



Oloolua Holdings Limited v Nairobi City County & 7 others (Environment & Land Case 896 of 2015) [2023] KEELC 20253 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 896 OF 2015
OA ANGOTE, J
SEPTEMBER 21, 2023**

BETWEEN

OLOOLUA HOLDINGS LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

**LOISE NYAGUTHII MURIITHI & PAUL MUHORO MURIITHII 2ND
DEFENDANT**

GAIL ADHIAMBO GUMBA 3RD DEFENDANT

WINNIE ATIENO OPUCH 4TH DEFENDANT

STEPHEN NDIRANGU KAMAMIA 5TH DEFENDANT

JOHN WANJOHI NDIRANGU 6TH DEFENDANT

MARYANN WANJA NDIRANGU 7TH DEFENDANT

SHERRY AYUGI 8TH DEFENDANT

JUDGMENT

Background

1. Vide a Complaint dated 18th September, 2015, the Plaintiff seeks the following reliefs against the Defendants:
 - a. An injunction order be issued restraining the Defendants whether by themselves or servants or otherwise from developing, transferring, offering for sale, charging or in any way interfering with plots emanating from L.R No 209/6989/158 that is plot numbers 209/6989/158,159,160,161,162,163,164, and 165.



- b. A declaration that the sub-division and allocation of plot L.R No 209/6989/158 to the 2nd to 8th Defendants was illegal and done fraudulently hence the same is null and void.
 - c. An order be issued compelling the 1st Defendant and National Land Commission and/or Commissioner of Lands to cancel all leases issued to the 2nd -8th Defendants L.R No 209/6989/159-169 emanating from L.R No 209/6989/158.
 - d. That general and punitive damages to be awarded to the Plaintiff as against the 1st Defendant for fraudulently sub-dividing and allocating her land to the 2nd -8th Defendants.
 - e. Costs of this suit.
 - f. Such further or other orders as this Honourable Court may deem fit and just.
2. The Plaintiff's case is that it is, and has at all material times been the registered owner of the parcel of land known as L.R 209/6989/158 measuring 0.138Ha (hereinafter the suit property); that it purchased the property on 26th August, 2011 and paid all the requisite rates to the 1st Defendant and that it has paid all the requisite rates to date.
 3. The Plaintiff averred in the Plaint that after purchasing the suit property, it pursued approval to construct a residential block on the property which approval the 1st Defendant granted; that on or about 15th July, 2015, it visited the suit property with the intention to start developing the same but was surprised to find some people constructing thereon and that it thereafter went to the 1st Defendant's offices to ascertain the position of the property and found the records indicating that it was the registered proprietor of the same.
 4. According to the Plaintiff, it discovered documents indicating that the suit property had been sub-divided into smaller portions and the same were allocated to the 2nd -8th Defendants by the 1st Defendant and that the 1st Defendant's actions aforesaid constituted fraud, the particulars of which included sub-dividing the Plaintiff's plot and allocating the sub-divided plots to the other parties.
 5. It was averred in the Plaint that the 1st Defendant has been unable to explain how the plot was sub-divided and allocated to the 2nd -8th Defendants yet the Plaintiff has the title to the land and has been paying rates to the 1st Defendant and that the Plaintiff will suffer loss if the 2nd -8th Defendants continue developing the suit property.
 6. The 1st Defendant filed a statement of Defence in which it denied the assertions as set out in the Plaint. The 1st Defendant averred that the suit property was leased to one Plain Land Survey Limited for a leasehold for 99 years; that the Lessee did not have the authority or legal capacity to transfer the suit property to a third party including the Plaintiff and that no approval was sought from its offices nor was it given to effect the purported transfer to the Plaintiff by Plain Land Survey Limited.
 7. According to the 1st Defendant, all city county documents are signed and the name of the relevant person indicated in its documents, which was not the position with the documents adduced by the Plaintiff; that the Plaintiff was never the legal owner of the suit property, whose ownership has always remained with the 1st Defendant who legally sub-divided and allotted the same to the 2nd -8th Defendants and that the Plaintiff was conned by the party who purportedly sold it the suit property.
 8. It was averred by the 1st Defendant that the mere payment of land rates pertaining to the suit property does not prove ownership of the same and that the suit as presently drawn is immature as no demand letter was ever served upon the Defendant before its institution. The 2nd -8th Defendants did not participate in the suit.



Hearing & Evidence

9. The matter proceeded for hearing on 15th December, 2021. PW1 was Livingstone Gitau, a Director of the Plaintiff and a businessman. He adopted his witness statement filed on 21st September, 2013 as his evidence in chief. PW1 produced the bundle of documents of an even date as PEXHB1-13 and a further list of documents dated 10th December, 2021 as PEXB14.
10. Briefly, it was the evidence of PW 1 that the Plaintiff is the registered owner of the suit property; that sometime in 2011, he saw an advert for the sale of the suit property and approached the registered owner, Plain Land Survey Limited, with an offer to purchase the suit property and that after conducting a search and confirming the plot belonged to Plain Land Survey Limited, the Plaintiff entered into an agreement to purchase the suit property on 4th April, 2011 and duly paid all the rates.
11. It was the evidence of PW1 that the City Council of Nairobi, the 1st Defendant, gave its consent for the plot to be transferred to the Plaintiff, which transfer was effected on 26th August, 2011; that they immediately thereafter instructed an architect to make drawing plans and applied for development permissions in 2012, and paid the necessary charges on 5th October, 2012 and that the construction permit was granted by the 1st Defendant on 3rd October, 2015.
12. PW1 stated that as they prepared for construction, he was on 15th July, 2015 informed that there were people carrying out constructions on the suit property; that he went to the site and met a contractor who informed him that he had authority from the owner to develop the plot and that when he visited Nairobi County Offices, he found the property was in the name of Plaintiff, although the same had purportedly been sub-divided into 8 small plots, seven of which had been allocated to the 2nd -8th Defendants.
13. In cross-examination, PW1 stated that he saw an advert for the sale of the suit land in a newspaper, which advert he has not adduced in evidence; that the Plaintiff bought the suit property from Plain Land Survey Limited which had obtained a Lease from the 1st Defendant; that the Plaintiff has been incorporated since 1992 and that he paid Kshs 13,000,000 for the land although the transfer shows a consideration of Kshs 7,000,000 as having been paid.
14. It was the evidence of PW1 that he has not shown proof of payment; that the Directors of Plain Land Survey are not witnesses in this case; that they were to obtain a consent from the 1st Defendant before selling the property which they did; that the consent by the Town Clerk for the sale of the land is at the back of the transfer document and was issued by the 1st Defendant on the date the Land Registrar received the document and that the consent was given on 26th August, 2011 after the transfer was done on 4th April, 2011.
15. PW1 admitted that consent of the 1st Defendant was required before any transactions on the suit property could be undertaken; that he was not sure at what point he was to get the consent; that he intended to put up apartments on the suit property and had applied for change of user and that pursuant to the approval which is dated 3rd October, 2010, he was to commence developments within 12 months of approval, which condition he did not abide by.

Submissions

16. It was submitted that the Plaintiff adduced evidence proving his proprietorship of the suit property, including a search, indicating that Plain Land Survey Limited was the initial owner of the suit property, the Sale Agreement between Plain Land Survey Limited and the Plaintiff and a transfer with the consent endorsed thereon.



17. Counsel for the Plaintiff submitted that contrary to its assertions, the 1st Defendant has not adduced evidence showing that the consent was denied; that the Plaintiff further produced the Lease registered in its favour, the evidence for land rates for the property, the development approvals by the County Government and NEMA and a search indicating that the Plaintiff is the current owner of the suit property.
18. As to whether the 1st Defendant could allot the suit property, it was submitted that the 1st Defendant had not produced any evidence indicating that it repossessed the suit property or evicted the Plaintiff; that Section 65 of the *Land Act* guarantees a Lessee the right to quiet and peaceful possession, which covenant the 1st Defendant has violated and that the Plaintiff made a complaint to the Director of Criminal Investigations who carried out investigations and concluded that the Plaintiff was the owner of the suit property.
19. The 1st Defendant's Counsel submitted that Plain Land Survey Limited grossly misled the Plaintiff; that any transactions or dealings and or the alienation of the suit property resulting from the Lease was void *ab initio*; that the terms of the Lease were clear that the Lessee was not to transfer the property to any person and that paragraph 16 of the Lessee's covenant states that the Lessee was not to assign, underlet, mortgage, charge or part with the possession of the demised premises or any part thereof without the previous consent in writing of the Commission.
20. It was submitted that the 1st Defendant has never received any rates payments from the Plaintiff as alleged; that in the case of *Charles Mwangi v Dhranj Popat* (2005), the Court quoted the passage in the Judgement of Lord Morris of Borth-Gest in the case of *Mistry Amar Singh v Kulobya* [1963] EA 408 at page 414 Letter D which emphasized the principle of Ex Turpi Causa mon Ovitir action" being that no Court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal.
21. According to counsel, the acquisition of title cannot be construed only as the end result; that if a document of title was not acquired through a proper process, then the title is invalid and that the sub-division and subsequent allocation of the suit property was valid as the property can only have been transferred by its owner who was the 1st Defendant who indeed sub-divided and allocated the same to the 2nd -8th Defendants.

Analysis & Determination

22. Having considered the pleadings, testimonies and submissions, the following issues arise for determination;
 - i. Whether the Plaintiff has proved its case against the Defendants on a balance of probabilities and if so,
 - ii. What are the appropriate orders to issue?
23. The Plaintiff instituted this suit against the Defendants seeking inter alia a permanent injunction restraining the Defendants from interfering with its possession of the suit property, a declaration that the sub-division and allocation of the suit property to the 2nd -8th Defendants was illegal and an order for the cancellation of the Leases granted to the 2nd -8th Defendants.
24. The 1st Defendant entered appearance and filed a statement of Defence. The 1st Defendant denied the Plaintiff's assertions and averred that the Plaintiff did not get any title to the suit property and that it was duly authorized to allocate the suit property as the proprietor. The above notwithstanding, the 1st Defendant did not call any evidence to prove that position.



25. As such, the 1st Defendant failed to substantiate the allegations made in its Defence and produce any evidence to counter the Plaintiff's testimony. It therefore follows that the Defence on record remains mere allegations, and the Plaintiff's evidence is uncontroverted and unchallenged. The 2nd -8th Defendants did not participate in the suit.
26. As aforesaid, the Defendants failure to testify and adduce evidence rendered their Defence mere allegations and left the Plaintiff's evidence uncontroverted. However, that position in no way lessens the burden on the Plaintiff to prove its case. As expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR;
- “The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”
27. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under Section 107(1) (2) of the *Evidence Act*, which provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
28. And Sections 109 and 112 of the same *Act* which state as follows;
- “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 the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
29. In discussing whether the Plaintiff has discharged its legal burden herein, the Court will focus on two key questions, firstly, whether the Plaintiff is the legal proprietor of the suit property and secondly, whether the 1st Defendant had the authority to sub-divide and allocate the suit property.
30. According to the Plaintiff, it is the lawful proprietor of the suit property having purchased it from Plain Land Survey Limited who owned the property by virtue of a Lease granted to it by the 1st Defendant; that it duly paid the purchase price and the requisite rates and that before it could commence construction, it realized that the 2nd – 8th Defendants were occupying the suit property on account of Leases granted to them by the 1st Defendant.
31. The Plaintiff adduced into evidence the Lease Agreement dated 6th October, 2010 between the 1st Defendant and Plain Land Survey Limited, the Sale Agreement between itself and Plain Land Survey



Limited dated 4th April, 2011, receipts for rates payments dated 23rd May, 2011, and the transfer dated 4th April, 2011 with the consent endorsed thereon.

32. The Plaintiff also produced in evidence a Lease indicating the Plaintiff was registered as the owner of the land on 26th August, 2011, development approval by the Nairobi City County dated 3rd October, 2013, the NEMA approval dated 23rd December, 2014, the search conducted on 28th July, 2015, amongst other documents.
33. To begin with, it is not disputed that the 1st Defendant, through the Nairobi City Commission, leased the property to Plain Survey Land Limited, vide a Lease dated 6th October, 1992 for a period of 99 years from 1st January, 1968. It is further not disputed that Plain Survey Land Limited thereafter sold the property to the Plaintiff vide a Sale Agreement dated 4th April, 2011.
34. Evidence has been adduced of rates payments with respect to the suit property and the search dated 28th July, 2015 produced by the Plaintiff showing that the suit property is registered in its name. That being the position, the Court finds that the Plaintiff is the current registered owner of the suit property.
35. The Plaintiff's claim to the property is on account of a Lease pursuant to the *Registration of Titles Act* (repealed), and registered in the Plaintiff's name on 26th August, 2011. Subsequently, the law governing the Plaintiff's title is the *Registration of Titles Act* (repealed) which provided as follows with respect to proprietorship of land;

“ 23. The certificate of title issued by the registrar to a purchaser of land upon a
(1) transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

36. Section 26(1) of the *Land Registration Act* now provides as follows in this respect:

“ 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.”

37. Has the Plaintiff's title been impugned under Section 23 of the *Registration of Titles Act* or Section 26 of the *Land Registration Act*? The 1st Defendant contends that the transfer of the property from Plain Survey Limited to the Plaintiff was void as it was done in breach of the Lease granted to Plain Survey



Limited. The Court has considered the Lease and in particular clause 16 of the Lease, which provides as one of the covenants to be complied with by the Lessee as follows:

“not to assign, underlet, mortgage, charge or part with possession of the demised premises or any part thereof without the previous consent in writing of the commission first had and obtained which consent shall not be unreasonably withheld.”

38. So was the transfer in breach of this clause? The Court has considered the evidence in this respect. It is noted that on the back of the transfer document dated 4th April, 2011 is an excerpt stating as follows: “consent is hereby given to the above” signed by the Town Clerk, City Council of Nairobi. In cross-examination, PW1 stated that the consent was signed on 26th August, 2011 after the transfer of 4th April, 2011. On re-examination PW1 stated that the consent was signed on 4th April, 2011.
39. The consent is in itself of no help in this respect as it is not signed. Nevertheless, what is abundantly clear is that the consent was not signed after the transaction. Whereas the transfer was dated 4th April, 2011, the property had not passed at the time if indeed the consent was endorsed on the document on 4th April, 2011 as alleged by the Plaintiff.
40. In the absence of any evidence impugning the consent, the Court finds that it was valid and did not breach the terms of the Lease between the 1st Defendant and Plain Survey Limited and as such the transfer between Plain Survey Limited and the Plaintiff was valid. In any event, no evidence was called by the Defendants to show that the endorsement of the transfer document by the then Town Clerk was a forgery.
41. As regards clause 17, it has not been demonstrated that Plain Survey Limited did not give a copy of the transfer instrument to the 1st Defendant. In any event, this is not a breach that would terminate the Plaintiff’s proprietorship considering that the term of the Lease in favour of Plain Survey Limited was still running.
42. In the circumstances, the Court finds that the Plaintiff has ably demonstrated the root of its title, which title has not been impugned by the 1st Defendant. Having affirmed the Plaintiff’s proprietorship of the suit property, it is evident that the Defendants had no right to interfere with the said ownership in the manner that it did.
43. As aforesaid, the title to the suit property validly passed from Plain Survey Limited to the Plaintiff. Nonetheless, even if the title had not validly passed, the 1st Defendant would still not have had any authority to deal with the property. This is because there is no evidence nor indeed any allegation of termination or forfeiture of the Lease that had been issued to Plain Survey Limited, or any circumstance leading to the conclusion that the 1st Defendant had taken back the suit property.
44. Indeed, the report by the DCI produced by the Plaintiff further affirms that the 1st Defendant’s purported allocation of the suit property to the 2nd – 8th Defendants was irregular. The Plaintiff is therefore entitled to permanent injunction orders.
45. The Plaintiff has also sought for general and punitive damages. As stated by Lord Macnagten in *Stoms Broks Aktie Bolag v Hutchinson* [1905] AC 51 J, general damages are such as the law will presume to be the direct natural or probable consequences of the action complained of.



46. In the case of *Godfrey Julius Ndumba Mbogori & Another v National City County* [2018]eKLR, the Court of Appeal stated thus as regards punitive/exemplary damages;

“The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.”

47. Despite seeking for damages, the Plaintiff did not present any evidence to guide the Court on the quantum of the general damages. Indeed, no evidence was given by the Plaintiff to show that the Defendants had trespassed on the land. The court therefore declines to make an order for damages, especially considering that the Plaintiff had not commenced developing the suit property despite having been given approvals to do so.

48. Consequently, the Plaintiff’s suit is allowed as follows:

- a) An injunction be and is hereby issued restraining the Defendants whether by themselves or servants or otherwise from developing, transferring, offering for sale, charging or in any way interfering with plots emanating from L.R No 209/6989/158 that is plot numbers 209/6989/158,159,160,161,162,163,164, and 165.
- b) A declaration does hereby issue that the sub-division and allocation of plot L.R No 209/6989/158 to the 2nd to 8th Defendants was illegal and done fraudulently hence the same is null and void.
- c) An order be and is hereby issued compelling the 1st Defendant and the National Land Commission and/or Commissioner of Lands to cancel all Leases issued to the 2nd -8th Defendants L.R No 209/6989/159-169 emanating from L.R No 209/6989/158.
- d) The 1st Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF SEPTEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kamau for Plaintiff

No appearance for Defendant

Court Assistant - Tracy

