



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC 29 OF 2017

ROBERT MUNENE MURIUNGI.....PLAINTIFF

VERSUS

KINYUA MBAYA.....DEFENDANT

JUDGMENT

A. PLEADINGS

1. By a plaint dated 2.2.2017 the plaintiff averred he was the registered owner of **Plot No. 1019 under PDP No. ISL 117/16/374** measuring **50 ft by 100 ft** situated at **Kambi Ya Juu Isiolo County** which he had bought from one Martin Kingori Ndegwa for a sum of Kshs. 650,000/= on 12.8.2016 but which the defendant forcefully entered into, took vacant possession, fenced it off and purported to displace the plaintiff. He prayed for a permanent injunction barring and restraining the defendant from interfering in any way with his peaceful possession and occupation of the suit land plus costs and interests.

2. The defendant filed a defence dated 13.4.2017 denying the contents of the plaint and stated the plaintiff had fraudulently obtained the plot.

3. In a reply dated 26.4.2017, the plaintiff denied any fraud, averred prior to purchasing the plot, he undertook due diligence and confirmed from the County land office that the seller was genuine, the title was clean and that a demand letter had been served upon the defendant prior to the filing of the suit.

B. EVIDENCE

4. PW1 testified on behalf of the plaintiff, said to be out of the country. She adopted her witness statement dated 14.9.2017 and produced a sale agreement dated 12.8.2016, an acknowledgement receipt for the final payment, a part development plan, map from the survey department, receipt from the Isiolo County Government for PDP charge, photographs showing the euphorbia shrubs on the plot and a demand letter dated 31.1.2017 as **P exh 1 (a) 1 (b), P exh 2, 2, 4 and 5 (a) (b) and (c)** respectively.

5. As regards the defendant's Plot 750, PW1 denied knowledge of its existence and or its owner but insisted that the defendant was not the one utilizing the plot but herself. She also confirmed she had never been served with any pleadings in **Isiolo C.C. No. 271/2016**. She confirmed the seller was the 1st defendant and her son the 3rd defendant in the Isiolo suit.

6. PW1 admitted being served with a court order issued on 22.11.2016 as well as being charged in Isiolo Law Courts for threatening the defendants. She insisted the plot was unoccupied after the order was served; though there was a structure as could be seen on **P exh 5 (a) and (b)** though she could not tell the owner.

7. She testified she knew the owner was genuine since he had brought all the requisite documents at the time of the sale.

8. Regarding the threats, PW1 explained it came about at the time the defendant was being served with summons to enter appearance on 31.1.2017. She denied that the plot belonged to Nazarene Wawira Njeru who alleged to have allowed the defendant to occupy the plot.

9. Further, PW1 told the court her son, the plaintiff had followed up the transfer up to Ardhi House Nairobi and was the registered owner of the plot and that they had no claim over Plot No. 750 which plot number was indicated in the defendant's pleadings.

10. PW1 further stated she was not aware Nazarene Wawira Njeru had objected to the sale by her husband.

11. PW2 told the court he lived on Plot No. 487 and was a witness to the sale agreement dated 12.8.2016 whose owner then was Martin Kingori Ndegwa.

12. DW1 told the court that his plot was No. 750 though he had no documents from the County offices Isiolo to show he owned the land. He admitted he erected the euphorbia fence on 31.1.2017. He denied he had pleaded the plot was his in his defence.

13. Similarly, DW1 admitted he had no land rent and rates payment receipts for the plot nor had he challenged the injunction issued on 8.3.2017 though according to his witness statement, the plot belonged to Nazarene Wawira Njeru. He denied stating one Martin Kingori Ndegwa was the husband to Nazarene Wawira Njeru before they allegedly fell out.

14. DW1 stated he knew the Isiolo case involved Plot 750 where the plaintiff was Nazarene Wawira Njeru though not a party in this suit. In his view, he had not sought to have the two cases consolidated though according to him, the subject matter was the same plot since Martin Kingori Ndegwa was also sued as the 2nd defendant and PW1 as the 1st defendant alongside the plaintiff.

15. Regarding the plaintiff's exhibits, DW1 admitted he had not challenged the said documents over the ownership of **Plot No. 1019**. Further, DW1 admitted he did not have the permission of the plaintiff in planting the euphorbia shrubs. Similarly, he stated he had no documents to show he was an employee of Nazarene Wawira Njeru.

16. In re-examination, DW1 claimed to have been a caretaker of Nazarene Wawira Njeru who stayed on the plot since 2012.

17. DW2 told the court DW1 was her caretaker though there was no written agreement to take care of her plot. She admitted she had no ownership documents to the plot but was the one who planted euphorbia trees in 2012 though DW1 planted additional ones on 31.1.2017. She could also not remember when the plot was changed from 750 to 1019 even though she had no documents to prove those changes.

18. Regarding the Isiolo case, DW2 admitted she was the plaintiff in that case claiming **Plot No. 750 and not Plot No. 1019** where she had sued the plaintiff, PW1 and one Martin Kingori Ndegwa.

19. DW2 testified she had a house or a structure on the plot and had also planted some crops in which in her view was the same plot but bearing two plot numbers, which a surveyor she had engaged had confirmed the position as stated though she had not filed the report or photographs to indicate her developments.

20. In re-examination, DW2 maintained she had been in occupation of the plot since 2011 through her caretaker, who reinforced the fence in 2017 around the time the plaintiff started claiming ownership. This led to her to file a case in Isiolo where she was asserting ownership rights, the plaintiff being the principal defendant.

C. WRITTEN SUBMISSIONS

21. With leave of court, parties filed written submission dated 17.11.2021 and 18.12.2021 respectively.

22. The plaintiff submitted the issues for determination were whether the plaintiff was the owner of the suit land and if so he deserved the prayers sought.

23. It is submitted the registration of the land in favour of the plaintiff was not disputed and he had produced documents to that effect backed by oral testimony from PW1 – 3 which testimony was not shaken by the defendant's oral, or documentary evidence. Reliance was placed on *E A R –vs- F H J [2018] eKLR, MERU E.L.C. No. 245 of 2016, Yuda Imunya alias Yuda K. Imunya –vs- Atanasio Kibaara, Avid Developers Ltd –vs- Blue Horizon Properties Ltd & 2 Others [2021] eKLR, John Monyancha Ngoge –vs- Marcela Kerubo Kababe [2019] eKLR, Kinyanjui Kamau –vs- George Kamau Njoroge [2015] eKLR, Samson Emuru –vs- O; Suswa Farm Ltd [2006] eKLR.*

24. On the other hand, the defendant submitted the issues for determination are whether the prayers sought could issue in view of apparent ownership dispute, if a suit against an agent of a disclosed principle was competent and lastly if the suit was an abuse of the court process.

25. On the 1st issue, the defendant submitted without a determination on whether the two plot numbers refer to one and the same plot and who was the rightful owner, the orders could issue, which determination could only occur in the Isiolo suit where the issue was over the ownership to the plot and the ground position issue.

26. It is submitted the issue at hand was a common phenomenon and of general notoriety in Isiolo as noted in *Dennis Gitonga & Another –vs- Manyara Delamere Kiranji [2020] eKLR* and since the facts and evidence were the plaintiff and DW2 with the common denominator being Martin Kingori Ndegwa, this suit was improperly founded and an abuse of the court process and until ownership was properly determined, this suit should be stayed or referred to Isiolo for determination or dismissal in its entirety; otherwise, any determination will extensively prejudice a fair trial in the substantive suit at isiolo.

27. Regarding issue No. 2, it was an established common law principle that where there was a disclosed principal, one could not sue an agent. Reliance was placed on *Victor Mabachi & another –vs- Nurtun Bates Limited [2013] eKLR.*

28. As pertains abuse of court process, reliance was placed on *Muchanga Investments Ltd –vs- Safari Unlimited (Africa) Ltd & 2 Others [2009] eKLR, RC –vs- KKR [2021] eKLR and Republic –vs- Paul Kihara Kariuki & 2 others; Ex Parte Law Society of Kenya [2020].*

D. ISSUES FOR DETERMINATION

29. Having gone through the pleadings, the evidence tendered and written submissions, the issues for determination are:-

i. If the two plots refer to one and the same parcel of land.

ii. If the plaintiff has proved his case on the balance of probability.

iii. Whether the plaintiff was entitled to the orders sought.

30. The plaintiff's claim was that he bought and was registered as the owner of **Plot No. 1019**, took vacant possession and that the plot was invaded by the defendant on 12.8.2016. He sought for a permanent injunction restraining the defendant from interfering with his quiet possession and occupation.

31. The defendant filed a defence and alleged he was a caretaker of DW2 and a plaintiff in **Isiolo Suit No. 271 of 2016** where the plot was described as **Plot No. 750**.

32. The plaintiff has tendered evidence on how he acquired the land and was registered as such. For the plaintiff to be entitled to a permanent injunction, he must prove a legal right which has apparently been infringed by the opposite party as to call for an explanation. See *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others*[2003] eKLR.

33. The plaintiff produced documentary evidence on how the property was acquired out of a sale and registered in his favour. On the other hand, the defendant did not produced any ownership documents in his favour or in favour of DW2. There was nothing adduced to show **Plot No. 1190 and Plot No. 750** refer to one and the same property.

34. The defendant did not establish on what basis he trespassed into and claimed possessory or occupation rights over **Plot No. 1190**.

35. DW2 who alleged the defendant was her caretaker did not produce anything to show that she held any possessory or ownership rights as regards **Plot No. 1190**.

36. Under **Section 3 (1) of Trespass Act**, any person who without reasonable excuse enters, is or remains upon or erects any structures on, or cultivates or tilts private land without the consent of the occupier thereof shall be guilty of an offence. The documents possessed by the plaintiff support his title and the process culminating to the acquisition of it.

37. Where there are two titles of land over the same land, each of the competing parties is obliged to bring forth evidence showing the chain of acquisition without a break. It is not enough to waive a title document and expect the court to give strength to it without showing the root cause of the acquisition.

38. On the strength of the documents produced by the plaintiff, I see nothing from the defendant challenging the validity of those documents and or doubts that the plot belongs to the plaintiff. The defendant did not call any evidence to rebut the authenticity, legality and strength of the plaintiff's title documents particularly that the allegations that the plot did not exist in the register of the issuing authority and or it has been invalidated on account of either double allocation or replacement both on the register and on the ground with **Plot No. 750**.

39. The defendant in his testimony and submissions claimed he was a mere agent and a disclosed principal should have been joined to the suit. The claim herein against a person who trespassed into the plot belonging to the plaintiff. It is against the defendant who was found on the land and who the plaintiff terms as an intruder without justification or lawful cause.

40. If the defendant had been authorized to do so by DW2, it was his duty to seek for indemnity through issuance of a third party notice. The defendant did not claim any right and or interest to the suit property. He has stated he was neither a witness or an authorized agent of DW2. He has neither produced DW2's ownership documents nor explained the manner in which DW2 acquired the property. It was not enough for the defendant to lay his basis on a pending case which has not been heard and determined on merits.

41. Further, if the defendant claimed there was subjudice or resjudicata and or abuse of the court process, nothing stopped him from seeking for the transfer and or consolidation of the two suits. In any event and as indicated above, the defendant has produced nothing to show the two parcels of land in the two suits refer to one and same parcel of land.

42. In *Zacharia Onsongo Momanyi –vs- Evans Omurwa Onchagwa* [2014] eKLR, trespass was defined as an unjustified intrusion by one person upon the land in possession of another.

43. To establish the tort of trespass, the plaintiff has produced title documents and the fact that the defendant was unjustified in occupying the land.

44. The oral and documentary evidence by the plaintiff has not been challenged that the entry of the defendant was wrongful. He took possession which without consent, he has displaced him, has committed acts of wastage and fixed an alleged semi-structures on the land. The defendant has tried to allege fraud. Fraud must be specifically pleaded and proved as held in *Arthi Highway Developers –vs- West End Butcheries & 6 Others* [2015] eKLR & *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another* [2000] eKLR.

45. There was no evidence produced by the defendant that **Plot No. 1190** did not exist in law and or was irregularly registered by the County Government of Isiolo in favour of the plaintiff, or that investigations have been concluded and a report made that the plot did not exist on the ground and what exists on both the register and on the ground was **Plot No. 750**.

46. In *Willy Kipsongok Morogo –vs- Albert K. Morogo* [2017] eKLR, the court held, where evidence on record indicated the land was

registered in the names of the plaintiff, the owner was entitled to protection under **Sections 24, 25 and 26 of the Land Registration Act.**

47. The plaintiff in this case has title documents whose strength has not been impeached by way of fraud, mistake or illegality under **Section 26** hereof.

48. The plaintiff seeks the protection of this court for acts of trespass by a person whose rights and or interests have not been asserted let alone disclosed. In his evidence, the defendant said he had no interest on the land since he was not the principal but an agent. That by itself is unbelievable given there was no agency documents produced and secondly the principal came before this court with no better title except that the suit property was subject to a pending suit.

49. The defendant's witness withheld vital documents before this court so as to justify the acts of trespass perpetrated by the defendant over **Plot No. 1190.**

50. In **Simeon Kiprono Mutai –vs- Hillary Rotich & another [2018] eKLR**, the court stated that where a party has proved that the other was on the land illegally and without his consent or authority, judgment should be entered.

51. The testimony of the defence and his witnesses are mere denials.

52. In the premises, I find the plaintiff entitled to a prayer for permanent injunction together with costs. See **Gathenya Ngumi –vs- Eric Kotut & 4 Others [2022] eKLR**.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 9TH DAY OF MARCH, 2022

In presence of:

Kariuki for defendant – present

C.P. Mbaabu for plaintiff – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE