



**Shah & 5 others v Amir; Chief Land Registrar, Nairobi Central Registry (Interested Party)
(Environment & Land Case E114 of 2022) [2023] KEELC 19187 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E114 OF 2022**

**MD MWANGI, J
JULY 27, 2023**

BETWEEN

**PARAG KIRTI SHAH 1ST PLAINTIFF
SHRUTI KIRTI KUMAR 2ND PLAINTIFF
RAVI NAENDRA SHAH 3RD PLAINTIFF
POONAM BHIKHU RAMJI SHAH 4TH PLAINTIFF
NIRAJ NAENDRA KARAMSHI SHAH 5TH PLAINTIFF
SIMMER RAJ SINGH BACHHER 6TH PLAINTIFF**

AND

AHMED FUAD AMIR DEFENDANT

AND

**CHIEF LAND REGISTRAR, NAIROBI CENTRAL REGISTRY INTERESTED
PARTY**

JUDGMENT

1. The Plaintiff herein filed this suit by way of a plaint dated 23rd March, 2022 against the Defendant seeking for the following Prayers; -
 - a. A permanent injunction restraining the Defendant, his employees, servants or agents from trespassing, interfering, intermeddling in any manner whatsoever or howsoever with the Plaintiffs 'quiet and peaceful enjoyment and use of Land Reference Number 7158/117.



- b. An order of Declaration that the Land Reference Number 7158/117 belongs to the Plaintiffs;
 - c. An order of Declaration that the Defendant's claim on Land Reference Number 7158/117 as unlawful;
 - d. An order do issue revoking the Defendant's/Respondent purported title over Land Reference Number 7158/117;
 - e. General damages for breach of the Plaintiffs' rights;
 - f. Any other reliefs that this Honourable Court may deem just and expedient to so grant;
 - g. Costs of this suit and interests thereon.
2. The gist of the Plaintiffs' case is that they are the registered owners of all that parcel of land, known as Land Reference Number 7158/117 situated in Spring-Valley, Nairobi County measuring approximately 2.12, the suit property herein. They acquired ownership of the suit property after purchasing it from Agem Limited at a consideration of Kshs. 230,000,000/= vide a Sale Agreement dated 21st December, 2020. The transfer instrument for the said sale land transaction was registered on the 26th March, 2021. The Plaintiffs assert that they conducted due diligence and ascertained ownership of the suit property before purchasing it. They thereafter took possession and are making preparations to develop the said property.
 3. The Plaintiffs allege that sometime on 17th March, 2022, the Defendant either by himself or through his agents attempted to encroach, trespass and or unlawfully occupy the suit property. The Defendant attempted to evict the Plaintiffs' guards from the suit property. Upon enquiry, the Defendant's agents produced a Certificate of registration bearing the Defendant's name. Though the Land Reference on the Certificate was similar to the suit property as described above it had a different I.R number.
 4. The Plaintiffs assert that the Chief Land Registrar, the Interested Party herein, has since renounced the Defendant's Title as a forgery and or bogus document whose origin is unknown purportedly issued on the 17th November, 2021 whilst the Plaintiffs' title has been in existence for a period of over 90 years.
 5. The Plaintiffs accuse the Defendant of breaching their right to quiet and peaceful possession, enjoyment and use of the suit premises by his continued unlawful attempts to encroach and occupy the suit property. The particulars of the Defendant's meddling and attempted trespass by the Defendant are pleaded at paragraph 12 of the plaint.
 6. On 1st April, 2022, the Plaintiffs filed an affidavit of service sworn by one, Awuor Linda Ayimba (Process Server) indicating that the process server had served summons and the plaint upon the Defendant on 28/3/2022 via the Defendant's WhatsApp. Further, on 29/03/2022 the Defendant was again served via Registered Post Office to his postal address.
 7. The Defendant entered appearance on the 5th April, 2022 vide the Memorandum of Appearance dated 4th April, 2022 through the firm of Amadi & Associates. The said firm of Advocates appeared on numerous occasions when the matter came for Mention. Counsel for the Defendant informed court that parties were negotiating for a possible out of court settlement. However, the Plaintiffs' counsel refuted the assertion stating that they had not received any proposal from the Defendant.
 8. On 22nd May 2023, the Defendant's Advocate informed the court that they wished to cease acting in the matter. They were however yet to file an application to that effect. The Court granted the Defendant's



advocates leave to file the intended application but set down the matter for formal-proof hearing. To date, no application has been filed.

9. The Defendant did not file any statement of defence. Consequently, the matter proceeded to hearing with the Plaintiffs calling one witness. The Defendant did not participate in the hearing. On the date for hearing, the court noted that the date had been issued in the presence of the Advocate on record for the Defendant.

Evidence on behalf of the Plaintiffs

10. The 1st Plaintiff, Parag Kirti shah testified on behalf of the Plaintiffs as PW1. He adopted his comprehensive Witness Statement dated 23rd March, 2022 as his evidence in-chief. He further produced the documents on the Plaintiffs' List of Documents dated 23rd March, 2022 as exhibits in support of his case. The documents were marked accordingly as Plaintiffs' Exhibits 1-12.
11. The witness statement of Parag Kirti Shah now forms part of the record of the court. I need not replicate it here. It affirms the Plaintiffs' case as pleaded in the plaint.

Court's directions

12. At the close of the hearing of the case, the court directed Counsel to file the Plaintiffs' written submissions. Counsel filed submissions dated 5th July, 2023. The court has had the opportunity to read the submissions.

Issues for determination

13. Having considered the Plaint, the testimony of the Plaintiffs' witnesses and the submissions subsequently filed, the issues for determination in this matter are;
 - a. Whether the Plaintiffs are the legal owners of the suit property;
 - b. Whether the Plaintiffs are entitled to the orders sought in the Plaint.

Analysis and Determination

A. Whether the Plaintiffs are the legal owners of the suit property

14. I begin by pointing out that despite the Plaintiffs' case being undefended they still have a burden to prove the issues of fact pleaded in their case. The provisions of Sections 107 and 109 of the [Evidence Act](#), Cap 80 Laws of Kenya are clear that: -

“107. Whoever desires any court to give judgment as to any legal right or liability dependent on facts which he asserts must prove that those facts exist.

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of the fact shall lie on any particular person.”

15. Thus the position is that he who alleges bears the burden of proving. (Jennifer Nyambura Kamau – vs- Humphrey Mbaka Nandi [2013] eKLR.)
16. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract.



Section 3(3) of the Law of Contract reads as follows; -

“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; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”

17. A perusal of the Agreement for Sale dated 21st December, 2020 between the Plaintiffs and Agem Limited produced as Plaintiffs’ Exhibit 1 confirms that the above requirements of the law were compiled with. Subsequently, a Transfer Instrument executed on the 25th March, 2021 was duly registered on 26th April 2021.
18. The Certificate of Title produced as Plaintiffs’ Exhibit 3, confirms the transfer from Agem Limited to the Plaintiffs vide Entry Number 25 on the 26th April, 2021.
19. The Plaintiffs’ Exhibit 6, was a copy of a Search Certificate dated 21st March, 2022, confirming the Plaintiffs as the registered owners of the suit property.
20. There is also evidence that the Plaintiffs took possession and they have been paying the requisite rent and rates to the relevant authorities.
21. The Plaintiffs allege that the Defendant through his agents has attempted to trespass on the suit property and tried to evict the Plaintiffs’ guards. The said intruders presented to the Plaintiffs’ guard a Certificate of Registration in the name of the Defendant herein. The said Certificate of Title was produced as Plaintiffs’ Exhibit 8. It bears a different I.R number from that of the Plaintiffs.
22. The Plaintiffs accuse the Defendant of breaching their right to quiet and peaceful possession, enjoyment and use of the suit property. As stated earlier, the Plaintiffs’ claim is uncontroverted and unchallenged. The Defendant has not adduced any evidence to contradict the Plaintiffs’ evidence. In any event, the Defendant’s title has been renounced by the Chief Land Registrar as a forged and bogus document of unknown origin. This is evident from the Letter from the Ministry of Lands and Physical Planning adduced as Plaintiffs’ Exhibit 9. The letter confirms the Plaintiffs as the registered owners. It further terms the lease and certificate of title purportedly registered on 17th November 2021 as I.R 219144 as forgeries that do not emanate from the office of the Chief Land Registrar.
23. In the premises, having considered the unchallenged evidence adduced by the Plaintiffs and the exhibits produced in support of their case, I find that the plaintiffs have proved that they are the lawful owners of the suit property.

B. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff

24. The Plaintiffs being the lawful owners of the suit property herein are entitled to enjoy quiet possession of the said property. The plaintiffs in their Plaintiff pray for issuance of an order for permanent injunction restraining the Defendant and his agents from interfering with their peaceful enjoyment and use of the suit property.



25. In the case of *Sammy Kemoo Arekai v Eliakim W Olweny & Another* [2021] eKLR Mutungi J stated that;

“A permanent injunction would issue only after the rights of the contesting parties have been adjudicated and the Court has reached a final decision.... He cited the case of *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* [2018] eKLR where the learned judge stated that: -

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

26. In view of my finding above that the Plaintiffs are the legal owners of the suit property, they are entitled to an order of permanent injunction as sought.

27. The Plaintiffs also sought for a declaration that the Defendant’s claim over the suit property is unlawful and order to issue revoking the Defendant’s title on the suit property.

28. Section 26(1)(a) & (b) of the *Land Registration Act*, 2012 states that:-

“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 proprietor shall not be subject to challenge except: -

- (a) On 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.

29. The letter ‘PE 9’ by the Chief Land Registrar is categorical that the Plaintiffs are the registered owners of the suit property. It further terms the lease and certificate of title purportedly registered on 17th November 2021 as I.R 219144 in the Defendant’s name as a forgery that do not emanate from the office of the Chief Land Registrar.

30. Section 80 of the *Land Registration Act* which provides that:

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.



31. In the case of *Mary Ruguru Njoroge v John Samuel Gachuma Mbugua & 4 Others* [2014] eKLR, it was held that:
- “It is up to the party seeking rectification, whether under the relevant statutory provisions or the equitable principles to satisfy the court or the Registrar, for that matter, that their intervention is justified. The evidence must in my view be convincing. Even though the ordinary standard of proof on a balance of probabilities applies the evidence ought to be sufficient to overcome the inherent probability that what is sought to be rectified was what was intended all along.”
32. Based on the facts as presented and in associating myself with the decisions cited above and relying on the cited legal provisions, I am convinced that the Plaintiff has indeed proved that the purported title by the Defendant was acquired illegally and unprocedurally.
33. Accordingly, the court orders that the purported title/lease by the Defendant be canceled. The Interested party herein is directed to do so forthwith.
34. The plaintiffs in their plaint had further sought for general damages for breach of their rights. The evidence adduced however was that the Defendant only attempted to take over possession by evicting the Plaintiffs’ guards from the suit property. Evidently, there were only attempts to trespass on the suit property as the Plaintiffs are still in possession. Therefore, I find no basis whatsoever upon which to grant the general damages sought. The prayer for general damages is therefore disallowed.
35. On the issue of costs, since the Defendant did not contest the claim, the court will not make any order as to costs.

Conclusion

36. Accordingly, the Plaintiffs’ case against the Defendant is allowed in the following terms: -
- a. It is hereby declared that the Plaintiffs are the legal and rightful owners and or proprietors of that piece or parcel of Land known as Land Reference Number 7158/117 situated in Spring-Valley within Nairobi County measuring 2.12.
 - b. It is hereby declared that the Defendant’s claim on Land Reference Number 7158/117 is unlawful.
 - c. A permanent injunction be and is hereby issued against the defendant restraining him, his employees, servants or agent from, trespassing, interfering, intermeddling in any manner whatsoever or howsoever with the Plaintiffs ‘quiet and peaceful enjoyment and use of Land Reference Number 7158/117.
 - d. An order is hereby issued directing the Land Registrar, Nairobi Land Registry, to cancel and or revoke the title/lease in the name of the Defendant, if any, in respect of the suit property forthwith.
 - e. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE



In the virtual presence of:

Mr. Chahenza for the Plaintiff.

No appearance by the Defendant and Interested Parties.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

