



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1391 OF 2014

FRANCIS MAINA NDUNG'U.....PLAINTIFF

VERSUS

PETER MWANGI.....1ST DEFENDANT

JOSEPH MUGO.....2ND DEFENDANT

PETER NJOROGE NDERITU.....3RD DEFENDANT

JOHN KAMANDE NJOROGE.....4TH DEFENDANT

PETER WANJOHI MWANGI.....5TH DEFENDANT

WANJIKU WANJENGA KARANJA.....6TH DEFENDANT

FRANCIS NJENGA MUKUA.....7TH DEFENDANT

ISAIAH PETER KANYI.....8TH DEFENDANT

JUDGEMENT

1. By a plaint dated 28th October 2014 and amended on 29th January 2015, the plaintiff seeks judgment against the defendants jointly and severally for:-

(a) A permanent injunction against the defendants to stop construction, demolish the structures currently erected on the suit property and vacate plot number Ruiru/Kiu block/4547.

(b) A mandatory injunction against the defendants to vacate plot number Ruiru/Kiu block 2/4547 voluntarily in breach thereof the court to make an order for the defendant to be evicted by the plaintiff forcefully through the assistance of the police and the orders of eviction be executed by OCS Ruiru police station.

(c) General damages for illegal occupation and use of property number Ruiru Kiu Block 2/4547.

(d) Costs of this suit.

(e) Any other or further relief as this court may deem just.

2. Upon being served with copies of plaint and summons to enter appearance, the defendants entered appearance through the firm of M/s Muchoki kangata Njenga & Co. Advocates. They also filed a joint statement of defence dated 14th April 2017. They denied the allegations of fraud particularized in paragraph 7 plaint. In paragraph 6 of the statement of defence they gave the particulars of fraud and conspiracy by the plaintiff as follows:-

(i) Conspired with Stephen Maina (deceased) who manipulated and falsified company records at Githunguri Constituency Ranching Company Ltd, to unlawfully allocated to himself the suit property when he was director.

(ii) Conspiring with Teresia Njeri, to urgently transfer the property to himself to avoid any claim to the suit property by the defendants being the bonafide owners of the suit property.

(iii) Conspiring with Teresia Njeri to transfer the property to himself without offering any consideration.

(iv) Causing the property to be transferred to him without any consideration.

3. PW1, Francis Maina Ndung'u the plaintiff herein, told the court that he is the proprietor of Ruiru/Kiu Block 2/4547. He told the court that he purchased the said property from Teresia Njeri Mwangi in August 2014. The said Teresia Njeri Mwangi had a title deed in her name. He said he followed all the procedures including seeking consent from the Land Control Board which was granted on 2nd September 2014.

4. PW1 adopted his witness statement and the bundle of documents dated 28th January 2014 and the additional list of documents dated 14th April 2016. All the documents were produced as exhibit in this case.

5. PW1, further stated that after lodging all the relevant documents at the Thika Lands Registry, a title deed was issued on his name on 8th October 2014. He further stated that the 1st and 2nd defendants are in possession of the suit property. He asked them to vacate but they did not heed. He wrote demand letters which the defendants refused to honor.

6. He confirmed that the suit property was initially owned by Githunguri Ranching Constituency Company Limited in which Teresia Njeri Mwangi was a shareholder. She held a share certificate number 1533. The said Teresia Njeri Mwangi also got a clearance certificate for the company to enable her to be issued with a title to the suit property. She was issued with the said title on 13th July 2004. PW1 further stated that there are two dwelling houses on the suit property which ought to be demolished. He told the court that the defendants are trespassers on the suit property and ought to vacate.

7. In paragraph 7 of the Amended Plaintiff the particulars of the defendants, their agents and/or servants acts of trespass are given as:-

(a) The defendants and or their agents and servants entered the said property, subdivided the same together with other people unknown to the plaintiff without prior authorization by the plaintiff, the legal owner of the said property.

(b) The defendants and or their agents or servants erected illegal structures and are in the process of so erecting illegal structures on the suit property and fencing off what the defendants call subdivisions of the suit property and as such interfering with the plaintiff's right to quiet enjoyment of the said property.

(c) The defendants and or their agents or servants continue to stay on the said property contrary to the plaintiff's right to exclusive possession of the said property.

(d) The defendants continue to illegally use connect utilities such as power and water and occupy the suit property to the detriment of the plaintiff.

8. PW1 states that he also seeks general damages for the illegal occupation by the defendants from 2014. He also seeks costs of the suit.

9. D.W.1, Peter Wanjohi Mwangi, the 1st defendant adopted his witness statement dated 18th April 2017 as part of his evidence in Chief. He also produced copies of share certificates issued by Githunguri Constituency Ranching Company Limited as exhibit D1. He told the court that he bought the plot from a shareholder of the company called John Maina Mburu. That his plot is T.44. he also stated that he resided on the said Plot.

10. DW2 Wanjiku Wanjenga Karanja, the 6th defendant, adopted her witness statement as part of her evidence in chief. She told the court that she was a member of Githunguri Constituency Ranching Company Limited. That she was given plot No T.41. she told the court that John Maina is the one who gave her the plot. She referred to the ballot number and a share certificate. She told the court that she is not in occupation of the said plot and that she did not know the plaintiff in this case.

11. DW3, John Maina Mburu, the chairman of Githunguri Constituency Ranching Company Limited adopted his witness statement dated 19th July 2019 as part of his evidence in chief. He told the court that the defendants are members of the company and owners of the sub plots within the suit property. He confirmed that each member was issued with a ballot and share certificates. That the share certificate produced by the defendants were issued by the company.

12. He also stated that the defendants occupy Ruiru/Kiu/Block 2/4546 and that they have been wrongly sued. He confirmed that he is the one who signed the letters which show the defendants as the owners of the plots. He said he signed as the chairman of the board of directors.

13. He further stated that who ever sold the suit property to the plaintiff was not allocated land by the company. That Teresia Njeri Mwangi was not allocated land by the company as there is no minute allocating her any land. He stated that the defendants are not in occupation of Ruiru/Kiu/blocks/2/4547. He stated that Teresia Njeri Mwangi may have gotten title through fraud.

14. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

15. They are dated 10th March 2020. The plaintiff in his evidence told the court that he purchased the suit property Ruiru/Kiu/Block 2/4547 from Teresia Njeri Mwangi who had been registered as the initial owner of the property and issued with a title on 13th July 2004. The survey records as per the area map Ruiru/Kiu/Block/2/4547 (Githunguri) sheet No 5 as of the date of the purchase shows that the suit property is one (1) acre and has no existing or subsisting sub divisions. The plaintiff applied and attended the Githurai Land Control Board meeting on 9th September 2014 and obtained consent to transfer the suit property from Teresia Njeri Mwangi to the plaintiff. The letter of consent was produced as an exhibit in this case. The plaintiff also paid stamp duty of Kshs.200,000/= before the transfer was effected in his favour. The plaintiff's evidence has not been challenged.

16. Only two out of the eight defendants testified. DW3 John Maina Mburu is the one who allegedly sold the plots to DW1 and DW2. His evidence must be treated with a lot of caution. DW3's evidence is in respect of Ruiru/Kiu/Block 2/4546. It is clear that the defence has not used the issue of the defendants being wrongfully sued yet DW3 raises the issue and gives evidence not touching on the suit property. His evidence does not help the defendants in any way. In their defence the defendants plead that the suit property which is Ruiru/Kiu/Block 2/4547 is subdivided into individual plots owned by the defendants. They do not plead that they are wrongfully sued. In fact, they plead that they are in occupation of the suit property.

17. The plaintiff acquired his title on 8th October 2014. The suit was filed on 30th October 2014. The suit came after the transfer to the plaintiff and the doctrine of *lis pendens* is not applicable at all. The 2nd to the 7th defendants did not testify and did not file their witness statements. There is no authority from the 2nd to 7th defendants to confirm that the 1st and 6th defendants were testifying on their behalf. The authority must be in writing. The 1st and 6th defendants cannot be said to have tendered evidence on behalf of the other defendants. Each of the defendants was required to give evidence and show precisely which portion of land they claim and how each piece came into their hands. DW3 only testified for the 6th defendant, Wanjiku Karanja. The defendants failed to produce the register which is alleged to be in custody of DW3 or a certified extract of the said register. A letter by the chairman stating they are shareholders cannot suffice. The proposed subdivision of the suit property is not dated and is not prepared by a registered physical planner as required by the Physical Planning Act.

18. The doctrine of *lis pendens* does not apply as the suit property was not transferred to the plaintiff during the pendency of the suit. No evidence at all was offered to this extent by the defendants. The title was issued to Teresia Njeri Mwangi in 2004. It was not until 2014 when the plaintiff purchased the suit property. The defendant had not filed any complaint against the said Teresia N. Mwangi to the police or file a suit. The defendants did not tender evidence as to whether they occupied their respective portions. The 1st and 2nd defendants have constructed on the plaintiff's property and the plaintiff claims mesne profits and general damages.

19. The plaintiff holds title to the suit property. The title is sacrosanct and any person in occupation without the permission of the plaintiff is a trespasser and this court should enter them to move out. The defendants have not proved any allegation of fraud against the plaintiff. The plaintiff has clearly demonstrated the root of his title. His title is protected under section 26 of the Land Registration Act, 2012.

20. The defendants have not sought for the plaintiff's title to be cancelled and or revoked. The plaintiff is entitled to general damages for trespass. The plaintiff proposes Kshs.4,000,000/- would suffice. He has put forward the cases of **Nancy Wanjiru Wangai vs NSSF & 4 others [2016] eKLR**; **Strantam East Africa Limited vs Hassan Guyo Wakalo [2014] eKLR**. He prays that he be granted the prayers in the Amended Plaint.

The Defendants' Submissions

21. They are dated 22nd June 2020. The plaintiff has failed to prove his case to the applicable standard. The plaintiff has failed to prove that the defendants have trespassed upon and encroached on his land. Such encroachment cannot be presumed. No map, beacon certificate or defendants' pictures were produced showing or even suggesting that the defendants have violated the plaintiff's boundaries and encroached on his land. DW3 stated that the defendants reside on Ruiru/Kiu/Block 2/4546.

22. The plaintiff admits in his evidence that the 1st and 2nd defendants were already on the suit property when he went to take possession. The said Teresia N. Mwangi was not called as a witness in this case to give a plausible explanation as to whether she sought eviction of the people occupying land all these years. These material facts cannot be glossed over in a suit that seeks eviction and demolition of the defendants' houses. She would have confirmed whether or not she ever pointed out the suit property to the plaintiff and if yes, when and on what bases e.g an area map. In the absence of this evidence the court is being asked to order the eviction of the defendants without any clear, relevant and admissible evidence that they have trespassed upon the plaintiff's land.

23. In an action for trespass, mandatory injunction from land or eviction, it is not enough to produce a title but further thereto, one must demonstrate to a balance of probabilities, that the person against whom the order is sought is actually liable for trespass. They have put forward the case of **Justin Gatumuta –vs- Kenya Power & Company Limited [2019] eKLR**. The plaintiff was categorical that only the 1st and 2nd defendants are in possession of the suit property. No evidence was given as against the other defendants that would warrant consideration of any claim or prayers sought as against them.

24. The plaintiff has wholly relied on the evidence of his title and transfer without addressing the fundamental issue that goes to the root of its validity on how it was procured from Githunguri Constituency Ranching Co Ltd which he admits is the original proprietor. This is not disputed. They have put forward the case of **Munyu Maina vs Hiram Gathiha Maina [2015] eKLR**. It was imperative for the plaintiff to show that the applicable process was followed in the issue of that title that has been expressly and directly disputed and impugned by the defendants. The defendants have pleaded and attached share certificates in their statement of defence which show that they were shareholders or members of Githunguri Constituency Company Limited. The credibility of DW3's evidence was not questioned on cross examination. The plaintiff did not produce or call contrary evidence from the company to dispute the evidence of DW3. They have put forward the case of **Republic vs AG & 2 Others Exparte Xplico Insurance Company Limited [2014] eKLR**.

25. The failure by the plaintiff to lead any evidence from the company's directors or authorized officers confirming the company had issued a share certificate and a clearance as claimed is fatal to his case and there would be no basis in law for this court to declare that their title is valid. The defendants on their part called DW3, the Chairman of the company, who confirmed that their documents were issued by the company. The plaintiff was under an obligation to prove that his title was procured lawfully from the company. They have put forward the case of **Eunice Wayua Munyao vs Mutilu Beatrice & 3 Others [2017] eKLR**. The plaintiff's title to the extent that it was obtained unprocedurally and without adherence to due process then the same is liable to cancellation. They have relied on section 26(1) of the Land Registration Act, 2012 and the case of **Elija Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013] eKLR; Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR**. They pray that the plaintiff's suit be dismissed with costs.

26. I have considered the pleadings and the evidence on record. I have also considered the written submissions tendered on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Who is the registered proprietor of the Land Parcel No. Ruiru/Kiu/Block 2/4547 "the suit property"?

(ii) Is the plaintiff entitled to the reliefs sought?

(iii) Who should bear costs?

27. It is not in dispute that the plaintiff is the registered owner of the suit property. He has produced a title issued on 8th October 2014. It is in his name. He told the court that he purchased the suit property from Teresia Njeri Mwangi whose title was issued on 13th July 2004. It is for Land Parcel No Ruiru/Kiu Block 2 Githunguri/4547 measuring 0.40 hectares and appears on Registry Map Sheet NO 5. Before being issued with the title she was issued with a share certificate No 1533 on 5th August 2003 for 1 acre and clearance certificate showing that she balloted for the said parcel. All these documents were issued by Githunguri Constituency Ranching Company Limited. The plaintiff traces his title to this history. No evidence was tendered by the defendants to show that the said Teresia Mwangi did not ballot for the said parcel or that she was not issued with the said documents.

28. **Section 24** of the Land Registration Act, 2012 provides that:

" (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

29. As things stand the plaintiff holds a title for the suit property. The 1st defendant (DW1) Peter Wanjohi Mwangi told the court that his plot measures 50 ft by 100 ft which he bought from John Maina Mburu (DW3). He said his plot is NO T.44 which he has developed and resides on it. He told the court, one other person Ndonga resides on the said plot. DW2, Wanjiku Wa Njenga Karanja, the 6th defendant told the court she has a share certificate issued in 2000 for Plot NO. T. 41. She confirmed that she has no title for the said plot. It should be noted that these are the only defendants who testified. The rest did not record witness statements nor testify. There is no written authority authorizing the two defendants to testify on behalf of the other defendants. As it is, the claim by the other defendants is not known.

30. DW3, John Mburu Maina, told the court that he is the chairman of the Board of Directors of Githunguri Constituency Ranching Company Limited. He adopted his witness statement dated 19th July 2019. He states:-

"That the company maintains all the records in relation to the subject property herein and as the record of the property all the allottees thereof and the subsequent transferees of the various subdivisions arising from the property that was initially Title No Ruiru/Kiu Block 2/4546....."

He told the court that the defendants reside on Ruiru/Kiu Block 2/4546 and not the suit property, which is Ruiru/Kiu/Block 2/4547. It is clear that his evidence contradicts the statement of defence and what DW1 and DW2 told the court.

DW3 told the court he got a plot in 4546 and not 4547. This is the plot he sold to DW1. DW3 stated that he bought the plot from another member of the company before he (DW3) became a director of the company. I find that the evidence of DW3 contradicts that of DW1 and DW2.

31. There is no evidence tendered by the defendants to challenge the title issued to Teresia Njeri Mwangi, the initial owner and the subsequent transfer to the plaintiff herein. The plaintiff took the court through the process he followed before the title was registered in his name. There seems to be nothing unprocedural. I therefore find that the plaintiff is the registered proprietor of Ruiru/Kiu Block 2/4547 ("the suit property").

32. DW3 told the court that there are no minutes in the company records allocating the suit property to Teresia Njeri Mwangi. He believed that the same was acquired through fraud. He admitted in cross examination that he only became a director in 2009 long after Teresia Njeri Mwangi had been issued with a title. He may not have been privy to the dealings in the company before then. When he was cross examined by Mr. Njonjo for the plaintiff he admitted that he had no share register for all the members who got land measuring 1/8th of an acre. He also did not avail the ballot register to show which member balloted for which plot. He also failed to avail the surveyor's report to confirm that the defendants are residing on Ruiru/Kiu/ Block 2/4546. I agree with the plaintiff's counsel submissions that his evidence ought to be treated with caution since he is the one who sold the plots to two of the defendants herein.

33. In paragraph 6 of the statement of defence the particulars of fraud and conspiracy by the plaintiff are given. Though pleaded I find that fraud has not been proved. The defendants have failed to demonstrate that the plaintiff committed acts of fraud in the acquisition of his title.

As stated earlier the plaintiff's title can be traced to the company who was the initial owner of the land.

34. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA** stated that:-

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

I find that no particulars of fraud against the plaintiff as set out by the defendants have been proved and their claim must fail.

35. In the statement of defence, the defendants sought that the plaintiff's suit be dismissed with costs. If the defendants indeed felt that the plaintiff's title was acquired illegally then they should have raised a counterclaim and sought that the said title be cancelled. They never did.

36. It is on record that DW1 and one other defendant reside on the suit property. As the plaintiff is the registered owner, I find them to be trespassers. The plaintiff told the court that some defendants have constructed on the suit property making it impossible for him to possess and construct his family home. I find that he has suffered damage and is entitled to general damages for trespass only.

I say so because the plaintiff is not entitled to mesne profits as claimed. He did not state the amount. The same ought to be specifically proved. I award Kshs. 500,000/- general damage for trespass which I think is adequate.

37. Accordingly, I find that the plaintiff has proved his case as against the defendants on a balance of probabilities. I enter judgment in his favour as against the defendants jointly and severally as follows:-

a) That a permanent injunction is hereby issued restraining the defendants from constructing on the said property.

b) That a mandatory injunction is hereby issued compelling the defendants to vacate the Land Parce No. Ruiru/Kiu/Block 2/4547 and to demolish the structures currently erected on the suit property voluntarily within one twenty (120) days from the date of this judgment in default the plaintiff is allowed to evict the defendants by lawful means through the assistance of the police and the orders of eviction be executed by the OCS Ruiru Police Station.

c) General damages for trespass Kshs.500,000/=-.

d) Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24th day of January 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. Njenga for the defendants

Phyllis – Court Assistant