



Contefour Property Consultants Limited v Mbugu & 4 others (Environment & Land Case 13 of 2019) [2023] KEELC 21277 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 13 OF 2019**

JG KEMEI, J

NOVEMBER 2, 2023

BETWEEN

CONTEFOUR PROPERTY CONSULTANTS LIMITED PLAINTIFF

AND

KAMAU MBUGU 1ST DEFENDANT

PETER MUIGAI KIHARA 2ND DEFENDANT

HOSEA MWANGI KIRAGU 3RD DEFENDANT

DANIEL WANDETO 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

JUDGMENT

The pleadings

1. The Plaintiff sued the Defendants vide Plaint dated the 18/1/2019 and filed on the 23/1/2019 seeking the following orders; -
 - a. A permanent injunction restraining the 2nd Defendant whether by themselves, any other person's claiming on their behalf, their agents and/or servants from trespassing on, wasting, intermeddling, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Land Reference Number 10821/77 (Original Number 10821/48/33) South West of Thika Municipality, Title Number I.R. 61815.
 - b. A declaration that the Plaintiff is the sole legitimate, legal and registered owner of the suit property.
 - c. General damages for trespass.



- d. Special damages as listed under paragraph 11 herein above.
 - e. Interest thereon.
 - f. Costs of this suit.
 - g. Any other relief the Court deems fit to grant.
2. The Plaintiff avers that he is the registered owner of the suit land. That the 1st - 3rd Defendants have trespassed onto the land destroying structures erected thereon and stealing building materials on site. That any documents of title they purport to hold are fraudulent. Particulars of fraud and illegality have been itemised under para 10 of the Plaint. In addition, the Plaintiff claims loss and damages occasioned by the 1st and 2nd Defendants in the sum of Kshs. 451,673/-
 3. The 1st and 2nd Defendants have denied the Plaintiff's claim vide the statement of defence dated the 27/3/2019 and filed on the 28/3/2019. It is the 2nd Defendant's contention that he is the registered and exclusive owner of the suit land having acquired it from the 1st Defendant on the 18/4/2006 and has enjoyed quiet and exclusive possession of the land since then. He contends that the claim of the Plaintiff with respect to ownership of the title is founded on quick sand and forgery. He denied fraud and trespass on the suit land on account that he is the legitimate owner of the suit land. Interalia, that the claim of the Plaintiff is time barred the 2nd Defendant having been in occupation in excess of 12 years. He opined that the cause of action based on fraud having been brought 3 years later is statutorily time barred.
 4. On the 16/5/2019 the Plaintiff sought for request for Judgement against the 1st and 4th Defendants who had failed to enter appearance or file a statement of defence within the prescribed period despite service of summons having been effected through substituted service by way of advertisement.
 5. The 5th Defendant filed its statement of defence dated the 8/4/2019 on the 23/5/2019. It admitted that the Plaintiff is the registered proprietor of the suit land having acquired it from the previous owner namely John Muriuki Kibuchi. That the current deed file was opened following its reconstruction pursuant to the deed of indemnity registered as Vol D1 Folio 83/859, file MMXVI and gazetted vide Notice No. 4246 of 10/6/2016. It denied the claim of fraud and illegality and contended that the Plaintiff has not demonstrated any cause of action against the 5th Defendant and urged the Court to dismiss the claim against it entirely.

The Evidence of the parties

6. The case of the Plaintiff was led by John Muriuki Kibuchi as a sole witness. He stated that he is an Advocate of the High Court of Kenya practising as such in the law firm of Kibuchi & Co Advocates since 1970's. He relied on his witness statement on record dated 9/11/2022 appearing on page 94 of the Plaintiffs trial bundle. He produced documents marked as PEX No 1-24 on pages 54 – 71 of the said bundle.
7. He stated that he is one of the Directors of the Plaintiff's Company. That he purchased the suit land from Priscila Wanjiru Kariuki in 1993 took possession of the land and constructed permanent structures for his caretaker. That he was alarmed in 2016 when he was informed that the deed file at the Lands Office was missing. That the register was later reconstructed on his request.
8. He testified that the 1st and 2nd Defendants trespassed on to the land and he filed a report with the Juja Police Station in 2018 twice but no action was taken by the Police against the said trespassers forcing him to file the instant suit.



9. The witness stated that he sued the 5th Defendant as the custodian of titles. He confirmed that the title was reconstructed vide a 60 day Gazette Notice and no objection was raised against the said reconstruction. He stated that rates payment and clearance certificates allegedly in the said Defendant's possession are not evidence of title. That the 1st and 2nd Defendants do not have a genuine title capable of protection by the law.
10. DW1 - Peter Muigai Kihara stated that he acquired the land from the 1st Defendant in 2006. He relied on his witness statement dated the 27/3/2019 in evidence in chief. He produced documents marked as DEX. No 1-3 in support of the 2nd and 3rd Defendants' case. He stated that he does not know PW1. That he is in occupation of the suit land since 2006 and PW1 has been interfering with his quiet possession on the suit land.
11. In cross he stated that he purchased the land from the 1st Defendant at a time he could not recall. That the agreement of sale is with his Advocate and has not been produced in Court. He could not remember the purchase price either. He was not aware if the 1st Defendant was served with the Summons in the case. That he is not calling him as one of his witnesses. When asked about the e- citizen search dated the 18/4/2006, he stated that he does not know who gave him the search at Ardhi House. That he has a title as can be confirmed by the e-citizen search and has been paying land rates at the local Council.
12. DW2 – Nyandoro David Nyambaso stated that he is the Senior Assistant Chief Land Registrar in the Ministry of Lands and Physical Planning. He relied on his witness statement dated the 28/9/2021 in evidence in chief and produced documents marked as DEX 4-7 in support of the 5th Defendant's case. He stated that the Plaintiff is the current owner of the suit land. He informed the Court that the e-citizen platform was discontinued on the 27/4/2021 because of the numerous discrepancies and concluded that the e-citizen search was presented by DW1 in Court was not authentic. That though the property is located in Thika, the titles are under Registration of Titles Act are based at the central registry in Nairobi.
13. He led evidence that the suit land belongs to the Plaintiff having been acquired from PW1 who purchased it from one Priscila Wanjiru Kariuki in 1993. That the suit land was a subdivision of LR 10821/48. He denied any records of title in the name of the 2nd Defendant. That the e-citizen search does not reflect the true position of the record as kept in the registry.
14. At the close of the hearing, parties elected to file written submissions by close of business on the 14/7/2023. At the time of writing this Judgement only the 2nd, 3rd and 5th Defendants have filed their submissions.
15. The 2nd and 3rd Defendants submitted that the suit land belongs to the 2nd Defendant as shown by the copy of title and search adduced in evidence. That under Section 26 of [Land Registration Act](#) the 2nd Plaintiff has not shown prima facie evidence that he has a good title to the suit land. That the 2nd Defendant having been in possession of the suit land for a period in excess of 12 years, the Plaintiff's claim is therefore time barred. That having not proved any title to the land the Plaintiffs claim for damages and loss is untenable.
16. The 5th Defendant submitted that proof of ownership is shown by documentary evidence which lead to the root of title. That the 2nd Defendant failed to avail any evidence to show how he acquired ownership of the land. That the Plaintiff has provided evidence that it acquired the land as well as relevant supporting documents to the ownership of the land. In the absence of any fraud and or illegality on the part of the Plaintiff, the Court was urged to find that the land belongs to the Plaintiff based on the root of title and the records at the Lands Registry.



17. The Court was further urged to hold that the Plaintiff has not shown any cause of action against the 5th Defendant.

Analysis and determination

18. The key issue for determination is whether the Plaintiff has proved title to the suit land.
19. The gist of the Plaintiff's suit is that it is the registered owner of the land having acquired it in 2018 from PW1 who in turn purchased it in 1993 from the original owner. It is the Plaintiff's case that when it conducted a search he was informed that the file was missing and upon causing a deed of indemnity to be registered for purposes of reconstruction of the misplaced file, the same was gazetted on 10/6/2016 and thereafter the file was reconstructed. That later it learned through PW1 its Director that the Defendants were trespassing on the land claiming ownership. That he reported the matter to the Police who took no action leading to the filing of the suit.
20. The 2nd Defendant claims to be the owner of the suit land and only produced a certificate of search (e-citizen), clearance certificate and rates payment receipts in support of his ownership). He claimed that he purchased the land from the 1st Defendant in 2006 and that he has been in possession of the land for a period of over 12 years.
21. The 1st and 4th Defendants failed to enter appearance nor file statement of defence despite having been served through substituted services vide the Daily Nation of 9/4/2019. The case of the 1st and 4th Defendants therefore remains undefended.
22. The 5th Defendant on the other hand admitted that according to their records the registered owner of the suit land belongs to the Plaintiff. It denied any knowledge of the alleged 2nd Defendant's title documents.
23. Title to land is governed by law. The supreme law of the land protects the right to property under Article 40 of *the Constitution*. Under Article 40 (6) of *the Constitution*, this protection however does not extent to any property that has been found to have been unlawfully acquired.
24. Section 26 of the *Land Registration Act* mandates this Court to take the Certificate of Title issued by the Land Registrar upon registration or to a purchaser of land upon transfer or transmission as prima facie evidence that the person registered therein as proprietor of the land is absolute and indefeasible owner subject to the limitations and conditions permitted in law. The law also provides for the circumstances in which a title may be impeached that is to say; on the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.
25. The Plaintiffs claim is premised on fraud and illegality. It is the case of the Plaintiff that the title documents by the 2nd Defendant are a forgery with glaring irregularities.
26. Fraud is defined as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.
27. In the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, the Court held as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

28. The Court has analysed the documents presented by the two disputants and finds as follows; the suit land is a resultant subdivision of the mother title being LR No 10821/48 registered in the name of Priscillah Wanjiru Kariuki on the 19/2/1988. The mother title measures 23.17 ha for a term of 941 years from 1/11/1964. On the 21/2/1992 a caveat was registered on the title in favour of PW1 claiming purchaser’s interest pursuant to a sale agreement attached to the caveat. The said caveat was withdrawn on the 12/2/1993 and a transfer was registered in favour of PW1 on the 12/10/93 for a portion namely LR No. 10821/77 (original No 10821/48/3 vide Certificate of Title IR No. 61815. This entry is reflected on the title of the Plaintiff registered on the 12/10/93 at 12.08 hrs.
29. Further entries on the title show that a provisional title registered on the 29/3/2017 pursuant to the Gazette Notice No. 4246 of 10/6/2017 was issued. PW1 led evidence that on a routine search of the title he was informed that the records were missing and he caused an indemnity to be registered leading to the issuance of the provisional title. This evidence was admitted by DW2 who stated that it is their office who issued the said provisional title.
30. PW1 led unchallenged evidence that he transferred the suit land to the Plaintiff on the 12/9/2018. This evidence is supported by the evidence of DW2 who produced a duly registered transfer in favour of the Plaintiff culminating into the issuance of a title on the 2/10/18. This title has been confirmed by the Land Registrar as the true and authentic ownership of the Plaintiff.
31. The 2nd Defendant led evidence that he purchased the land from the 1st Defendant. He however failed to produce any evidence in form of title to support his averment. In support of his alleged title he procured a search dated the e-citizen dated the 18/4/2006 which document was challenged by DW2 as inauthentic in respect to ownership of the land. He also produced a clearance certificate and a rates demand as evidence of title. When asked about his title he stated in evidence that it is with his lawyer.
32. The Court’s attention has been pointed to documents attached to the Supporting Affidavit of the 2nd Defendant sworn on the 4/4/2019 which comprise of a copy of the Deed Plan, search dated the 18/4/2006 together with a copy of title issued to the 1st Defendant registered on the 12/10/1993. It has not been explained why the 2nd Defendant elected not to produce these documents during the hearing. The Court notes that this title is similar with the one of the Plaintiff with the exception of the name of the registered owner, and the address of the registered owner. The Plaintiff led unchallenged evidence that the 1st Defendants title was a forgery. Based on the overwhelming evidence adduced by DW1 and PW1, the Court takes the evidence of the Plaintiff as probable in the circumstances.
33. I have already stated in the Judgement that the 2nd Defendant failed to produce any title in his name and the Court finds his claim unfounded.
34. In the case of Munyu Maina Vs. Hiram Gathiha Maina [2013] eKLR where the Court had to say the following;

“ We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
35. Going by the above decision, the Court finds that the root of the title of the Plaintiff has been proven. It is the holding of the Court that the legitimate owner of the suit land is the Plaintiff.



Trespass

36. The 2nd Defendant has challenged the claim of trespass on the Plaintiff's land on the ground that he is the registered owner. The Court having found that the title belongs to the Plaintiff the occupation of the suit land by the 1st and 2nd Defendant is without any legal basis.
37. It is the law that trespass per se is actionable and the claimant need not prove damages. In this context the Court having found that the 2nd and 3rd Defendants trespassed on the land are condemned to pay the sum of Kshs 1,000,000/- being general damages for trespass.

Special damages for loss

38. The general rule is that special damages must be pleaded and proved. Save for the plea of Kshs. 451,673/- being special damages, the Plaintiff failed to place evidence before the Court in support of this claim. It is dismissed for being unmeritorious.

Nullification of title

39. Having held that the title of the 1st, 2nd and 4th Defendants (see paragraph 30) cannot stand the test of the law, the same are declared illegal, null and void. The title cannot be afforded any protection in law on account of its illegality. Mandated by Section 80 of the Land Registration Act, this Court proceeds to hold that the title and the register be and are hereby stand cancelled. This is to avoid the same being used for other ulterior motives and at the expense of unsuspecting citizens.

Costs

40. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Plaintiff's case is merited and therefore entitled to costs.
41. In the end I find that the Plaintiff has proven her case and consequently enter Judgement in its favour as follows;
- a. A declaration be and is hereby issued that the Plaintiff is the sole legitimate, legal and registered owner of the suit property.
 - b. A permanent injunction be and is hereby issued restraining the 2nd Defendant whether by themselves, any other person's claiming on their behalf, their agents and/or servants from trespassing on, wasting, intermeddling, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Land Reference Number 10821/77 (Original Number 10821/48/33) South West of Thika Municipality, Title Number I.R. 61815.
 - c. General damages for trespass in favour of the Plaintiff against the 2nd and 3rd Defendants in the sum of Kshs. 1.0 Million is hereby allowed.
 - d. Special damages for wrongful entry by the 1st and 2nd Defendants on to the Plaintiff's said parcel and destruction of property is hereby disallowed.
 - e. Costs of this suit and interest thereon.
42. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Tumu HB Mr. Musyoka for the Plaintiff

1st, 2nd, 3rd and 4th Defendants – Absent

Ms. Mwalozi for 5th Defendant

Court Assistant – Lilian

