



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

KERICHO ELC NO. 7 OF 2014

ELIJAH KIMUTAI BIWOTT.....PLAINTIFF

VERSUS

PATRICK LUMUMBA OMBURA.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 25th February 2014, the Plaintiff filed suit against the Defendant seeking that the Defendant be evicted from the Plaintiff's land parcel known as KERICHO/MUNICIPALITY BLOCK5/468. He also prays for general damages and costs of the suit. The said Plaint was amended on 3rd April 2014.
2. The Defendant filed a defence through the office of the Attorney General in which he denied the Plaintiff's claim and stated that the Defendant had obtained the title fraudulently.
3. The suit was set down for hearing and both the Plaintiff and the Defendant testified and called their witnesses.

Plaintiff's case.

4. The Plaintiff in his witness statement of 20th February 2014 claims that the Defendant is illegally occupying his house comprised in L.R. KERICHO MUNICIPALITY/BLOCK 5/468 and that despite several requests to vacate the suit premises, the Defendant has refused to vacate.
5. The Plaintiff testified that he bought the suit premises from one Anthony Kimetto. He produced a certificate of lease for the said parcel and a sale agreement together with letters of allotment as Plaintiff's exhibits 1, 2 and 5 respectively. He stated that the house was given to the defendant by his friend who was a former tenant of the Plaintiff through a local arrangement and that the Defendant was not paying any rent. He said that he has been paying the land rent and rates and produced a bundle of receipts to prove this. He therefore wants the Defendant evicted to enable him develop his plot.
6. Upon cross-examination , he stated that he bought the house from Antony Kimetto in 1995 who was a Councillor in the former County Council of Kipsigis. He said he was not aware that the house belonged to the Government of Kenya. He denied that the house was allocated to him irregularly. He said he has not had any tenancy agreement with the persons who have been staying in the suit premises since he bought it. He denied having received any communication from the National Land Commission.

Defendant's case.

7. The Defendant called two witnesses. DW1, Charles Stephens Omollo who is the County Director of Housing is the custodian of all Government houses in Kericho County testified that the house in dispute is a Government house which is currently occupied by the Administration Police Commander. He said the Defendant who used to live in the said house is also an officer with the Administration Police but he was transferred to another station.
8. He explained the procedure for the sale of a Government house which is as follows:

“The house is identified then a letter is written to the Permanent Secretary seeking authority to board the house. If the Permanent Secretary gives his authority, a Board of Survey initiated by the Officer in Charge of the buildings is constituted. After determining the condition of the building, the Board prepares an inspection report for the authorized Officer who is the Accounting Officer of the Ministry and the proceedings and recommendations of the Board of Survey are recorded in Form F058 and sent to the Accounting

Officer with the inspection report.

The said form F058 is forwarded to the Principal Secretary, Treasury for approval and it is only after the Ps approves the sale that bidders are invited to bid for the property. The successful bidder is then given an official receipt for the property he bought. Thereafter the building or house is deleted from the register and the Controller and Auditor General informed accordingly.”

9. He said he did not have any records to show that the house had been sold and it still appeared in his records as a Government house. Mr. Omollo testified that he had written to the National Land Commission to confirm the position with regard to the suit property and he produced a letter from the National Land Commission (DEX 3) indicating the suit property was among the Government houses that had been irregularly allocated. He stated that the officers who have been occupying the house have been paying rent to the Government. He stated that the house had a sign board with the Government number KER/HOU/MG/12 on it. The court had occasion to visit the house and confirmed that it situated in the Administration Police compound and it still has the said sign board on it.

10. DW2 who is the current occupant of the house testified that he is the current AP Commander, Kericho. He produced a letter from the Ministry of Transport Infrastructure and Housing allocating him the house. The said letter was marked as Defence Exhibit 7. He stated that the house had been occupied by AP Commanders since the eighties. He produced a list of previous occupants of the house.

Issues for determination

- i. Is the Defendant is properly sued ?
- ii. Does the plaintiff have a valid title to the suit property?
- iii. Is the Plaintiff entitled to the reliefs sought?

Analysis and Determination.

11. At paragraph 8 of his Defence filed on 17th March 2014, the Defendant raised a point of law that the suit as instituted contravenes the mandatory provisions of section 12 of the Government Proceedings Cap 40, Laws of Kenya. The said section provides as follows:

“Subject to the provisions of any other written law, Civil Proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be.”

12. It is not in dispute that Defendant in this case was a Sub-County Administration Police Commander (SSP) who was sued by virtue of being a Government Officer and was not in occupation of the house at the time the suit was filed.

13. Counsel for the Defendant submitted that the Plaintiff sued the Defendant in person instead of suing the Attorney General. In the circumstances, the suit does not lie and the same should be dismissed on that ground. She submitted that the provisions of Order I Rule 10(2) of the Civil Procedure Rules should apply as this is a case of misjoinder of a party. Furthermore, the Plaintiff did not adduce any evidence to show that the defendant was occupying the house. Infact by his own admission the defendant had left the house by the time the suit was filed. It is therefore my finding that the suit against the defendant does not lie as the plaintiff has no cause of action against him.

14. The second issue for determination is whether the Plaintiff has a valid title to the suit property.

15. The Plaintiff testified that he bought the suit property from Antony Kimetto. He produced the sale agreement and certificate of lease in his name as well as receipts to show that he has been paying land rent and rates.

16. Learned counsel for the Plaintiff submitted that the Plaintiff being the registered proprietor of the suit property is entitled to protection of the law by virtue of section 26 of the Land Registration Act, 2012. The said section provides as follows:

“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 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 grounds of fraud, or misrepresentation to which 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.”

17. Counsel submitted that the Defendant failed to prove that the Plaintiff’s title was obtained fraudulently. He submitted that the Plaintiff was a bona fide purchaser and his title was indefeasible. He cited the case of **Charles Karathe Kiarie & 2 Others v Administrators of the estate of John Wallace Mathare Deceased & 5 Others (2013)eKLR** where Court of Appeal reaffirmed the doctrine of indefeasibility of title.

18. He argued that even if the property is found to have been illegally acquired, the Government owes a duty of care to all its citizens and is liable for the negligence of its officers.

19. He submitted that the Plaintiff had failed to prove fraud to the required standard as set out in the case of **Kibira Wagoro Makumi v Francis Nduati Macharia & Another (2018) eKLR**.

20. On the other hand learned counsel for the Defendant submitted that the Plaintiff does not have a good title as the correct procedure for acquiring government land was not followed. She submitted that the procedure for the sale of Government houses was contained in Chapter 19 of the Government Financial Regulations and Circular No. 8/58 dated 1st March 1958. She submitted that according to the evidence of DW1 the house is still reflected in the Government records and rent continues to be paid to the Government. The suit property is also listed by the National Land Commission as one of the Government properties that were irregularly acquired.

21. The question is whether the Defendant is a bona fide purchaser as submitted by his counsel and whether he has a title valid?

22. In the case of **Samwel Kamere V Land Registrar (2015) eKLR**, the Court of Appeal held that;

“ In order to be considered a bona fide purchaser a person must prove that he had acquired a valid title, secondly, that he carried out due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly, that he paid valuable consideration for the purchase of the suit property”

23. The Court of Appeal reaffirmed this position in the case of **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR** by upholding the decision of the Environment and Land Court at Nairobi that cancelled all titles issued by the Appellant and ordered the land to revert back to the original owner after certain crooks fraudulently acquired title to land and later sold the same to other parties.

24. It is interesting to note that the plaintiff did not make any effort to prove that he acquired a good title by demonstrating that the person from whom he bought the suit premises followed the procedure laid down in the law. Infact he never mentioned that he carried out due diligence before buying the house. All he did was exhibit a sale agreement and certificate of lease to demonstrate that he had purchased the suit property.

25. As was stated in the case of **Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR** it is not enough to wave the certificate of title before this court. A party must prove that the same was lawfully acquired. The court stated as follows:-

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and asserts that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

26. Counsel for the Plaintiff submitted that the Plaintiff's title ought to be protected by virtue of section 26 of the Land Registration Act 2012. He submitted that the Defendant had not proved that the said title was acquired fraudulently. I agree with counsel that the Plaintiff did not give the particulars of fraud in the Plaintiff. However, section 26 (1) (b) of the Land Registration Act provides that a title may be challenged on grounds that it was obtained **illegally, unprocedurally or through a corrupt scheme**.

27. In the case of **Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others (2015) eKLR**, the Court relied on the case of **Makeri Nyangwara v Stephen Mungai Njuguna & Another** where it was held as follows:

“It needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove the protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”

28. Without implicating the Plaintiff in any corrupt scheme, or illegality, I am not at all persuaded that he holds a good title as the person who sold him the suit property acquired his title unprocedurally. It is therefore my finding that the Plaintiff' title is not valid.

29. The third issue for determination is whether the Plaintiff is entitled to the reliefs sought. The orders sought by Plaintiff include an order of eviction as well as costs against the Plaintiff. I have already made a finding that the Defendant was wrongly sued since he was not in occupation of the suit premises at the time the suit was filed, any eviction order issued would therefore be in vain. Since the court does not act in vain the orders sought cannot be granted.

30. The upshot is that the Plaintiff suit fails and is hereby dismissed with costs to the Defendant.

Dated, signed and delivered at Kericho this 28th day of March, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for the Plaintiff
2. No appearance for the Defendant
3. Court assistant – Rotich