



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 116 OF 2016

MIRIAM NJOKI CHEGE.....1ST PLAINTIFF

LUCY MUMBI KARINGITHI.....2ND PLAINTIFF

VERSUS

GODFREY GATUNDU.....DEFENDANT

AND

THUO INVESTMENT COMPANY LIMITED.....INTERESTED PARTY

JUDGMENT

Introduction

1. Sometimes in the year 2010, both Plaintiffs and the Defendant purchased their respective properties known as **MITUBIRI/WEMPA BLOCK 1/7095 and MITUBIRI/WEMPA BLOCK 1/7092** from **Thuo Investment Company Limited** with their respective titles being issued in 30th June 2011 and 9th February 2011. The facts of this case point out that after the transactions, both parties were shown the physical location of their properties, however it later turned out that there was confusion as to where exactly was the actual location of the Plaintiffs' property which had allegedly been taken by the Defendant. The matter was not resolved hence necessitating this current suit.

2. The suit herein was filed by the Plaintiffs on 12th February 2016. The Plaintiffs sought the following prayers: -

i) A permanent injunction barring the defendant, his agents or relatives from occupying, using, dealing or in any other way interfering with MITUBIRI/WEMPA BLOCK 1/7095.

ii) A permanent eviction order directed against the defendant, his agents and or relatives evicting them from the occupation of MITUBIRI/WEMPA BLOCK 1/7095.

iii) General damages against the defendant for depriving the plaintiffs of the use and occupation of MITUBIRI/WEMPA BLOCK 1/7095.

iv) Cost of the suit and interest at court rates.

v) Such other or further orders as may meet just ends of justice in the case.

3. The Defendant upon being served with the Plaintiffs' pleadings and summons, filed a Statement of Defence dated 22nd March 2016. No response was filed by the Interested party save for an undated witness statement and a list and bundle of documents dated 2nd April 2020.

The Plaintiffs' case

4. **Miriam Njoki Chege** testified on 9th December 2019 as **PW1** and the sole Plaintiff's witness. During her testimony she adopted her witness statement dated 12th February 2016. She also produced her list and bundle of documents dated the same day and urged the Court to refer to the same.

5. She testified that she bought a parcel of land known as **MITUBIRI/WEMPA BLOCK 1/7095** which was jointly registered in her names and the 2nd Plaintiff **Lucy Mumbi Karingithi**. She further testified that before she could undertake any developments in the land, the Defendant went ahead and encroached and commenced construction on their parcel despite admitting owning **MITUBIRI/WEMPA BLOCK 1/7092** which was different from their property.

6. In cross examination, she said the survey report had confirmed that the defendant's property was different being **MITUBIRI/WEMPA BLOCK 1/7092** and the defendant had equally been informed about the same. She also stated that she was aware that the Defendant had encroached and proceeded to construct on her plot **7095** on the pretext that it belonged to him.

7. During re-examination, she confirmed that Plot **7095** was her plot while plot **7092** was the one that belonged to the Defendant and that the survey report that she had produced as part of her testimony had indeed confirmed the location of the two plots was different and that the title documents too were different.

The Defendant's case

8. The Defendant, **Godfrey Gatundu Muraya** testified as **DW1** on **16th November 2021**. It was his case that, he bought the land from **Thuo Investments Co. Limited**. The land was initially Plot No. 27 while that of the Plaintiffs was Plot No. 30.

9. It was his testimony that after payment of the purchase price, he was shown the physical location by the officials of Thuo Investments Company Limited and was later called to collect his title document. Prior to that he had also been issued with an allotment letter which was surrendered when he collected his title document.

10. He further stated that after issuance of the title, he was again shown the physical location of the land. He averred that he took possession of the land and it was only until the year 2016 when the Plaintiffs started claiming interest over the same.

11. During cross-examination, he stated that the Plaintiffs' property was **7095** which appeared in the map. He also disputed the contents of the survey report that indicated his encroachment to the Plaintiffs' property.

12. On re-examination by his Advocate he maintained that he was shown the physical location of the land by someone from the Interested Party.

The case for the Interested party

13. The Interested party did not attend the hearing but had filed a witness statement by one **Joseph Njoroge Thuo** and a list and bundle of documents dated 2nd April 2020. They did not lead any evidence neither did they produce any documents in evidence.

The Plaintiffs' submissions

14. The Plaintiffs filed their written submissions dated 10th December 2021 through their advocates **M/S Gichamba & Co. Advocates**. They outlined three issues for determination namely;

i) Whether the defendant has illegally and unlawfully occupied the plaintiffs' property,

ii) Whether the Plaintiffs were entitled to vacant possession of the property,

iii) Whether by denial of utility, the Plaintiffs are entitled to general damages, costs and interest therein.

15. On the first issue, Counsel submitted that the Defendant had admitted in his evidence that his property was **7092** and not **7095**. The said properties were different and as such the Defendant's encroachment on **7095** amounted to a violation of the Plaintiffs' right to property.

16. On the second issue, Counsel submitted that, having established that the Defendant had encroached on the Plaintiffs' property, the Plaintiffs' were entitled to vacant possession of the same and it didn't matter what which kind of investment had been undertaken.

17. On the third issue, Counsel submitted that the actions of the defendant amounted to trespass and owing to the same, the Plaintiffs had not been able to use the said land for seven years. Counsel also submitted that the Plaintiffs were entitled to damages for trespass and urged the court to assess and award the same. Counsel concluded his submissions by referring to several authorities including the case of **Kamau Macharia Vs. Mwangi Kigundu & 2 Others, HCCC No. 4067 of 1986.**

The Defendant's submissions

18. The Defendant filed his written submissions dated 22nd December 2021 through **M/s Ngoochi Wanjiku Advocates**. Counsel gave brief facts of the case and outlined four issues for determination which included the following: -

i) Whether the Defendant has encroached on Land Parcel No. MITUBIRI/WEMPA BLOCK 1/7095

ii) Whether the Defendant acquired valid title MITUBIRI/WEMPA BLOCK 1/7092

iii) Whether the Plaintiffs are entitled to the prayers sought.

iv) Who should bear the costs of the suit.

19. On the first issue, counsel submitted that the Defendant upon purchasing his property from the Interested party, he was subsequently shown its physical location by the officials of the Interested party together with their surveyor and for the said reasons he should not be faulted for encroaching on the Plaintiffs property and that the Interested party was fully to blame for the confusion that was created.

20. The second issue was not disputed and counsel submitted that the Defendant had followed the due process in acquiring a valid titled to his property **7092**.

21. On whether the Plaintiffs were entitled to any remedies, Counsel submitted that the Plaintiffs never raised any issue of encroachment when each party was shown their respective plots but the same was only raised when he had started developing the same. Further the Interested party was responsible for the confusion and the Court ought not to grant any remedies to the Plaintiffs. On costs, it was submitted that the Defendant should not be condemned to pay but the same should be borne by the Plaintiffs.

Analysis and Determination

22. Having considered the pleadings herein, the submissions of the parties and the available evidence, the Court finds the issues for determinations are as follows: -

i) Whether the Defendant has unlawfully and illegally occupied the Plaintiffs' property MITUBIRI/WEMPA BLOCK 1/7095?

ii) Whether the Plaintiffs are entitled to the reliefs sought?

iii) What orders should issue in respect to costs?

23. With the foregoing outline of the pleadings, litigation history, evidence and submissions and of course the relevant law I must now decide the suit.

Issue No. 1

Whether the Defendant has unlawfully and illegally occupied the Plaintiffs' property MITUBIRI/WEMPA BLOCK 1/7095?

24. PW1 stated that the Plaintiffs were the registered owner of the suit land. From the documentary evidence vide the copy of the title deed for **MITUBIRI/WEMPA BLOCK 1/7095** herein, it is evident that both plaintiffs were registered as the proprietors of the suit land. The title document was issued on 30th June 2011.

25. The law is very clear on the position of a holder of a title in respect to the land. **Section 24(a) of the Land Registration Act** provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

26. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

27. The Plaintiffs have proved that they are indeed the registered owner of the suit property and therefore the rightful owners having purchased the same lawfully from the Interested party. The Plaintiffs stated that the Defendant had refused to vacate and had trespassed onto the suit land to the extent of putting up some structure.

28. During the hearing and in his submissions, the Defendant denied trespassing to the suit property. The Defendant testified that after purchasing his property from the Interested party, he was shown the physical location by officials of the third party and their surveyor. However later on he was surprised to see the Plaintiffs' claiming ownership of the same and was informed that the physical location of his property **MITUBIRI/WEMPA BLOCK 1/7092** was at a different place. The Defendant faulted the Interested party for the confusion that was created at the time of identifying the physical location of the property since according to him he had every right to believe that the physical location of **7092** was the actually location of his property and not the Plaintiffs.

29. In the instant case, the Defendant acted with a mistaken belief that the Physical location of plot 7095 was the actually location of his

property.

30. It is therefore not in dispute that the Plaintiffs are the legal owners of plot **7095** while the Defendant is the owner of Plot **7092**. The Court was also furnished with a survey report dated 10th May 2016 from the government surveyor which report confirmed that indeed Plaintiffs plot was number **7095** which was currently being occupied by the Defendant herein. Even though the Defendant disputed the contents of the survey report, he did not produce any separate survey's report to counter the contents of the survey report that had been produced by the Plaintiffs. From the foregoing, it is evident that the confusion was caused by the Interested party who sold the property to both the Plaintiffs and the Defendant. In the circumstances and in as much as the Defendant had occupied the Plaintiffs property on the supposition that it was his, it is apparent that the mistake was attributed to the Interested party and should not be placed on him, see also ***Colwill v Reeves (1811) 2 Camp 575***. Accordingly, it is the finding of this court that the Defendant's action of occupying the Plaintiffs' property were not involuntary.

Issue No. 2

Whether the Plaintiffs are entitled to the reliefs sought?

31. The plaintiffs sought for several reliefs as was outlined at the earlier part of this judgement. Having held that the plaintiffs are the legal owner of suit land and that the Defendant had occupied the same albeit not intentional, the Court will proceed to issue the appropriate reliefs.

32. On the prayer for permanent injunction, from the evidence of PW1 stated above, it is the finding of this Court, that the Plaintiffs have met the threshold for the grant of the same. Similarly, the Defendant has no right to continue being in occupation of the suit property. As such this prayer is meritorious and the same is for granting.

33. On the issue of general damages against the Defendant for depriving the Plaintiffs their use to the land, Counsel for the Defendant submitted that the same should not be granted since the Plaintiff never raised the issue earlier with the Defendant nor with the Interested party.

34. In his submissions, Counsel for the Plaintiffs also never included any quantum on what would be an appropriate award for general damages to the Plaintiffs. The Court also having noted earlier that the Defendant were not to blame for the said confusion, it is therefore the finding of this Court that no basis has been laid by the Plaintiffs for the grant of such damages and in the circumstances, the said relief is declined.

Issue No. 3

What orders should issue in respect to costs?

35. **Section 27 of the Civil Procedure Act** grants the Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. In the instant case, the circumstances leading to the commencement of this case could have been avoided had the Interested party remedied the confusion that was created at the time of pointing out the physical location of the plots to the parties after the completion of the sale transactions. In the circumstances, I will direct that each party bears its own costs of the suit.

Final orders

36. From the foregoing analysis, the Plaintiffs have proved their case on a balance of probabilities and in this regard, this Court makes the following final orders;

i) An eviction order be and is hereby issued directed to the Defendant, his agents and or his relatives ordering him to vacate the plaintiffs' parcel of land known as MITUBIRI/ WEMPA BLOCK 1/ 7095 within ninety (90) days from the date of this Judgment, failure of which the Plaintiffs be at liberty to evict him from the suit property.

ii) A permanent injunction be and is hereby issued restraining the Defendant, his agents and or relatives from occupying, using, dealing or in any other manner interfering with parcel of land known as MITUBIRI/ WEMPA BLOCK 1/ 7095.

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

37. It is so ordered.

Dated, Signed and Delivered at Nairobi this 3rd day of March 2022.

E. K. WABWOTO

JUDGE

In the virtual presence of:-

N/A for the Plaintiff.

N/A for the Defendant.

N/A for the Interested Party.

Court Assistant: Caroline Nafuna.