



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 35 OF 2019(OS)

JOSEPH NJUGUNA KABUGUA.....PLAINTIFF

VS

PETER NJUGUNA GIICO.....1ST DEFENDANT

JOHN THUO GIICO2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed an Originating Summons dated 11/12/2013 against the Defendants for orders that; -

- i. A declaration that PETER NJUGUNA GIICO and JOHN THUO GIICO are illegally occupying the land parcel L.R NO. LOC.1/THUITA/1078, THIKA.
- ii. The Defendants be evicted from the said parcel of land being L.R NO.LOC.1/THUITA/1078, THIKA.
- iii. The Defendants do pay mesne profits equivalent to rent chargeable for continued occupation of the property from 2011 until the final determination of the Summons.
- iv. The Defendants do bear the costs of this application.

2. The Originating Summons are supported by the Plaintiff's Affidavit sworn on even date. The Plaintiff averred that he is registered owner of L.R No. LOC.1/THUITA/1078, THIKA (*hereinafter referred to as the suit land*) having bought it from the late Pauline Wanjiru Ndichu, now deceased. That despite demand having been issued to the Defendants to vacate the suit land, the Defendants are persistent in the illegal occupation of the suit land. Inter alia that he has been denied the right to develop the suit land.

3. The Defendants/Respondents opposed the suit vide their Replying Affidavit sworn on 10/02/2014 and deposed by both Defendants. They contend that they have lived on the suit land for over 12 years with the permission of Agnes Njeri Kabatha. That the suit land was excised from Land parcel No LOC1/THUITA/576 (original parcel) belonging to Pauline Wanjiru Ndichu, the mother of Agnes Njeri Kabatha.

4. That in 1992 when the said Agnes learnt that her mother was subdividing the land for sale, she filed Suit No CMCC No 1284 of 1995 where the Court issued orders on the 24/6/98 inter alia cancelling the subdivisions and disposition of parcel No.s 1077 and 1078 and maintaining the status quo as at the 20/11/1995.

5. Further that the Court in CMCC No 381 of 1996 ordered Pauline Wanjiru to transfer parcel No LOC 1/THUITA/576 to Agnes Kabatha.

6. That the title of the Plaintiff was issued at a time when there subsisted an order barring alienation of the suit land.

7. In a further affidavit in reply, the Plaintiff averred that he purchased the suit land from the rightful owner free from any encumbrances. That the Land Control Board consent was obtained and all the processes were followed in the acquisition of the suit land.

8. Further that the orders of the Court issued on the 24/6/98 expired and pursuant to the Limitations of Actions Act and have no effect to his title.

9. The Plaintiff relied on his Supporting Affidavit and further Affidavit dated 18/07/2014 and testified that he bought the suit land in 1997 from Pauline Wanjiru who died in 2010. He added that he has never entered the suit land on account of the Defendants' occupation hence the prayer for eviction.

10. He further relied on the official search of the suit land dated the 6/11/13, the title issued on the 28/10/97 and a certified copy of the green card opened on the 22/9/97.
11. He stated that the Defendants are brothers and are his relatives. That Pauline Wanjiru was the step mother of Agnes Kabatha.
12. On Cross-examination, PW1 denied knowledge of Court cases between the late Pauline Wanjiru and Agnes Kabatha before purchasing the suit land. That he later became aware of the suits after purchasing the suit land. That the Defendants are not the registered owners of the suit land.
13. He explained that Pauline had two parcels of land LOC.1/THUITA/180 and LOC.1/THUITA/576. The later was subdivided into parcels Nos 1077 and 1078. That he was not aware of any clan meetings and deliberations in respect of the suit land. He stated that though the orders of the Court ordered for the cancellation of the above subdivisions, the same was not effected hence the green card reads that he is still the registered owner.
14. DW1- John Thuo Giiko opposed the Plaintiffs claim and deponed that he and the 2nd Defendant have been in occupation of parcel 576 for over twelve years with the consent of Agnes Kabatha. That in 1992, Agnes learnt that Pauline was in the process of subdividing the suit land and sought the Court's intervention to stop the same. That in 1996, Agnes filed Thika CMCC No. 381 of 1996 for injunction against Pauline and transfer of the suit land to Agnes. The Court decrees were annexed as PNG & JTG II.
15. He added that he was aware of the Court cases at Thika that were consolidated and ruled in favour of Agnes. He produced the Court Order dated 24/06/1998 as Dexh. 1. DW1 reiterated that there was a clan meeting called for purposes of dividing the land parcels between Pauline and Agnes which the Plaintiff attended and therefore the Plaintiff was well aware of the family dispute over the land.
16. He informed the Court that after the clan meetings, Pauline was allocated parcel No. 180 while Agnes got parcel No. 576. That this parcel had been illegally subdivided into parcel Nos. 1077 and 1078. DW1 said the Plaintiff's brother occupied parcel No. 180. That both parcels Nos. 180 and 576 were registered in the name Pauline Wanjiru.
17. He testified that the Plaintiff was present in the clan meeting though he did not address the elders. He concluded that following Pauline's passing on, then Agnes was the rightful person to petition for administration of Pauline's estate as Pauline did not have her own children.
18. DW2, Peter Njuguna Giiko echoed DW1's testimony adding that there was no relationship between him and the late Pauline and Agnes though he lived on the suit land with the latter's permission. Notably on cross-examination, DW1 elucidated that the Plaintiff was present in the clan meeting and denied knowledge of the Plaintiff's purchase of the suit land.
19. The Plaintiff filed his written submissions dated 26/03/2021 and submitted that he is a *bona fide* purchaser for value of the suit having legally purchased it from Pauline Wanjiru in September 1997. That the suit land was free from encumbrance but the Defendants are utilizing the suit land to his detriment and he has never occupied it.
20. The Plaintiff is emphatic that the family dispute raised by the Defendants arose almost five years before his purchase and it was resolved. Be that as it may, he argues, there was no entry in the green card to restrict any further dealing by way of caveat, caution or inhibition.
21. In addressing the Court Order issued on 24/06/1998, the Plaintiff maintains that it was not executed within 12 years of its delivery and by virtue of Section 4(4) of the Limitation of Actions Act, the order is time barred. Reliance was placed on the Court of Appeal case of **M'ikiara M'rinkanya & Anor. -Vs- Gilbert Kabeere M'mbijiwe [2007] eKLR.**
22. Lastly, the Plaintiff also submitted that the transfer of the suit land was valid and that there was no proof of any fraud or illegality in acquiring the suit land title to warrant its impeachment. He is adamant that he notified the Defendants on several occasions to grant him vacant possession to no avail; claims which the Defendants have not refuted. That he has proved his case on a balance of probabilities and urged this Honorable Court to allow his claim with costs.
23. The Defendants rehashed the genesis of this case as stated above. They do not dispute the fact the Plaintiff is registered owner of the suit land but contend that the Plaintiff's title is tainted with illegality as it contravened a valid Court order. This is because according to them, the late Pauline purported to sell the suit land to defeat Agnes' legitimate interest and true ownership according to the Thika Court Order and clan elders' resolution. They cited Section 26 (1) of the Land Registration Act and Section 1A (3) of the Civil Procedure Act and the Court decision on compliance with Court orders in **Republic v Principal Secretary, Ministry of Defence Ex-parte Geroge Kariuki Waithaka [2018] eKLR.**
24. In view of the foregoing, the Defendants stated that the Plaintiff is not the legal owner of the suit land hence lacks authority to evict the Defendants. They prayed that the suit be dismissed with costs.
25. From the pleadings and submissions on record, the germane issues for determination are; Whether the Plaintiff's title is valid; What is the position of the Court Orders issued on 24/06/1998 and 27/9/2010; Whether the Plaintiff has proved his claim for eviction orders costs of the suit.
26. It is not in dispute that the Plaintiff was duly registered as the rightful owner on 28/10/1997. The Plaintiff produced exhibits to that effect namely copies of official search dated 06/11/2013, Title Deed and green card. He contends that he conducted due diligence on his part thus his submission as a bona fide purchaser for value.
27. What is in contention is the family feud between the late Pauline Wanjiru and Agnes Kabatha which the Defendants insist the Plaintiff

was aware of the tainted title held by Pauline and her purported ownership and transfer of the suit land. The Defendants have heavily relied on the Court order issued on 24/06/1998 nullifying the subdivision of land parcel no. LOC.1/THUITA/576 that resulted in the suit land. To this end, I agree with the Plaintiff's submissions that at the time of purchasing the suit land, there was no apparent encumbrance on the green card to prohibit any dealings on the land.

28. The burden of proof to prove validity of the title lies with the Plaintiff. Section 107 of the Evidence Act requires the Plaintiff to prove his case on a balance of probabilities. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. The Plaintiff produced exhibits that showed he is the registered owner of the suit land. The Plaintiff went ahead and submitted that his efforts to notify the Defendants to grant him vacant possession were futile and hence the instant suit.

29. On the other hand, the Defendants argue that the late Pauline did not have title to the suit land as the same belonged to Agnes. The effect of their defence, shifted the burden of proof for them to prove their assertions. They produced Court orders dated 24/06/1998 and 26/10/2010. However, the Defendants did not call Agnes who would have testified directly on the issue of her alleged ownership of the suit land as against the late Pauline. Moreover, no explanation was given as to why the said Court orders were never implemented.

30. Validity of title is a question of fact and law. Section 26 of the Land Registration Act, 2012 that; -

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

31. It therefore follows that for the Defendants to impeach the Plaintiff's title, they must demonstrate that the title was acquired by fraud or misrepresentation to which the Plaintiff is proved to be a party or the title was acquired illegally, unprocedurally or through a corrupt scheme. The Defendants have not proven either of the two grounds to indict the Plaintiff's title. The Defendants have not shown any title registered in their names with respect to the title.

32. The Defendants concede that the Plaintiff is the registered owner of the suit land. The bone of contention is that the Plaintiff acquired the title illegally. The Defendants submitted that at the Plaintiff was present in the clan meetings held to resolve the family dispute. However, a cursory look at the minutes of the said meeting, the Plaintiff's name does not appear anywhere. Consequently, my considered opinion is that the Plaintiff did not participate in that clan meeting.

33. The Defendants argued that their occupation was with Agnes' consent despite acknowledging that there is no relationship between them and Agnes. The Defendants heavily rely on the Court orders issued on 24/06/1998 and 26/10/2010. The Plaintiff has objected to the validity of the said Orders that they are stale.

34. **Section 4(4) of the Limitation of Actions Act** that states; -

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

35. The gist of the foregoing provision is that after expiry of twelve years, a party cannot waive a judgment and claim its shield when it has become statute barred. In the Court of Appeal case of **Willis Onditi Odhiambo v Gateway Insurance Co Ltd [2014] eKLR** the Learned Judges dismissed an Appeal that challenged the trial Court decision to strike out a suit seeking to enforce a judgment that was statute barred. This Court held a similar view in the case of **James Maina Kinya v Gerald Kwendaka [2018] eKLR** and cited with approval the case of **M'ikiara M'rinkanya** above.

36. The Defendants did not explain why the said Orders were not implemented nor call Agnes to testify on her ownership of the suit land. In light of the above provision, it is not in doubt therefore that the Court order issued on 24/06/1998 expired in 2010 by operation of law and the Defendants cannot rely on it.

37. The Court has been invited to commend on the orders issued on the 27/9/2010 in CMCC No 381 of 1996 between Agnes Njeri Vs Pauline Wanjiru where the Court ordered that Pauline transfers 1.3 acres from land parcel LOC1/THUITA/576 to Agnes. It is not clear whether these orders were effected. In any event the parties in this case are different and not parties in CMCC No 381 of 1996.

38. It is not clear to the Court whether by the time that these orders were issued the suit land existed in view of the lapse of the previous orders that remained unexecuted. The Defendants ought to have shed more light on this. Neither was a copy of the green card for this parcel presented to the Court to enable the Court determine its true position.

39. The Defendants contended that they have been in occupation of the suit land over 12 years. To my mind, the Defendants imply that they are entitled to the suit land by virtue of adverse possession. I am not convinced that a claim of adverse possession is a plausible defence in

the circumstances of this case because they did not file a counterclaim. In this case there is no pleading nor evidence with respect to a case of prescriptive rights and the Court is unable to entertain a claim that is not pleaded.

40. In the case of **Peter Njau Kairu Vs Stephen Ndung'u Njenga & Another [1998] eKLR** the Court held that that in a claim for adverse possession, there must be stringent and straightforward evidence because a property owner should be deprived of his title in the clearest of cases.

41. With respect to the claim for mesne profits, it is the finding of the Court that the Plaintiff did not prosecute this claim by presenting evidence to support the claim.

42. Finally, the Court finds that the Plaintiff is the rightful owner of the suit land and the Defendants have neither impugned the title nor justified their continued stay on the land.

43. In the end the Plaintiffs suit succeeds and I make orders as follows;

- a. It is hereby declared that PETER NJUGUNA GIIKO and JOHN THUO GIIKO are illegally occupying the land parcel L.R NO. LOC.1/THUITA/1078, THIKA.
- b. The Defendants be and are hereby ordered to vacate from the suit land within 90 days from the date of this judgment, in default they shall be evicted in accordance with the provisions of the law.
- c. The claim of mesne profits is declined.
- d. The costs of the suit shall be borne by the Defendants in favour of the Plaintiff.

44. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF MAY 2021

J G KEMEI

JUDGE

Delivered in the presence of;

Mbuthia HB for Muyula for the Plaintiff

1st & 2nd Defendant: Defendant

Court Assistants: Kuyiki/Alex