



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 1 of 2000

STANLEY NJEHIA NGANGA.....PLAINTIFF

VERSUS

LEONARD NGATIA KIRAGU.....DEFENDANT

JUDGEMENT

The suit herein was filed way back on 5th January, 2000. For reasons recorded in the court file, the hearing of the same did not commence until 18th September, 2007. As stated in the plaint dated 17th December, 1999, the plaintiff Stanley Njehia Ng'ang'a, seeks relief against the Defendant Leonard Ngatia Kiragu in the following terms:

- (a) **An order of a permanent injunction restraining the defendant by himself, his agent, servant and/or assigns from trespassing, ploughing, plaintiff crops, putting up structures or in any way interfering with the Plaintiff's enjoyment and quiet possession of land parcel No. ELBURGON/ELBURGON Block 4/9**
- (b) **An order for eviction.**
- (c) **Mesne profits**
- (d) **Costs of the suit**
- (e) **Interest on (c) and (d) above at court's rates**

The Plaintiff's claim is founded on the grounds that he was allotted the said parcel of land by Mukinyai Company Limited on 7th February, 1984 and a title deed issued in his name on 30th March, 1992. The Plaintiff claims that the Defendant without any colour of right entered into the said parcel of land, built a semi permanent house therein and started cultivating the same. The Plaintiff avers that such activities which were continuing events at the time the plaint was filed amounts to trespass.

The Defendant has objected to the plaintiff's suit on the strength of an amended defence and counter claim filed on 5th April, 2006 in which he,

- (a) **Denies that the plaintiff was ever allocated the same piece of land by Mukinyai Company limited as alleged in the plaint**

(b) Admits having moved on to the land and built a semi permanent structure thereon and cultivating the land. He avers that he has a right to carry out the said activities on the said parcel of land being the bonafide allottee of Mukinyai Company Limited since the year 1995.

(c) He avers that if at all the plaintiff holds a title deed over the parcel of land then such a title deed must have been fraudulently obtained.

The defence lists seven particulars of fraud as follows:

(a) That the Plaintiff processed and forced the title deed to be possessed with full knowledge that the same belonged to the Defendant.

(b) That the Plaintiff caused the title deed to issue through false pretences.

(c) That the Plaintiff obtained the title deed unlawfully.

(d) That the title deed was obtained by misrepresentation.

(e) That the Plaintiff caused the title deed to issue without presenting any documentary evidence that the suit land belonged to him.

The Defendant counter-claims against the Plaintiff a plot measuring 120x100 ft. said to be part of ELBURGON/ELBURGON Block 4/9 and for the cancellation and/or nullification of the Plaintiff's title over the entire plot. He prays that the Plaintiff's suit be dismissed and judgment entered in the Defendant's favour for the cancellation and/or nullification of the Plaintiff's title deed and any other relief that this court may deem fit to grant.

The Plaintiff testified at the hearing and called one witness to support his claim. He testified that the land in question measures 2 acres and that he bought the same from Mukinyai Company Limited in which he and the defendant were shareholders. He produced a receipt evidencing that he paid a sum of Kshs.15,000/= as consideration. The Plaintiff further testified that his purchase of the suit land was with the approval of the company contained in minutes of a shareholders' meeting of 18th July, 1981. A copy of the relevant minutes was produced as an exhibit alongside the certificate of title issued to the Plaintiff. The Plaintiff further testified that sometimes between 1981 and 1985, the Defendant raised a complaint with the company in respect of the Plaintiff's purchase of the suit land, but the same was rejected by the company through a members' resolution of 18th January, 1985 wherein the Plaintiff was declared the rightful owner of the suit land. A copy of the members' resolution was produced by the Plaintiff at the hearing. Being dissatisfied with the resolution declaring the Plaintiff as the owner of the plot, the Defendant is said to have lodge a complaint with the police complaining that the Directors of Mukinyai Company Limited had fraudulently repossessed the Defendant's 100x120ft. plot and illegally sold the same without his consent as the rightful allottee. The Plaintiff testified that the police preferred criminal proceedings against the Directors of Mukinyai Company Limited which was heard under case reference number CR.C.NO.34 of 1992 but the same was dismissed, the court having found that the alleged fraud by the Directors of Mukinyai Company Limited had not been proved. The Plaintiff produced a copy of the judgment as an exhibit. The Plaintiff has further testified that the sister to the defendant is the one now occupying his land and runs a school thereon. He claims General Damages of Kshs.500,000/= claiming that he has been denied the opportunity to develop his plot since the Defendant who initially laid a claim over a portion of the same now claims to own the entire plot of two acres.

The Plaintiff's only witness, Joseph Kamau Mwangi also known as Kibe testified that he was a former Director of Mukinyai Company Limited and was fully conversant with the Plaintiff's purchase of plot number ELBURGON/ELBURGON Block 4/9. He told this court that the plot was one of a number of plots sold by the company to raise money to pay survey fee required for the sub-division of the company's 2000 acres that it wished to distribute to its members. Testifying under cross examination, P.W.2 stated that the defendant was allocated a plot No.874 and a farm bearing the number 5. He stated that plot No.874 was not inside ELBURGON/ELBURGON BLOCK 4/9.

On his part, the Defendant testified on his own behalf and called two witnesses in support of his defence and counter-claim. He produced his original share certificate No.188 to prove that he was a shareholder in Mukinyai Company Limited owning 100 shares. He also produced receipts for the payment of share capital, entrance fees and Kshs.10/= plot fees. His evidence was that the certificate entitled him to a shamba and a residential plot and that he was allocated shamba No.5 and a plot No.14. He stated that he took possession of the plot and put up a semi-permanent house that he occupies today. Strangely enough, the Defendant stated in his testimony that the plot measures 100x150 meters or roughly ½ an acre. He told the court that he was never issued with a title deed and had never asked to be issued with any, stating that he has failed to do so owing to this suit. He testified that he was not away of the Plaintiff's title deed. He claims that the ½ acre occupied by him is one of 4 plots making up the Plaintiff's two acres of land. He denied knowledge of any members' resolution authorising the Plaintiff's purchase of the suit land and says that he has no knowledge whatsoever of any Land Board consent issued in respect of that transaction. For that reason, the Defendant's position is that the Plaintiff colluded with other Directors to allocate the Plaintiff the same plot the company has allocated to the defendant. According to the Defendant, the suit land could not have been sold to the Plaintiff in the manner claimed since the Defendant was in occupation of the same when the company decided to dispose of certain plots to raise survey fees. He further states that only vacant portions were sold for the purpose.

Susan Njeri Wanjohi, who claims to be a shareholder of Mukinyai Company Limited by virtue of her late husband's shareholding, testified for the defendant. She said she knew both the Plaintiff and the Defendant and that to the best of her knowledge, the defendant was allocated the plot he occupies in 1971. She however did not disclose the source of such knowledge. The Defendant's sister, Janet Muringi testified in his favour stating that indeed she was the one occupying the suit land where she runs a nursery school but the same together with other structures were burnt down during the post election violence of January, 2008. She claimed to have lived on the plot for 15 years which she referred to as plot No.551. According to D.W.3, the Defendant's plot measure 100 x 120 meters only and the Defendant's claim is limited to that portion only.

Counsels for both parties herein have filed written submission which this court has considered. From the evidence adduced herein, there is no dispute that the Plaintiff bought land from Mukinyai Company Limited. The title deed he produced in evidence has not been validly challenged since no evidence has been adduced by the defence to support the Defendant's claims that the title was fraudulently obtained. The Defendant has not proved any evidence to support his claim that he was allocated the portion in respect of which he claims a prior right of possession and occupation to that of the Plaintiff having stated that he was allocated two plots (an agricultural plot No.5 and residential plot No.874) he ought to have adduced evidence to demonstrate that either of the two or both of them form part of the suit land. The reference by the sister Janet to a plot No.551 does not help his case it only goes to create further confusion as what exactly the Defendant is counter claiming from the Plaintiff as rightly put by counsel for the Plaintiff in his submission, the Defendant claim is purely on occupation and possession. This is borne out by the Defendant's advocate's submissions that the Plaintiff's registration as owner of the suit land is subject to an alleged overriding interest in favour of the Defendant under Section 30 of the. My understanding of Section 30 of the Registered Land Act is that an overriding interest is only recognisable where such right of possession is recognisable in law. Indeed sub-section (g) of Section 30 sighted by counsel in his submission clearly spells out that no overriding interest shall be presumed where inquiry is made of a person claiming such interest and the rights to such possession or occupation are not disclosed. In other words, my view is that the person claiming an overriding interest must be in occupation or possession of the land ***as of right***. The Defendant in this case has not proved such a right whatsoever. He has not even established in what circumstances he entered the land. He can only be taken to be a trespasser thereon.

In view of the above, I find that the Plaintiff has, on the balance of probabilities, proved his case against the Defendant. On the other hand, the Defendant has not proved his counter-claim and his defence cannot hold. I therefore allow the plaintiff's suit and enter judgement as prayed in the plaint. The counter-claim is accordingly dismissed. As regards the mesne profit claimed, let the Plaintiff set down the matter for assessment of damages.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nakuru this 26th February, 2009.

M. G. MUGO

JUDGE