully. His arguments cannot be supported by the law.

Even assuming what he says about the land not having been sold by his grandfather can be entertained for the sake of argument, the plaintiff's stand cannot be supported on the grounds that from the contents of Exhibit P3 which were the proceedings in Land Case Number 22 of 1966, his own grandfather Mugesu Kisengwa is recorded to have said, he had sold his entire land to the defendant before he migrated to Tanzania.

What better proof would one need to know to prove that the land in question do belong to the defendant and was registered in his name quite legitimately.

Even if the plaintiff was to stage his claim on adverse possession, it is clear from his evidence that his grandfather came back in 1985 and started laying a claim on the land by year 1993 when this suit was filed, hardly twelve years had elapsed and hence a claim cannot lie from that angle.

It is therefore my holding that the parcel of land know as Bukira/ Bwisaboka/675 cannot and has never belonged to the plaintiff and is therefore not entitled to be registered as the owner thereof in place of the defendant.

Consequently the plaintiff has not proved his case on the balance of probabilities and his suit fails and the same is hereby dismissed with costs.

On the other hand the defendant has proved on the evidence on record that the land is his. The same is

registered in his name. That registration confers on him the absolute ownership of the land together with the rights and privileges that go with the registration as provided for by section 27 (a) of the Registered Land Act and those acquired rights cannot be defeated except as provided by the provisions of the Registered Land Act. Under the provisions of section 28 of the said Act the defendant is entitled to the rights with all the privileges that belong to the land. Those include the right to enjoy and use his land.

The plaintiff therefore and all those who claim through him are trespassers on the said piece or parcel of land.

The defendant has on the balance of probabilities proved his counterclaim and an order is hereby issued to have the plaintiff evicted from parcel number Bukira/ Bwisaboka/675 within tow months from the date of this judgment.

I also issue an order of permanent injunction to restrain the plaintiff, his servants and or agents from interfering with the defendant's peaceful occupation and enjoyment of the said land.

I award the defendant the costs of the suit and interest.

Dated and delivered at Kisii this 7th day of January, 2002

P.K.A Birech CA



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