



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

E & L CASE NO. 42 OF 2012

CHARLES OCHOLA MUSINGO.....PLAINTIFF

VERSUS

WELLINGTONE MUTULA MUHOLO alias

HANNINGTON FREDRICK MUTULA.....1ST DEFENDANT

VINCENT OTIENO ODHIAMBO.....2ND DEFENDANT

DANIEL OKOTH OGUTU alias DANIEL ONYANGO ODUORY.....3RD DEFENDANT

JUDGMENT

1. *Charles Ochola Musingo*, the Plaintiff, commenced this suit against *Wellingtone Mutula Muholo alias Hannington Fredrick Mutula, Vincent Otieno Odhiambo*, and *Daniel Okoth Ogutu alias Daniel Onyango Oduory*, the 1st to 3rd Defendants respectively, vide the amended plaint dated the 12th October, 2012 seeking for permanent injunction in respect of *East Ugenya/Kathieno "B"/793*, the suit land, and costs. The Plaintiff avers that he is the registered proprietor of the suit land. That the Defendants have without any reasonable cause or authority trespassed onto the suit land barring him from tilling, cultivating and developing it and hence this suit.

2. The 1st Defendant denied the Plaintiff's claim through the statement of defence dated 9th October, 2012. He averred that the Plaintiff had a similar dispute with his late wife before the Siaya Land Dispute Tribunal, that was decided and adopted by Siaya Principal Magistrate Courts. That the suit is incompetent and an abuse of the process of the court.

3. The 2nd Defendant opposed the Plaintiff's claim through the statement of defence dated the 24th September, 2012 denying ever trespassing onto the suit land. That he is in occupation of East Ugenya/Kathieno "B"/794 to which he is legally entitled, and not the suit land.

4. The 3rd Defendant also opposed the Plaintiff's claim through the statement of defence dated 11th February, 2014 averring that he was in occupation of East Ugenya/Kathieno "B"/753, and not 793 suit land.

5. The Plaintiff testified as PW1 and told the court that the suit land had come from parcel 760 that belonged to his late father, and registered with his late elder brother, Julius Oluoch Musingo. That he became registered with the parcel through a Succession cause and thereafter noted the Defendants were cultivating it. That when he demanded that they vacate from the land, the Defendants took him to the Siaya Land Disputes Tribunal whose award was adopted by the Siaya Court and were ordered to subdivide the land. The Plaintiff told the court that he was dissatisfied and filed an appeal with the Appeals Committee, but due to the change in the law, the appeal was not heard. The Plaintiff then did a demand letter to the Defendants and prays for the other lands of his late father be

returned to him with costs. During cross examination, PW1 testified that the Land Disputes Tribunal was between him and Cecilia Mutula, and that after her death, the 1st Defendant took over the case on her behalf. That the 2nd Defendant was not a party in the Tribunal case. That nobody filed any objection proceedings when he filed a Succession Cause over his late brother's estate. That the 1st Defendant has placed a relative to cultivate on the disputed land. That the parcels of lands used by the 2nd and 3rd Defendants were part of his late father's land parcel 760 and that he does not know how they got those parcels.

6. The 1st Defendant testified as DW1 and told the court that he is the administrator of his late wife's estate. That his late wife had bought land from the late father to the Plaintiff, called Pius Ochola. That after Pius passed away, the Plaintiff went to court and got the title to the land. That his late wife filed a claim before the Tribunal which ordered that the land be subdivided to enable his late wife get her share. The Tribunal award was adopted by the Lower Court, but the Plaintiff filed an appeal which was later forwarded to this court. During cross examination, DW1 stated that his late wife had bought a portion of land from parcel 793, from the Plaintiff's father about 1992 but did not have a copy of the sale agreement. That the Tribunal had cancelled the plaintiff's title to the suit land. The 1st defendant then called Lawrence Baraza and Samuel Muyala Liwala, who testified as DW2 and DW3 respectively.

7. The 2nd and 3rd Defendants testified as DW4 and DW5 respectively. The 2nd Defendant stated that he owns East Ugenya/Kathieno "B"/794 which was a subdivision from parcel 760 that he bought from the late Julius Oluoch. That he established a home on the land and is farming it. He produced copies of the sale agreements dated 16th August, 1998, 5th December, 1998 and copy of his title deed among others as exhibits. During cross examination, the 2nd Defendant testified that the suit land is registered with the Plaintiff, though the late wife to 1st Defendant had been using it by planting trees on a portion of it. That the 1st Defendant was using a portion of the suit land by the time this suit was filed but later stopped after the Plaintiff asked him to. The 3rd defendant testified that he owns East Ugenya/Kathieno "B"/753 which does not border the suit land. That he does not use the suit land and the Plaintiff's case should be dismissed with costs. Answering questions, DW5 stated that he does not know the owner of the parcel that is between his land and that of the plaintiff.

8. The learned Counsel for the parties agreed on the timeline of filing and exchanging submissions on the 27th June, 2019 but when the matter was mentioned on the 30th October, 2019, only the plaintiff's counsel had filed the submissions dated 27th August, 2019.

9. The following are the issues for the court's determinations;

- (a) *Whether the Plaintiff is the lawfully registered proprietor of East Ugenya/Kathieno "B"/793, the suit land.*
- (b) *Whether any of the defendants has any legal right over the suit land.*
- (c) *Whether any of the Defendants has trespassed onto the suit land.*
- (d) *Whether the Plaintiff is entitled to the order of permanent injunction sought.*
- (e) *Who pays the costs"*

10. The court has carefully considered the parties pleadings as summarized above, the oral and documentary evidence of PW1, DW1 to DW5, the written submissions by counsel for the Plaintiff, and come to the following findings;

(a) That from the oral evidence of the Plaintiff and the 2nd Defendant, the suit land was at all material times of this suit registered in the name of the Plaintiff. That further, the Plaintiff has produced copies of the Certificate of official Search issued on the 16th August, 2012 confirming that fact. The 2nd Defendant also produced a copy of the green card, (register) of the suit land confirming that it was registered on the 27th November, 1998 following subdivision from parcel 760, and registered in the name of Julius Oluoch Musingo and transferred to the Plaintiff on the 16th July, 2004 vide *Succession Cause No. 39 of 2003, Siaya Senior Resident Magistrate*. That as there is no evidence tendered before this court to show that the Succession Court's decision on the registration of the Plaintiff as proprietor has ever been set aside through revocation or appeal, and in terms of **Section 26 of the Land Registration Act No. 3 of 2012**, the court takes the Plaintiff as the absolute and indefeasible owner of the suit land.

(b) That the evidence adduced by the Plaintiff, the 1st and 2nd Defendant confirms that the late wife to the 1st Defendant had lodged a claim against the Plaintiff before Siaya Land Dispute Tribunal in Case No. 89 of 2006, over a portion of the suit land that she

allegedly bought from “Mzee Musingo about fifteen years ago”. That is confirmed by the copies of the Tribunal proceedings produced by the Plaintiff and 1st Defendant which shows the tribunal award was to effect that the Plaintiff’s title to the suit land be revoked and that the land be subdivided into two, and one part be registered with Cecilia Hope Mutula and the other the Plaintiff. That the Plaintiff filed an appeal with the Provincial Appeals Committee which was however abolished through repealing of the **Land Disputes Tribunal Act** under **Section 31 of the Environment and Land Court Act No. 19 of 2011** before it could conclude the appeal. The Plaintiff then filed this suit even though the fate of the appeal is not clear from the facts presented before the court. That even though the Plaintiff has not sought any prayers from this court over the Land Disputes Tribunal award, it is quite clear that award was in excess of the Tribunal’s powers under **Section 3 (1) of the Land Disputes Tribunal Act (repealed)**, and hence null and void as it amounted to taking away the Plaintiff title to a registered land.

(c) That the 1st Defendant was properly enjoined in this suit as the administrator of his late wife’s estate, and as the person who continued with the activities previously carried out by his late wife on the suit land as confirmed by the Plaintiff and the 2nd Defendant. That further, DW2 and DW3 who had been called by the 1st Defendant as witnesses, confirmed that his late wife was using the suit land and had given them building stones. The 1st Defendant claim to the suit land was through a purchase allegedly made by his late wife from the late Mzee Musingo, who the court takes to be the father of the Plaintiff. That however, the 1st Defendant did not avail any written documentary evidence of the sale transaction between his late wife and the Plaintiff’s late father. That he had also not availed a consent from the Land Control Board that was obtained within the six months as required under **Section 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya**. That by the time the late wife of the 1st Defendant testified before the **Siaya Land Disputes Tribunal in Case No. 89 of 2006** that was decided in 2007, she indicated that she had bought the land from Mzee Musingo about fifteen (15) years ago. That there is no evidence adduced that the said Mzee Musingo was ever the registered proprietor of the suit land as the green card produced by the 2nd Defendant indicated the first registered proprietor of the suit land was Julius Oluoch Musingo. That from the foregoing, the court finds that the 1st Defendant had no interest known in law or equity over the suit land and his use of the land amounted to trespass.

(d) That there was no evidence adduced by the Plaintiff to show that the 2nd and 3rd Defendant were actually using the suit land or that persons authorized by any of them had trespassed onto the land. That accordingly, the Plaintiff’s claim against the 2nd and 3rd Defendant fails.

(e) That the Plaintiff having succeeded in his claim against the 1st Defendant is entitled to his costs. That further, as the Plaintiff’s claim against the 2nd and 3rd Defendants has failed, he should pay them costs. That is in accordance with the dictate of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** that costs follow the events.

(f) That so as to confirm the ground boundaries of the suit land, in relation to the other neighbouring parcels it is necessary that the County Land Registrar and Surveyor do visit the suit land and re-establish its boundaries. The applicable fees to be met by the Plaintiff.

11. That flowing from the foregoing, the court finds that the Plaintiff has established his claim against the 1st Defendant to the standard required by the law. That the Plaintiff has however failed to establish his claim against the 2nd and 3rd Defendants. That the court therefore, orders as follows;

(a) That judgment be and is hereby entered for the Plaintiff against the 1st Defendant in terms of prayers (i) and (ii) of the Amended Plaint dated 12th October, 2012. That further, the County Land Registrar and Surveyor do visit the suit land with a view of confirming its ground boundaries. That the requisite fees to be paid by the Plaintiff.

(b) That the Plaintiff’s case against the 2nd and 3rd Defendant be and is hereby dismissed with costs.

Orders accordingly.

Dated and signed at Eldoret this 3rd day of February, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 6th day of March, 2020.

A. OMBWAYO

JUDGE

Judgment read in open court in the presence of:

Mirembe for Plaintiff.

No appearance for 1st Defendant.

No appearance for 2nd and 3rd Defendants.

Court Assistant: Joanne



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