



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 307 OF 2014

(Formerly NYERI HCC No. 108 of 2009)

JAMES WAHOME KARIUKI.....PLAINTIFF

-VERSUS-

MARY WANGUI KAMITA.....DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was initially instituted at the Nyeri High Court in the year 2009 as Nyeri HCCC No. 108 of 2009. It was later transferred to this Court on 27th November, 2014.

2. By his Plaint dated 25th June, 2009 as filed herein on 6th July 2009, James Wahome Kariuki (*hereinafter the Plaintiff*) prays for Judgment against Mary Wangui Kamita (*hereinafter the Defendant*) for:

(a) An injunction to restrain the Defendant, (her) agents and/or servants from interfering with Plot No. 157 Chaka;

(b) A declaration for eviction of the Defendant from Plot No. 157 Chaka;

(c) An order for eviction of the Defendant from Plot No. 157 Chaka;

(d) Costs of this suit.

(e) Interest on (c) above at Court rates; and

(f) Any other or better relief that this Court may deem fit to grant.

3. Those prayers arise from the Plaintiff's contention that at all times material, he was the real owner of the said Plot No. 157 Chaka. The Plaintiff accused the Defendant of proceeding on her own volition to occupy the said property and thereafter refusing to yield vacant possession thereby depriving the Plaintiff of an opportunity to develop the same and enjoy the fruits of his sweat.

4. But in her statement of Defence dated and filed herein on 24th July 2009, Mary Wangui Kamita (*the Defendant*) denies that the said plot belongs to the Plaintiff. On the contrary, the Defendant avers that the said parcel of land belongs to her the same having been allocated to her by Ndathi Mugunda Company.

5. The Defendant asserts that she has been in occupation of the land even since it was allocated to her and terms the Plaintiff's claim as baseless and deserving to be dismissed with costs.

THE PLAINTIFF'S CASE

6. The Plaintiff testified as the sole witness in his case. Testifying as PW1, he told the Court he was the real owner of Plot No. 157 Chaka having been issued with a clearance certificate by Ndathi Mugunda Company Limited.

7. PW1 told the Court that his Advocates had written a demand letter asking the Defendant to vacate the land but she had refused to do so. He had also gone to the District Officer Naromoru who wrote a letter to the Defendant but she disregarded the same.

8. On cross-examination, PW1 told the Court he bought the land from one Harrison Wahome Kanyi on 20th June, 2006. He was then issued with a Clearance Certificate dated 10th May, 2001. He conceded that there was 5 year difference from the date he bought the land and the date on the clearance certificate. PW1 told the Court that he also owns Plot No. 158 Chaka having bought the same on the same date as Plot No. 157. He however conceded that he had no documents to show that he bought the plots of land.

9. PW1 further told the Court that when he bought the suit property, the seller told him he had put up some structures on the land. The seller did not however tell him that there was an earlier dispute in regard to the same. The seller died thereafter before they could resolve the dispute.

THE DEFENCE CASE

10. On her part, the Defendant called three (3) witnesses in support of her case.

11. DW1 – Mary Wangui Kamita is the Defendant herself and a business woman. She told the Court that Plot No. 157 Chaka was allocated to her by Ndathi Mugunda Company Limited. She had become a member of the company in 1976 after paying the entrance fee.

12. DW1 testified that after joining the company, she continued paying for shares until 9th June, 1982 when she made the last payment and was shown her plot. Upon being shown the plot, DW1 constructed a timber house which remains thereon to-date.

13. DW1 told the Court that sometimes in mid 2002, one Harrison Wahome Kanyi went and claimed that the plot of land belonged to him. DW1 reported the matter to the company and the company heard both parties before resolving that the plot belonged to DW1. Later on, DW1's caretaker on the property informed her that someone had gone to the plot claiming to have bought the same. DW1 thereafter got a demand letter from the Plaintiff's Advocates.

14. On cross-examination, DW1 told the Court she became a member of the company in 1976 but Plot numbers were allocated in 1982. She paid Kshs.45,400/- before being allocated Plot No. 157.

15. DW2 – Stanley Ngoiri is a tailor in Chaka and a neighbour of the Defendant at Kiricho. He told the Court that the Defendant had appointed him as the caretaker of her plot No. 157 in Chaka. He was aware the plot was allocated to the Defendant by Ndathi Mugunda Company. DW2 also has a plot in the area.

16. DW2 further testified that when a dispute arose as to the ownership of the plot between the Defendant and Harrison Wahome Kanyi, the company resolved the dispute in favour of the Defendant. The Plaintiff later went to DW2 claiming to be the owner of the plot.

17. On cross-examination DW2 testified that he was present when the Defendant was allocated the land by the area District Officer.

18. DW3 – Charles Kinyua Karoki is the Chairman Ndathi Mugunda Company Limited. He told the Court he became the chair of the company in 2007 and was aware of the plot in dispute. DW3 produced the original Register for the company and pointed out that the Defendant was their member No. 588.

19. DW3 further testified that from their records, Plot No. 157 belongs to the Defendant. A dispute had earlier been taken to their offices regarding Plot Nos 157 and 158. DW3 told the Court the Defendant is the owner of Plot No. 157 while Nahashon Kanyi owns Plot No. 158 and they made that determination when the dispute was referred to them.

20. DW3 told the Court the Plaintiff is not their member and that his name does not appear on their Register.

ANALYSIS AND DETERMINATION

21. I have carefully perused and considered the pleadings filed by the parties herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have also perused and considered the submissions filed by the Learned Advocate for the Defendant. I was unable to find any submissions filed by the Plaintiff.

22. The Plaintiff herein prays for a declaration that he is the owner of Plot No. 157 Chaka (*the suit property*). He also prays for eviction of the Defendant from the suit property as well as an order of injunction restraining her from interfering with the suit property.

23. **Section 107 (1) of the Evidence Act** is clear on the burden of proof it provides that:

“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.”

24. In support of his case, the Plaintiff told the Court that he is the real owner of the suit property and that the Defendant had on her own volition occupied the suit land and refused to vacate therefrom despite the demands made by the Plaintiff. He told the Court that he had a Clearance Certificate for the said parcel of land issued by Ndathi Mugunda Company Limited. That certificate was however not produced in Court.

25. On cross-examination, it did emerge that the Plaintiff traced his ownership of the land to one Harrison Wahome Kanyi from whom he claimed to have bought the suit property on 20th June, 2006. The said Harrison who has since died did not inform the Plaintiff that there had been a previous dispute in regard to the suit land.

26. On the other hand, the Defendant told the Court that she became a member of the said Ndathi Mugunda Company Limited in 1976 for purposes of buying land. She produced a bundle of receipts showing the payments she made for shares from the company until 9th June, 1982 when she told the Court the company allocated and showed them their respective plots of land.

27. The Defendant further told the Court that upon being allocated the land, she put up a timber house thereon and placed a caretaker to look after the same. The Defendant told the Court that sometime in 2002, the same Kanyi from whom the Plaintiff purportedly bought the property laid a claim to the land. The Defendant reported the matter to the Company which then summoned both parties and upon hearing the dispute resolved that plot No. 157 belonged to the Defendant while Plot No. 158 belonged to the said Kanyi.

28. The Defendant's position was corroborated by that of her caretaker Stanley Ngoiri (DW2). More significantly, the Defendant called the Chairman of the Ndathi Mugunda Company Charles Kinyua Karoki (DW3) who produced a register of their members and told the Court that from their records, Plot No. 157 Chaka was allocated to the Defendant. DW3 further testified that the dispute on the ownership of the suit property was taken before a committee of the company and that they had resolved the same in favour of the Defendant.

29. Faced with a near similar matter in **James Njoroge Gitau -vs- Lucy Chepkurui Kimutai (2018) eKLR** , Justice Sila Munyao held as follows:

“What is before me is a straight contest over who between the Plaintiff and the Defendant ought to own the land. For either litigant to succeed, they need to demonstrate to me, the root of their title, and the root of their title must originate from the shares held at Kalenjin Enterprises. I have already outlined that the Plaintiff purchased shares from Mr. Chumo who had in turn purchased shares from Mr. Morogochi. This is affirmed by the company through its director, Mr. Chelaite who testified as PW2. Mr. Chalaite produced a register of the Company and I have absolutely no reason to doubt that register. The register shows the name of the Plaintiff and assigns him the Plot No. 7. This evidence is coming from the company itself, and cannot be taken lightly. It is the company which knows its members and knows what land it has assigned to the members. If the company refutes that one is a member, then that person needs to rebut this, through cogent evidence. I am afraid that the Defendant had not delivered any evidence to me that Kimutai held any shares at Kalenjin Enterprises. She has not delivered any share certificate, nor any receipt for payment for survey so as to be assigned the suit land. All that the Plaintiff had was a document, titled “Rift Valley Enterprises (Koelel Farm) List of Allotees” as proof that the suit land was assigned to the deceased.”

30. In the matter before me, the Plaintiff was himself not a member of Ndathi Mugunda Company. He has not produced any share certificate showing that Harrison Wahome Kanyi from whom he says he bought the land was allocated Plot No. 157 Chaka by the Company. The company through its Chairman Mr. Karoki (DW3) has affirmed that the said plot was allocated to the Defendant. The company has produced a Register which shows the Defendant's name and the Plot she was assigned.

31. The company has also confirmed that a dispute between the Defendant and the man who sold the land to the Plaintiff was taken before them and that they had long resolved the same in favour of the Defendant. The Plaintiff has not brought any evidence to refute the company's position.

32. It follows that I am not persuaded that there was any merit in the Plaintiff's case. The same is dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED ON OPEN COURT AT NYERI THIS 17TH DAY OF MARCH, 2022.

In the presence of:

Mr. Andrew Kariuki for the Plaintiff

Mr. Muchiri wa Gathoni for the Defendants

Court Assistant - Kendi

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J. O. Olola

JUDGE