



**Mwangi & another (t/a Dianasons & Dianasons) v Commissioner of Lands & 2 others
(Environment & Land Case 100 of 2011) [2022] KEELC 2848 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 100 OF 2011**

LN MBUGUA, J

JULY 7, 2022

BETWEEN

ELIAS MBURU MWANGI 1ST PLAINTIFF

ELIZABETH WANGARI 2ND PLAINTIFF

T/A DIANASONS & DIANASONS

AND

ATTORNEY GENERAL 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

SAMMY KARIUKI MUTURI 3RD DEFENDANT

JUDGMENT

1. This matter was scheduled for delivery of the judgment on 23rd of June 2022 when counsels for the plaintiffs and 3rd defendant informed the court that the pleading to be relied on for the plaintiff was the further amended plaint dated 21st July 2017. In the said pleading, the plaintiffs claim that they are the owners of the parcel of land L.R. 13868/18 (the suit property situated in Karen). That while on a regular visit to the said land, they discovered that the 3rd defendant had taken possession and constructed a permanent house where he resides. The plaintiffs therefore claim for the following orders;
 - i. A declaration that the Plaintiffs are the lawful proprietors of the suit parcel and that any allocation to a 3rd party and/or to the 3rd Defendant or any other party is unlawful and void for all purposes.
 - ii. A permanent injunction and an order of prohibition restraining the defendants from dealing with the parcel described as LR No. 13868/18 situated in Karen within Nairobi County.



- iii. Costs.
- iv. Interest.
2. The 3rd Defendant (Samuel Kariuki Muturi) in his further amended statement of defence filed on 11th October 2019 opposed the Plaintiffs' claim stating that the suit property LR No. 13868/18 is lawfully registered in his name. He therefore prays for aggravated damages and that the suit be dismissed with costs.
3. As per that amended plaint dated July 25, 2017 the fate of the Commissioner of Lands was not explained seeing that the office is defunct. The Attorney General had filed a statement of defence dated June 17, 2011 but they did not participate in the trial.

Plaintiffs case

4. During the hearing on November 4, 2021, Elias Mburu Mwangi testified as PW1. He adopted his witness statement dated 14th May 2019 as his evidence in chief and he produced five documents in his trial bundle dated November 14, 2019 as exhibits 1-5 namely; title certificate, official search, a letter from the Attorney General's office, land rent invoice and 2 deed plans. PW1 stated that when he purchased the suit property, he did not take possession immediately because he was out of the country and learnt that the 3rd defendant had occupied the land in year 2010. He avers that by the time the 3rd Defendant was issued with the title documents, he (PW1) was already the registered owner of the suit property.
5. On cross examination PW1 confirmed that the title he had produced in court was for the property LR No. 13868/7, and that the deed plan was dated 2002. He was not aware that before a title was issued, the director of survey had to issue a deed plan. He contends that he was allocated the said land by the Commissioner of Lands, one Sammy Mwaita, and that the application for allotment was with the said Commissioner.
6. PW1 also confirmed that the land rent invoice on his bundle of documents referred to a parcel of land in an 'unknown' location and 'unknown' district although it was from the Ministry of Lands, but he was not aware why such particulars were indicated in the aforementioned document.
7. PW1 also confirmed that the first subdivision plan in his exhibits had the words "Superseded by No. 476/129" and the other subdivision plan had the words "Folio No. 476 Register No. 129" written on it. The witness could not point out his land on the subdivision plans which he presented before court and he finally stated that the land is not there.
8. He stated that when he got the property in 1999, he neither fenced nor occupied it because he went out of the country to Canada until 2010. When he came back, he found the 3rd defendant putting up a building on the suit property and that is what led to the institution of this suit.
9. On re-examination, PW1 affirmed that he had never received any information from the Ministry of Lands regarding the validity of the property. He stated that his title was issued in 2003 and the one to the 3rd defendant must have been issued after his.

Case of 3rd Defendant

10. The 3rd defendant Sammy Muturi testified as DW1. He adopted his witness statement dated 28th August 2017 as his evidence in chief and produced 16 documents in the same bundle as D- exhibits 1-16. He contends that he learnt of this suit vide a newspaper cutting placed on his gate on or about



- 10th May 2017. However the party's name in the suit was different from his, but the suit parcel made reference to LR No. 13868/18 situated in Karen which was the land he owns and occupies.
11. On Cross examination, DW1 indicated that he could see that the title deed marked as Plaintiff Exhibit 1 was issued on 1st July 1999 but the stamp date was 10th February 2003. However, the names on the title were those of the Plaintiffs. He stated that his title deed which he had produced as evidence was issued on 1st July 1993 which was for the initial grant of 5 acres. Upon subdivision, the suit property was transferred to him and the instrument of transfer registered on 16th February 2009 which was 6 years from year 2003. DW1 also produced a letter dated 2nd June 2008 which indicated that the surveyor had been duped and that the title given to him (surveyor) was neither original nor authentic.
 12. DW1 stated that he purchased the suit property from Sukhwinder Singh Dhillon and Avitar Singh which was available for sale, and that it is the owners of the property who engaged a surveyor at that time.
 13. Wilson Ndirangu Kamau was called by the 3rd defendant as DW2. He is a licensed surveyor practicing with Geodata Licensed Land Surveyors. He adopted his statement dated 24 April 2018 as his evidence in chief. He contends that he was engaged in the surveying and subdivision of all that parcel of land known as LR 13868 in Karen and the documents of ownership presented to him were for parcel LR No. 13868 grant no.61321 issued on 1.7.1993, as well as a transfer dated 26.1.1994 from Willy Kamuren to Avtar Singh Kenth and Sukwinder Singh Dhillon. He proceeded with the survey work and submitted documents for approval to the Director of Surveys.
 14. That is when he learnt that the land had been surveyed earlier on and the surveyor who conducted this survey admitted through a letter dated 2nd June 2008 to the Director of Surveys that he had surveyed the land only using an approved subdivision plan and a letter from the Commissioner of Lands without the original copy of the title. Based on this letter the Director of Survey cancelled that survey and marked it superseded by Fr No. 475/129.
 15. On cross examination, Dw2 stated that he received instructions to survey the land from the owners of the land; Avtar Singh and Singh Dhillon sometime on 11th March 2008 but discovered from the director of Survey that another survey had been undertaken earlier on. He had also come across the letter of 2.6.2008.

Analysis and determination

16. I have considered the pleadings the evidence adduced by the two protagonists, that is PW1 and DW1, as well as the submissions of the latter. It is noted that the plaintiffs did not avail any submissions. The issues falling for determination are:
 - i. Are the Plaintiffs the bonafide owners of the suit property LR. No. 13868/18?.
 - ii. What is the Relief available?.
17. In the matter at hand, the two protagonists are laying claim to land parcel LR. No. 13868/18 situated in Karen in which the plaintiffs claims to have been allotted the same by the Commissioner of Lands but neither settled on it nor developed it because he (pw1) was out of the country. On the other hand, the 3rd defendant is claiming the land on the basis of having purchased it from Avitar Singh and Singh Dhillon and that he is the registered owner of the suit land.
18. I do find that the onus was on the plaintiffs to proof that they owned the land mentioned in their pleadings. The most glaring missing link relates to the identity of the suit property. Throughout the various amendments of their pleadings, the plaintiffs were consistent in identifying the suit land



as L.R. No.13868/18 situated in Karen. However, the document availed by pw1 as proof of their ownership refers to L.R No. 13868/7. Although this issue was raised during cross examination, pw1 was not able to give any clarification in cross examination and re-examination stage as to why their title document was different from the one they are claiming in their pleadings. That inconsistency renders the plaintiff's suit dead on arrival.

19. There are other tell tale signs that the claim of the plaintiffs cannot be sustained. The first point of call still relates to the title produced by pw1 to assert their claim of ownership. A scrutiny of the same indicates that a second entry of transfer of the property was made to one to Paul Kipyegon Rutto on April 11, 2004. If the property was transferred to another person in 2004, how then could the Plaintiffs be claiming that the property still belongs to them!? There is no evidence that the same was re-transferred back to the plaintiffs.
20. Secondly, the same title document availed by the plaintiffs as exhibit- 1 indicates that the land LR. 13868/7 is measuring 0.255 ha. The title registered in the name of the 4th defendant, LR No. 13868/18 is measuring 0.200 ha. The plaintiff was mute on these different acreages which is a pointer to the fact that plaintiffs don't really know the land they are claiming.
21. Thirdly, I find that pw1 did avail two deed plans to support his claim of ownership of the land. He admitted during cross examination that the first one (the one of year 2002) is written "superceded by F/R. No. 476/129. He further conceded that the other deed plan (the one of year 2008), bears the Folio and Register numbers as 476 and 129. The cancellation of the first deed plan is consistent with the evidence of DW2 that the first survey had been cancelled. However, what is rather curious is that pw1 was unable to point out his land in any of the two aforementioned documents and he eventually stated that the land is not there!
22. Fourthly, PW1 was cross examined on the land rent invoice on page 10 of his documents and he confirms that the location of the land is marked as "unkown". He doesn't know why the document was so marked. A scrutiny of the document again shows that reference is made to parcel LR.No.13868/7 and not 13868/18.
23. Fifthly and finally, the identity of the claimants appear to be vague. The title LR. 13868/7 availed by pw1 is in the name of three persons namely; ELias Mburu Mwagi, Elizabeth Wangari & Diannah Njoki Mwangi, but only the first two are captured in the pleadings. Likewise in his recorded statement, pw1 does not mention Diannah. He doesn't explain how all the three persons came to be registered jointly in the parcel 13868/7. Pw1 has stated that he did not take up possession of the land when he acquired it because he went to Canada and only came back in year 2010. He is mute on the whereabouts of Elizabeth who is supposed to be a co-claimant of parcel 13868/18.
24. It is trite law that he who alleges must prove. The provisions of Section 107 (1) of the Evidence Act stipulates that:

"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."
25. Sections 109 and 112 of the same Act as adds:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.



112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
26. The above provisions of law were espoused in the celebrated Court of Appeal case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where the court held:
- “... The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side...”
27. It is the finding of this court that the plaintiff has presented a sham claim and the net effect is a dismissal.
28. I must however add that the 3rd Defendant has given a plausible chronology of how he came to own the suit land. The original large parcel L.R. 13868 measuring 2.31 acres was issued to Willy Kamuren on 1.7.1993 (see D-EXH1) who then sold the land to Avter Singh and Sukhwinder Dhillon on 26.1.1999 (seeDEXH 2). The latter then sold the land to 3rd defendant on 31.12.2008 (ses Dexh 3). By then the vendors had caused the large parcel to be subdivided to yield 10 parcels as captured on the transfer document which is to be found on page 45 of 3rd defendants bundle of documents. The resultant parcels were 13868/10-13868/19. This evidence is consistent with the testimony of Dw2.
29. I am in agreement with the submissions of the 3rd defendant that no evidence has been placed by the plaintiffs to impeach his title No. L.R.13868/18 through fraud or misrepresentation. It follows that the cases cited by the 3rd defendant; *Alice Chamutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR, *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* [2013] eKLR, *Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & Another* [2018] eKLR and *Chemai Investments Ltd vs The Attorney General & 2 Others* petition No. 94 of 2005 are applicable in this case.
30. I however reject the 3rd defendant’s claim of aggravated damages as the same, though set out in the further amended statement of his defence was not proved in evidence.
31. The upshot of this judgment is that the plaintiff’s suit is hereby dismissed with costs to the 3rd defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ndungu for the 3rd Defendant (Sammy Kariuki)

Court Assistant: Eddel

