



**Rukomia v Kamau (Environment & Land Case 368 of 2014)
[2023] KEELC 18769 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 368 OF 2014**

**AA OMOLLO, J
JULY 13, 2023**

BETWEEN

FESTUS WANJOHI RUKOMIA PLAINTIFF

AND

VINCENT GICHOMO KAMAU DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendant through a plaint dated 21st march 2014 which was dismissed on 23rd March 2022 for want of prosecution with costs. The Defendant had filed a defence and counter claim dated 2nd May 2014. In the counter-claim, the Defendant sought for the following orders:
 - a. A declaration that the suit property belongs to the Defendant as the registered proprietor.
 - b. A permanent injunction restraining the Plaintiff by himself, his agents, servants and/or personal representatives from trespassing, alienating or in any way interfering with the Defendant's quiet possession and occupation of the suit property.
 - c. Damages for malicious damage to the Defendant property valued at Kshs.30,000/
 - d. General damages
 - e. Costs of this suit and interest thereon till payment in full
 - f. Any other reliefs this Honourable Court may deem just and fair.
2. The Defendant stated that at all material times he was the registered proprietor of plot No.1282 original plot No.1127 situate in Ruaraka hereinafter referred to as "the suit land" having purchased the same from its original allottee, Mr. Josephat Kahungu Karuhi, on 15th August 2013. That the transfers were



signed and effected at the Lucky Summer Estate Company Limited offices, and during that process, it is the Plaintiff who received the transfer fees of Kshs. 75,000 from the Defendant.

3. The Defendant stated that the Plaintiff is one of the Directors of Lucky Summer Estate and through an abuse of that office, he illegally had a transfer effected in his favour without any Sale Agreement between him and the original allottee of the suit land. The Defendant continued to state that on several occasions, the Plaintiff forcefully and illegally entered upon the suit land which made the Defendant file a complaint at the Ruaraka Police station vide O.B No.17/2/8/13. On 22nd August 2013 the police asked the Plaintiff to produce the title documents to the suit land but he was not able to do so.
4. The Defendant contended that he has suffered loss and damage owing to the illegal acts of the Plaintiff because he demolished his stone perimeter wall on the suit land, begun illegally constructing on the same and only stopped when he was arrested and charged with malicious damage to property.
5. The Plaintiff filed a response to the Defendant's counter claim dated 23rd September 2015 denying the allegations thereof and reiterated that his claim against him as pleaded in his Plaint was valid. The Plaintiff failed to give oral evidence despite service of hearing notice having been effected. DW1 testified in support of his counter claim as the Plaintiff and adopted his written statement dated 2.5.2014 as evidence in chief. He averred that he has lived on the suit land since 2013 and produced the documents filed to support his case that included sale agreement for the sale of the suit land, receipts for transfer fees, letters indicating change of plot numbers as DExh 1-10.
6. The Plaintiff filed submissions dated 20th March 2023 and the Defendant filed submissions dated 13th February 2023. The Plaintiff stated that he supports the Defendant's case that he is the owner of the suit land and his only issue is that he has sued him being the owner of the adjacent plot 1283. The Plaintiff therefore, framed the issues that he would submit on as;
 - i. whether there is a mistaken identity on the location of the property being pursued by the Defendant,
 - ii. whether Lucky Summer Estate Limited ought to have been joined as Interested parties,
 - iii. whether Nahshon Mutua should have been joined as a party to the suit and
 - iv. whether the matter offends the doctrine of sub judice.
7. The Plaintiff submitted that the issue as pertaining to the ownership of the suit land is not a matter in issue herein but rather its location. He was contesting the location of the said plot on the ground submitting that the plot ascertained to belong to the Defendant is the plot next to number 1282. He also submitted that Lucky Summer Estate Limited issued both their titles wherewith they derive their ownership rights therefore it is trite that they were to be joined as an interested party to properly explain before court the location of subject matter. Further, the Plaintiff argued that the suit land was grabbed by Nahshon Mutua, the former OCS for Ruaraka therefore he should be joined as a party to the suit.
8. The Plaintiff submitted there is another matter at the Chief Magistrates Court at Nairobi, Civil Case 7050 of 2019 still pending at the Chief Magistrates Court and therefore deciding this matter herein will be in subordinating the matter at the Chief Magistrate's Court.
9. The Defendant submitted that the Plaintiff had claimed to be the legal and beneficial owner of the suit property known as Lucky Summer Estate Limited LR No 31/Block 16 &18, Plot 1283R 1355.The Defendant stated that he is the registered proprietor of the suit land and relied on the sale agreement between himself and Dominic Gathecha, the sale agreement between himself and Josphat Kahungu



- Karuhi and a copy of original Certificate No. 5054 in the name of Vincent Kamau Plot No. 1282 to prove ownership.
10. Further, the Defendant tendered a copy of the original Certificate No.1127 that belonged to the original allottee of the suit land stating that the only reason he had not tendered the certificate of title is because the same is yet to be processed by the Registrar of Lands. In support the argument, he cited the case of *Munyu Maina v Hiram Gatbitba Maina*, Civil Appeal No. 239 where the court stated that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. That it is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.
 11. The Defendant also submitted that after specifically pleading the fraud by the Plaintiff in acquiring the title to the suit land, the Plaintiff did not rebut those allegations, citing the case of *Mohammed & another v Haidara* [1972] EA (166 at page 167 paragraph F-H Spry V.P where the court considered the failure by a party to file a reply to allegations set out in evidence and expressed that the allegations remain unrebutted, therefore from the foregoing observation the Defendant produced sufficient evidence to prove that he purchased the suit land and that the Plaintiff has not made any attempt to rebut the his averments.
 12. The Defendant submitted that he is entitled to the orders sought in his counter claim stating that immediately he purchased the suit property, he took possession and fenced it but the Plaintiff maliciously demolished the perimeter stoned wall. He urged that he is entitled to value of the work that had been done and of the damaged materials and supported the averment with the holding in case of *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR Civil Suit No. 290 of 2000.
 13. The Defendant added that he is entitled to the cost of the dismissed suit because the Plaintiff maliciously instituted the same against him with interest at 24% per annum until payment in full as restitution for all the malicious acts occasioned upon him by the Plaintiff.
 14. On special damages, the defendant submitted that the court should be guided by the provisions of section 27 of the *Civil Procedure Act* and also the decision in the case of *Bio-Medical Laboratories Limited vs Attorney General* [2012] eKLR where the judge found that the Plaintiff was undoubtedly entitled to the interest at the commercial rate of 28% which was the applicable rate at the time, therefore requested the court to grant an order of interest at 24%.
 15. After careful consideration of the pleadings, the evidence tendered by the Defendant together with the submissions he rendered, I have noted that the plaintiff does not contest the fact that the defendant owned a plot. According to the Plaintiff as pleaded in the plaint (which was dismissed for want of prosecution), he was told the Defendant's plot was number 1282 and not 1283 which is the gist in the counter-claim. However, the Plaintiff did not produce any evidence to corroborate this assertion.
 16. Further, the Defendants evidence that he has been in possession of his plot number 1283 has not been controverted. The occupation of the Defendant is supported by the prayers sought in the dismissed plaint as what was sought included that the Plaintiff be paid damages or mesne profits until possession of the suit plot is delivered up.
 17. Therefore, besides the Plaintiff not adducing evidence, the pleadings and the documents on the court record does affirm the claim as presented in the counter-claim including the prayer for compensation for malicious damage to the Defendant's wall. Consequently, I hold that the Defendant has proved his



case on a balance of probabilities in so far as the provisions of order 12 rule 3(3) of the Civil Procedure Rules require of him. Thus judgement is entered for the Defendant as follows;

- i. A declaration is hereby made that the suit property plot no. 1282, Lucky Summer Estate Company Ltd belongs to the Defendant
- ii. A permanent injunction be and is hereby issued restraining the Plaintiff (Festus Wanjohi Rukomia) whether by himself, his agents, servants and/or personal representatives from trespassing, alienating or in any way interfering with the Defendant's quiet possession and occupation of the suit property.
- iii. Payment of Kenya shillings Thirty Thousand (Kshs 30000) as compensation for the damaged wall.
- iv. Costs of this suit
- v. Interest thereon at court rate from the date of filing of the counter-claim till payment in full

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2023

A. OMOLLO

JUDGE

