



REPUBLIC OF KENYA



**Kamau v Rotich (Environment & Land Case 167 of 2015)
[2022] KEELC 3335 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 167 OF 2015**

JM MUTUNGI, J

JULY 28, 2022

BETWEEN

PETER GITHINJI KAMAU PLAINTIFF

AND

WILLIAM CHERUIYOT ROTICH DEFENDANT

JUDGMENT

1. The plaintiff instituted the instant suit by way of a plaint dated 10th May 2015 filed in court on 11th May 2015. The plaintiff's claim against the defendant was that he was lawfully registered as the owner of land parcel Miti Mingi/Mbaruk Block3/53 (Barut) (herein after referred to as "the suit property") and that the defendant had unlawfully encroached onto the land. The plaintiff prayed for judgment against the defendant for:-
 - a. A mandatory injunction against the defendant, his servants and/or agents to vacate land parcel No.MitiMingi/Mbaruk Block3/53
 - b. That a declaration do issue that the plaintiff is the sole and absolute owner of all the property known as Miti Mingi/Mbaruk Block3/53
 - c. General damages
 - d. Mense profits
 - e. Costs of this suit
 - f. Any other or further relief this honourable court may deem fit to grant to meet the ends of justice.
2. The defendant filed a statement of defence and counterclaim dated 13th November 2015. The defendant denied the plaintiff's allegations contained in the plaint and contended that he was in



occupation and possession of the suit property pursuant to purchase agreement with the registered proprietor dated 21st April 2009. The defendant averred that the plaintiff had fraudulently procured title to the suit property. The defendant by way of counter claim sought judgment against the plaintiff for: -

- a. That orders of permanent injunction do issue restraining the plaintiff, his agents servants and/or any persons exercising authority from entering, tilling, disposing, using, alienating and/or in any other manner interfering with the defendant's quiet use, possession and/or occupation of all the parcel of land known as Miti Mingi/Mbaruk Block3/53 (Baruk)
 - b. A declaration that the defendant herein is the legal owner of all the parcel of land known as Miti Mingi/Mbaruk Block3/53 (Baruk)
 - c. An order for cancellation of the plaintiff's illegally acquired title and/or any other document in respect of Miti Mingi/Mbaruk Block 3/53 (Baruk) and the same do remit to the names of the original owner Evans Ondieki to enable the Defendant pursue the issuance of title.
 - d. Costs of the suit be borne by the plaintiff.
3. During the trial both the plaintiff and the defendant testified and called one witness each in support of their respective cases.

The case for the plaintiff

4. The plaintiff testified as PW1. The plaintiff in his evidence relied upon and adopted his recorded and filed witness statement dated 11th November 2013. In brief, it was his evidence that he purchased the suit property from one Shem Osiago Murumbwa through a sale agreement dated 11th October 2013 for the consideration of Kshs650,000= . It was the plaintiff's evidence that the seller was selling the land as the beneficial owner as a Mr. Evans Ondieki from who he (the seller) had bought the land had not yet transferred the suit land to him. The plaintiff testified that he paid the seller the full purchase price as per the sale agreement and that the land was eventually transferred to his name and he was issued with a title deed on 19th September 2014.
5. The plaintiff explained that at the time he purchased the plot, it was vacant though it had been cultivated. He stated that he was to pay the seller the balance of Kshs.100,000/= after the land was transferred to the seller's name. He testified that the property was transferred to the name of Kebeya Autoworks a business firm of Shem Osiago Murumbwa, on 6th January 2014. The plaintiff exhibited a copy of certificate of Registration of business dated 17th May 2010 that showed that Shem Osiago Morumbwa was carrying on business under the name of Kebeya Auto Works. The plaintiff exhibited an abstract of title (green card) which revealed that Evans Ondieki was registered as owner of the suit property on 14th August 2007 and issued with a title deed on the same date; that on 22nd August 2013 there was a restriction registered by William Rotich claiming a purchaser's interest which restriction was removed on 30th December 2013 and on 6th January 2014 Kebeya Autorwork was registered and title issued in its favour. The plaintiff as per abstract of title was registered and issued title on 19th September 2014. The plaintiff tendered in evidence all the documents exhibited in the plaintiff's bundle and further bundle of documents and the same were admitted as ("PEX1-8"). The plaintiff maintained he was a bonafide purchaser for value and prayed for judgment in terms of the prayers in the plaint and for the dismissal of the defendant's counterclaim.



6. In cross examination by Mr. Mukira advocate for the defendant, the plaintiff stated he did not take possession of the land immediately he entered into the agreement. He admitted at the time he signed the agreement there was a restriction registered against the title of the suit property by the defendant. He stated at the time of the agreement, Shem Morumbwa had not been registered as the owner but he said it was a condition of the agreement he pays the balance of the purchase price after he (Shem Morumbwa), was registered as owner which he did. The plaintiff stated he attempted to cultivate on the suit land in 2015 but the defendant prevented him which prompted the institution of the present suit.
7. Shem Morumbwa Osiago PW2 testified that he had purchased the suit property from one Evans Ondieki and that before the same was transferred to his name he sold the same to the plaintiff as per the agreement of sale dated 11th October 2013. He stated he had purchased the parcel of land from Evans Ondieki in 2009. He further testified that the suit property was transferred to his business firm registered as Kebeya Auto Works. He affirmed the business firm was solely owned by him and that he subsequently transferred the suit property to the plaintiff. He further stated the defendant had registered a restriction against the title to the land, but the defendant resolved the issue he had with Evans Ondieki and the restriction was removed on 30th December 2013 before the land was transferred on 6th January 2014 to his (PW2's) business firm.
8. In cross examination PW2 stated that there was a house in the suit property that had been built by Evans Ondieki. He said he was cultivating on the land in 2012 and 2013 although the defendant was interfering. He stated it was after he sought the intervention of Evans Ondieki who engaged with the defendant that the restriction registered on the property was removed. The witness affirmed that Evans Ondieki executed the transfer in favour of his business firm.

The defendant's case.

9. The defendant (DW1) testified that he purchased the suit property from Evans Ondieki on 21st April 2009 pursuant to sale agreement ("DEX1") for the consideration of Kshs130,000/=. He stated that he paid a deposit of Kshs100,000/= on execution of the agreement and that he was to pay the balance on completion. He testified that he took possession of the land immediately after the sale agreement and started utilizing the land. He stated that Evans Ondieki failed to complete the transaction despite efforts to get him to do so which he said prompted him to register a restriction against the property to protect his interest.
10. The defendant stated that in 2014 some persons started encroaching on the land. He stated when he carried out a search at the Lands Office he discovered the Land had been transferred to Bakeye Auto Works. He stated he was not involved before the restriction that he had registered on the title was removed.
11. The defendant stated that Shem Morumbwa had never utilized the suit land at any time. He further stated that Evans Ondieki had never informed him that his sale agreement with him was rescinded and that he had not refunded to him the purchase price he had paid for the land. The defendant sought for the cancellation of the title issued to the plaintiff and for the title to be restored in the name of Evans Ondieki.
12. In cross examination, the defendant affirmed that other than the agreement dated 21st April 2009 he and Evans never signed any other documents and no consent of the Land Control Board was sought. He affirmed that he did not reside on the land but only cultivated thereon. The defendant averred that the restriction was removed without any reference to him and that he wrote a letter to the Lands office complaining about the unlawful removal of the restriction.



13. The defendant called one Lilian Wangari (DW2) as his witness. Defence witness 2 evidence was to the effect that she was a witness to the sale agreement dated 21st April 2009 between the defendant and Evans Ondieki. She affirmed she witnessed the defendant pay Evans Ondieki the deposit of Kshs100,000/=. The witness stated she was not involved in the transaction between the defendant and Evans Ondieki beyond that.
14. Following the close of the trial the parties filed their final written submissions. The plaintiff's submissions were filed on 1st April 2022 and those of the defendant were filed on 20th May 2022.

Analysis evaluation and determination

15. After reviewing the pleadings, the evidence adduced by the parties, and upon considering the submissions by the parties, the following are the issues that arise for determination.
 - i. Whether the plaintiff is the registered proprietor of Land Parcel Miti Mingi/Mbaruk Block3/53?
 - ii. If the answer to (i) above is in the affirmative, whether such registration was obtained fraudulently?
 - iii. Whether the defendant is entitled to be declared as the owner of land parcel MitiMingi/Mbaruk block3/53?
 - iv. Who bears the costs of the suit?
16. The facts of the present suit are rather straight forward. On the part of the plaintiff it is his case that he purchased the suit land from one Shem Osiago Morumbwa who had himself bought the same land from one Evans Ondieki but the land had not as yet been transferred to him. The sale agreement was conditioned on the vendor getting the title documents transferred to his name. The vendor, Shem Osiago Morumbwa, got the title transferred to the name of Bakeye Auto Works, a business firm where he was the sole proprietor. Eventually the vendor got the title transferred to the plaintiff on 19th September 2014.
17. The defendant on his part predicated his case on the fact that he had an agreement of sale of the suit land dated 21st April 2009 with Evans Ondieki who was the registered owner. As per the agreement, the defendant was to pay the balance of the purchase price of Kshs.30,000/= after the title to the land was transferred to him. The vendor, Evans Ondieki, apparently failed to honour the terms of the agreement, and as is evident, went ahead to enter into another agreement with Shem Osiago Morumbwa which he completed by transferring the suit property to Bakeye Auto Works owned by the said Shem Morumbwa. Subsequently, Shem Morumbwa transferred the suit property to the plaintiff to complete the sale transaction entered into between them on 11th October 2013.
18. Turning to the determination of the issues identified, on the 1st issue there can be no contest. The documents and evidence adduced by the parties confirm that indeed the plaintiff was registered as the proprietor of land parcel Miti Mingi/Mbaruk Block3/53 on 19th September 2014 and was issued a title deed. The plaintiff exhibited a copy of search certificate, title deed, and abstract of title (greencard) which all confirmed he was registered as proprietor on 19th September 2014. On the first issue therefore the answer is in the affirmative that the plaintiff was the registered proprietor of the suit property.



Whether the registration was obtained fraudulently?

19. On the second issue, the defendant has alleged that the plaintiff got registered as owner of the suit property fraudulently. It is noteworthy that, Evans Ondieki who was the registered owner at the time when both the plaintiff and the defendant entered their respective sale agreements was not made a party in these proceedings. If any fraud would have been perpetrated by the plaintiff or any other party respecting the suit property, invariably Evans Ondieki being the owner of the land, would have been party to such fraud and hence a necessary party in any proceedings where fraud was alleged respecting the subject property. The land Registrar also who is the custodian of the land records was not a party in the suit and was not called to testify.
20. The plaintiff has demonstrated he had entered into a sale agreement with Shem Morumbwa to purchase the suit property on 11th October 2013 and performed his obligations under the agreement. The agreement was fully fulfilled and the plaintiff was registered as the owner of the suit land. The defendant in his submissions has contended that, the agreement between the plaintiff and Shem Osiago Morumbwa was in violation of Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya. With respect I do not think so, the agreement was in writing and was duly attested by an advocate who represented both the plaintiff and the vendor. I do not also agree the plaintiff's suit is founded on the said contract and/or agreement. The plaintiff's suit is in my view founded on the fact of him being the registered owner of the suit property. The agreement between the plaintiff and the said Shem Osiago Morumbwa was completed and the defendant was not party to the agreement and could not properly contest the same. Shem Osiago Morumbwa who was party to the agreement confirmed its contents.
21. The defendant's allegations of fraud as pleaded were premised on the fact that he had purchased the property earlier in time and therefore the same was not available to be sold to the plaintiff. The defendant further averred that he had placed a restriction against the title which was lifted without notice to him. Further the defendant alleged that the plaintiff acted in collusion with officials at the Lands office. I observed earlier in this judgment that the Land Registrar was not made a party in the suit and if it was the defendant's position that the Land Registrar acted unlawfully, in collusion or fraudulently, he ought to have been made a party to the suit to answer the allegations. Nevertheless apart from the allegations that the defendant made against the plaintiff, there was no evidence led to prove the allegations of fraud. It is not sufficient to merely plead and/or allege fraud, there must be tangible proof of the allegations of fraud.
22. In the instant matter no evidence was led by the defendant to prove that the plaintiff played any role in having the restriction placed on 22nd August 2013 removed by the Land Registrar. As per the abstract of title (green card) the restriction was removed on 30th December 2013. Restrictions are registered by the Land Registrar under section 76 of the Land Registration Act, 2012 and the same may be removed and/or varied under section 78 of the Act which provides as follows:-
 78. Removal and variation of restrictions.
 - (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
 - (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs



23. As is evident from the provisions of Section 78 above, it is the Land Registrar who has the mandate to remove or vary a restriction. No evidence was led to illustrate how and in what circumstances the restriction, was removed. After the removal of the restriction, the suit property was not registered in the name of the plaintiff but in the name of Kebeya Auto Work on 6th January 2014. The plaintiff was not registered until 19th September 2014. I find no basis to find that the plaintiff was involved in any fraudulent dealing to procure his registration as the owner of the suit property. I hold that he was properly and validly registered as owner of the property.
24. In regard to the third issue, whether the defendant should be declared as the owner of the suit property, I find no basis for such a declaration. Even going by the evidence of the defendant, the agreement between him and Evans Ondieki was never completed. The defendant stated in his evidence he was to pay the balance of the purchase price of Kshs.30,000/= when the suit property was transferred to him. He stated the vendor, Evans Ondieki, failed to honour the agreement as he failed to process the transfer of the suit property to his name. It would appear from 2009 to 2015 when the plaintiff filed the instant suit seeking inter alia orders for the defendant to vacate the suit land, the defendant had taken no action to enforce, the contract he had entered with Evans Ondieki. In 2015 it was too late for the defendant to seek enforcement since the suit land had already been transferred and registered in the plaintiff's name. The defendant's cause of action, if any would have been against or through Evans Ondieki. The defendant had no dealings with the plaintiff and as such his counterclaim against the plaintiff has no legs on which it can stand. The defendant is non-suited against the plaintiff and he would have to pursue Evans Ondieki for any redress.
25. Although the plaintiff in his submissions submitted on the issue of the limitation of the defendant's counter claim and on the issue of the lack of consent of the Land Control Board in regard to the defendant's sale transaction, these were not issues which were either pleaded and/or canvassed in evidence. I will therefore make no finding on the two issues on the basis that parties are bound by their pleadings and the court is not free to entertain and determine issues that were not pleaded and/or canvassed in evidence.
26. The upshot is that after carefully evaluating and analyzing the evidence, I am satisfied that the plaintiff has proved his case on a balance of probabilities and is entitled to judgment. I find the defendant's counterclaim not proved to the requisite standard and I dismiss the same.
27. The plaintiff in his plaint sought an award of general damages for trespass and mesne profits. Although I have found that the plaintiff was properly registered as the owner of the suit property, there is evidence that the defendant may have been in possession and was cultivating the suit land before the plaintiff purchased and had the land transferred to himself. There is no evidence that the plaintiff ever utilized the land for any purpose. Without any basis upon which I can make an assessment for award of general damages, I will decline to make an award of general damages or mesne profits. No basis was laid by the plaintiff which would have given a guide to such an assessment.
28. Accordingly I enter judgment in favour of the plaintiff and make the following consequential orders: -
1. That a declaration be and is hereby issued that the plaintiff was validly registered and is the sole and absolute proprietor of Land parcel Number Miti Mingi/Mbaruk Block3/53.
 2. That the defendant is ordered to vacate the said land parcel within 30 days from the date of this judgment failing which the plaintiff shall be entitled to an order for the forcible eviction of the defendant upon application
 3. The defendant's counterclaim is dismissed with costs to the plaintiff



4. The plaintiff is awarded the costs of the suit against the defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY
OF JULY 2022.**

J M MUTUNGI

JUDGE

