



REPUBLIC OF KENYA



Ndungu v Elburgit Enterprises Limited & 3 others (Environment & Land Case 355 of 2016) [2023] KEELC 21890 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21890 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 355 OF 2016
A OMBWAYO, J
NOVEMBER 30, 2023**

BETWEEN

EMILY WANGARI NDUNGU PLAINTIFF

AND

ELBURGIT ENTERPRISES LIMITED 1ST DEFENDANT

PAUL MAINA KUNGU 2ND DEFENDANT

WANGUI NGURAKA 3RD DEFENDANT

MACHARIA MWENDA 4TH DEFENDANT

JUDGMENT

Introduction

- 1 The Plaintiff commenced this suit vide a Complaint dated 8th August, 2016 against the Defendants seeking the following orders:
 - a. A declaration that the Plaintiff is the lawful and absolute owner of all that parcel of land known as title number Elburgon/Elburgon Block 3/244.
 - b. A permanent injunction restraining the Defendants either by themselves, their agents, servants, employees or otherwise howsoever from trespassing onto or dealing with all that parcel of land known as title number Elburgon/Elburgon Block 3/244 in any manner whatsoever prejudicial to the Plaintiff's interests.
 - c. General damages for trespass.
 - d. Costs of this suit with interest till payment in full.
 - e. Any other relief that the Honourable court may deem fit to grant.



- 2 The 1st Defendant filed its Defence and Counter claim dated 31st October, 2016. It sought for the following orders in its counter claim:
 - a. Declaration that the Plaintiff's title to Elburgon/Elburgon 3/244 was fraudulently obtained.
 - b. Cancellation of the title in the name of Plaintiff and all entries in the relevant Green Card indicating the names Daniel Wambugu Kamau, Macharia Mwenda and the Plaintiff.
 - c. A permanent Injunction restraining the Plaintiff by herself, her servants and/or agents from entering, remaining on or disposing of or in any manner dealing with or interfering with the First Defendant's possession of Elburgon/Elburgon 3/244.
 - d. Declaration that the First Defendant and/or its agent and nominee Samuel George Mbora Gitonga are the rightful legal and equitable owner of Elburgon/Elburgon 3/244.
 - e. Costs of and incidental to this suit.
 - f. Any other or further relief that this honourable court may deem fit to grant.
- 3 On 24th May, 2017, the Plaintiff withdrew its case against the 2nd and 3rd Defendants to only proceed against the 4th Defendant. On 6th February, 2019, the court found that the suit against the 4th Defendant abated since one year had lapsed since his death. The case proceeded between the Plaintiff and the 1st Defendant.

Plaintiffs' Case

- 4 Emily Wangare Ndungu testified as PW1 where her statement dated 8/8/2016 and filed on 1/9/2016 was adopted as her evidence in chief. She had a list of documents produced as follows: A certificate of posting (PEX 1), Demand letter (PEX 2), Demand letter dated 30/10/2015 (PEX 3), photos (PEX 4), titles (PEX 5, 6,7 and 8) and photo (PEX9). She testified that she has sued the Defendant since before she got the plot, she had done a search and given the original title deed. She further testified that when she decided to build, she found that the plot was not for sale. She stated that she then went to see the advocate. She prays that the court declares that the plot belongs to her.
- 5 On cross examination by Mr. Mburu, she confirmed that she had never given her identity number. She however admitted that she gave her ID to the land's office. She confirmed that she bought the plot from Mwende. She also confirmed that she did a search but admitted that she did not have a copy of the receipt and the said search in court. PW1 admitted that she knew the company known as Matuiku Company Ltd but confirmed that she was not a member. She also confirmed that she was not aware of any exchange between Daniel Wambugu and the 1st Defendant. She stated that KENHA had encroached onto the land. On reexamination she stated that no one had constructed on the land.
- 6 The Plaintiff was later recalled where she testified that Stephen Macharia Mwenda died about five years ago. She stated that before he died he had done his statement dated 21/2/2017. The Plaintiff prayed that the statement and documents be produced as evidence. The list of documents was admitted pursuant to section 33(b) of the *evidence*. They were produced as PEX10, Letter dated 22/7/1991 PEX 11, Letter dated 25/7/1991 PEX 12, Letter dated 10/2/1992 PEC 13 and RIM PEX 14.

This marked the close of the Plaintiff's case.

Defendant's Case

- 7 Samuel Mbora Gitonga testified as DW1. He relied on his written statement dated 1/3/2017 filed on 7/3/2017 which was adopted as his evidence in chief. He testified that he is the Managing Director of



- the 1st Defendant (now Plaintiff). He produced the exhibits from the registrar (DEX2), title (DEX3), title for 275 (DEX 4), title for 243 (DEX 5), R.I.M (DEX 6), survey report (DEX 7) and photos as DEX8.
- 8 He testified that he is a shareholder of Matiuku company and that he has 6 plots, parcel numbers *Elburgon/Elburgon Block 3/293, 275, 280,281, 355*. He testified that he exchanged with Elburgon/Elburgon Block 3/275 with *Elburgon/Elburgon Block 3/244* so as to clear a loan. He added that he exchanged Elburgon/Elburgon Block 3/293 with Elburgon/Elburgon Block 3/237 and that he built a hotel on plot number Elburgon/Elburgon Block 3/6423.
- 9 He further testified that to pave the way for the hotel he had to go through plots in Matuiru. He also testified that he was a member. It was his testimony that he realized that the road to the hotel was a riparian land. He testified that he had approached the owner of Elburgon/Elburgon Block 3/237 to sell him the said plot but he refused. He testified that he later asked him to do an exchange which he agreed. He stated that he gave him plot number Elburgon/Elburgon Block 3/293. He further stated that he approached the owner of Elburgon/Elburgon Block 3/244 one, Daniel Wambugu with the same offer where he accepted and gave him plot number Elburgon/Elburgon Block 3/ 244 in exchange for number Elburgon/Elburgon Block 3/275.
- 10 He stated that he bulldozed the road to the hotel in 1991. He further stated that someone came and claimed plots number Elburgon/Elburgon Block 3/244. He added that he gave plot no Elburgon/Elburgon Block 3/293 to the owner of plot number Elburgon/Elburgon Block 3/237 and that the exchanges were witnessed by Director of the company.
- 11 He testified that he exchanged Elburgon/Elburgon Block 3/ 244 with Mr Daniel Wambugu and added that they did not have titles in 1991. He added that Macharia and Daniel were brothers.
- 12 He testified that his name was removed from Elburgon/Elburgon Block 3/244 and put on Elburgon/Elburgon Block 3/243 as an exchange of plot. He also testified that he did a transaction with plot number Elburgon/Elburgon Block 3/243. DW1 testified that he only heard of the plaintiff in 2015, 14 years after the plots were exchanged. It was his testimony that Macharia Mwenda was the chairman of Matuiku Company and he blames the company for the confusion. He testified that the current statement is that there is a shell portion of the plot remaining
- 13 He stated that when KENHA came in, there was a surrender as the plot is on a road reserve. He prays that the suit be dismissed and the counter-claim allowed. The statement of Joram Mudia was produced as (DEX 9) while the statement of Betherl Murimi produced as (DEX10).
- 14 On cross examination, he confirmed that he did not have “an access road but a dangerous road” between plot number Elburgon/Elburgon Block 3/243 and Elburgon/Elburgon Block 3/244. He further confirmed that it was also between Elburgon/Elburgon Block 3/242 and Elburgon/Elburgon Block 3/237 and also between Elburgon/Elburgon Block 3/240 and Elburgon/Elburgon Block 3/239. He stated that Elburgon/Elburgon Block 3/243, 242 and 237 are all on riparian land.
- 15 He admitted that he was accessing the land through the back of his plot which he never complained of the said access road. He further stated that Plot number Elburgon/Elburgon Block 3/243 does not exist. He stated that he complained to company that the road was dangerous and served 20 plots.
- 16 DW1 was shown the green card where he confirmed that the title was issued in 1990 and the exchange done in 1992. He admitted that there was one title and that he occupied plot number Elburgon/Elburgon Block 3/244. He added that he has occupied the road and put a permanent road.



17 On re-examination, he stated that he does not have the sole use of the road. He further stated that 243 was on top of a culvert. He stated that he did not write the letter dated 25/7/1991 or sign the register. He further stated that in 1990 there were no title deeds as they were issued in 1996. In conclusion he stated that he has been in possession of the land.

Analysis and Determination

18 I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:

- a. Whether the Plaintiff's title was fraudulently or irregularly obtained.
- b. Whether the parties' are entitled to the reliefs sought.

19 The Court of Appeal in Mombasa, Civil Appeal No. 312 of 2012- *Emfil Limited Vs Registrar of Titles Mombasa & 2 others* [2014] eKLR held as follows; -

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

20 Further, the Court of Appeal in *Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others* [2015] eKLR held as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427: ‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...’

21 In the instant case, the Plaintiff argues that she purchased the suit property from one Stephen Macharia Mwenda after conducting her due diligence. She contends that the 1st Defendant has since trespassed onto her land and seeks for an order of permanent injunction against it and its agents.

22 The 1st Defendant on the other hand contends that the Plaintiff fraudulently obtained the suit property and that the said title ought to be cancelled. It was its testimony that through one David Wambugu it exchanged plot number 275 and was issued with the suit property in order to clear a loan. Through the 1st Defendant's agent, Samuel Mboru Gitonga argued that his name was removed from 244 and put on 243 as an exchange of plot.

23 In essence, the 1st Defendant is challenging the Plaintiff's title and, in such circumstances, the Plaintiff must establish the root of her title.

24 In the case of *Munyu Maina -v- Hiram Gatbiha Maina* (2013) eKLR, the Court of Appeal expressed itself thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of the title as proof of ownership. It is this 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 need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

25 The Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR stated as follows:

"... whereas the legal burden of proof is on he who asserts that a property comes within the provisions of Article 40 (6) of the Constitution, the evidential burden is on a registered proprietor to rebut an assertion that his property was unlawfully acquired and demonstrate that the property does not come within the provisions of Article 40 (6) of the Constitution.

61. This Court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of Article 40 (6) of the Constitution. In the instant matter, the appellant never led convincing evidence to establish the root of his title. ..."

26 The 1st Defendant through its agent claimed that he was a shareholder of Matuiku Company Limited where he owned various plots including Elburgon/Elburgon Block 3/275 from which he did the alleged exchange. He had the evidential burden to prove the said assertion but instead failed to adduce any evidence to prove the same. This court has perused the green card for plot number Elburgon/Elburgon Block 3/275 and it is clear that the 1st Defendant's name or its agent does not appear. This concludes that he could not have exchanged what he never owned in the first place in order to be issued with the suit property.

27 In addition, the green card as produced for the suit property shows how the suit property was transferred from one Macharia Mwenda to the Plaintiff. However, it is a fact that the Plaintiff did not adduce evidence in form of any sale agreement or proof of payment from the alleged sale of the suit property from one Stephen Macharia Mwenda. One therefore wonders, how the suit property transferred from Macharia Mwenda to the Plaintiff in the absence of a sale agreement, receipt of payment and transfer forms. Furthermore, none of the parties called the Land Registrar as a witness in support of either of their case.

28 This court has also looked at the title document for the suit property and established that the same measures approximately 0.0259 hectares. Worse still, a perusal of the surveyor's report dated 28th February, 2023 found that the ground measurements of the suit property was 0.0071 hectares which clearly differs with that in the title document. Neither of the parties offered any explanation as to the discrepancies in size. This court is of the view that if indeed it is dealing with the same property, it cannot possibly be different sizes on the ground.

29 From the evidence adduced by both parties, this court finds that there is clearly some form of shortcomings especially on the title of the suit property. Both parties must be aware of the rule under Section 107 (1) of the *Evidence Act* that he who alleges must prove as well as the provisions of Section 108 of the same *Act* which place the burden of proof squarely on him.

30 In the circumstance, the Plaintiff failed to discharge the burden of proof. She has not demonstrated why she is the absolute legal owner of the suit property and for those reasons, she is not entitled to the reliefs sought. The 1st Defendant's has equally failed to meet the threshold to prove fraud against the Plaintiff.



31 This court cannot ignore the fact that the surveyor's report exhibited discrepancies in the acreage in the suit property. I therefore find that none of the parties herein has proved on a balance of probabilities to be entitled to the suit property. In the upshot this court dismisses the 1st Defendant's Defence and Counter claim and the Plaintiff's case as they both failed to prove their case to the required standard. It is so ordered. Each party to bear own costs.

JUDGMENT DATED AND SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF NOVEMBER 2023

A. O. OMBWAYO

JUDGE

