



Gatkim Enterprises Limited v County Government of Nairobi & 3 others (Environment & Land Case 135 of 2015) [2023] KEELC 20566 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 135 OF 2015
LC KOMINGOI, J
OCTOBER 5, 2023**

BETWEEN

GATKIM ENTERPRISES LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF NAIROBI 1ST DEFENDANT

GEORGE THEURI 2ND DEFENDANT

ROBERT MBATIA 3RD DEFENDANT

NICHOLAS MAINGI 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated 16th February 2015, the Plaintiff claims that it is the registered owner of LR No. 209/8274/172 IR No. 113193/1 (suit property) pursuant to a transfer registered on 6th May 2010 but on 13th February 2015, the 1st Defendant with the help of the 2nd and 3rd Defendants wrongfully entered and trespassed on the suit property, tried to subdivide the suit property and dispose it off to third parties without the Plaintiff's consent. This deprived the Plaintiff its legal possession causing loss and damage despite being declared the registered proprietor of the suit property in High Court Misc. Application No. 41 of 2011 (Judicial Review)- *Republic v The Town Clerk, City Council of Nairobi ex parte Gatkim Enterprises Ltd.* As such, it sought for the following orders:
 - a. A permanent injunction restraining the Defendants whether by themselves, their servant or agents or otherwise howsoever from entering upon, occupying, encroaching, alienating, subdividing, entering into purported contracts for the sake of lease, license, charge or other dealings including construction or other developments or otherwise acting in a manner inconsistent with the Plaintiff's title or remaining on the suit premises namely LR No. 209/8274/172 (Grant no. IR 113193)



- b. A declaration that the Plaintiff is the legitimate registered proprietor of the suit premises to the exclusion of all other parties including the Defendants herein.
 - c. General damages for trespass and waste.
 - d. Aggravated and exemplary damages.
 - e. Interest on c and d above.
 - f. Costs of the suit.
 - g. Any other or further relief deemed fit.
2. The 1st defendant filed a statement of defence dated 16th March 2015 denying the plaintiff's claim. It's case is that the suit property was set aside as a public utility having been surrendered in the 1980's.
 3. The 2nd and 3rd defendants filed a statement of defence dated 17th December 2019 denying the plaintiff's claim.
 4. The 4th defendant did not enter appearance and /or file defence.

Evidence of the Plaintiff.

5. Lydia Wahome Muthoni a director of the plaintiff testified on 20th June 2019. She adopted her witness statement as part of her evidence in chief and produced ten documents which were admitted and marked as Plaintiff Exhibit 1 to 10. She stated that the suit property belonged to the Njiriri family before it was transferred to the plaintiff who has been paying land rates thereafter.
6. On cross examination she stated that they undertook due diligence before purchasing the suit property and found buses parking there. She confirmed that to date, the suit property was being used as a bus park and at the time of the purchase but the buses were allegedly paying parking fees to the Njiriri's. She did not adduce any evidence to support this.
7. On re-examination she confirmed that the suit property was being used as a bus terminus for a fee. She also stated that there was no evidence that the suit property was either illegally acquired or public land noting that the Title had not been cancelled.

Evidence of the Defendants'

8. DW1 Stephen Gathuita Mwangi a licensed land surveyor testified on 7th March 2022. He adopted his witness statement and produced four documents as exhibits marked as D. Exhibit 1-4. He stated that when a proprietor submits subdivision plans for approval, some of the set conditions include setting aside public utility spaces such as access roads. As such when the suit property was subdivided this is what happened as per the letter dated 12th January 1981 D. Exhibit 1 and the approved subdivision plan D. Exhibit 3 which had a provision for a bus park which was the same property the Plaintiff was claiming. He went on to state that the Plaintiff had sought a change of use approval from residential to commercial but it was disapproved because the suit property was a bus terminus.
9. On cross examination he stated that the suit property was surrendered to the 1st Defendant and the 1st Defendant had not consented to the Title issued to the Plaintiff. He indicated that as per D. Exhibit 2 the Director of Surveys issued registration numbers but it was the mandate of the Commissioner of Land to determine their usage.
10. He went on to state that every surrendered plot was indicated on the title and confirmed that plot 172 was not among the title numbers that were cancelled which was akin to it not having been surrendered.



On the issue of payment of land rates. He indicated that payment of rates could be done by any purported owner of land whether legally or illegally. He pointed out that in 2010 when the suit property was allegedly transferred to the Plaintiff, it was signed by one J.W. Njenga who was no longer in office at the time. As such it was an illegal transfer. He also indicated that he was not aware whether the 1st Defendant had revoked the title issued to the Plaintiff or not.

11. On re-examination, he stated that the title to the suit property could have been acquired irregularly because it did not state the amount of stamp duty paid, and the person who appended his signature was no longer in office at the time. He also indicated that his subdivision scheme did not have a registration number because they were issued by Director of Surveys.
12. DW2, was the 2nd Defendant George Theuri (Member of Parliament Embakasi East Constituency from 2013). He adopted his witness statement as part of his evidence in chief and indicated that he was not involved with subdivision of land.
13. On cross examination he stated that the suit property was public land which had been developed and was being used as a bus terminus and had been a bus terminus for as long as he could remember. He stated that he was not aware who had title to the suit property.
14. On re-examination he sought for a dismissal of the suit with costs stating that the allegations against him had not been demonstrated.
15. DW3 Robert Mbatia, the 3rd defendant (Member of County Assembly- Kariobangi South, Embakasi West Constituency) testified as DW3. He adopted his witness statement as part of his evidence in chief. He stated that the suit property was being used as a bus terminus adding that he had not incited any persons to encroach on the suit property as claimed. As such the suit should be dismissed with costs.
16. On cross examination he stated that he was born and raised up within the locality where the suit property was and it has always been used as a bus terminus. He went on to state that the Plaintiff's title should be cancelled because it was public land and that there was a motion before the County Assembly on the suit property. Although he did not adduce evidence of this.
17. On re-examination he once again contested his inclusion in the suit.
18. At the close of oral testimonies parties tendered final written submissions.

The Plaintiff's Written Submissions

19. Counsel for the Plaintiff outlined the following issues for determination summarised below:
20. On whether the Plaintiff was the legitimate registered proprietor of the suit property, counsel submitted that the Plaintiff had adduced evidence of ownership adding that the Court in HC Misc App No. 41 of 2011 (JR) also found that the Plaintiff was the registered proprietor and that decision was valid since it had not been appealed. As such, the Defendants were estopped from claiming the suit property. Counsel went on to submit that the Defendants had claimed that the suit property was public land but did not file a counterclaim which would enable court make that determination and that is the same determination that the Court gave in the aforementioned case. Counsel also stated that if the suit property was public land, the 1st Defendant had not taken any steps to have the same compulsorily acquired or Title revoked. As such the Plaintiff was protected by Article 40 of the *Constitution* and Sections 24 and 26 of the *Land Registration Act* since the Defendants had not shown had been acquired illegally or through fraud. To support this counsel made reference to *Shimoni Resort v Registrar of Title & 5 others* [2016] eKLR, *Gujral Sandeep Singh Ragbir v Minister for Public Works, Road and Transport County Government of Kajiado & Another* [2018] eKLR, *Ahmed Ibrahim Suleiman &*



Another v Noor Khamisi Surur (2013) eKLR, *Khimji Bhimji Seyani & 2 others v Attorney General* [2015] eKLR.

21. On whether the suit property was surrendered to the 1st Defendant as public land, counsel submitted that they failed to adduce substantive documents evidencing the claim. Counsel stated that the documents adduced indicating conditions for subdivision of LR No. 209/8274 did not specify that the suit property was one of the plots to be surrendered as a road reserve. Counsel added that the subdivision scheme produced by the 1st Defendant as D. Exhibit 3 was illegible, unauthenticated and could thus not be relied as evidence. Counsel also pointed out that if the suit property was earmarked for subdivision as claimed, an entry would have been made on the mother Title clearly stipulating this as was the case with the entries that had been spelt out for surrender such as entries number 10 and 11 on the mother Title. While making reference to *Gujral Sandeep Singh Ragbir v Minister for Public Works, Road and Transport County Government of Kajiado & Another* (*supra*) counsel submitted that the onus was with the 1st Defendant to show that the map from the Director of Survey produced by the Plaintiff was illegally acquired.
22. Counsel queried that is the suit property was public land, how come the 1st Defendant had continued levying for land rates of the suit property from the Plaintiff as late as 2019 during the pendency of this suit including issuing it with receipts of payment? Counsel went on to submit that the 2nd and 3rd Defendants claimed that they had seen the suit property being used as a bus terminus since their younger years but did not prove this as per Section 107, 108 and 109 of the *Evidence Act*. Counsel further questioned why the 2nd and 3rd Defendants who were legislators did not use proper channels to have title to the suit property revoked if at all it was public land.
23. Whether the Defendants had encroached and trespassed on the Plaintiff's suit property, counsel submitted that the 1st Defendant had acknowledged that they had erected bus parks and bus terminus on the suit property which amounted to trespass, waste and damage. As such, the Plaintiff continued to suffer loss because it could not make use of the suit property which had been acquired for valuable consideration. Counsel also submitted that the 1st Defendant was not justified in refusing to approve the Plaintiff's change of user request.
24. Whether the Plaintiff was entitled to the reliefs sought, counsel submitted that having demonstrated that the Plaintiff was the duly registered and absolute owner of the suit property it was entitled to reliefs sought for the 1st Defendant's acts of trespass from 2015. The value of the property having not been submitted as evidence, counsel asked court to grant exemplary damages for trespass taking into consideration the suit property's measurements, location and costs for restoration citing *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2021] eKLR and *Gujral Sandeep Singh Ragbir* (*supra*). Counsel also prayed for costs of the suit.

The 1st Defendant's Submissions

25. It is worth noting that Counsel for the 1st Defendant in their submissions dated 23rd February 2023, Counsel highlighted the issues for determination as whether the Plaintiff was entitled to a temporary injunction, had established a prima facie case, was likely to suffer irreparable damage that could not be compensated by an award of damage and whether the balance of convenience was in its favour. In the conclusion counsel submitted "... We submit that the Plaintiff has failed to meet the threshold for grant of the orders sought in their Application and thus the same should be dismissed with costs to the 1st Defendant."
26. This court wished to respectfully state that the issues submitted on were in regards to issuance of interlocutory reliefs at a preliminary stage, which is not what is under consideration at this juncture!!



Nonetheless, the Court still went on and perused through the submissions and only picked out what it deemed relevant as summarised below.

27. Counsel submitted that the suit property was given to the 1st Defendant as a surrender for a road reserve as per D. Exhibit 1 and the Plaintiff purportedly purchased it from the previous owner Paul Njiriri with a clear indication that it was an open space. Counsel went on to submit that the alleged sellers were not called as witnesses to collaborate its claim adding that the alleged transfer signed by one James Raymond Njenga was fraudulently acquired since he was no longer the Commissioner of Lands at the time of the alleged transfer. Counsel also questioned authenticity of the documents produced by the Plaintiff claiming that the Register Index Map adduced did not have an indication of plots surrendered. Counsel submitted that the suit property had been used as a bus terminus from the 1960s and altering this would bring chaos and alter the existing town plan for the area and that the issue of payment of rates did not confer title to the Plaintiff. Counsel acknowledged that the 1st Defendant ought to have amended its records to reflect the proper position regarding the suit property.

The 2nd and 3rd Defendants' Submissions

28. They are dated 22nd February 2023 Counsel submitted that the 2nd and 3rd Defendants were wrongly joined to the suit and no evidence had been adduced to show their involvement in the Plaintiff's claim of encroachment, trespass, waste of the suit property or even incitement and prayed for its dismissal with costs.

Analysis and Determination

29. This court having considered the pleadings, evidence and submissions finds that the issues for determination are:
- i. Whether the Plaintiff is the lawful proprietor of suit property LR No 209/8274/172
 - ii. Was the 2nd and 3rd Defendants wrongly joined in the suit?
 - iii. What orders/ Reliefs should issue.
 - iv. Who should bear costs of the suit?
30. The Plaintiff claims to be the legal owner of the suit property having purchased it from the Estate of Njiriri and subsequently transferred to it in the year 2010 and was thus protected by Section 26 of the [Land Registration Act](#) as the absolute indefeasible owner. The said section provides that :
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



31. At the hearing, a director of the plaintiff testifying as PW1 indicated that prior to the purchase they undertook due diligence and even visited the site. She confirmed that at the visit she saw buses terminating at the suit property but the owners of the property at the time informed her that the buses were paying a fee for using the suit property as a bus terminus. However, this was not adduced as evidence.
32. A further perusal of the Plaintiff's evidence confirms that it did not produce any documents showing how the suit property was acquired. There is no sale agreement, no receipts of payment of any consideration, no stamp duty, nothing at all. However, the Plaintiff has a Certificate of Title which it has waved to court and wants the court to approve as prima facie evidence of its indefeasibility. The courts have held time without number that he who alleges must prove which is also embedded in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in Munyu Maina v Hiram Gatbiha Maina [2013] eKLR also pronounced:
- “... We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”
33. The court is not satisfied that this standard of proof has been attained by the Plaintiff.
34. Further, all the witnesses (including the Plaintiff) acknowledged that the suit property has and continues to be used as bus terminus. It is also on record that the 1st Defendant vide letter dated 27th May 2013 objected to the change of use request by the Plaintiff on the ground that the suit property was a bus terminus following a subdivision and surrender. Counsel for the Plaintiff submitted and questioned why the 1st Defendant had not sought to reclaim the suit property and cancel the Plaintiff's title if it was public utility.
35. Whereas the court understands where the Plaintiff's query is emanating from, the 1st Defendant not having revoked Title to the suit property does not negate the fact that it has and continues to be used as a bus terminus which is a public utility. Courts have held that an overriding interest need not be registered for it to be enforceable and Section 28 of the Land Registration Act provides right of way as an overriding interest as follows:
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
-
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
36. I agree with the 1st Defendants submission that the transferors did not confer a better title to the plaintiff herein and therefore it cannot derive a better title than what became public land meant for public use.
37. Further that the issue of payment of rates does not confer title to the plaintiff.



Exhibit D3 clearly indicates the suit property as a parking space. This shows that the same is public utility.

38. Moreover, courts have been urged to make sound determination that do not have adverse effects on the public interest. In this particular case, the Plaintiff wants the court to declare it as the absolute indefeasible owner of the suit property which clearly is a bus terminus. It begs the question, what then happens to the members of public who has been using it as a bus terminus for decades? Who stands to suffer a greater loss between the Plaintiff and the public? It is definitely the public because the Plaintiff can always claim for compensation if the suit property had been legally and lawfully acquired which the court has already determined was not. To support this sentiments, the Court of Appeal in *Attorney General & another v Andrew Kiplimo Sang Muge & 2 others* [2017] eKLR quoted:

Githinji, JA in *Center for Rights Education and Awareness & Another v John Harun Mwau & 6 others*:

“... the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise...”

39. Having determined that the Plaintiff has not proved its case, the other reliefs for damages sought hereby fail.
40. The final issue is whether the 2nd and 3rd Defendant were wrongly joined in the suit and should be dismissed with costs in their favour. Having gone through the entire suit and evidence placed before court, I am in agreement that there was no concrete evidence that was adduced against the 2nd and 3rd Defendant to apportion any claim against them. As such the suit against them is hereby dismissed with costs.
41. In conclusion I find that the plaintiff has failed to prove it’s case as against the defendants on a balance of probabilities.
42. Accordingly, the plaintiff’s suit is dismissed with costs to the 1st, 2nd and 3rd defendants.

SIGNED, DATED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF OCTOBER, 2023.

L. KOMINGOI
JUDGE.

In the presence of:

Ms. Wambui for the plaintiff.

Mr. Mackenzie for Mr. Magoye for the 1st Defendant.

N/A for the 2nd, 3rd Defendants.

Court Assistant – Mutisya.

