



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 62 OF 2013

DAVID O. ORANGO MONGARE.....PLAINTIFF

VERSUS

ABDI ISAAK.....1ST DEFENDANT

FREDRICK GICHERU.....2ND DEFENDANT

KWARE MUKURU KWA NJENGA

JUA KALI ASSOCIATION.....3RD DEFENDANT

JUDGMENT

Introduction

1. The suit was commenced vide a Complaint dated **8th January 2013**. In the complaint, the plaintiff averred that he was the owner of **Plot No. 57/84 of Kware Mukuru Kwa Njenga** which he discovered that in the year 2012, had been fraudulently transferred to the 2nd Defendant by the 1st Defendant. In the Complaint he sought for judgement against the defendants jointly and severally as follows:

i. An order of permanent injunction restraining the Defendants from committing acts of trespass on the Plaintiff's plot and or in any manner whatsoever interfering with the Plaintiff's ownership and occupation or possession of the suit property or evicting the Plaintiff;

ii. General damages;

iii. Costs of the suit and interests at the court rates

iv. Any other and/or further reliefs the Honourable court deems fit to grant.

2. The 2nd Defendant upon being served with the plaintiff's pleadings and summons herein, filed a statement of defence and counterclaim dated **17th November 2014**. In the counterclaim, he sought for dismissal of the Plaintiff's suit and the following reliefs:

i) A declaration that the suit property is Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association and the 2nd Defendant is the legal owner thereof.

ii) A declaration that the Plaintiff is a trespasser on the 2nd Defendant's property.

iii) An order of eviction against the Plaintiff, his employees, servants, agents or any other persons claiming under him from Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association.

iv) An order of permanent injunction restraining the Plaintiff from committing any acts of trespass, or in any manner interfering with the 2nd Defendant's ownership, occupation and possession of Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association.

v) Costs of the suit.

3. The 1st and 3rd Defendant's did not file any defence to the plaintiff's suit, however the evidence on record confirms that the 1st defendant filed witness statement and testified as a 2nd Defendant's witness in support of the 2nd Defendant's case. The Plaintiff did not file any reply to the defence and counterclaim.

4. The record of this Court, confirms that the Plaintiff's suit was dismissed for want of prosecution by my sister **Lady Justice L. Komingo on 17th July 2019**. This necessitated the suit to proceed with the 2nd defendant's counterclaim that had been filed together with the Statement of Defence. As earlier stated the 1st Defendant and 3rd Defendant's never entered appearance in the matter and there were not listed as parties to the counterclaim.

The Plaintiff's case

5. After the dismissal of the Plaintiff's suit against the defendants for want of prosecution, the Plaintiff despite being served, never attended any subsequent proceedings to the matter and neither did he file any response to the 2nd Defendant's counterclaim.

6. Pursuant to the court's directions, the matter was set down for hearing and it subsequently proceeded for hearing of the counterclaim on **18th November 2021 and 3rd December 2021**. Later parties were granted time to file and exchange their respective written submissions.

The 2nd Defendant's case

7. It was the 2nd Defendant's case that he bought the suit property **Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association** from the 1st Defendant on **16th August 2011**. A formal sale agreement was executed and he paid a consideration of **Ksh 1,500,000/-**

8. He also averred that prior to the purchase of the property he did due diligence by confirming with the offices of the 3rd Defendant to confirm on who was the previous owner. The 3rd Defendant indeed confirmed that the property was under the names of the 1st Defendant who had been issued with ownership certificate serial No. 5029. Upon acquisition of the property, the said certificate was cancelled by the 3rd Defendant and he was issued with a new ownership certificate serial number 5098.

9. He further averred that after payment of the purchase price, he was surprised that later in August 2012, **New Life Kingdom of God Ministry** moved into the suit property and started conducting Sunday worship services. Upon inquiry from them, he was informed by their **Pastor Elizabeth Muia** that they had a tenancy agreement with the Plaintiff in respect to **Plot No. 57/84** a copy of which was shown to him.

10. Owing to this development, he complained to the officials of the 3rd Defendant who informed him that indeed he was the owner of the suit property and a notice was issued to **New Life Kingdom of God Ministries** to vacate the premises.

11. The 2nd Defendant also stated that he engaged the services of Machogu & Partners Surveying Consultancy who prepared a report and confirmed that there was no encroachment on the suit property.

12. During the hearing of the counterclaim, a total of three witness testified on behalf of the 2nd Defendant. The 2nd Defendant testified as DW1 and he adopted his witness statement dated 9th March 2021, he also produced his bundle of documents dated 9th March 2021 as part of his evidence in chief.

13. **Andrew Mokuu Machogu** testified virtually as DW2. It was his testimony that he is a licensed surveyor with a bachelor's degree from University of Nairobi. He was instructed by the 2nd Defendant to undertake a survey on Plot No. 313/84. He was also given the share certificate and the survey plan from the 3rd Defendant as reference documents. He visited the site on 30th and 31st May 2013 to undertake the survey and later submitted the report which he requested the court to refer to the same. It was his conclusion that the Plot No. 313 was certified to be in existence and there were no encroachments.

14. **Abdi Isaak** who was the 1st Defendant herein testified as DW3. He relied on his witness statement dated 9th March 2021. He stated that he was the initial owner of the Plot No. 313 which he had bought from the one **Joseph O. Shamwata** for **Ksh 1,100,000/-** on **3rd June 2011** and had a sale agreement confirming the said transaction. It was his testimony that **Joseph O. Shamwata** had acquired the plot after it was allocated to him by the 3rd Defendant. He testified that he later sold the plot to the 2nd Defendant for **Ksh 1,500,000/-** who took vacant possession of the same.

The 2nd Defendant's submissions

15. The 2nd Defendant's filed written submissions dated **17th January 2022**. The Plaintiff did not file any submissions; however, the court was still duty bound to evaluate all the facts and evidence adduced notwithstanding the non-existence of his submissions on record. The 2nd Defendant submitted that the membership card as produced by the Plaintiff was not proof of ownership since it did not indicate the suit property.

16. It was further submitted that the 2nd Defendant's ownership certificate No 5098, beacon certificate, sale agreement and all other documents that were produced, were sufficient as prima facie evidence of ownership. He relied on the case of **Nancy Wanjiku Kunyihia v Samuel Njoroge Kamau(2018) eKLR and Naftal Kerengo Ongweso v Samuel Mogere(2021)** where the court held that a plot card and other supporting document were adequate to prove ownership.

17. The Court was invited to apply the criteria set out in Hubert L Martin & 2 others vs Martin J. Kamar & 5 others where:

“ ...A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld...”

It was reiterated that the trail of documents which were supported by oral evidence should suffice to prove the 2nd Defendant as the bonafide owner. To bolster this position, he also relied on the case of Caroline Awinja Ochieng and another v Jane Anne Mbithe Gitau and 2 others [2015] eKLR

“...In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

*The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.*

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al....”

18. With regard to all other reliefs sort, it was submitted that by declaring the 2nd Defendant as bonafide owner, the irreparable harm suffered would be apparent therefore meeting the threshold set in Nguruman Limited v Jan Bonde Nielsen & 2 others CA 77 of 2012[2014]eKLR.

19. Lastly, it was highlighted that the Plaintiff's continued occupation on the suit property infringes on the 2nd Defendant's constitutional right to property. For all the above reasons, he submitted that the Court should find merit in the counterclaim and grant the reliefs sought.

Issues, Analysis and determination

20. Having considered the oral evidence, documentary evidence and written submissions of the 2nd Defendant, it is clear that the issues for determination before this court are as follows:

- i. Whether the 2nd Defendant is the legal bonafide owner of Plot No. 313/84?*
- ii. Whether the plaintiff is a trespasser on the suit property?*
- iii. Whether the 2nd Defendant is entitled to the prayers sought in the counterclaim?*
- iv. Who should bear costs of the counterclaim?*

Issue No. 1

Whether the 2nd Defendant is the legal bonafide owner of Plot No. 313/84?

21. In as much as the 2nd Defendant's counterclaim proceeded as undefended. The 2nd Defendant still had a duty to prove his case. It is trite law that in civil cases a party must prove his case on a balance of probability. **Section 107(i)** of the **Evidence Act** provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

22. The suit herein relates to **Plot No. 313/84** which is essentially unregistered land. According to the 2nd Defendant, he acquired the suit property by purchasing it from the 1st Defendant on 16th August 2011 wherein a formal sale agreement was executed and he paid a

consideration of Ksh 1,500,000/-. The Defendant produced a copy of the sale agreement to support his evidence. The testimony of DW3 confirmed as much. Having therefore evaluated the evidence that was tendered together with the documental evidence on record, this Court is satisfied that the said documents establish a clear chain that leads ownership of the suit property and as such this court is satisfied on the material placed before it that the 2nd Defendant is the registered proprietor of the suit land.

Issue No. 2

Whether the plaintiff is a trespasser on the suit property?

23. **Section 3 (1) of the Trespass Act, Cap 294** provides that:

"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."

In the case of ***Entick vs Carrington (1765)*** as quoted in the case of ***Maina Kabuchwa v Gachuma Gacheru [2018] eKLR***, Lord Camden CJ had this to say: -

"Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave".

In the case of ***Maina Kabuchwa v Gachuma Gacheru (Supra)***, the Learned Judge defined trespass ***"as the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant."***

24. It was the 2nd Defendant's contention that the Plaintiff commenced construction on the suit property in **October 2014** after he had acquired the same. This has interfered with his right to enjoyment of the property. The Plaintiff despite being given a notice to vacate never bothered to budge. As such the Court finds that the Plaintiff's' action of moving into **Plot No. 313/84 Kware Mukuru Kwa Njenga** and commencing construction on the same amounted to an act of trespass.

Issue No. 3

Whether the 2nd Defendant is entitled to the prayers sought in the counterclaim?

25. Having held that the 2nd Defendant is the legal owner of suit land and that he never authorized the Plaintiff to enter into, occupy or possess the land, it is evident that the Plaintiff had trespassed onto the suit land and he should be restrained.

26. On the prayer for permanent injunction, from the 2nd Defendant's evidence stated above, it is my finding that he has met the threshold for the grant of the same. Similarly, the Plaintiff had no right to encroach over his land in any manner. As such this prayer is meritorious and the same is for granting.

27. The 2nd Defendant has proved his case against the Plaintiff to the required standards and has laid down a basis for the grant of the prayers sought.

Issue No. 4

Who should bear costs of the counterclaim?

28. The general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. In the instant case, the Plaintiff suit was dismissed for want of prosecution on 17th July 2019, the record further shows that the Plaintiff never resisted the counterclaim and neither did he file any response to the same. In view of the foregoing, it would not be appropriate to condemn him with costs. In the circumstances I direct each party to bear their own costs of the suit.

Final orders

29. Having found that the counter claim by the 2nd Defendant against the Plaintiff has been proved on a balance of probability, I hereby make the following disposal orders: -

Judgement be and is hereby entered for the 2nd Defendant in Counterclaim as follows;

i) A declaration that the 2nd Defendant is the legal owner of suit property Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association.

ii) A permanent injunction do issue restraining the Plaintiff from committing any acts of trespass or in any other way interfering with the 2nd Defendant's ownership, occupation and possession of Plot No. 313/84 Kware Mukuru Kwa Njenga Jua Kali Association.

iii) That the Plaintiff do give vacant possession of the suit property to the 2nd Defendant within ninety (90) days from the date of this Judgment, failure to which the 2nd Defendant be at liberty to evict him from the suit property.

iv) Each party to bear their own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2022.

E. K. WABWOTO

JUDGE

In the presence of:

N/A for the Plaintiff.

Ms. Aradi for the 2nd Defendant.

N/A for the 1st and 3rd Defendant.

Court Assistant; Caroline Nafuna.