



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 462 OF 2011

NAFTALI RUTHI KINYUA.....PLAINTIFF

VERSUS

PATRICK THUITA GACHURE.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit against the Defendants by way of a plaint dated 5th September 2011 and filed on 6th September 2011 seeking the following reliefs;

- a) A declaration that the Plaintiff is the rightful owner of Land Reference Number 8285/1522 also known as Plot Number 133 Kariobangi Light Industries (hereinafter referred to only as “the suit property”) by virtue of having purchased the same.
- b) An order directing the cancellation of any documents of title that may have been issued by the 2nd Defendant or the Registrar of Lands in favour of the 1st Defendant.
- c) An order compelling the 2nd Defendant to supply the Plaintiff with title documents over the suit property and upon failure to do so, the Deputy Registrar of the Court be mandated to execute the necessary transfer.
- d) A permanent injunction to issue against the 1st and 2nd Defendants either by themselves, their agents, servants, employees, accomplices and/or anyone claiming under them or on their behalf from doing the following acts or any of them that is to say, from further encroachment, occupation, trespassing upon, fencing, developing, selling or disposing of the suit property or any portion of it and/or in any manner whatsoever interfering with the Plaintiff’s right of ownership of the said land.
- e) A mandatory injunction compelling the 1st Defendant to demolish the fence erected around the suit property.
- f) General damages for trespass.
- g) Costs of the suit and interest at court rates until payment in full.

The Plaintiff’s case:

In his plaint, the Plaintiff averred as follows: The plaintiff was and had at all material times been the owner of the suit property. The suit property was a leasehold interest from the Government of the Republic of Kenya that was granted to the 2nd Defendant for a term of 99 years with effect from 1st January, 1968. The 2nd Defendant allotted the suit property to one, Peter Muthaura (hereinafter referred to only as “the first allottee”) on or around 5th June, 1979. Through agreement of sale dated 17th January, 1980, the original allottee sold the suit property to the plaintiff. The 2nd Defendant was notified of the transaction and the Plaintiff had been paying to the 2nd defendant land rent and rates as and when the same fall due. The Plaintiff had paid survey and conveyancing fees to the 2nd Defendant and had been issued with a Deed Plan No. 328596 dated 9th August, 2011 in respect of the suit property. What remained was the title document.

While waiting to be issued with a title by the 2nd Defendant, the Plaintiff learnt that the 1st Defendant had encroached on the suit property and erected a fence around the property using corrugated iron sheets. The 1st Defendant had also commenced digging of trenches in readiness to start construction. When the 1st Defendant was asked to produce evidence in support of his claim to the suit property, he failed to do so.

The Plaintiff averred that he had paid for the suit property and complied with all the 2nd Defendant's requirements pertaining to the same. The Plaintiff averred that the 1st and 2nd Defendants had fraudulently colluded to deprive him of the suit property. The Plaintiff averred further that the said acts of the 2nd Defendant amounted to a breach of contract for the sale of the suit property to the Plaintiff. The Plaintiff averred that he was the lawful proprietor of the suit property and as such he was entitled to peaceful and quiet enjoyment thereof. The Plaintiff averred that the purported acquisition of the suit property by the 1st Defendant was null and void *ab initio*. The Plaintiff averred that he was apprehensive that unless restrained by the court, the 1st Defendant would develop the suit property to the Plaintiff's detriment.

At the trial, the Plaintiff adopted the contents of the plaint and his witness statement both dated 5th September, 2011 as part of his evidence in chief. In summary, the Plaintiff told the court that he acquired the suit property from the original allottee in January, 1980 at a consideration of Kshs. 17,000/-. As at the time the property was sold to him, the original allottee owed the 2nd Defendant Kshs. 49,400/- that he paid in full by instalments and was issued with receipts by the 2nd Defendant. The Plaintiff told the court that the 2nd Defendant confirmed in a letter dated 16th December, 2008 that the original allottee had sold the suit property to the Plaintiff. The Plaintiff stated that he was issued with a Deed Plan for the suit property by the 2nd Defendant dated 9th August, 2011 and that it was while he was waiting for the title for the suit property that he learnt of the 1st Defendant's encroachment.

The Plaintiff produced as a bundle the documents attached to his list of documents dated 5th September, 2011 as PExh.1, a copy of the judgment of the Court of Appeal delivered on 6th March, 2015 in Civil Appeal No. 44 of 2014 which was his appeal against the refusal by the court to grant him injunction as PExh. 2, a copy of his affidavit sworn on 5th September, 2011 as PExh. 3(a) and a copy of his affidavit sworn on 3rd November, 2011 in support of his application for contempt of court as PExh. 3(b). The Plaintiff stated that as at 10th August, 2011 when the 1st Defendant purported to acquire the suit property from Samuel Onyango Osowo, the property was owned by him. The Plaintiff stated that he had taken possession of the suit property and fenced the same using iron sheets. The Plaintiff stated that the allotment of the suit property to him had not been revoked when the 2nd Defendant purportedly wrote to Samuel Onyango on 3rd August, 2011 to pay for the suit property. The Plaintiff stated that the suit property was not available for allotment to Samuel Onyango. He stated that whereas Samuel Onyango purported to pay Survey fees for the suit property on 10th August, 2011, he had made a similar payment on 28th January, 2009. The Plaintiff asked the court to note that Samuel Onyango made all the payments for the suit property on the same day that he purportedly sold the property to the 1st Defendant. The Plaintiff stated that he was the one in possession of the original Deed Plan for the suit property. He urged the court to grant the reliefs sought in the plaint.

The 1st Defendant's case:

The 1st Defendant entered appearance and filed his statement of defence on 17th January 2012. In his defence to the Plaintiff's claim, the 1st Defendant denied the Plaintiff's claim generally. At the trial, the 1st Defendant who gave evidence as DW1 adopted his witness statement dated 17th January, 2012 as part of his evidence in chief and produced the documents attached to his list of documents of the same date as DExhs. 1 to 4. In his testimony in court, the 1st Defendant told the court that he stays in Kariobangi and that in 2011 he heard that there was a parcel of land on sale in the neighbourhood by one, Samuel Onyango Osowo. He met the seller and they agreed on a purchase price of Kshs. 1,200,000/-. The parcel of land is the suit property herein. As evidence of his ownership of the suit property, Samuel Onyango Osowo (hereinafter referred to only as "Osowo") gave him a letter of allotment dated 3rd August, 2011. He went to the 2nd Defendant for confirmation of Osowo's title and the 2nd Defendant confirmed that Osowo was indeed the owner of the property. He thereafter visited the suit property and found the same undeveloped. The property was being used as a dump site. Osowo owed the 2nd Defendant some money in respect of the suit property which he cleared and was issued with receipts. He entered into an agreement of sale with Osowo and paid him the full purchase price after which he started developing the suit property. It was at that stage that the plaintiff came and claimed that he was the owner of the suit property. He stated that he continued with the development of the property and as at the time he was giving evidence, he had put up one storey building on the property that was occupied by tenants. He stated that the suit property was transferred to him on 22nd September, 2011. He stated that when he purchased the suit property he was not aware of any third party claims in respect thereof. He stated that since the property was transferred to his name he was the one who was paying all levies due to the 2nd Defendant in respect thereof.

The 2nd Defendant's case:

The 2nd Defendant entered appearance and filed a statement of defence on 5th June, 2012 that was amended with leave of the court on 18th May 2017. In its amended statement of defence, the 2nd Defendant admitted that it allotted the suit property to Peter Muthaura (the original allottee) on 5th June, 1979 through a letter of allotment of the same date. The 2nd Defendant admitted further that the original allottee sold the suit property to the Plaintiff. The 2nd Defendant denied the Plaintiff's claim that it colluded with the 1st Defendant to deprive the Plaintiff of the suit property. The 2nd Defendant denied the allegations of fraud and breach of contract pleaded against it in the plaint. The 2nd Defendant averred that the Plaintiff's suit disclosed no or any reasonable cause of action against it. The 2nd Defendant averred that the Plaintiff was at liberty to follow up on his title to the suit property with the Ministry of Lands.

At the trial, the 2nd Defendant called its Deputy Chief Valuer, Gyneth Magiri (DW2) as its witness. DW2 adopted her witness statement dated 17th May, 2017 as part of her evidence in chief. In the statement, she reiterated the contents of the 2nd Defendant's amended statement of defence. She reiterated that the suit property was allotted by the 2nd Defendant to the original allottee who subsequently sold the same to the Plaintiff. She stated further that it was doubtful if Osowo had a title to the suit property before he purported to sell the same to the 1st Defendant. DW2 stated that the authenticity of the documents said to be from the 2nd Defendant's office which the 1st Defendant was relying on in support his claim over the suit property could not be verified because the 2nd Defendant's officer who was claimed to have signed the same was deceased.

DW2 produced the two documents attached to the 2nd Defendant's list of documents dated 8th September, 2015 as DExh. 7 and DExh. 8

respectively. In her oral testimony, DW2 reiterated the contents of her witness statement. DW2 stated that unless the 1st Defendant produced the originals thereof, she could not confirm whether the documents relied on by the 1st Defendant originated from the 2nd Defendant. DW2 stated that as at the time the 2nd Defendant is purported to have confirmed the sale of the suit property by Osowo to the 1st Defendant, a Deed Plan in respect of the property had already been issued.

The submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff filed his submissions on 25th February, 2020. The Defendants did not file submissions. The Plaintiff submitted that the 1st Defendant was a trespasser on the suit property. The Plaintiff submitted further that Osowo had no valid proprietary interest in the suit property that he could transfer to the 1st Defendant. The Plaintiff submitted that he had made out a case for the grant of the reliefs sought.

Analysis of the issues arising and determination thereof:

From the pleadings, the following in my view are the issues arising for determination in this suit:

1. Whether the 1st Defendant is a trespasser on the suit property.
2. Whether the Plaintiff is entitled to the reliefs sought against the Defendants.
3. Who is liable for the costs of the suit?

Whether the 1st Defendant is a trespasser on the suit property.

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, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass. To establish trespass, the Plaintiff had to prove that he was either lawfully in possession of the suit property or was the owner thereof and that the 1st Defendant entered and occupied the property without any justifiable cause. As rightly submitted by the Plaintiff, trespass is not only a civil wrong but is also a criminal offence. Section 3 of the Trespass Act, Chapter 294 Laws of Kenya provides as follows:

3. Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

From the evidence before the court, I am satisfied that the Plaintiff was at all material time the lawful owner of the suit property. It was not disputed that the suit property was allotted for the first time by the 2nd Defendant to Peter Muthaura (the first allottee). That being the case, the suit property could only be owned by any other person on being sold by the first allottee or on the first allotment being cancelled by the 2nd Defendant and the property being allotted a fresh to another person. The suit property was allotted by the 2nd Defendant to the first allottee on 5th June, 1979. The Plaintiff produced sufficient evidence showing that the first allottee sold to him the suit property at Kshs. 17,000/- through an agreement of sale dated 17th January, 1980. The Plaintiff placed evidence showing that as at 8th March, 2007, he was the one recognised by the 2nd Defendant as the owner of the suit property and that he made all the requisite payments to the 2nd Defendant. The Plaintiff also placed in evidence a letter dated 16th December, 2008 addressed to whom it may concern in which the 2nd Defendant confirmed that the suit property had been sold by the original allottee to the Plaintiff. The Plaintiff also placed in evidence a copy of a Deed Plan No. 328596 dated 9th August, 2011 in respect of the suit property that was issued to him by the 2nd Defendant in acknowledgment of his ownership of the property. The 2nd Defendant who is the head lessor in respect of the suit property admitted that the suit property was allotted to the original allottee and that the original allottee sold the same to the plaintiff. The 2nd Defendant recognised the Plaintiff as the owner of the suit property.

The 1st Defendant had claimed that he was the lawful owner of the suit property. The 1st Defendant claimed to have acquired the suit property from one, Samuel Onyango Osowo (Osowo) on 10th August, 2011. The burden was on the 1st Defendant to prove that Osowo held proprietary interest in the suit property as at the date of the alleged sale thereof to the 1st Defendant. In proof of his title to the suit property, the 1st Defendant produced a copy of an agreement of sale dated 10th August, 2011 between him and Osowo, a copy of specific power of attorney dated 10th August, 2011 that was donated to him by Osowo, a copy of a letter dated 3rd August, 2011 allegedly written by the 2nd Defendant to Osowo confirming that the suit property had been allocated to him, copies of receipts for the payments that Osowo made to the 2nd Defendant on 10th August, 2011 for the suit property and a copy of a letter that is alleged to have been written to him by the 2nd Defendant on 22nd September, 2011 acknowledging the transfer of the suit property by Osowo to him.

The 2nd Defendant disowned the documents that were produced by the 1st Defendant in evidence which were alleged to have originated from the 2nd Defendant. DW2 told the court that all the letters produced by the 1st Defendant were allegedly signed by one officer of the 2nd

Defendant who was deceased and whose signature in the documents she could not vouch for. The 1st Defendant did not produce in evidence a letter of allotment of the suit property by the 2nd Defendant to Osowo. No evidence was also placed before the court as to the circumstances under which Osowo would have been allotted the property. As I have stated earlier, Osowo could only acquire the property through purchase from the original allottee or allotment by the 2nd Defendant upon cancellation of the original allotment. There was no evidence that Osowo acquired the suit property from the original allottee or that the 2nd Defendant cancelled the original allotment and re-allotted the suit property to Osowo. As at the time the suit property was allegedly sold to the 1st Defendant, the same was owned by the Plaintiff, the Plaintiff having acquired the same from the original allottee in 1980. Since Osowo neither acquired the property from the Plaintiff nor the 2nd Defendant, he had no proprietary interest in the property that he could transfer to the 1st Defendant. Even if it is assumed which is not the case that the suit property was allocated to Osowo by the 2nd Defendant, such allotment would have been invalid since the 2nd Defendant had not revoked or cancelled the first allotment and Osowo would have taken the property subject to the Plaintiff's interest therein.

It is a maxim of equity that where there are equal equities, the first in time prevails. In the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal cited with approval the High Court case, Gitwany Investment Limited v Tajmal Limited & 2 others [2006] eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

It is my finding from the foregoing that the 1st Defendant acquired the suit property from a person who had no proprietary interest in the same. The 1st Defendant did not therefore acquire any ownership interest in the suit property since Osowo had none to transfer to him. It follows therefore that the suit property was owned by the Plaintiff when the 1st Defendant entered thereon and started developing the same.

Since the 1st Defendant was not the owner of the suit property and did not enter thereon with the permission of the Plaintiff, the 1st Defendant was a trespasser. The only excuse that the 1st Defendant had for entering and occupying the suit property was that he was the owner thereof which I have found to have no basis. Due to the foregoing, I am satisfied that the Plaintiff has proved that the 1st Defendant trespassed on the suit property and has continued with acts of trespass thereon.

Whether the Plaintiff is entitled to the reliefs sought against the Defendants.

From my findings above, I am satisfied that the Plaintiff has proved his case against the Defendants and as such he is entitled to the reliefs sought against them. I will however not compel the 2nd Defendant to issue the Plaintiff with a title for the suit property. I am in agreement with the 2nd Defendant that the Plaintiff should pursue his title with the Ministry of Lands.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, costs of and incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. The Plaintiff has succeeded in his claim. There being no reason given why he should be denied the costs of the suit; I will award him the costs of the suit as against the 1st Defendant.

Conclusion:

In conclusion, I hereby enter judgment for the Plaintiff against the Defendants as follows:

1. I declare that the Plaintiff is the rightful owner of Land Reference Number 8285/1522 also known as Plot Number 133 Kariobangi Light Industries (“the suit property”).
2. Any document of title that may have been issued by the 2nd Defendant or the Chief Land Registrar/Ministry of Lands in favour of the 1st Defendant in respect of the suit property is cancelled.
3. The 2nd Defendant shall supply the Plaintiff with the documents necessary to facilitate the processing of a title in respect of the suit property in favour of the Plaintiff.
4. A permanent injunction is issued restraining the 1st and 2nd Defendants either by themselves, their agents, servants, employees and/or anyone claiming under them or on their behalf from doing the following acts or any of them that is to say; from further encroachment, occupation, trespassing upon, fencing, developing, selling or disposing of the suit property or any portion of it and/or in any manner whatsoever interfering with the Plaintiff's right of ownership of the said property.
5. A mandatory injunction is issued compelling the 1st Defendant to demolish the fence he has erected around the suit property.

6. Kshs. 500,000/- as general damages for trespass together with interest from the date hereof until payment in full as against the 1st Defendant.

7. Costs of the suit to be paid by the 1st Defendant.

Delivered and Dated at Nairobi this 29th day of April 2021

S. OKONG'O

JUDGE

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

Mr. Mirie h/b for Mr. Kingara for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Ms. C. Nyokabi - Court Assistant