



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1011 OF 2015**

**JOHN NJOROGI MUIGAI.....PLAINTIFF**

**VERSUS**

**EMBAKASI RANCHING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**PAULINE KOKI.....2<sup>ND</sup> DEFENDANT**

**DUNCAN OGOO.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 14<sup>th</sup> October 2015, the plaintiff has filed this suit seeking judgment against the defendants jointly and severally for:-

*(a) A permanent injunction restraining the defendants, their officials, family, kin, agents, employees or servants from trespassing upon, ingressing into, cultivating, selling, constructing upon, re-allocating, disposing off or in any other manner interfering with the plaintiff's quiet possession and ownership of Plot No V.8734 Embakasi Ranching.*

*(b) A declaration that the plaintiff is the absolute, rightful and bonafide owner of plot Nos.V.8734.*

*(c) A mandatory order directed to the 1<sup>st</sup> defendant ordering it, its officials and/or successor in title to forthwith and unconditionally initiate the process of issuance of a title deed to the plaintiff.*

*(d) Costs of this suit and any other relief that this honourable court may deem just and fair to order.*

2. Upon being served with copies of plaint and summons to enter appearance the 1<sup>st</sup> defendant entered appearance through the firm of C. K. Advocates LLP on the 15<sup>th</sup> April 2019.

3. It also filed a statement of defence dated 18<sup>th</sup> June 2019. In paragraph 7, of the said statement of defence it states :-

*“In response to paragraph 21 of the plaint, the 1<sup>st</sup> respondent avers that it only issued the original documents to the plaintiff and that if any other documents exist they never originated from the 1<sup>st</sup> respondent”.*

It prays that the plaintiff's suit as against the 1<sup>st</sup> defendant be dismissed with costs.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered appearance through the firm of Ombachi Monasi & Co. Advocates on the 29<sup>th</sup> October 2015. They also filed a statement of defence dated 12<sup>th</sup> April 2017. They deny each and every allegation in the plaint. In paragraph 5 they state:-

*“The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denies the contents of paragraph 12 of the plaint and aver that 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the bonafide and lawful owners of the piece and parcel of land known as Plot V-14695 which is situated at Ruai and the same was identified and shown to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants agents, servants and/or employees. Therefore the allegations adduced by the plaintiff are false hence put to strict proof thereof”.*

**The Plaintiff's Case**

5. It is the Plaintiff's case that he is the registered owner of Plot No. V 8734 situated at Ruai. It is also his case that he bought the said Plot on 1<sup>st</sup> July 2014 and was subsequently issued with a certificate of plot ownership No. 029241 by the 1<sup>st</sup> defendant. The plaintiff paid all the charges demanded by the 1<sup>st</sup> defendant including survey, engineering registration and for site visit. He was issued with receipts accordingly.

6. It is also the plaintiff's case that he started developing the suit property in June 2015 by erecting a perimeter fence. It was during this time that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in company of hired goons interrupted and confronted his workmen claiming the plot belonged to them. The said goons proceeded to pull down the plaintiff's structures in blatant disregard of private property rights. The plaintiff further stated that there is no relationship between his plot and the one claimed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

7. The plaintiff approached the 1<sup>st</sup> defendant to solve the dispute. The 1<sup>st</sup> defendant summoned the parties to the office but the meeting never took off. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants then commenced construction on the suit property.

8. It is the plaintiff's case that failure by the 1<sup>st</sup> defendant's officers to intervene or restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from trespassing on his property is part of the defendants' scheme to defraud him of the suit property.

#### **The 1<sup>st</sup> Defendant's case**

9. The 1<sup>st</sup> defendant filed its statement of defence on 24<sup>th</sup> July 2019 in which it admitted having transferred to the plaintiff plot NO V8734 for valuable consideration after the plaintiff paid all the requisite charges. The plaintiff was issued with a plot ownership certificate No 029241.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Case**

10. They contend that they are the bonafide and lawful owners of Plot No V-14695. That they took vacant possession way back on 25<sup>th</sup> January 2013 and have been in occupation. That they do not know Plot No V8734 claimed by the plaintiff.

11. PW1 John Njoroge Mungai the plaintiff herein adopted his witness statement dated 14<sup>th</sup> October 2015. He told the court that he bought the plot from Lilian Wachuka Kingori. Lilian Wachuka showed him a certificate of plot ownership No. 014291 for Plot No V8734. This was produced as exhibit P2. The plaintiff entered into a sale agreement with Lilian Wachuka Kingori. The same is dated 1<sup>st</sup> July 2014. The same is witnessed by one Francis N. Mwaura. The purchase price is Kshs.2,000,000/-. The same was produced as exhibit P1. He also produced a permit to develop the plot. The same was issued by the 1<sup>st</sup> defendant. it is produced as exhibit P3.

12. PW1 stated that he paid the site visit fees of Kshs.20,000/-. He was shown a vacant plot. He produced a plot ownership certificate number 029241 issued by the 1<sup>st</sup> defendant on 1<sup>st</sup> December 2014 as exhibit p4, a receipt dated 2<sup>nd</sup> July 2014 for transfer fees paid to the 1<sup>st</sup> defendant as exhibit p5, a receipt dated 2<sup>nd</sup> July 2014 towards survey/processing fees for plot as exhibit p6. All these documents are in respect of Plot No V 8734 in Map 5.

13. He further told the court that he put up a fence on the plot but the same was pulled down by some people who also chased away his workers. He went to inquire from the office of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant confirmed the plot was his and gave him a development permit No 0240 dated 11<sup>th</sup> July 2017. He prays that the prayers sought on the plaint be granted.

14. The 1<sup>st</sup> defendant opted not to call any witnesses but intimated that they would put in written submissions.

15. DW1 Pauline Koki, the 2<sup>nd</sup> defendant, confirmed that the 3<sup>rd</sup> defendant is her husband. She also told the court that she had a power of attorney from the 3<sup>rd</sup> defendant testify on his behalf. The said power of attorney was produced as exhibit D1. She confirmed that she was testifying on her own behalf and that of the 3<sup>rd</sup> defendant. she also adopted her witness statement dated 12<sup>th</sup> April 2017.

16. She further stated that they took possession of the Plot on 25<sup>th</sup> January 2013. That their plot is number V 14695. She produced a certificate of plot ownership issued on 9<sup>th</sup> September 2013 as exhibit D2 and a transfer from David Wanyata to Duncan Ochieng as exhibit D3. She also produced a copy of bankers cheque dated 3<sup>rd</sup> September 2013 to the 1<sup>st</sup> defendant in respect of transfer as exhibit D4. She told the court that they have been in possession of the suit plot since 2013.

17. She further stated that she met the plaintiff in 2015 at Ruai Police Station. Both parties presented their documents and they were asked to take the dispute to court. She told the court that she did not know Plot NO. V8734. She prays that the plaintiff's suit be dismissed with costs.

18. At the close of the oral testimonies parties tendered their written submissions.

#### **The Plaintiff's submissions**

19. They are dated 6<sup>th</sup> February 2020. They raise four issues for determination.

*(i) Who has valid documents to the suit property?*

*(ii) Due diligence and authority to transact.*

*(iii) Possession.*

*(iv) Whether the orders sought should be granted.*

20. The plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim to hold genuine documents to the suit property albeit under different plot numbers; that is V8734 by the plaintiff and V 14695 by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is not disputed that the 1<sup>st</sup> defendant is the custodian of the documents which it issues upon transfer to various beneficiaries. In paragraphs 3 and 7 of the statement of defence, the 1<sup>st</sup> defendant admits that it transferred the suit property V8734 to the plaintiff. It admits the original documents are those in possession of the plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have failed to controvert the 1<sup>st</sup> defendant's position.

21. The plaintiff has produced documents as exhibits in court that confirm he is the bonafide owner of the suit property. The 2<sup>nd</sup> defendant could not explain how they acquired the suit property and whom they dealt with at the 1<sup>st</sup> defendant's offices. The purported genuine documents held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were never given to them by David Wanyatta or the 1<sup>st</sup> defendant.

22. The plaintiff bought the suit property from Lilian Wachuka. The sale agreement was produced as exhibit in this case. Subsequently, the plot ownership certificate was transferred to the plaintiff's name. There are explainable chronological events that led to the plaintiff to own the suit property upon paying consideration and all relevant fees. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants, on the other hand purport to have bought the suit property from the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant failed to point out specific officials who were involved in the transfer. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants could not prove how they acquired the suit property.

23. They did not conduct due diligence prior to purchasing the plot. They did not produce any receipts for the alleged payments of Kshs.108,000/- and other fees to the 1<sup>st</sup> defendant. They did not enter into a written sale agreement which goes against the provisions of Section 3 (3) of the Laws of Contract Act. They did not conduct due diligence or even engage the real owner before purchasing the plot. They were therefore duped into buying a fictitious and non existent plot. They thereafter facilitated hired goons to invade the plaintiff's plot in a bid to mitigate their loss.

24. The plaintiff being the bonafide owner had started to erect fence on the suit property before goons hired by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants invaded the suit property and disrupted his activities. The plaintiff was and still in possession of the suit property as the bonafide owner.

25. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim to be in possession by virtue of building a toilet and erecting a temporary site house after they illegally threw the plaintiff out of the suit property. Their illegal acts cannot confer possession. This honourable court issued status quo orders which limited any activities being perpetuated by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to allegedly gain possession. The 2<sup>nd</sup> defendant claimed to have taken possession in January 2013 eight months, before she paid the full purchase price to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not had possession of the suit property.

26. The plaintiff has proved his case in a balance of probabilities, that he is the bonafide owner of the suit property. The prayers sought on the plaint ought to be granted. He has put forward the case of **Mary Mwelu Muva & Another vs Alio Ibrahim Hassan & 2 Others [2019] eKLR.**

27. The 1<sup>st</sup> defendant did not tender any final written submissions.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Submissions:**

28. The 1<sup>st</sup> defendant filed its defence but failed to defend itself. No single witness was called by the 1<sup>st</sup> defendant. They rely on Section 107 of the Evidence Act and the case of **North End Trading Company t/a Kenya Refuse Handlers Ltd vs City Council of Nairobi HCCC (Nairobi) No 731 of 2008.**

29. The burden of proof was on the plaintiff to prove the location and/or ground of plot No. V8734. The only way would be by way of a survey map. The burden was on the plaintiff to prove that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have trespassed, constructed and/or in any other manner interfered with the plaintiff's quiet possession and ownership of Plot No V8734. They have relied on section 109 of the Evidence Act. The plaintiff claims plot NO V8734 and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim Plot NO V14695. Both parties have documents issued by the 1<sup>st</sup> defendant. The surveyors of the 1<sup>st</sup> defendant did not come to court to adduce evidence. No map was adduced in court. They have relied on Section 108 of the Evidence Act and the cases of **Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR; Kirugi & Another vs Kabiya & 3 Others [1987] KLR 347; Evans Otieno Nyakwana vs Cleophas Bwana Ongara [2015] eKLR.**

30. The court should take judicial notice that the 1<sup>st</sup> defendant is notorious in double allocating and allotting the company's parcels of land. This is a fact generally known within the territorial jurisdiction of this court. The 1<sup>st</sup> defendant is solely to blame in this matter as both parties have genuine documents in respect of the plots allocated.

31. The plaintiff holds documents in relation to plot No V8734 where as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants hold documents in relation to Plot NO V14695. The said plot ownership certificates were issued by the 1<sup>st</sup> defendant. A survey map was not adduced in court to vindicate the plaintiff. This failure means the plots are distinct from each other and therefore the suit fails.

32. It is evident that the plaintiff failed to prove that he paid Kshs. 2 million while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants adduced evidence that Kshs.108,000 was paid on or about 11<sup>th</sup> September 2012 to the defendant and a transfer was subsequently affected. The 1<sup>st</sup> defendant is a limited liability company hence the 2<sup>nd</sup> and 3<sup>rd</sup> defendants obligation was to deal with the office. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants had no power to dictate how a receipt of their payment should appear and/or read. Consideration was paid as per the 1<sup>st</sup> defendant's directions.

33. The 1<sup>st</sup> defendant issued official documents to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant has not stated that the documents held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were a forgery and/or fraudulently obtained. The transferor on David Wanyata Wainaina has not brought any claim against the defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did due diligence by paying directly to the 1<sup>st</sup> defendant. The failure by the plaintiff to do due diligence led him to where he is.

34. The onus is on the plaintiff to prove that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have trespassed on his plot.

35. The particulars of fraud pleaded in paragraph 15 (a-c) of the plaint have not been proved as both parties have genuine documents from the 1<sup>st</sup> defendant. they have put forward the case of **Rosemary Wanjiru Murithi vs George Maina Ndirwa [2014] eKLR**. They pray that the plaintiff's suit be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

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

*(i) Who has a valid claim to the suit property?*

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

*(iii) Who should bear costs of the suit?*

37. It is not in dispute that the plaintiff holds documents in respect of plot number V8734 situated at Ruai. The said documents were issued by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant is the party authorized to issue such documents as it owned the parcel of land. In fact the 1<sup>st</sup> defendant in paragraph 3 and 7 of the statement of defence dated 18<sup>th</sup> June 2019 admits that it transferred Plot No V 8734 to the plaintiff upon payment of all the requisite fees. It denies that it issued any documents to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

38. It is the plaintiff's case that he bought the plot from Lilian Wachuka Kingori for a consideration of Kshs. 2 Million. He produced the sale agreement as exhibit in this case. The said Lilian appears to have been issued with a plot ownership certificate number 014291 way back on 4<sup>th</sup> December 2008 upon payment of Kshs.32,000/- being Survey, Engineering and Registration Fees. The plaintiff can trace his claim to Lilian Wachuka Kingori who previously owned the plot.

39. The 1<sup>st</sup> defendant in its defence states that it issued original documents to the plaintiff. The plaintiff produced receipts as evidence of payment of various fees demanded by the 1<sup>st</sup> defendant including survey, site visit and engineering fees.

40. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other hand claim to own Plot No V14695 which they bought from the 1<sup>st</sup> defendant who was selling after it was repossessed from David Wanyata Wainaina. There are no documents produced to show that the said David Wanyata was allocated the plot. They claim to have paid kshs.108,000/- to the 1<sup>st</sup> defendant but they did not adduce any receipt to support this payment. They did not adduce any sale agreement to confirm which plot they were purchasing. This is contrary to the provisions of Section 3(3) of the Law of Contract Act (Cap 23 Laws of Kenya).

41. **Section 3(3)** of the Laws of Contract Act provides:-

*(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—*

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

42. The 1<sup>st</sup> defendant has denied that it issued any documents to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I find it curious that the 1<sup>st</sup> defendant did not call any witnesses in support of their defence. It appears it was because it was protecting some of its officials. But this this is a story for another day. I find that the failure to call witnesses does not affect the plaintiff's claim in any way. In the absence of a sale agreement it is difficult to believe that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant bought the suit plot from the 1<sup>st</sup> defendant.

43. It is not in dispute that the two plots V8734 and 14695 are one and the same on the ground. I agree with the plaintiff's counsel submissions that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants failure to do due diligence may have led them to purchase a fictitious plot, if at all, they

purchased.

44. As stated earlier the plaintiffs claim can be traced to the original owner of the plot Lilian W. Kingori while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim is neither here nor there. They filed a statement of defence but they did not put in a counterclaim. If indeed they paid certain monies to the 1<sup>st</sup> defendant they ought to seek a refund.

45. All in all, I find that the plaintiff has proved his case on a balance of probabilities as against the defendants. I find that he is entitled to the reliefs sought.

46. Accordingly, I enter judgment for the plaintiff as against the defendants jointly and severally as follows:-

*(a) That a permanent injunction is hereby issued restraining the defendants, their officials, family, kin, agents, employees or servants from trespassing upon, ingressing into, cultivating, selling, constructing upon, reallocating, disposing off or in any other manner interfering with the plaintiff's quiet possession and ownership of Plot No. V8734 Embakasi Ranching.*

*(b) That a declaration is hereby issued that the plaintiff is the absolute rightful and bonafide owner of Plot NO V8734.*

*(c) That a mandatory injunction is hereby issued directing the 1<sup>st</sup> defendant, its officials and/or successors in title to forthwith and unconditionally initiate the process of issuance of a title deed to the plaintiff.*

*(d) That the plaintiff shall have costs of the suit and interest.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 22<sup>nd</sup> day of April 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Karwanda for Mr. Wachira for the Plaintiff

Mr. Kimeto for Mr. Juma for the 1<sup>st</sup> Defendant

Mr. Morara for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Phyllis – Court Assistant