



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 218 OF 2013

ANNE WAMBUI MUNA.....PLAINTIFF

=VERSUS=

KENYA FOREST SERVICE.....DEFENDANT

JUDGEMENT

1. The Plaintiff brought this suit against the Defendant through a plaint dated 4th February 2013 seeking the following reliefs:

- a) A declaration that the Defendant, its servants and/or agent's presence and/or activities on the Plaintiff's parcels of land known as Ngong/Township Block 2/660, Ngong/Township Block 2/661, Ngong/Township Block 2/662, Ngong /Township Block 2/663, Ngong/Township Block 2/664, Ngong/Township Block 2/665, Ngong/Township Block 2/666 and Ngong/Township Block 2/667 are unlawful trespass and gross violation of the Plaintiff's exclusive and registered title to the said properties.
- b) An order for the removal forthwith of the offending presence of the Defendant's officers, servants and/or agents together with the tree seedlings unlawfully, illegally and wrongfully placed and /or otherwise planted on the Plaintiff's aforementioned suit parcels of land.
- c) A permanent injunction restraining the Defendant, its servants and/or agents from further trespassing upon the Plaintiff's said parcels of land known as Ngong/Township Block 2/660, Ngong/Township Block 2/661, Ngong/Township Block 2/662, Ngong/Township Block 2/663, Ngong/Township Block 2 /664, Ngong/Township Block 2/665, Ngong/Township Block 2/666 and Ngong/Township Block 2/667.
- d) That the District Officer Ngong and the OCS Ngong do oversee the lawful eviction of the Defendant, its servants and/or agents from the suit premises.
- e) Mesne profits calculated at Kshs. 300,000/= per month from 10th September, 2009 until the Defendant removes itself from the said properties.
- f) General damages.
- g) Costs of the suit.
- h) Interest thereon.

The Plaintiff's case:

2. From the plaint, witness statements and the evidence that the Plaintiff and her witness Francis Kenyeru Orioki (PW2) gave at the trial, the Plaintiff's case can be summarized as follows: The Plaintiff is the registered owner of eight (8) adjacent parcels of land located in Ngong Town known as Ngong/Township Block 2/660, Ngong/Township Block 2/661, Ngong/Township Block 2/662, Ngong /Township Block 2/663, Ngong /Township Block 2/664, Ngong/Township Block 2/665, Ngong/Township Block 2/666 and Ngong/Township Block 2/667 (hereinafter referred to together as "the suit properties").

3. The Plaintiff had acquired a parcel of land known as L.R No. 4480/204, Grant No. I.R.N 3488 (hereinafter referred to as "the original parcel of land") through a public auction that was held by Kilombi Auctioneers on 13th July, 1995 on behalf of Kenya Commercial Bank Limited as chargee at Kshs.1, 105,600/-.

4. The Plaintiff paid the full purchase price of Ksh. 1,105,000/= to Kenya Commercial Bank Limited's advocates M/s Musyoka & Wambua Advocates after which she was issued with the Original Grant Number I.R.N 3488 and a duly executed Transfer by Chargee in her favour.
5. The said instrument of transfer was registered on 5th February, 1996 as No. I.R.N 3488/4 by her then advocates, Farouk Adam & Company Advocates thereby making her a lessee of the original parcel of land from the County Council of Olkejuado for a term of 99 years with effect from 1st July, 1976.
6. As the lawful proprietor of the original parcel of land which measured 0.8097 of a hectare, the Plaintiff made an application to subdivide the property into smaller parcels measuring between 0.0850 and 0.090 of a hectare and for the titles for the sub-plots to be issued under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).
7. The Plaintiff's application to subdivide the original parcel of land was approved by the Commissioner of Lands on 26th September, 2000 after which the Plaintiff surrendered Grant No. I.R.N 3488 that was issued under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) to the Commissioner of Lands so that she could be issued with a new lease under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).
8. Following the surrender of Grant No. I.R.N 3488 and the conversion of the registration of the original parcel of land from the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) regime to the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) regime, the original parcel of land was given a new registration number namely, Title Number Ngong Township/Block 2/195.
9. The subdivision of title Number Ngong Township/Block 2/195 was successfully carried out through a surveyor she had engaged for that purpose, one, L.K Gitau who obtained all the necessary approvals for the exercise and the same gave rise to the suit properties.
10. The Plaintiff was subsequently issued with leases for the suit properties which she executed after which the same were registered and she was issued with certificates of leases on 10th September, 2009.
11. During the entire process of acquiring and subdividing the original parcel of land that gave rise to the suit properties, the Defendant did not raise any objection. The Defendant was not in occupation of Title Number Ngong Township/Block 2/195 when the Plaintiff's surveyor was undertaking the subdivision thereof and placing beacons on the boundaries of the suit properties. The Defendant appeared in the scene in 2009 when the Plaintiff hired workers to fence the suit properties.
12. The Defendant's servants and agents violently prevented the Plaintiff's workers from fencing the suit properties and the Defendant had stubbornly refused to vacate the suit properties on which it had trespassed even after being supplied with documents showing the Plaintiff's ownership of the same.
13. As a result of the Defendant's refusal to vacate the suit properties, the Plaintiff was prevented from continuing with the developments she had intended to carry out on the suit properties.
14. The Plaintiff intended to construct residential flats on the suit properties from which she could earn up to Kshs. 300,000/- per month as rent. As a result of the Defendant's refusal to vacate the suit properties, the Plaintiff had been deprived of the said income that she could have earned from the suit property.
15. The Plaintiff acquired the suit properties through a lawful and bona fide process for valuable consideration at a public auction that was carried out by Kenya Commercial Bank which must have conducted adequate due diligence and satisfied itself that the original parcel of land was free from any encumbrance or third party claims before taking it as security.
16. As the first registered proprietor of the suit properties, the Plaintiff's right as the owner thereof is indefeasible under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).
17. The Plaintiff produced several documents in evidence in support of her case.

The Defendant's case.

18. The Defendant filed a defence on 2nd April, 2013 that was amended on 5th April, 2013. In its amended statement of defence, the Defendant denied the Plaintiff's claim in its entirety and contended that the suit was time barred. From its pleadings, witness statements and the evidence tendered at the trial on its behalf by Chimanyi Jira Njuma (DW1), the following in summary is the Defendant's case.
19. The suit properties are situated in an area known as Ngong Hills Tree Nursery (hereinafter referred to only as "the tree nursery area"). The land on which the tree nursery area is situated measures approximately 5 acres. The tree nursery area has been occupied and developed by the Defendant which was formerly known as Forest Department since 1970s.
20. In the tree nursery area, there is an existing tree nursery with seedlings that has been in existence since 1980s, staff quarters, a store and a water tank which were constructed in 1970s.
21. The suit properties have encroached on the tree nursery area that is occupied by the Defendant and the purported subdivision of the original parcel of land was carried out when the tree nursery and the buildings aforesaid owned by the Defendant were in place.
22. The original parcel of land that gave rise to the suit properties was allocated when the Defendant was in possession thereof and had put

the same in use.

23. The registration of the Plaintiff as the owner of the suit properties was obtained unprocedurally and illegally in disregard of the Defendant's existing rights, claims and interest in the said properties.

24. The tree nursery area was reserved by the Government of Kenya through Olkejuado County Council for public use and the Defendant had occupied the area for several decades without any interruption.

25. The Plaintiff's suit is time barred under Section 7 of the Limitations of Action Act, Chapter 22 Laws of Kenya.

26. The titles for the suit properties were issued illegally in breach of the relevant statutes relating to physical planning.

27. The Plaintiff failed to obtain the requisite Part Development Plan (PDP) and did not abide by the terms of the subdivision scheme approvals that were issued by the Commissioner of Lands on 19th February, 2007.

28. The tree nursery within the tree nursery area serves Kajiado County and the same is important for the rehabilitation of Ngong Hills Forest as it constitutes the sole reservoir of seedlings for the rehabilitation exercise.

29. The Defendant's occupation of the suit properties does not amount to trespass since it is discharging its statutory mandate. The Plaintiff's claim for loss of rental income is speculative and premature.

30. The Defendant produced several documents and photographs in evidence in support of its case.

Submissions:

31. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions and supplementary submissions on 21st July, 2020 and 13th November, 2020 respectively while the Defendant filed its submissions on 30th October, 2020.

Analysis of the issues arising and determination thereof:

32. I have considered the pleadings, the evidence tendered and the submissions of counsels. I set out below what in my view are the issues arising for determination in this suit which the court will seek to answer in the following paragraphs of the judgment.

Issues for determination.

- a) Whether the Plaintiff acquired the suit properties lawfully.
- b) Whether the Defendant trespassed on the suit properties.
- c) Whether the Plaintiff's suit is time barred.
- d) Whether the Plaintiff is entitled to reliefs sought?
- e) Who is liable for the costs of the suit?

Whether the Plaintiff acquired the suit properties lawfully.

33. I am satisfied from the evidence on record that the Plaintiff acquired the suit properties lawfully. The Plaintiff chronologically and clearly outlined how she acquired the original parcel of land on 5th February, 1996 from Kenya Commercial Bank Limited which sold the same through public auction in exercise of its statutory power of sale to recover a debt that was owed by the former registered owner of the property, Mohamed Ali Motha. The Plaintiff also took the court through the process that she undertook of converting the original parcel of land from the Registration of Tiles Act regime to the Registered Land Act before the original parcel was subdivided to give rise to the suit properties and certificate of leases issued to her.

34. From the evidence on record, it is doubtful whether the surveyor who subdivided the original parcel of land into eight (8) subplots (the suit properties) went to the ground. A survey report that was submitted to court on 26th January, 2018 by the Director of Surveys pursuant to a court order made a finding that an in-depth search on the ground did not yield any beacon marking the boundaries of the suit properties. The same finding was also made by DW1 in his survey report that was produced in evidence as Dexh.1.

35. That said, I am in agreement with the Plaintiff that any irregularity in the subdivision of the original parcel of land does not affect his title to the Original parcel of land that gave rise to the suit properties. So long as the acquisition of the original parcel of land was lawful, the Plaintiff remained the lawful owner of the property. In my view, any irregularities in the survey that gave rise to the suit properties can be rectified and need not nullify the Plaintiff's title to the said properties.

36. From the totality of the evidence on record, it is my finding that the Plaintiff acquired the original parcel of land and subsequently the suit properties lawfully. This finding is however subject to what I will say later in this judgment while considering the issues relating to time bar

and whether the Plaintiff is entitled to the reliefs sought.

Whether the Defendant trespassed on the suit properties.

37. From the evidence adduced by both parties, it is clear that as at the time the Plaintiff purchased the original parcel, the Defendant was in possession of the property. In her evidence in cross-examination, the Plaintiff told the court that she went to the original parcel of land before she purchased the same at the auction. She stated that she found on the property a water tank but she did not know the owner thereof. She stated that she did not know that the tank belonged to the Defendant and that the Defendant was using the water from the tank to water the seedlings in its tree nursery.

38. The Plaintiff also told the court that a part from the water tank, she also saw old houses and trees. Again, she stated that she did not know the owner of the said houses and trees and she did not bother to inquire more on the same.

39. On examination by the court, the Plaintiff retracted her earlier testimony that she had visited the original parcel of land before purchasing the same. She told the court that she visited the property 2 months after purchasing the same and that was when she saw the water tank and people planting trees. The survey report that was filed in court on 26th January, 2018 that I have referred to earlier made findings that the Defendant's tree nursery, servant quarters and water tank were within the suit properties.

40. From the evidence that was adduced by the Defendant and the evidence of the Plaintiff on cross examination, I am in agreement with the Defendant that it was in occupation of the original parcel of land when the Plaintiff acquired the same. The Defendant did not however adduce any evidence that it had a title to the property. The Defendant's claim to the suit properties is based merely on its long occupation and use of the property for tree nursery and as residence for its staff.

41. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff acquired the suit properties lawfully. The original parcel of land was registered under the Registration of Tiles Act, Chapter 281 Laws of Kenya (now repealed). It was thereafter converted to Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

42. Section 23(1) of the Registration of Tiles Act provides as follows:

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

43. Sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides as follows:

27. Subject to this Act -

(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;

(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 and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Section 24 and 25 of the Land Registration Act, 2012 provides as follows:

24. Subject to this Act—

(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.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

44. It is clear from the foregoing that under the current land registration system and the land registration regimes under which the original parcel of land and the suit properties were registered, the Plaintiff's titles were indefeasible unless any illegality, procedural impropriety or fraud was established. In the present case, I have made a finding that the Plaintiff acquired the suit property lawfully. The plaintiff was therefore entitled to enjoy all the rights accruing to a proprietor of land including that of possession from 5th February, 1996 when the original parcel of land was registered in her name.

45. Since the Defendant was in occupation of the original parcel of land when the Plaintiff acquired the same without any right or any lawful excuse, it was a trespasser on the property and it was supposed to give possession upon being asked to do so by the Plaintiff. Due to the foregoing, it is my finding that the Defendant was a trespasser on the Original parcel and on the suit properties.

Whether the Plaintiff's suit is time barred.

46. I have held above that the Plaintiff acquired the original parcel of land on 5th February, 1996 while the Defendant was in possession and that as at that date, the Plaintiff was entitled to possession thereof because the Defendant had no title to the property and was thus a trespasser. It is not disputed that the Plaintiff did not take any action with a view to evict the Defendant from the suit properties until 17 years later on 12th February, 2013 when this suit was filed. The Plaintiff's cause of action against the Defendant accrued on 5th February, 1996 when she was registered as the owner of the original parcel of land. The time within which the Plaintiff was to bring a suit against the Defendant did not stop running when the Plaintiff sub-divided the original parcel and obtained new titles for suit properties on 10th September, 2009 under the Registered Land Act. I am not in agreement that the Plaintiff's cause of action accrued on 10th September, 2009 when the Plaintiff was registered as the owner of the suit properties under the Registered Land Act and was issued with certificates of leases. That would be hard to believe because it would mean that between 5th February, 1996 when the Plaintiff was registered as the owner of the original parcel of land and 10th September, 2009 when the Plaintiff obtained titles for the suit properties under the Registered Land Act, the Plaintiff was not the owner of the original parcel. It will also mean that a party can defeat statutory period of limitation by changing the legal regime under which land is registered and having the land subdivided. It is trite law that the right of adverse possessor runs with the land and cannot be defeated by sale or subdivision. In Githu v Ndeete [1984] KLR 776 it was held that:

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

47. Due to the foregoing, it is my finding that the Plaintiff's suit against the Defendant is time barred. The suit should have been brought on or before 5th February, 2008. It was brought 5 years after the expiry of the limitation period for the recovery of land provided in section 7 of the Limitation of Actions Act.

Whether the Plaintiff is entitled to reliefs sought?

48 Although I have held that the Defendant was at all material times a trespasser on the suit properties, the Plaintiff lost her right to recover the suit properties from the Defendant through statute of limitation. Under section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the Plaintiff's title to the original parcel of land became extinguished on 5th February, 2008 when her right to recover the land from the Defendant came to an end. The Plaintiff had no right thereafter to maintain an action for trespass or for the recovery of the land from the Defendant since she had to title to the land. The titles that the Plaintiff acquired in respect of the suit properties in 2009 were inconsequential and were subject to the Defendant's right to the land by adverse possession that had accrued pursuant to sections 7 and 17 of the Limitation of Actions Act aforesaid. Since the Plaintiff's suit is time barred and the Plaintiff no longer has any proprietary interest in the suit properties, the Plaintiff is not entitled to any of the reliefs sought in the plaint.

Who is liable for the costs of the suit?

49 Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and an incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. In this case the Plaintiff has failed in her claim against the Defendant. The Defendant has succeeded in its defence of time bar. No reason has been put forward that would justify denying the Defendant the costs of the suit. The

Defendant shall have the costs of the suit.

Conclusion.

50 In conclusion, I find no merit in the Plaintiff's suit. The same is accordingly dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. McRonald h/b for Mr. Gatheru for the Plaintiff

Ms. Ngesa for the Defendant

Ms. C. Nyokabi-Court Assistant