



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 986 OF 2015

BENSON ONGOTO OGOT 1ST PLAINTIFF

JOSEPHINE ACHIENG AKOTH 2ND PLAINTIFF

VERSUS

KANYUKU WANJAUDEFENDANT

JUDGMENT

Background

1. In the Plaint dated 8th October, 2015, the Plaintiffs are seeking for the following orders as against the Defendant:

- i. A declaration that the Plaintiffs are and continue to be the registered proprietors of all that property known as Plot No. C66 in Kariobangi South (Mahatima Project) located on L.R No 209/10046 within Nairobi County and are entitled to the possession of the said property.*
- ii. An order that the Defendant jointly and severally be strictly enjoined and restrained whether by himself or by his servants, agents or otherwise howsoever from trespassing on, alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the Plaintiffs' quiet possession over all that piece of property known as Plot No. C66 in Kariobangi South (Mahatima Project) located on L.R No 209/10046 within Nairobi County.*
- iii. Consequent to the grant of prayers (a) and (b) supra, an order requiring the Defendant/his agents/servants to permanently vacate the suit property to enable the Plaintiffs enjoy their quiet possession.*
- iv. Further and/ or in the alternative to prayer (c) aforesaid, a mandatory injunction do issue restraining the Defendant from ever trespassing on the suit property again.*
- v. Damages for trespass.*
- vi. Aggravated Damages*
- vii. Costs*
- viii. Interests*
- ix. Such other and/or further relief as this Honourable Court may deem fit to grant.*

2. It is the Plaintiffs' case that they are the proprietors of all that property known as Plot No. C66 in Kariobangi South (Mahatima Project) located on L.R. No. 209-10046 within Nairobi County (hereinafter the suit property) and that they purchased the property from one Joshua Mungai Mweha on or about 26th November, 2012 for the sum of Kshs 575,000.

3. The Plaintiffs averred in the Plaint that the said Joshua Mungai Mweha was the then registered proprietor of the suit property as per the records held by the County of Nairobi; that the suit property forms part of the property referred to as the Mahatima Project wherein members purchased the properties for valuable consideration and had their interests registered at the County Government offices pending issuance of the Certificate of Title and that they have ownership documents which constitute conclusive evidence of their ownership of the suit property.

4. According to the Plaintiffs, on or about 7th July, 2015 and 15th September, 2015, the Defendant and his cohorts entered onto the suit property and chased away their laborers who had been hired to develop the suit property; that the matter was reported at Buru Buru Police Station and registered under Occurrence Book Number 52/26/7/2015 and that the above notwithstanding, the Defendant has been persistent in his harassment thus subjecting them to losses, humiliation and mental anguish.

5. The Defendant filed a Defence under protest on 3rd May, 2016 in which he denied the Plaintiffs' averments contending that he is the original allottee and legal owner of plot No.C-66 Mahatima Investment in Kariobangi South within Nairobi City County having been allocated the same by Mahatima Investments and that he has at all material times been in lawful possession of the suit property and has developed the same.

Hearing & Evidence

6. The matter proceeded for hearing on 7th October, 2020. The 1st Plaintiff, PW1, adopted his witness statement and produced in evidence the bundle of documents as exhibits. It was his testimony that the 2nd Plaintiff is his wife; that they purchased the suit property from one John Mungai Mweha on or about the 26th November, 2012 for the sum of Kshs 575,000 and that prior to the said purchase, they carried out due diligence and confirmed that the said John Mweha had an ownership card for the suit property issued by the Nairobi City Council.

7. PW1 informed the court that they have been paying rates to the Nairobi City Council; that the Defendant is attempting to encroach on their property; that they have not had access to the suit property since the year 2017 when the court issued orders for the maintenance of status quo and that he has produced in evidence the Part Development Plan from Nairobi City Council which shows the position of the suit property which is plot C81/1.

8. In cross-examination, PW1 stated that John Mweha purchased the suit property from Mahatima Investments; that he did not have any documents issued by Mahatima Investments to John Mweha; that John Mweha did not have the documents issued to all the purchasers under the project and that he is unaware whether ownership of the suit property by Mahatima Investments was formalized by Nairobi City Council.

9. It was the evidence of PW1 that he received the plot formalization cards from John Mweha; that he conducted a search before purchasing the suit property, which search is with his advocate; that he stopped paying rates when this court issued *status quo* orders and that attempts at arbitration were futile as the Defendant did not avail himself.

10. It was the evidence of PW1 that he has never executed any formal transfer; that the document referred to in paragraph 6 of the Sale Agreement is the Plot Ownership Card; that he never attempted to have the matter resolved by Mahatima Investment; that when he went to Mahatima Investment, the Chairman asked him to toss a coin; that Samuel Mwai Kariuki confirmed that they (the Plaintiffs) are the owners of the suit plot and that he has not called the said Samuel Mwai Kariuki to testify on his behalf.

11. PW2 was Joshua Mungai Mweha. He adopted his witness statement filed on 15th December, 2020. PW2 informed the court that he sold the suit property to the Plaintiffs having been allocated the same by one Samuel Mwai Kariuki, the then Chairman of Mahatima Investments; that upon allocation of the suit property, he was issued with a certificate from Mahatima Investments which certificate got lost in a burglary incident and that he reported the issue of the loss of the certificate to Kandara Police Station in 2011.

12. It was the evidence of PW2 that he was later issued with a certificate by the Nairobi City Council which rendered the certificate issued by Mahatima Investment redundant; that before being issued with a certificate by the City Council, all the allottees were required to pay the sum of Kshs 20,000 which he paid; that he acquired three plots for the sum of Kshs 60,000 which he paid to Samuel Mwai Kariuki and that Samuel Mwai Kariuki did not issue him with a receipt.

13. PW2 testified that the Mahatima Project was duly formalized by the Nairobi City Council; that his name appears as number 63 in the Mahatima Project register; that there are receipts from Nairobi City Council showing that he is the owner of the land and that he is unaware of Plot C-81 which is attributed to him and has no interest in it.

14. On cross-examination, PW2 stated that he was allocated the suit property by one Samuel Mwai Kariuki in his capacity as the chairman of Mahatima Project; that the certificate that was issued to him was stolen during a house burglary which he reported to the police; that the police abstract is with his lawyer and that when he went to seek for a replacement of the certificate, he was informed that the project had been formalized and the card declared redundant.

15. It was the evidence of PW2 that he was given the suit plot by way of a private arrangement with the Chairman and spent approximately Kshs 70,000; that he was not issued with a receipt nor a beacon certificate; that he was taken to the ground by the Chairman of Mahatima Project and that he does not know one David Ruthia Kabogo.

16. DW1 was Julius Kanyuku Wanjau who adopted his witness statement and produced the bundle of documents as DEXB-1. It was the testimony of DW1 that Mahatima Investments allocated him the suit property sometime in 2010; that he has a certificate, receipts and beacon certificates; that he paid the survey fees and was given the plot and that he is on the suit property since the same was allocated to him.

17. According to DW1, he has laid a foundation on the suit property; that he is unaware of any report made to the police in respect of the suit property; that the Nairobi City Council has never owned the project as stated by the Plaintiffs and that no evidence has been adduced in this regard.

18. According to DW1, the Plaintiffs have not presented a search which should be done at City Hall; that pursuant to the affidavit filed by the officials of Mahatima Investments, any dispute arising from the allocation of the plots ought to have been referred to arbitration by Mahatima Investment which never happened and that his materials are wasting on the ground.

19. In cross-examination, DW1 stated that the process of allocation of the suit property includes being given a certificate; that Mahatima Investments advertised the suit plot and he went to their office and purchased the same; that he paid Kshs 30,000 for the plot and Kshs 10,000 for the beacon certificate; that he does not have a receipt for the payment of Kshs 30,000 and that the beacon certificate is signed by the surveyor.

20. According to DW1, the suit land has never been entered into the records of the Nairobi City Council; that he has never paid rate and does not have a card from the City Council; that he was allocated the plot on 7th October, 2004 and was given the clearance certificate and that he did not know the Plaintiffs prior to the filing of this case.

21. In re-examination, DW1 stated that by the time the court issued the orders maintaining status quo, he was already on the suit property; that he has been guarding the materials on the ground; that he has not been given authority to pay land rates to the county government and that he has not been shown a certificate which is different from his.

22. DW2 was David Ruthia Kabogo. He adopted his witness statement as his evidence in chief. It was his testimony that he is the secretary of Mahatima Investments responsible for keeping and maintaining records; that the company's records show that the suit plot is owned by the Defendant; that he is not in possession of any documents supporting the Plaintiffs' assertions; that the land was never taken over by the City Council; that if the City Council had taken over the land, there would be minutes to that effect and that every fully paid up purchaser was issued with a certificate of plot ownership, a clearance certificate and a beacon certificate as well as receipts for the purchase price.

23. According to DW2, the documents in the Plaintiffs' possession are not in the company's register; that the Plaintiffs are not members of Mahatima Investment and that the company did not issue the Plaintiffs with any certificates. On cross-examination, DW2 stated Mahatima Investment has approximately 400 plots and that due process was followed in the issuance of the plots to its members.

24. DW2 stated that the affidavit in the Plaintiffs bundle was signed by the officials of Mahatima including himself; that they had begun the process of handing over the plots to the city council of Nairobi and had given them the register and part development plan and that the handover process was never completed.

25. In re-examination, DW2 stated that the document at page 27 of the Plaintiffs' bundle was not a genuine document; that the genuine document should have been signed by the three officials and that they had started the process of handing over the project to the city council which was never completed.

Submissions

26. The Plaintiffs filed submissions on 14th December, 2021. Counsel submitted that the Plaintiffs have proved ownership of the suit property; that there is evidence indicating that PW2 was initially allocated the suit property and followed all the conditions thereof and that the Plaintiff was entitled to the suit property. Reliance was placed on the cases of Joseph Arap Ngo'k vs Justice Moijo Ole Keiwua [1997] eKLR and Rukaya Ali Mohamed vs David Gikonyo Nambachia & anor Kisumu HCCA 9/2004.

27. It was submitted that PW2 later on formalized the ownership process at the county; that pursuant to the formalization, an allottee was required to pay stand premium or ground rent and the requisite costs for the provision of ownership documents and that PW1 duly laid out the process leading to his acquisition of the suit property.

28. With respect to the question of trespass, it was submitted that the Plaintiffs having proved to be the owners of the suit property, and the Defendant having admitted to having structures thereon, it follows that the Defendant is guilty of trespass on the land as defined by **Section 3(1) of the Trespass Act** and **Clerk & Lindsell on Torts, 18th Edition at page 18**; that in any event, trespass is actionable per se and that the Plaintiffs are entitled to damages.

29. Reliance was placed on the cases of Nakuru Industries Limited vs S.S Mehta & Sons [2016] eKLR and Park Towers Ltd vs John Mithamo Njika and 7 Others [2014] eKLR. It was submitted that the Plaintiffs are entitled to nominal damages for the sum of Kshs 500,000 and the costs of the suit.

30. The Defendant's counsel submitted that the alleged original proprietor of the suit property failed to demonstrate how he acquired the said property and therefore could not have passed on a better title than he had to the Plaintiffs. Reliance was placed on the case of Diamond Trust Bank Kenya Ltd vs Said Hamad Shamisi & 2 others [2015] eKLR and that the case of Joseph Arap Ng'ok vs Moijo Ole Keiwua & 4 others [1997] eKLR is of no assistance to the Plaintiffs as they do not have a title to the property.

31. It was submitted by the defence that no contract existed between PW2 and the Chairman of Mahatima Investment Project; that any purported sale was void for being contrary to **Section 3 of the Contract Act** and that no evidence was led in support of the Plaintiffs' contention that the Defendants certificate of ownership dated 7th October, 2004 is fraudulent.

32. It was submitted that the Defendant's certificate of ownership is conclusive evidence of ownership and contains no flaws as alleged by the Plaintiffs; that the principle of indefeasibility of title was expressed by the court in Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR and that nonetheless, the court has powers to nullify titles which have been obtained fraudulently.

33. Reliance was placed on the cases of Republic vs Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] IKLR (E&L) and Alberta Mae Gacci vs Attorney General & 4 Others (2006) eKLR. According to the Defence, the Plaintiffs cannot claim to be bona fide purchasers as they purchased property which had an existing proprietary interest; that as held in the case of Richard Oduolopole vs Commissioner of Lands & 2 others [2015] eKLR, one cannot be a bona fide purchaser for value without notice where the procedure leading to the registration of the title is tainted with irregularity.

34. Counsel submitted that the Plaintiffs have failed to prove their case on a balance on probabilities pursuant to **Sections 107 and 112** of the **Evidence Act** and have failed to discharge their burden of proof. Reliance was placed on the case of ***Evans Otiemo Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR***. Counsel submitted that the Plaintiffs having failed to prove ownership of the suit property, they have subsequently not proved trespass as against the Defendant.

35. In Reply to the Defendant's Submissions, the Plaintiffs' counsel submitted that no challenge was raised on the admissibility of the documents from Nairobi City County Housing Development and that whereas the general rule on the production of documents is that documents are ordinarily produced by their authors in court as provided in **Section 35 (b)** of the **Evidence Act**, once a party consents to their production in court, the party so consenting accedes to their veracity subject to the right to cross examine the party producing them on their relevance to the case at hand.

36. Counsel submitted that **Section 3** of the **Contract Act** is inapplicable in the circumstances as the Plaintiffs' claim is not against the officials of Mahatima in respect of the disposition of the suit property but against the Defendant for trespass which is actionable per se. Reliance was placed on the case of ***Duncan Nderitu Ndegwa vs Kenya Pipeline Company Limited & another [2013] eKLR***. It was submitted that the above notwithstanding, the Plaintiff proved ownership of the property.

Analysis and Determination

37. Upon considering the pleadings filed herein, the testimonies of the witnesses as well as submissions, the following arise as issues for determination:

- i. *Whether the Plaintiffs are the lawful proprietors of all that land known as Plot No. C66 in Kariobangi South (Mahatima Project) located on L.R No 209-10046 within Nairobi County and if so,*
- ii. *Whether the Defendant has trespassed onto the property?*
- iii. *Whether the Plaintiffs are entitled to the reliefs sought in the plaint?*

38. The dispute herein revolves around the ownership of Plot No C66 in Kariobangi South located on L.R No 209-10046 (the suit property) which both the Plaintiffs and the Defendant lay claim to. It is the Plaintiffs' position that they purchased the suit property from one Joshua Mungai Mweha for the sum of Kshs 575,000 on 26th November, 2012.

39. In support of their case, the Plaintiffs produced in evidence copies of the receipts for payment of the plot by Joshua Mweha dated 23rd March, 2009 and 4th November, 2011 issued by the Housing Development Department of the Nairobi City Council, the Sale Agreement dated 26th November, 2012 and a Bankers Cheque for Kshs 500,000 and Kshs 70,000 dated 27th November, 2012 and 28th November, 2012 respectively.

40. In addition, the Plaintiffs produced in evidence the plot formalization and registration cards in their favour with respect to the suit plot, the Mahatima Project list of officials dated 24th June, 2011, the letter from the District Commissioner dated 27th June, 2011 indicating that Mahatima project has met the conditions to be considered for formalization and the affidavit by the officials of Mahatima Investments indicating that they intend to hand-over the project to the Nairobi City Council for formalization.

41. The Plaintiffs also produced in evidence the certificate of registration for Mahatima Investments dated 19th May, 2006, Mahatima Project list of officials and the part development plan for Kariobangi South, Riverbank Estate, the rates payment receipts dated 8th June, 2015, and the demand letter dated 24th August, 2015.

42. The Defendant equally claims ownership of the suit property. It is the Defendant's case that he was the original allottee of the suit property having been allotted the same sometime in 2010. The Defendant produced in evidence his plot ownership certificate dated 7th October, 2004, the certificate of registration of Mahatima Investments dated 19th May, 2006, receipt from Mahatima Investment for the sum of Kshs 10,000 being survey fees, beacon certificate with respect to plot C66, plot ownership certificate for plot C81/1 in the names of the Plaintiff and a copy of part development plan showing the position of the suit plot and plot C81/1.

43. None of the parties herein has a title to the suit plot. For this Court to determine who between the Plaintiffs and Defendant has a valid claim over the suit property, the court is required to examine who between the two has established the root of his claim to the suit property. As persuasively stated in the case of ***Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR***;

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....

*It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’”: per Nourse LJ in *Sen v Headley [1991] Ch 425 at 437.**

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al."

44. It is undisputed that the suit property herein forms part of the property known as L.R No 209-10046 belonging to Mahatima Investments, and forming part of what is known as the Mahatima Investment Project. PW2 stated that he was allotted the suit property by the then Chairman of Mahatima Investments, Samuel Kariuki, and was issued with a certificate; that the certificate was lost in a burglary and that he was asked not to replace the same as it would be rendered redundant due to the formalization of the project.

45. It was the evidence of the Plaintiffs that they paid the sum of Kshs 60,000 for the suit property. The Plaintiffs produced two receipts from the Housing Development Department of the Nairobi City Council for the sums of Kshs 6,000 and Kshs 2,000, the plot formalization card and a register of Kariobangi South C Riverside where the 2nd Plaintiff's name appears as the proprietor of Plot C66.

46. It is apparent from the above narration that PW2's root of the title is wanting in several crucial elements. There is no evidence with respect to any sale and/or allotment of the property to him between himself and Samuel Kariuki, nor the alleged payments made in that regard. PW2 did not produce any evidence of the certificate that was issued to him nor any evidence of its loss.

47. In addition, no evidence was produced from the said Samuel Kariuki with respect to the sale. It was the evidence of DW2, an official of Mahatima Investments, which initially owned the suit property, that all fully paid up purchasers of the plots were issued with plot ownership certificates, receipts, beacon certificates, receipt of survey fees and clearance certificates. PW1 and PW2 had none of these documents from Mahatima Investments.

48. PW1 adduced in evidence a plot formalization card which he contends was issued to him by the Nairobi City Council after the project was taken over by the Nairobi City Council from Mahatima Investments. However, the issue of formalization of the Mahatima Investments was disputed.

49. It is trite that he who alleges must prove. It is apparent that an official from Mahatima Investments or indeed an official from Nairobi County Government would have been best placed to answer the question of the takeover of the project if at all, by the then Nairobi City Council or from Mahatima Investments. None was called by the Plaintiffs to testify in this regard.

50. DW2, the secretary of Mahatima Investments, did not contest the affidavit signed by the officials of Mahatima dated the 24th June, 2011 with respect to the attempted formalization of the project by the then Nairobi City Council. It was his evidence that plans were underway to undertake the formalization of the project but the same was never completed. The court finds that DW2's evidence in this respect was not controverted.

51. On the other hand, the Defendant, who also claims to be an original allottee of the plot, produced in evidence the Plot Ownership Certificate dated 7th October, 2004, receipt for survey fees and the beacon certificate. The evidence of the Defendant was corroborated by DW2, the secretary of Mahatima Investments, who testified that the Defendant was the rightful proprietor of the suit plot and that they did not have documentation confirming the Plaintiffs' assertions.

52. Despite alluding to fraud on the part of the Defendant with respect to the legitimacy of the documents adduced in support of his claim to Plot No C-66, the Plaintiffs did not tender any evidence in that respect. It is trite that fraud must be specifically pleaded and proved. That being the case, the court is satisfied that as between the Plaintiffs and the Defendant, the Defendant has been able to sufficiently establish the root of his title to the suit property. As a result, the court finds that PW2 did not have title to the suit property.

53. To the extent that PW2 herein did not have title to the suit property, the question then becomes whether he could pass a valid title to the Plaintiffs. The principle of *nemo dat quod non habet* is a general principle that one cannot pass a better title than one has. Whereas the principle was initially with respect to sale of goods, the same has been given recognition in property law. This principle was well articulated by the Court of Appeal in the case of Arthi Highway Developers Ltd vs West End Butchery & 6 others (supra), where the court in dealing with a fraudulent title which had been sub-divided and sold off to unsuspecting purchasers stated as follows:

"It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof."

54. More recently, the Court of Appeal in Mwangi James Njehia vs Janetta Wanjiku Mwangi & another [2021] eKLR while discussing the concept of an innocent purchaser for value without notice stated as follows:

"We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word "apparent" be done away with altogether."

The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has "purchased" the property on the basis of an "apparent title" at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the "purchaser" was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor."

55. It is undisputed that the Plaintiffs bought the property from PW2. Indeed, they executed a sale agreement and paid monies for the same. However, the court is not convinced that the Plaintiffs carried out any serious due diligence as alleged or at all. Despite averring that they conducted a search, no evidence of the same has been produced. They have not even indicated that they sought confirmation from Mahatima Investments on the legitimacy of the suit property.

56. That being the case, it is the finding of this court that the Plaintiffs did not prove their case on a balance of probabilities. The Plaintiffs' case is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF APRIL, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Makori for the Plaintiffs

Mr. Ngugi for the Defendant

Court Assistant: John Okumu