



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 130 of 2010

SAMUEL MAINA KARIUKI.....PLAINTIFF

VERSUS

ANGELICA KABISA KABITA.....1ST DEFENDANT

JOYCE WAMBUGU NG'ANG'IRA.....2ND DEFENDANT

BONIFACE KIRATU NJOGU.....3RD DEFENDANT

MARY AGNES GATHONI GAKUO.....4TH DEFENDANT

VITALIS L. OLOO.....5TH DEFENDANT

JUDGMENT

By a Complaint dated 28.05.2010 and filed on 2.06.2010 Samuel Maina Kariuki (*the Plaintiff*) sought the following orders -

- (a) an eviction of the Defendants from the suit land;
- (b) a permanent injunction to restrain the Defendants by themselves, their servants and/or agents from entering and/or interfering with the plaintiff's quiet enjoyment, or in any way dealing with all that piece of land known as NAKURU/MUNICIPALITY/BLOCK 22/1719 (*the suit land*),
- (c) mesne profits from 1999 to date,
- (d) costs of this suit, and
- (e) interest on (c),
- (f) such further or other relief that this court may deem fit to grant.

The Plaintiff's claim is that he was at all time material to the suit, the registered owner of all that parcel of land known as NAKURU/MUNICIPALITY BLOCK 22/179, measuring approximately 2.347 Ha.

The Plaintiff further claims that since the year 1999 or thereabouts, the Defendants by themselves, their agents and/or servants have unlawfully and without any colour of right interfered with the plaintiff's quiet enjoyment of about 6 acres of his property and in particular the 5th Defendant has assumed active and/or constructive possession thereon and has refused and/or neglected to give vacant possession.

The Plaintiff also claimed that by virtue of the Defendants' actions, including resistance with the use of force from vacating the suitland, the plaintiff has suffered loss as he cannot do any developments on the land. The plaintiff therefore claimed mesne profits at the rate of Ksh 2,000/= per acre per year from 1999-2002, Ksh 3,000/= per acre per year from 2003-2006, and Ksh 4,000/= per acre per year from 2007-2010.

In their collective defence, dated 8.09.2010, and filed on 10.09.2010, the Defendants aver at paragraphs 4 and 5 as follows -

“4. That the Defendants bought their plots at Ksh 100,000/= measuring 33.12 x 21.50 metres each from the plaintiff's father – FRANCIS KARIUKI GIKONYO (deceased) principal agent, JOHN KAGUNYI T/A UNITEX COMMERCIAL AGENCIES vide, Agreement dated 1st December 1998, and that Kshs. 10,000/= was paid for the Agreement, Transfer Stamp Duty, Registration of Title and survey fees inclusive therefor at Kamere & Company Advocates Nakuru for said purpose thereafter.”

5. ...that the said plots were purchased by the Defendants herein as follows -

- (a) Angelica Kabisa Kabita – one sub-divided Plot marked as No. 23,***
- (b) Joyce Wambugu Nyangira two sub-divided plots marked 16 & 17,***
- (c) Boniface Kiratu Njogu – one sub-divided plot marked as Number 15,***
- (d) Mary Agnes Gathoni Gakuo – one sub-divided –plot marked as Number 22,***
- (e) Vitalis Lwal Oloo – Four sub-divided plots marked as Number 18, 19, 20 & 21.***

all hived off from that piece of land known as Nakuru Municipality Block 22/1719 (Muguga) measuring approximately 2.347 Hectares.”

The Defendants also raised a Preliminary Objection that this Court had no jurisdiction to entertain the claim herein since a similar claim had been made and was pending before Nakuru CMCC No. 1356 of 2001, and had not been determined. Though the objection was not argued, it was doomed to fail as this court has original jurisdiction in all civil and criminal jurisdiction, and could only have stayed the suit before the subordinate court or ordered the transfer of this suit to that court, or the transfer of that suit to this court. In the event none of those options was argued before this court, and following the death of the Plaintiff therein abated, though the claim therein was subject of Defence Evidence Exhibit No. 10.

The Plaintiff who testified as PW1, reiterated the claims in the plaint, and the orders sought and closed his case.

Joyce Wambugu Nyangira the 2nd Defendant testified as DW1, Boniface Kiratu Njogu, the 3rd Defendant testified as DW2, DW3 was Vitalis Lwal Oloo, the 5th Defendant, while DW4 was one Zedekire Ongumbo the Officer-in-charge of the Chief Magistrate's Civil Registry who produced the file No. Nakuru CMCC suit No. 1356 of 2001 and confirmed in his evidence in-chief that the last orders in the file were made on 27.01.2005 when the Plaintiff (*therein*) was granted leave to amend his Chamber Summons and had not done so, and that the file had since remained inactive.

I have considered the evidence of both the Plaintiff and the Defendants. The Plaintiff's contention is that the parcel of land known as NAKURU/MUNICIPALITY/BLOCK 22/1719 (the suit land), belongs to him, and that the Defendants are trespassers. On their part, the Defendants contend **firstly**, that the suit land was a sub-division of the larger parcel of land known as NAKURU/MUNICIPALITY BLOCK 22/982, and **secondly**, that they bought the suit land through one John N. Kagunyi T/a Unitex Commercial Agencies, (UNITEX) the agent of the plaintiff's deceased father, one FRANCIS KARIUKI GIKONYO.

Though the Plaintiff's counsel filed on 16th February 2011 a list of issues dated 10th February 2011, to be determined by the court, those were reduced into five, in the Defendants submissions dated and filed on 16th November 2012, and these are -

- (1) whether the suit land belongs to the plaintiff as he contends or whether it was a sub-division of the original parcel of land known as NAKURU/MUNICIPALITY BLOCK 22/982,**
- (2) whether the suitland was sold to the Defendants prior to the plaintiff father's death,**
- (3) whether the Defendants should be evicted from their respective plots of the suitland,**
- (4) whether an order for mesne profit should be granted,**
- (5) whether the Defendants should be evicted or whether they should be allowed to remain in their respective plots and the Plaintiff ordered to sign their transfer form and title deeds issued to them respectively.**

These issues are considered sequentially in the paragraphs following of this judgment.

1. OF WHETHER THE SUIT LAND WAS A SUB-DIVISION OF NAKURU MUNICIPALITY BLOCK 22/982

The Plaintiff's own evidence, Pexh. 5, the Certificate of Confirmation of the Grant dated 2nd February 2007 shows that the Plaintiff was granted **firstly** the whole of NAKURU/MUNICIPALITY BLOCK 22/982 (MIGUGA) and **secondly** NAKURU MUNICIPALITY BLOCK 22/1719 (the suit land). The suitland is designated to be 2.347 Hectares, and to have been a sub-division of Plot No. 982. Again that is what the Plaintiff's Title Deed (PEXh. I) says. The question is what happened to Plot No. 982?.

Arising from the evidence of the Plaintiff, Plot No. 982, is one and the same land as the suit land (Nakuru Municipality Block 22/1719). It was given a new number because of the sub-division into the several plots. The first issue herein is therefore answered in the affirmative.

The other issues (2) – (5) inclusive, are answered in the following passages of this judgment.

Firstly, the court takes judicial notice of the fact that the Plaintiff is per the Title Deed and Official Search he produced, the legal owner of the suit land. This documentation does not of course tell the true position of the beneficial ownership of the plots. This is because the plaintiff in his evidence-in-chief, and in cross-examination completely avoided to mention the fact (*of which he was personally aware*) that the suit land was part of the original Plot 982 which had been sub-divided into the several plots which were bought by the Defendants among other buyers.

Secondly, the Defendants had not only bought the Plots but had also taken possession of them, and had erected buildings and made other improvements on them. In the case of the 5th Defendant, he testified that he first bought plot No. 21 by Agreement dated 15.04.1998 in 1998 and commenced construction of his house on that plot and completed it on 15.06.2001. He bought other plots 18, 19 and 20 by Agreement dated 16.11.1999, and paid a total of Ksh 440,000/= for the four plots. He has been in occupation and possession of the plots for over 13 years.

He further testified that at the request of the plaintiff's father he employed the plaintiff in the construction of his first house.

DW3 described in detail how he came to purchase the said 4 plots.

The evidence of the 2nd and 1st Defendants were not any more different from that of DW3. DW2, an Electrical Engineer, while undergoing a medical check-up in the neighbourhood of the chambers of Kamere & Co. Advocates, noticed an advertisement for sale of plots. Upon inquiry he was informed that

the plots were on sale for shs 100,000/=. He immediately paid shs 70,000/= and paid the balance later. He took possession and has remained in possession since 21.01.1999 when he signed the Agreement for Sale between him and UNITEX, the sellers. He has since been seeking title to his plot, and was shocked to receive a notice to vacate the land he has occupied for over 12 years.

The 1st Defendant a retired Teacher used her pension savings of Sh 250,000/= to purchase plots 16 and 17.

These Defendants all produced their respective purchase agreements, and stated that the purchase price was paid to and was received by the firm of Kamere & Co. Advocates who were Advocates for the Vendors.

The common feature among the Defendants was the agency of UNITEX COMMERCIAL AGENCIES who sold the plots as owner thereof. The **second** factor was the firm of KAMERE & Co. Advocates to whom the purchase money was paid on behalf of UNITEX AGENCIES (*the Sellers*).

The arrangement between the Plaintiff's father and FRANCIS KARIUKI GIKONYO is revealed in the pleadings in Nakuru C.M.C. Civil Case No. 1356 of 2001. The Plaintiff's father had entered into an Agreement with one JOHN N. KAGUNYI t/a Unitex Commercial Agencies, for the sale of Plot No. 832 (to UNITEX) for the sum or price of Ksh 2,010,000/= and that the Defendant (UNITEX) only paid Sh 360,000/=. However the Plaintiff's father surrendered the title to the said plot to said John N. Kagunyi.

UNITEX consequently arranged for the sub-division of Plot 983, and advertised the sale of the sub-divisions. The Plaintiff's father alleged that UNITEX failed to honour their bargain and sued them for a declaration that their agreement was null and void and claimed liquidated damages, the return of the original title, costs and others orders the court would deem fit to grant.

The Defendant (UNITEX) filed a Defence through the firm of KAMERE & Co. Advocates and denied the Plaintiff's father's claim and stated inter alia -

“...the suit was bad in law, in that it did not disclose any reasonable cause of action against the Defendant (UNITEX), and that it was frivolous, vexatious, incompetent, scandalous and an abuse of the process of the court and should be struck out.”

The Plaintiff's father changed the Advocates but despite the change of Advocates, the Plaintiff's father took no action on the case, and died on 30th January 2003 without prosecuting his case. Similarly the Plaintiff in this suit took no action following his father's death and the suit abated under Order XXIII rule 3(2) of the Civil Procedure Rules (*now Order 24 of the Civil Procedure Rules 2010*). Following the abatement of the suit there has been no other challenge directly or indirectly against the arrangements between the Plaintiff's father and UNITEX. The sale by UNITEX of the plots to the Defendants remain valid and enforceable.

This court takes judicial notice of notorious delays in obtaining titles arising from sub-divisions of land. Where sellers die or as in this case the Plaintiff's father's case against UNITEX abated, and personal representatives, want to take advantage of deaths of their relatives, the courts must be vigilant and ensure that the rights of bona fide purchasers of property for value without notice of any other technicalities, are enforced and titles to their property are issued.

The Plaintiff herein was aware that these Defendants and others had purchased the suitland from the plaintiff's fathers agents UNITEX. The plaintiff, had, at the intervention of his late father been employed at the construction of the 5th Defendant's plot. It is incredible and fraudulent that he should **firstly** under the Certificate of the Confirmation of the Grant, assign to himself the very parcel of land which he knew had been sold through his late father, and **secondly** bring this suit making spurious and entirely unjustified claims that the Defendants are trespassers and should be evicted and permanently kept out of their properties by mandatory injunction. That is, an abuse of the process of the court.

Thirdly, and in my considered opinion having been personally aware even if he did not see the Agreements for Sale, the Plaintiff saw and is a neighbour of these Defendants, he could not in equity assign to himself lands which he knew belonged to and were in possession of the respective Defendants. He could only hold such land in trust for those Defendants.

Fourthly, I am keenly conscious of the procedural law that the court can only award or order that which a party to a suit has pleaded. In their Defence (*dated 8th September 2010, and filed on 10th September 2010*), the Defendants merely prayed for dismissal of the Plaintiff suit with costs. Such order although effectual in determining this suit, does not enforce the Defendants' right to have title to their respective plots. The Defendants DW1, DW2 and DW3 all claimed for titles in respect of the plots they purchased. The case was perhaps best summed up in the concluding evidence in-chief of the 5th Defendant (DW3), ***"I have lived over 13 years on the land, I wish the court to grant me title to my plots."***

Dismissing the Plaintiff's suit without granting the Defendants the right to title to their plots would be sterile and lead to more costly and unhelpful litigation on both the Plaintiff's and the Defendants' part. For those reasons the questions or issues first raised in the preceding passages of this judgment are answered as follows -

- (1) *the suit land which the plaintiff contends belongs to him was in fact a sub-division of the original plot 832,*
- (2) *the suit land was sold to the Defendants prior to the Plaintiff's father's death, and title he purports to hold is held in trust for the Defendants herein,*
- (3) *there is no basis for either a permanent or mandatory injunction or eviction of the Defendants from the suit land. They were bona fide purchasers for value without notice of any arrangement between the plaintiff's late father and UNITEX,*
- (4) *the Defendants are entitled to remain on their respective plots,*
- (5) *to bring this matter to some finality the plaintiff is ordered to sign over the respective applications for the transfer of the respective plots to each of the Defendants within ninety (90) days of the date hereof. In default, the Deputy Registrar or Chief Executive Officer of this court shall sign such documents as are necessary for the issue and grant of title deeds to each of the Defendants in respect of each of their plots, or plot they bought,*
- (6) *the Plaintiff's suit lacks merit and is therefore dismissed with costs to the Defendants severally.*

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 15th day of March, 2013

M. J. ANYARA EMUKULE

JUDGE