



Kana & another v Director of Survey & 3 others (Environment & Land Case 574 of 2017) [2023] KEELC 21875 (KLR) (21 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 574 OF 2017
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

LALIT BABA KANA 1ST PLAINTIFF

MANJULA LALIT KANA 2ND PLAINTIFF

AND

DIRECTOR OF SURVEY 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

HAFAYA CONSTRUCTION COMPANY LIMITED 4TH DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit by a plaint dated 8.7.2017 and amended on 16.11.2022. They contend that they are the lawful and registered joint owners of the parcels of land known as LR No 1870/1/451 and LR 1870/1/452 by virtue of purchase from one Robert Kingston Davies in 1981 and 1983 respectively.
2. They further contend that they occupied the suit parcels until 4 years ago when they moved to Westlands. That in July 2017, their caretaker informed them that some people were inquiring about the ownership of the suit parcels. They made inquiries at the lands registry where they learnt that the relevant files were not available and that the criminal Investigations department was investigating the issue. They also learnt that the deed plans of the suit parcels at the survey headquarters had been tampered with and a new deed plan was existing.
3. They contend that in May 2022, the 4th Defendant issued them with a notice to vacate the suit parcels, and they also invaded the suit premises with goons who demolished a perimeter wall and also broke



padlocks at the gate. The 4th Defendants were claiming to have titles to the suit premises being LR No 1870/1/620 and LR No 1870/1/621.

4. The plaintiffs pray for judgment against the Defendants jointly and severally for;
 - a. A declaration that the Plaintiffs are the legal and legitimate owners of the suit premises.
 - b. An order directed to the 1st and 2nd Defendants for reconstruction of documents in relation to LR No 1870/1/451 and 1870/1/452 situated in Nairobi.
 - c. An order compelling the Defendants to cancel any document, title or any other name registered against the titles in relation to the suit premises other than the Plaintiffs' names and to restore the Plaintiffs' names in all their documents in relation to title LR No 1870/1/451 and 1870/1/452 situated in Nairobi as the legal registered owners.
 - d. General damages.
 - e. Costs of this suit together with interest.
 - f. Any other relief that this court may deem just and fair to grant.
5. The 1st - 3rd Defendants filed their defence on 7.6.2018 which contains general denials of the allegations made against them.
6. The 4th Defendant filed a statement of defence and counterclaim dated 20.2.2023 where they deny the allegations levelled against them by the Plaintiff. They however admit to having issued the notice to the Plaintiffs to vacate the suit land on the basis that the plaintiffs are unlawfully occupying the premises known as LR No 1870/1/620 and LR No 1870/1/621. The 4th defendant avers that they have titles to the suit parcels and that they are in possession of the same.
7. The 4th Defendant counterclaims for an order to be declared as the registered owner of the suit premises and an eviction order against the Plaintiffs. They also seek an order that the certificates of title held by the Plaintiffs being LR No 1870/1/451 and LR No 1870/1/452 be cancelled and expunged from the land registry records.
8. The 4th defendant was joined in these proceedings vide the court's ruling of 3.11.2022. Thereafter on 22.2.2023 the court gave directions for all parties to file and serve their trial bundles containing their pleadings, witness statements and documentary evidence before the pretrial date of 12.6.2023. Come the date of 12.6.2023 and counsel for the 4th defendant informed the court that they had not complied with pretrial directions of which they sought 7 days to comply. The court indulged them, giving them 21 days to comply. The court also fixed the matter for hearing on 3.10.2023. Not only did the 4th defendant fail to comply with the pretrial directions, but they also did not turn up for the trial.
9. As for the 1st - 3rd defendants, they did turn up for the trial but they did not call any witnesses.
10. The case of the Plaintiffs was advanced by the 2nd Plaintiff Manjula Lalit Kana (PW1). She gave her evidence virtually from United States of America. She stated that she is 79 years old. During her testimony, the court observed that she appeared to have a medical tube attached to her nose, but she was able to speak and hear.
11. Pw1 adopted her witness statement dated 16.11.2022 as her evidence. She produced the 19 documents in their list as P. Exhibit 1-19. She avers that sometimes in May 2017, while she was abroad, her servants living on the suit premises got a notice from the 4th defendant to vacate the suit land. This came as a shock to them as they have never parted with the suit premises since early 80's and they have titles to the said land.



12. That since then, they have had several problems as the 4th Defendant has been harassing them, hiring goons who even broke part of their perimeter wall, of which the incident was reported to Parklands Police station and later Gigiri Police station but the goons persisted until they reported the matter to CID Headquarters.
13. She avers that she has seen the titles being relied on by the 4th Defendant, but argues that they cannot be genuine for reasons that no title could be issued over an existing title and on the same deed plan.
14. PW1 also states that they have been paying land rent, land rates as well as water and electricity bills over the years.
15. Upon cross-examination by counsel for the 1st- 3rd defendants, PW1 stated that they are in possession of the 2 suit properties which are fenced and that they have titles thereto and have never sold that land to anyone.
16. The Plaintiffs filed written submissions dated 11.10.2023. They cited the case of *Mike Maina Kamau v Attorney General* [2017] eKLR to submit that the history and root of the Plaintiffs' titles can be traced, hence they hold good titles. That on the other hand, the 4th Defendant only dangled titles which it failed to produce, thus its acquisition of the 2 titles must have been through fraud.
17. The Plaintiffs added that when a court is faced with a case of 2 or more titles, it has to make an investigation to discover which of the 2 titles is to be upheld, and that the 1st one to be registered takes priority.
18. To this end, the plaintiffs proffered the cases of *Wrek Motors Enterprises v The Commissioner of lands and others* as cited in *Joseph Kiprotich Bor v Tabutary Chepkoech Chebusit* [2021] eKLR, *Michael Njiiri Kariuki v Ferdinand Ndungu Waititu & 3 others* [2021] eKLR and the case of *Gitwany Investment Ltd v Tajmall Ltd & 3 others* [2006] eKLR.
19. The Plaintiffs also urge the court to find that the 4th Defendant's conduct of locking the gates to the suit premises and of knocking the perimeter wall amounted to trespass and that it should award them ksh.6million in damages for trespass. They rely on the case of *Park Towers Ltd v John Mithamo Njika et all* [2014] eKLR.

Determination

20. This is a case of two parallel titles with the Plaintiffs having titles No LR No 1870/1/451 and LR 1870/1/452 while the 4th Defendant has title to LR No 1870/1/620 and LR No 1870/1/621 but they all claim the same physical parcels on the ground.
21. In *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, the Court of Appeal held as follows:

‘We state 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. 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 would not be noted in the register’.
22. In a bid to prove the legality of their titles to LR 1870/1/451 & 452, the Plaintiffs produced assignments dated 1.10.1981 and 23.12.1983 respectively between them and one Robert Kingstone Davies.



23. They established by documentary evidence (page 39-42 of their bundle) that they got a renewal of the leases to the respective parcels. LR 1870/1/451 and LR 1870/1/452 vide Grants Nos IR 95917 and IR 95916 for a term of 50 years commencing on 1.6.2003 under deed plans No 239098 and No 239099.
24. The Plaintiffs also established their claim that they have been in possession of the suit parcels since the time of purchase. They produced rates demands from city council of Nairobi dating as far as back as 1984. They also produced water bills and electricity bills from as far back as 1988 as well as land rent demands and receipts which show they have paid land rent upto year 2022.
25. Further, while the survey report dated 25.5.2023 at page 730 of the Plaintiff's bundle indicates that the original parcel number LR No 1870/1/451 and LR No 1870/1/452 have new numbers indicated as LR No 1870/1/620 and LR No 1870/1/621, which are now claimed by the 4th Defendant, the 1st Defendant did not challenge the Plaintiffs' title/deed plans which it generated.
26. According to Section 32 of the of the Survey Act, no land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya. No evidence was adduced by the 1st Defendant to show that it had surveyed or resurveyed the suit parcels or cancelled the original deed to generate the new titles now claimed by the 4th Defendant.
27. Apart from filing a defence contending that they have titles to LR No 1870/1/620 and LR No 1870/1/621, the 4th Defendant did not explain the root of the said titles. Accordingly, I am satisfied that the 4th Defendant did not acquire their titles regularly.
28. Further, the 2nd and 3rd Defendants did not challenge the authenticity of the Plaintiffs' title. This is despite the fact that the Plaintiffs applied for search of their titles on 5.6.2018 but they were informed that their deed files were not available.
29. The Plaintiffs also proved that the 4th Defendant invaded their parcel of land and issued them with notices to vacate despite them being the legitimate owners of the suit land. They also proved that they had fenced the properties and that the 4th Defendant invaded it and destroyed a portion of their perimeter wall, thus they are entitled to damages for trespass. See Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR. To this end, I will give an award of damages for trespass to the tune of Ksh 2 million as against the 4th defendant.
30. Final orders
 - 1). The Counter claim of the 4th defendant is hereby dismissed.
 - 2). The claim of the plaintiffs is allowed in the following terms;
 - a. An order is hereby issued declaring the Plaintiffs to be the legal and legitimate owners of the suit premises.
 - b. An order is hereby issued directing the 1st and 2nd Defendants to cause reconstruction of all documents and parcel files in relation to LR No 1870/1/451 and 1870/1/452 situated in Nairobi reflecting the plaintiffs as registered owners of the aforementioned parcels of land.
 - c. An order is hereby issued compelling the 1st – 3rd Defendants to cancel any documents, title or any other name registered against the titles in relation to the suit premises other than the Plaintiffs' names and to restore the Plaintiffs' names in all their documents in



relation to title LR No 1870/1/451 and 1870/1/452 situated in Nairobi as the legal registered owners.

- d. The plaintiffs' are awarded general damages for trespass to the tune of Ksh 2, 000 000 as against the 4th defendant.
- 3). The 4th defendant is condemned to pay costs of the suit together with interest at court's rates from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Were for Plaintiff

