



**Ramuka Agencies Limited v Kirima (Environment & Land Case
1458 of 2014) [2022] KEELC 13403 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1458 OF 2014
EK WABWOTO, J
SEPTEMBER 23, 2022**

BETWEEN

RAMUKA AGENCIES LIMITED PLAINTIFF

AND

STEPHEN KAMAU KIRIMA DEFENDANT

JUDGMENT

Introduction

1. This suit relates to a dispute between ownership of one parcel of land in Nairobi city park estate which according to the plaintiff it is known as Nairobi/Block 37/75 and known to the defendant as LR 209/11092/14(IR No 75353). The plaintiff contends that it is the registered owner of the suit property and that the defendant is a trespasser on the said parcel while on the other part, the defendant maintains that he is the registered owner and seeks for cancellation of the plaintiff's title known as Nairobi/Block 37/75.

Plaintiff's Case.

2. Through a plaint dated November 10, 2014, the plaintiff sought for the following orders against the defendant: -
 - a. A permanent injunction restraining the defendant either by himself, his agents, servants and or anyone otherwise from taking possession, constructing or in any way interfering with the plaintiffs property rights over the property known as Nairobi Block 37/75
 - b. A mandatory injunction to remove any structures or agents that the defendant may have placed over the property known as Nairobi Block 37/75



- c. General damages for trespass
 - d. Costs of this suit with interest thereon.
 - e. Any other reliefs as the honourable court may deem fit and just to grant.
3. It is the plaintiff's case that it is the registered proprietor of the suit land known as title No Nairobi/Block 37/75 located within the vicinity of city park area in Nairobi county. The property was registered in favour of the plaintiff on June 26, 2002 and that sometimes in February 2014, the defendant violently prevented it from carrying out development works including cleaning of bushes and further the defendant continues to trespass into the suits on the pretext that it has been in possession of the subject property.
 4. During the hearing of the suit, the plaintiff's witness Frankline Kamathi Kamau testified on February 22, 2022 as PW1. He stated that he was a director of the plaintiff's company. He adopted his witness statement as part of his evidence. He also produced his bundle of documents and supplementary bundle which were produced as plaintiff's exhibit 1-7.
 5. He further stated that the subject property was allocated to him and lease certificate subsequently issued and that it was not true that the defendant had been in occupation earlier than the plaintiff.
 6. On cross-examination by counsel for the defendant, he stated that he was not sure of the date of the lease agreement and neither did he have it in court. He also stated that he was not involved in the conversion of the property and that he took possession of the same immediately he got his certificate of lease. On further cross-examination he also stated that the address used in the certificate of title was not the company's address and in re-examination he stated that the same was used because it belonged to the town clerk who was known to him at the time of allocation of the subject property.

Defence Case.

7. The defendant filed a statement of defence and counterclaim dated June 24, 2019. In summary the defendant denied the plaintiff's allegations and asserted that he is the owner of the subject property registered as LR No 209/11092/14(IR No75353) since 1996. The defendant also alleged fraudulent conversion by the plaintiff of the property from the Registration of Titles Act regime to that under the Registered Land Act. In his counterclaim he sought for cancellation of the plaintiff's title Nairobi/Block 37/75.
8. The defendant testified as DW1 being the sole defendant's witness. He adopted his witness statement as part of his sworn evidence in chief. He stated that the main lease of this property was initially given to city council who subdivided and upon the said subdivision he was given a sub-lease and he took possession of the same. He also stated that he has been paying rates and produced receipts as evidence of the same. It was also his testimony that he was never informed of the conversation and neither has his lease ever been terminated. He further stated that the plaintiff's title was fraudulent since his title was issued first.
9. In cross-examination, he testified that he had been in occupation since 1997 and he did not have any allotment letter in court. He also stated that he became aware of the illegal conversion only that he did not know the year that it happened.
10. Upon re-examination, he stated that the city council had the mother title and his name was inserted under entry No 54 and that he paid for the allotment.



Plaintiff's Submissions.

11. The plaintiff filed written submissions dated July 19, 2022 through the firm of Guandaru Thuita & Co Advocates. Counsel for the plaintiff identified the following five issues for determination in this suit: -
 - a. Who between the plaintiff and the defendant is the rightful owner/registered proprietor of the suit land.
 - b. Whether there exists a case of fraudulent conversion as alleged by the defendant.
 - c. Whether there is trespass by the defendant.
 - d. Who is entitled to the reliefs sought.
 - e. Who should meet the costs of the suit.
12. On the first issue, counsel submitted that the plaintiff had produced a certificate of lease which the defendant did not have and hence therefore pursuant to section 26 of the *Land Registrar Act*, a certificate of title is prima facie evidence of proprietorship. Counsel further submitted that no evidence had been led by the defendant to demonstrate that their title was fraudulent.
13. On the second issue, it was submitted that the defendant has not produced any evidence of the alleged conversion of the suit property by the plaintiff. Counsel cited the case of civil appeal No 246 of 2013 between *Arthi Highway Developers Limited v West End Butcher Limited and others* to support his case.
14. On whether there was trespass by the defendant, counsel submitted that the defendant has been preventing the plaintiff from gaining entry to the property despite the fact that the property belongs to the plaintiff and as such he has committed trespass and is liable to pay damages.
15. On what orders should issue, it was submitted that damages for trespass be awarded for Kshs 8,000,000/- together with an order of injunction and costs of the suit.

Defendant's Submissions.

16. The defendant filed written submissions dated July 21, 2022. Counsel outlined six issues for consideration by the court: -
 - a. Is the defendant the lawful owner of LR 209/11092/14(IR No 75353)
 - b. Is the defendant in possession of LR 209/11092/14(IR No 75353)
 - c. Is Nairobi/Block 37/75 and LR 209/11092/14(IR No 75353) one parcel of land.
 - d. Is the defendant the bona fide owner of Nairobi/Block 37/75 or LR 209/11092/14 (IR No 75353) should be cancelled.
 - e. Who pays the costs of the suit.
17. On the first issue, counsel submitted that the defendant produced a copy of lease registered on the December 11, 1997. The lease is signed by both the mayor and town clerk of the then Nairobi city council on one hand and the defendant on the other hand before John Musyoka Aman counsel and the said lease confirms that the property known as LR 209/11092/14 belongs to the defendant. It was also submitted that the defendant produced a mother lease for LR No 209/11092 in which under



entry number 54, the defendant is registered as the owner of LR 209/11092/14 for a term of 99 years from November 1, 1981. Counsel also made reference to section 26 of the [Land Registration Act](#) in support of this position.

18. On whether the defendant is in occupation of the suit property, it was submitted that the defendant has been in occupation since December 11, 1996 which fact was not denied by the plaintiff. During trial, counsel submitted that the defendant produced photographs showing car garage business operating in his property and also evidence of rates payments receipts.
19. Counsel also submitted that it was not disputed that parcel of land known as LR No 209/11092/14(IR No 75353) and Nairobi/Block 37/75 refer to the same property.
20. On the issue of whether or not the defendant was the bonafide owner of the suit property, counsel argued that when the court is faced with such an issue relating to two competing interests over the same property, it ought to consider the root of both titles and which of the two titles was first in time in a bid to resolve the controversy. Counsel relied on the following cases in support of this position: Nakuru ELC No 98 of 2012 [Hubet L Martin & 2 others v Margaret J Kamar & 5 others](#) (2016) eKLR, Nyeri civil appeal No 239 of 2009 [Munyu Maina v Hiram Gathiba Maina](#) (2013) eKLR and Nyahururu ELC No 146 of 2017 [Kamau James Njendu v Serah Wanjiru & another](#) (2018) eKLR.
21. On the root of the defendant's title LR No 209/11092/14(75353) counsel submitted that the defendant's title is registered under the [Registration of Title's Act](#) system of registration. The title history is found on the face of the defendant's exhibit 1 and 2. The property was initially subdivided from land known as 209/11092 a leasehold from government of Kenya to Nairobi city council *vide* grant number IR 59724. Counsel also added that payment of Kes 48,650.00 was made by the defendant to Nairobi city council. The lease was subsequently registered on December 11, 1996 and an entry made in the mother title LR 209/11092 as proof that the defendant is the registered proprietor of LR 209/11092/14.
22. While submitting on the plaintiff's root of title, counsel argued that the plaintiff's title is registered as Nairobi/Block 37/75 under the [Registered Land Act](#) system and that during the hearing of the same, the plaintiff only produced a copy of the title but did not show its root neither has he demonstrated how the same was acquired.
23. Counsel also submitted that the defendant's sublease was registered on December 11, 1996 while the plaintiff's certificate of lease was issued on June 26, 2002. Counsel further submitted that the plaintiff's certificate of lease was issued after an alleged conversion which was unlawful and unprocedural since the defendant was never asked to surrender his title and also that a search of the title to the suit property confirmed that as at December 18, 2014 the register for LR No 209/11092/14 is still open. It was also stated that the rates payments receipts show that the defendant's rates register for LR No 209/11092/14 is also active. Reliance was made to the cases of Muranga ELC No 84 of 2017 [Margaret Nyokabi Mbugua & 5 others v Ngenda New Farmers Co Ltd & 4 others](#) (2019) eKLR and [Rosemary Wanjiru Njiraini v Officer in Charge of Station, Molo Police Station & another](#) (2017) eKLR.
24. Counsel concluded his submissions by urging the court to dismiss the plaintiff's suit and grant costs to the defendant.

Analysis and Determination.

25. The court has carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law together with the written submissions filed by the parties and finds that the issues for determination are: -



- i. Who is the *bona fide* owner of the suit property.
 - ii. What are the appropriate reliefs to issue herein.
 - iii. Who should bear the costs of the suit.
26. As a starting point, it is important to recall what the Court of Appeal stated in *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR:
- “It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”
27. Section 26 (1) (b) of the *Land Registration Act* which states;
- “The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except – on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
28. On the issue of the burden of the proof, the court in *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR held that:
- “As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the Evidence Act, chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”
29. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 stated that:
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.



30. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, the Court of Appeal held that:

“Denning J in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties... are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

31. Both the plaintiff and the defendant herein have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the defendant acquired the said property earlier than the plaintiff and further he is currently in occupation of the same. The defendant’s sublease was registered on December 11, 1996 while the plaintiff’s certificate of lease was issued on June 26, 2002. Further from the evidence that was tendered, the plaintiff’s certificate of lease was issued after an alleged conversion which was unlawful and unprocedural since the defendant was never asked to surrender his title and also that a search of the title to the suit property confirmed that as at December 18, 2014 the register for LR No 209/11092/14 was still open. It was also evident that the rates payments receipts showed that the defendant’s rates register for LR No 209/11092/14 was also active.

32. From the evaluation of the evidence that was adduced before this court, the plaintiff failed to demonstrate on how it acquired the property. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR pronounced itself as thus;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

33. Further in the case of *Kassim Ahmed Omar & another v Anwar Ahmed Abed & others*, Malindi ELC No 18 of 2015 the court held that;

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the court.”

34. On the other hand, the defendant was able to adduce sufficient evidence laying a good root as to how his title was acquired and having evaluated the evidence that was tendered together with the applicable provisions of the law, it is the finding of this court that the defendant has been able to satisfactorily convince this court that he is the bonafide and legitimate owner of the subject property and this court finds as such.

35. Having held that the defendant is the bonafide owner of suit land. I find that the defendant is entitled to all the rights, interest and privileges that pertain to the land. The defendant is therefore entitled to the prayers sought in his counterclaim. In sum, the plaintiff has not proved his claim against the



defendant. On costs, the same is a matter of courts discretion, the discretion given to courts is very wide though underpinned under section 27 of the Civil Procedure Act in which the provisions states that; -

“the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid.”

36. The defendant being the successful litigant is entitled to costs of this suit to be borne by the plaintiff herein.

Final orders

37. I accordingly make the following orders:

- i. I hereby dismiss the plaintiff's claim against the defendant.
- ii. I enter judgment for the defendant against the plaintiff in the counter claim dated June 24, 2019 in terms of prayers (i), (ii) and (iii) sought therein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Thuita for the Plaintiff.

Mr. Muuo for the Defendant.

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

