



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC. CASE NO. 684 OF 2014

CHARLES MURIITHI WANJAU.....1ST PLAINTIFF

MICHAEL NDEGWA MAINA.....2ND PLAINTIFF

JOHN NDUNGU NGETHE3 RD PLAINTIF

VERSUS

ELIZABETH GACHERI NJUGUNA..... 1 ST DEFENDANT

MUIRURI NJUGUNA.....2 ND DEFENDANT

MUNIU NJUGUNA3 RD DEFENDANT

JOMO NJUGUNA4 TH DEFENDANT

KINUTHIA NJUGUNA..... 5 TH DEFENDANT

JUDGMENT

Background

1. The plaintiffs are the registered proprietors of Land Title Number Dagoretti/Mutuini/709 (**the suit property**) measuring approximately 0.41 hectares. They purchased the land from Monica Waithira Hosea alias Waithira Kimani in 2011 at a consideration of Kshs 3,000,000. Their case is that the suit property was part of Parcel Number **Dagoretti/Mutuini/410** which was partitioned into three parcels, Dagoretti/Mutuini /709, 713 and 714 pursuant to a Court Order issued in **Nairobi RMCC No 5 of 1984**.

2. They initiated this suit through a plaint dated 29/5/2014, contending that the defendants had trespassed onto the suit property and had refused to move out of the land. They sought the following verbatim orders:

a. Declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as LR No. DAGORETTI/MUTUINI/709.

b. A declaration that the defendants are wrongfully in occupation of the suit property and are, accordingly, trespassers on the same.

c. A declaration that the defendants whether by themselves or their servants or agents and/ or otherwise howsoever are not entitled to remain on the suit property.

d. An injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.

e. Vacant possession of the suit property.

f. General damages for trespass.

g. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem

fit to grant.

h. Any such other or further relief as this honourable court may deem appropriate.

3. Through a joint statement of defence dated 30/11/2017, the defendants who are mother and sons denied the plaintiffs' claim of ownership of the suit property and the allegation of trespass. They contended that they were the legitimate proprietors of Land Parcel Number **Dagoretti/Mutuini/410** which they occupy, adding that the said parcel belonged to their late husband and father respectively, Benjamin Njuguna Kirika, who passed away in 1992. The defendants further contended that there had been previous court proceedings relating to the suit property, namely **Nairobi High Court ELC No. 573 of 2010 and Nairobi (Sheria House) RMCC No. 5 of 1984**. They urged the court to dismiss the plaintiffs' suit.

4. The parties did not have an agreed set of issues. The plaintiffs framed the following six issues: (i) Whether there is trespass (ii) Who is the trespasser? (iii) Who is the rightful owner of LR No. Dagoretti/Mutungu/709; (iv) Whether the defendants have any right whatsoever to use the land in question; (v) Whether the plaintiffs have a good cause of action to raise in this suit and pray for general and special damages; (vi) Who should pay for the costs of this suit.

Evidence

5. At the hearing, the plaintiffs led evidence by one witness, Michael Ndegwa Maina – PW1 (**the 2nd plaintiff**). He adopted his witness statement dated 29/5/2014 and filed in court on the same day. He testified that **Dagoretti/Mutuini/709 (the suit property)** was part of a larger parcel of land known as **Dagoretti/Mutuini/410**. By an order of the Resident Magistrate Court at Nairobi issued in Nairobi RMCC No 5 of 1984, dated 19/11/1984, Parcel Number 410 was partitioned into three portions, namely, Dagoretti/Mutuini/709, 713 and 714 and the said three subdivisions were apportioned and registered in the names of Waithira Kimani, Njuguna Kirika and Gitau Karanja respectively. Waithira Kimani was also known as Monica Waithira Hosea (the deceased) and was daughter to Milka Wambuku. On 2/8/2011, the deceased sold and transferred to them the suit property at a consideration Kshs 3,000,000 and they were issued with a Title Deed on 7/8/2012. The defendants have encroached onto the suit property and have refused to move out of it, prompting them to initiate the present suit.

6. PW1 produced the following exhibits: (i) copy of Land Certificate for Parcel Number Dagoretti/Mutuini/410 issued to Njuguna Kirika in 1974; (ii) Court Order issued in Nairobi RMCC No 5 of 1984; (iii) Mutation Form and Sketch relating to the subdivision of Parcel Number 410; (iv) Title Deed in respect of Parcel Number 709 in the name of Monica Waithira Hosea issued on 5/4/1991; (v) Sale Agreement between Monica Waithira Hosea and the plaintiffs dated 2/8/2011; (vi) Letter of Consent sanctioning transfer to the plaintiffs dated 9/11/2011; and (vii) Title Deed for Parcel Number 709 in the names of the plaintiffs issued on 7/8/2012.

7. In re-examination, he stated that the plaintiff in Nairobi RMCC No 5 of 1984 was Milka Wambuku (mother to Waithira Kimani aka Monica Waithira Hosea) while the defendant was Njuguna Kirika, the deceased husband to the 1st defendant and father to the rest of the defendants. He added that Njuguna Kirika was brother to Milka Wambuku and uncle to Waithira Kimani aka Monica Waithira Hosea).

8. The defendants led evidence by one witness, Elizabeth Gacheri Njuguna (the 1st defendant). She adopted her witness statement dated 30/11/2017. Her evidence was as hereunder. She was wife to the late Njuguna Kirika. Her late husband had a sister by the name Milka Wambuku. Monica Waithira Hosea was a daughter to Milka Wambuku and therefore a niece to her late husband. Monica Waithira Hosea was also known as Waithira Kimani. She was aware that Milka Wambuku sued her husband in Nairobi RMCC No 5 of 1984 and indeed judgment was entered in Wambuku's favour on 19/11/1984. The court ordered partitioning of Parcel Number 410. The current suit was about execution of the judgment in Nairobi RMCC No 5 of 1984 and therefore the proceedings herein ought to have been initiated in Nairobi RMCC No 5 of 1984. Monica Waithira never took possession of the suit property and never initiated legal proceedings to recover the suit property.

9. In her oral evidence which largely contradicted her written statement, she stated that she owns Parcel Number **Dagoretti/Mutuini/410** and she was not aware of any subdivision. Part of the land was snatched from her. She was not aware of the case filed in court in 1984. She was charged and acquitted by a Kibera Court on allegation of destruction of Monica's fence. She did not know anything about Parcel Number 709.

Submissions

10. The plaintiffs filed their written submissions on 26/4/2019. They submitted that they had legally purchased the suit property from the late Monica Waithira Hosea and they had a title to the property. They contended that they were protected under Sections 25(1) and 206 of the Land Registration Act. They urged the Court to grant them the orders sought in the plaint.

11. The defendants filed their written submissions on 22/5/2019. They submitted that the issues raised this suit were the same as the issues raised in Nairobi RMCC No 5 of 1984 and the same had been determined. They claimed that the order for subdivision had not been executed and the plaintiffs could not purport to execute it now. They further submitted that the plaintiffs claim was contrary to the provisions of Section 4(4) of the Limitation of Actions Act. Reliance was placed on the decision in **KGGCU Limited v Augustine Cheruiyot (2006) eKLR** where Musinga J held that judgment cannot be executed after expiry of 12 years. The defendants further relied on the decision in **Fredrick Kiura Njaga Waweru & 2 others v Justino Njue M'Mbuchi & 24 others (2013) eKLR** where Olao J echoed similar sentiments. The defendants submitted that the order in Nairobi RMCC No 5 of 1984 was directed at the late Njuguna Kirika hence, the suit against the defendants was a nullity because the plaintiffs did not sue the personal representatives of the late Kirika Njuguna. They further submitted that they were not served with summons to enter appearance according to Order 5 Rule 1 (3) and (6) of the Civil Procedure Rules. Reliance was placed on the decision in **Halima Kasi Tonui & 33 others v Board of Trustees Teleposta Pension Scheme Lloyd Masika Limited, Mombasa HCCC No 111 of 2012** where Kasango J struck out the plaintiffs' suit because summons to enter appearance had not been served on the defendants.

Analysis & Determination

12. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. The plaintiffs' claim is that they are the legitimate proprietors of the suit property and the defendants have trespassed onto it. They contend that the suit property was formally part of Parcel Number **Dagoretti/Mutuini/410** which, pursuant to the court order issued in Nairobi RMCC No. 5 of 1984, was subdivided into Parcel Numbers **Dagoretti/Mutuini/709, 713 and 714**. It is their case that the estate of the late Njuguna Kirika is only entitled to Parcel Number 713 but the defendants who are wife and children of the late Njuguna Kirika have encroached onto the suit property (Parcel Number 709). The defendants' defence is that they have no knowledge of the plaintiffs' ownership of Parcel No. 709. They have been living on Land Parcel Number 410 since 1974 and no one ever claimed ownership of the land either during the late Benjamin Njuguna Kirika's lifetime or at all. According to their defence and to DW1's oral evidence, they deny subdivision of Parcel Number 410, transfer of Parcel Number 709 to (Monica Waithira Hosea) and acquisition of the said parcel by the plaintiffs through purchase. They deny the alleged trespass. They contended that previously there were Nairobi ELC. 573 of 2010 and Nairobi RM CC 5 of 1980 in relation to the same suit property.

13. Taking into account the above pleadings, the following five issues fall for determination in this suit (i) Whether the parcel register for Parcel Number Dagoretti/Mutuini/410 is still open; (ii) Whether Land Parcel Number Dagoretti/Mutuini/709 exists and is owned by the plaintiffs; (iii) Whether the defendants are trespassers on Land Parcel Number Dagoretti Mutuini/709 (iv) Whether the plaintiffs claim is statute-barred; and (v) Whether the plaintiffs are entitled to the reliefs sought.

14. The first issue is whether the parcel register for Parcel Number Dagoretti/Mutuini/410 is still open. Framing of this issue is informed by the defendant's contention that they live on Parcel Number Dagoretti/Mutuini/410 which belonged to the late Benjamin Njuguna Kirika. The position of the plaintiffs is that Parcel Number 410 was subdivided into Parcel Numbers 709,713 and 714. Among the documents presented by DW1 as defence evidence is a court order issued on 19/11/1984 by the Resident Magistrate Court at Nairobi (Sheria House) in **Nairobi RMCC 5 of 1984; Milka Wambuku v Njuguna Kirika**. The import of the said order is that the court directed the partitioning of Parcel Number Dagoretti/Mutuini/410 into three portions to be registered in the names of Njuguna Kirika, Waithira Kimani and Gitau Karanja. PW1 produced a Mutation Form showing that the court order was fully implemented and the partitioning was effected. The Mutation was registered on 3/4/1986 and shows that Dagoretti/Mutuini/410 was subdivided into Dagoretti/Mutuini/709, 713 and 714 respectively. PW1 produced the Title Deed in relation to Dagoretti/Mutuini/709. The Title Deed shows that the parcel register was opened on 3/4/1986. The defendants did not produce any title, register or official search to controvert the plaintiffs' evidence and to demonstrate that the parcel register for Parcel Number 410 remains open and the subject land still exists as Parcel Number 410. It is therefore my finding that the parcel register for Parcel Number Dagoretti/Mutuini/410 was closed pursuant to the court order issued in Nairobi SRMCC No 5 of 1984 and Land Parcel Number Dagoretti/Mutuini/410 was lawfully subdivided into three portions, Dagoretti/Mutuini/709, 713 and 714 respectively.

15. The second issue is whether Land Parcel Number Dagoretti/Mutuini/709 exists and is owned by the plaintiffs. I have analysed evidence showing that pursuant to the court order issued in Nairobi RMCC No 5 of 1984, Parcel Number Dagoretti/Mutuini/410 was subdivided into three parcels, Dagoretti/Mutuini/709, 713 and 714. The plaintiffs produced a title deed for Parcel Number Dagoretti/Mutuini/709 issued in the name of Monica Waithira Hosea on 5/4/1991; Sale Agreement dated 2/8/2011 between Monica Waithira Hosea and the plaintiffs herein, showing that the plaintiffs purchased the suit property from Monica Waithira Hosea at Kshs 3,000,000; Letter of consent dated 9/11/2011 issued by Western Division Dagoretti Land Control Board sanctioning transfer of the suit property from Monica Waithira Hosea to the plaintiffs herein; and Title Deed issued on 7/8/2012 in the names of the plaintiffs. Consequently, in the absence of controverting evidence, the court is satisfied that the plaintiffs have proved, to the required standards, the existence of Parcel Number Dagoretti/Mutuini/709 and their ownership of the said parcel of land by the plaintiffs.

16. The third issue is whether the defendants are trespassers on Land Parcel Number Dagoretti/Mutuini/709. The defendants do not deny the fact that they have encroached on the suit property. Their contention is that the suit property is part of Land Parcel Number Dagoretti/Mutuini/410 which still exists. Having analysed evidence demonstrating that Parcel Number Dagoretti/Mutuini/410 was, pursuant to a court order, lawfully subdivided into Parcel Numbers Dagoretti/Mutuini/709, 713 and 714, I find no tenable basis upon which the defendants are insisting that the suit property is still Parcel Number Dagoretti/Mutuini/410. There is evidence that Parcel Number 410 mutated into three distinct portions now existing in the names of the lawful proprietors. The defendants cannot insist that the suit property is still part of Parcel Number 410. It is therefore my finding that the defendants are trespassers on Parcel Number Dagoretti/Mutuini/709.

17. The fourth issue is whether the plaintiffs' claim is statute-barred. Firstly, the defence of limitation was not pleaded in the statement of defence filed by the defendant. Secondly, the plaintiffs purchased the suit property in August 2011. They were issued with a title deed in August 2012. The present suit was instituted in May 2014, a period of less than three years from the date the plaintiffs purchased the suit property and less than two years from the date when they were registered as proprietors of the suit property. I do not therefore find the basis upon which the defendants contend that the plaintiffs' claim, which in any event could not have accrued prior to 2011, is statute-barred. My finding is that the plaintiff's suit is not statute-barred.

18. Before I dispose the last issue, I will make brief pronouncements on some issues which counsel for the defendants submitted on. Counsel contended that this suit is in essence an enforcement of the order made in Nairobi RMCC No 5 of 1984. I do not agree with that view. The order in Nairobi RMCC was duly implemented through the actual subdivision of Parcel Number 410. From the evidence of DW1, Monica Waithira became proprietor of Parcel Number 709 and at one point, DW1 was arraigned in court after she was alleged to have destroyed Monica Waithira's fence. Similarly, prior to her death, Monica Waithira, initiated civil proceedings and obtained a court order in Nairobi HCCC No 573 of 2010 barring the defendants against dealing with the suit property. The defendants are in essence waving that very order and contending that they never obeyed it.

19. Counsel further argued that the suit herein is res-judicata by dint of Nairobi RMCC No 5 of 1984. First, the plaintiffs were not parties to Nairobi RMCC No 5 of 1984. Second, the order in Nairobi RMCC No 5 of 1984 was duly enforced and execution of that order culminated in the partitioning of Parcel Number 410 into three portions and the opening of parcel registers for the three portions, among them Parcel Number 709. The plaintiffs acquired Parcel Number 709 in 2011. Before that time, they had no interest in the suit property and they did not have any cause of action. Their cause of action accrued subsequent to 2011. The contention that the plaintiffs' suit is *res-judicata* is therefore misplaced.

20. Counsel for the defendants also urged the court to dismiss this suit on the ground that summons to enter appearance were never served. This issue was never raised during trial or before commencement of trial. It was belatedly raised in submissions by counsel. The issue was raised after the defendants filed defence, led evidence and closed their case. I reject this limb of the defendants' submissions because it is being raised too late in the day. The plaintiffs have not been accorded the opportunity to demonstrate that they did or did not serve summons. In any event, I do not see any useful purpose which would be served by summons to enter appearance in a suit where the defendants have answered to the claim by entering appearance filed a joint defence, led evidence and made submissions.

21. It was also the contention of the defendants and their counsel that the defendants have had uninterrupted possession of the suit property for over 12 years. The evidence on record demonstrates the contrary. DW1 produced documents relating to litigations over Parcel Number 410 and Parcel Number 709. The documents reveal that Milka Wambuku and Monica Waithira Hosea, in succession, asserted their rights over the parcels. On their part, the plaintiffs in this suit brought this suit to assert their right.

22. The fifth issue is whether the plaintiffs are entitled to the reliefs sought. The plaintiffs have proved that they are the legitimate owners of the suit property. Article 40 of the Constitution protects the right to property. Section 25 of the Land Registration Act 2012 protects the rights of a registered proprietor of land. The plaintiffs have demonstrated that they are entitled to the constitutional and statutory protection offered by the law. In my view, the prayers sought by the plaintiffs accord with the Constitution and the Land Registration Act. I am therefore satisfied that on the basis of the evidence presented to the court, the reliefs sought by the plaintiffs, including general damages, are merited.

23. Having found that the plaintiffs are entitled to general damages, I proceed to assess quantum. The plaintiffs purchased the suit property in 2011 at Kshs 3,000,000. The defendants insist that Parcel Number 410 still exists and have made it impossible for the plaintiffs to utilize the suit property for the past seven years. I will, in the circumstances, award the plaintiffs general damages of Kshs, 1,000,000 to be paid by the defendants jointly and severally.

24. In light of the above findings, I come to the conclusion that the plaintiffs have proved their case on a balance of probabilities. I accordingly grant them the following orders in tandem with the prayers set out in the Plaint:

a. It is hereby declared that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of Land Title Number Dagoretti/Mutuini/70;

b. It is hereby declared that the defendants are wrongfully in occupation of the suit property and are accordingly trespassers on the suit property;

c. It is hereby declared that the defendants together with their servants or agents are not entitled to remain on the suit property;

d. An injunction hereby issues restraining the defendants by themselves or their agents or servants against remaining on or continuing in occupation of the suit property;

e. The plaintiffs are granted possession of the suit property;

f. The plaintiffs are awarded general damages of Kshs 1,000,000 against the defendants, severally and jointly;

g. The defendants shall bear costs of this suit jointly and severally; and

h. Lastly, the defendants are given ninety (90) days within which to remove their structures, if any, and vacate the suit property. In default, eviction shall ensue and the Officer Commanding the local Police Division shall ensure security during eviction.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Ngethe holding brief for Mr Gatumuta for the plaintiff

Mr Obok holding brief for Mr Ondabu for the defendant

Court Clerk - June Nafula