



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 54 OF 2013

ELIZABETH WANJIRA EVANS.....1ST PLAINTIFF

VERSUS

RICHARD KIPCHILAT.....1ST DEFENDANT

FRANCIS GACHANJA MWANGI.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGMENT

(Both plaintiff and 1st defendant having title to the suit land; plaintiff having purchased the suit land from the 2nd defendant; 2nd defendant having purchased land from a person who purported to hold a leasehold title to the suit land; emerging that leasehold title had already been issued to the 1st defendant way before; no second title could issue to the plaintiff's predecessor in title because a leasehold title was already in existence in favour of the 1st defendant; held that it is the 1st defendant with the better title and title of the plaintiff nullified; judgment however entered for the plaintiff against the person who sold the land to her)

1. This suit was commenced through a plaint which was filed on 29 May 2008. The original plaint (for it was later amended) had only one defendant, Richard Kipchilat. In her original plaint, the plaintiff contended to be the registered proprietor of the land parcel Nakuru/Municipality Block 12/210, and claimed that Richard Kipchilat had interfered with her possession. She thus sought orders to have him permanently restrained from the suit land, damages for trespass, and costs. The then sole defendant filed a defence and counterclaim, which he later amended, vide which he asserted that it was he (Mr. Kipchilat) who was the rightful registered proprietor of the suit land, having become so registered on 11 December 1991. He pleaded that the plaintiff's title was obtained fraudulently. Perhaps given the averments in the defence, the plaintiff amended her plaint to include one Francis Gachanja Mwangi as 2nd defendant. She pleaded that she purchased the suit land from the 2nd defendant, and averred in the alternative, that the 2nd defendant breached their sale agreement for covenanting that he had good title to the suit land when he did not have. She claimed to have lost the sum of Kshs. 3,784,002/- being Kshs. 1,800,000/= as the purchase price, Kshs. 180,000/= as "liquidated charge", Kshs. 154,410/= as rates and ground rent payments, Kshs. 10,000/= as valuation fees, Kshs. 479,217/= as "injurious affection" and Kshs. 770,000/= as miscellaneous expenses. Mr. Kipchilat further amended his defence to introduce the Commissioner of Lands as co-defendant in his counterclaim and also added a prayer for the cancellation of the title of the plaintiff.

2. The 2nd defendant did not enter appearance and did not participate in the suit.

3. The plaintiff testified that she purchased the suit land from Francis Gachanja Mwangi (2nd defendant) through a sale agreement dated 10 April 2008. The purchase price was Kshs.1,800,000/=. At the time of purchase, the property was registered in the name of Bergei Agencies and there was a Certificate of Lease issued to the said Bergei Agencies. The plaintiff stated that she was informed by Mr. Gachanja, that he (Gachanja), had purchased the suit land from Bergei Agencies, whose proprietor was one Julius Karanja Ngumo, and she was given the sale agreement between Bergei Agencies and Mr. Ngumo which was dated 8 December 2007. The property had not yet been transferred to Mr. Gachanja, and thus what was prepared was a direct transfer to herself from Bergei Agencies. The transfer was registered and she paid Kshs. 40,000/= as stamp duty for the same. She was thereafter issued with a Certificate of Lease in her name. She stated that she took possession of the land and has been paying land rates. She paid Kshs.51,400/= in the year 2009; Kshs.28,325/= in the year 2010; Kshs. 28,235/= in the year 2011; and Kshs. 124,630/= in the year 2016. She stated that she also paid land rents and had receipts of Kshs.4,388/= for land rent paid in the year 2009; and Kshs.4,100/= paid in the year 2011. She then engaged a firm to draw for her building plans which was duly done. It was later that the 1st defendant emerged claiming to also own the land. The matter was reported to the police who thought that it was the documents of Bergei Agencies which were the genuine ones. She also had a letter from the District Land Registrar, dated 6 May 2008, stating that the documents of the 1st defendant are not genuine. She thought that the 1st defendant's documents had issues, and she also questioned a sale agreement between one Catherine Kipchilat and Ephrain Gathiba, over the same land, which agreement was not dated, but bore the year 2005

and showed that it was prepared by M/s Ondieki Ayuka & Company Advocates.

4. PW-2 was Peterson Wachira from the Registrar of Companies. He produced a Certificate of registration of Bergei Agencies. It shows that it is a business name operated by Julius Karanja Ngumo. PW-3 was Joseph Inoti, a registered valuer who produced a valuation report of the property. PW-4 was Lawrence Macharia Karanja, an advocate of the High Court of Kenya, practising in the law firm of M/s Mirugi Kariuki & Company Advocates. He testified that in relation to the suit land, he was engaged on two transactions. The first was the sale between Julius Karanja Ngumo t/a Bergei Agencies and Francis Gachanja. He drew the sale agreement between the two on 8 December 2007. A transfer was drawn and left in his possession, but before he could effect the transfer, Mr. Gachanja subsequently came with the plaintiff, and advised that he wanted to sell the suit land to the plaintiff. He thus drew a second sale agreement between the plaintiff and Mr. Gachanja dated 10 April 2008. Mr. Gachanja then got hold of Mr. Ngumo, who came and executed another transfer instrument in favour of the plaintiff. He testified that he did a search which showed that the land is registered in the name of Bergei Agencies.

5. PW-5 was Eric Munene Nyamu, a Land Registrar, at the Nakuru land registry. He explained that leases come from their head office in Nairobi and their role as Land Registrars is to register them. In respect of the suit land, he testified that there are two leases. The first was a lease dated 22 November 1991 and registered on 11 December 1991 in favour of Richard Kipchilat, and the second was a lease dated 9 May 2002, and registered on 15 September 2007 in favour of Bergei Agencies. This later registration was not entered in the Presentation Book (which is a record containing the dates of registration of various land instruments). He also had a letter dated 6 May 2008 from Mr. Githii, the then Land Registrar, to Mr. Kipchilat, basically stating that it is the documents of Bergei Agencies which were the genuine ones. He testified that the white cards are not traceable in their registry. He also stated that their records are missing some documents. He stated that the persons best placed to affirm who the genuine leaseholder is are the personnel from their head office as he could not tell which of the two leases is the genuine one.

6. For his case, Mr. Kipchilat testified and called one Robert Simiyu, a Principal Land Administrative Officer based at Ardhi House, Nairobi. Mr. Simiyu had the correspondence land file for the suit land. He testified that Mr. Kipchilat was issued with an allotment letter dated 28 February 1991 for the suit land after a recommendation from the then Provincial Commissioner of Rift Valley fronting Mr. Kipchilat and one Mr. Edward Sambili to be granted land. Mr. Kipchilat paid Kshs. 37,327/= on 25 September 1991 as required in the allotment letter, and after this payment, a letter was written to the Director of Surveys to proceed and survey the land for it was then still unsurveyed land. He testified that the letter by Mr. Githii, dated 6 May 2008, was responded to by the Commissioner of Lands castigating Mr. Githii for his conclusion that the suit land is genuinely held by Bergei Agencies, and asserting that it was Mr. Kipchilat who is the genuine title holder. He stated that their office has no other record for the suit land apart from Mr. Kipchilat's. He further stated that their office does not prepare leases to a business name and also they do not issue leases dated 1st of January of any year for that date is a public holiday. He also noted that the ground rent payable in their file is Kshs. 5,600/= whereas that noted in the title held by the plaintiff is Kshs. 4,000/=. He was cross-examined on the late payment of the money noted in the allotment letter, which was to be paid in 30 days, and he stated that they ordinarily write a letter to withdraw the offer in the allotment letter, which was not done in this case.

7. In his evidence, Mr. Kipchilat stated that in 1990, he approached the Provincial Commissioner and asked him to assist him get land from the Commissioner of Lands. He was then issued with an allotment letter and he paid for the money noted therein. The land was then surveyed and he was subsequently issued with a lease and certificate of lease in 1991. He took possession of the land and fenced it. He later in the year 1995 borrowed money from Kenya Commercial Bank with the suit land as security and he left the title deed with the bank. He collected it in the year 2008 with a discharge of charge but when he went to the Land Registry to register the discharge, he met Mr. Githii, who told him to his face that he does not have records of his title. It was also around this time that the plaintiff came to the land wishing to deposit building materials. He was cross-examined on the late payment of the money in the allotment letter, and the fact that the certificate of lease does not contain any charge. He was also cross-examined on the alleged sale agreement between Catherine Kipchilat and Ephraim Gatiba but he said he knows nothing of this.

8. DW-3 was Joseph Karanja Kimani, a retired Government surveyor. He stated that he is the one who surveyed the suit land in 1991 and he surveyed both this land and that allotted to Mr. Sambili.

9. With the above evidence, the 1st defendant closed his case. The State did not call any witness.

10. I invited counsel to file written submissions which they duly did and I have taken these into account in arriving at my decision.

11. The contest in this case is who between the plaintiff and the 1st defendant is the proper owner of the suit land. Both parties have presented Certificates of Lease and each claims that it is their certificate of lease which is the genuine one. To enable me resolve the conflict between these two certificates of leases, I will need to independently assess the genuineness of each title, based on the evidence that both parties have presented.

12. On Mr. Kipchilat's title, I have ample evidence of how he got his title. He did seek to be allotted land and he was duly allotted the suit land. He was issued with a letter of allotment and he paid the requisite fees. The land at the time was unsurveyed, and a surveyor was sent to survey it. Subsequently, a lease was drawn for the suit land in the year 1991 and the same was registered in that year. Mr. Kipchilat has since 1991 been holding his certificate of lease. On the other hand, it is not clear to me how the land was allotted to Bergei Agencies. I could forgive the plaintiff for not having the allotment letter, because she is a purchaser from an initial proprietor, but, it is apparent that when a lease was being prepared in favour of Bergei Agencies sometimes in the year 2002, there had already been issued a title in the name of Mr. Kipchilat. I am unable to understand why it took 5 years, from 2002 to 2007, for Bergei Agencies to register their lease, and the only conclusion I can reach is that the proprietor of Bergei Agencies must have run into challenges because there was already a lease issued in the name of Mr. Kipchilat. Indeed, the registration of his lease was never entered in the Presentation Book.

13. But most importantly, since there was already a lease issued in the name of Mr. Kipchilat, which lease had been duly registered, and a Certificate of Lease issued, a second lease could not have been prepared and registered in favour of Bergei Agencies. The leasehold title to the suit land had already been vested in Mr. Kipchilat, and a second lease to another person could not subsequently be issued, while the lease to Mr. Kipchilat still subsisted. It is trite that only one title can exist at any one time for particular land. If a leasehold title had already been

issued to Mr. Kipchilat, then a second title could not have been issued to Bergei Agencies, without first the title of Mr. Kipchilat being formally cancelled and due process being followed.

14. There are also other problems with the leasehold title held by Bergei Agencies. The land rent shown is different from that existing in the land records, and bears a date of 1 January, which we all know is a public holiday. There is no explanation as to how this is the date entered in the certificate held by the entity. There is also the doubt on whether title could issue to a business name without the proprietor being indicated.

15. The only conclusion one can reach is that the certificate of title held by Mr. Kipchilat is the better title to the suit land. My hypothesis is that the proprietor of Bergei Agencies, knew of the defect in his title. That is why it took 5 years to register the fake lease that he held. Once he was issued with a certificate of lease, and knowing that there is a problem with his title, he quickly sought to dispose it. I am not sure if the disposition to Mr. Gachanja was a genuine sale, or was just an attempt at "title laundering", so that there can be the argument of an innocent purchaser for value. Mr. Gachanja himself did not appear in this case to state how he got involved in the matter, and I also see that he did not last long with the land, quickly passing it to the plaintiff. I further note that the sale agreement between himself and Bergei Agencies bears a consideration of Kshs.1,800,000/= which is the same consideration that Mr. Gachanja sold the land to the plaintiff, which is rather unusual for land does appreciate. I cannot vouch for Mr. Gachanja's innocence in the transactions leading to the sale of the suit land to the plaintiff and I think he knew that he was passing over rotten eggs to the plaintiff of which he was very glad to get rid of.

16. Having held that Mr. Kipchilat has a better title, I have no option but to proceed to cancel the title held by the plaintiff. That title is hereby cancelled forthwith. I am aware that the plaintiff made a claim against Mr. Gachanja which I now turn to. Given that Mr. Gachanja did not come to say anything in this case, I have no reason not to enter judgment against him for the claims made against him by the plaintiff. The plaintiff has pleaded damages constituting of the purchase of Kshs. 1,800,000/= which I award the plaintiff. I also award the plaintiff the sums of Kshs. 40,100/= paid as stamp duty for the botched transfer to her, which I believe can fall within the pleading of costs of conveyancing vide which she claimed Kshs.390,375/=. The plaintiff also produced receipts totalling kshs.204,355/- paid as rates and Kshs. 8,388/= as land rent, but she only pleaded Kshs. 154,410/= and I am thus limited in my award to what is pleaded. I can only grant Kshs. 154,410/= under the head of land rates and land rents. I will also award Ksh. 10,000/= for the valuation report, which I think is reasonable. The other pleadings of special damages were Kshs.770,000/= as miscellaneous expenses, Kshs. 180,000/= liquidated charge, and Kshs.479,217/= as injurious affection. I am unable to appreciate what the miscellaneous expenses are, for no explanation nor receipts were exhibited. So too, the claim for "injurious affection". I will however give the sum of Kshs. 180,000/= as specific liquidated damages, for it is in their sale agreement that if any person is in breach, such person will pay 10% damages. The awards I make in respect of special damages is thus a total of Kshs. 2,184,510/= (being Kshs.1,800,000/= as the purchase price; Kshs.154,410/= land rates and rents; Kshs. 180,000/= as liquidated damages, and Kshs. 10,000/= for the valuation report). This money will be paid by the said Francis Gachanja Mwangi. I am unable to make any claim against the Commissioner of Lands, for the Commissioner's representative, through DW-1 did affirm that they never issued any lease to Bergei Agencies, and this lease in my view, was probably manufactured at a backstreet.

17. I think I have dealt with all issues save for costs. The plaintiff will pay the 1st defendant's costs of the suit and of the counterclaim. She is however at liberty to claim these costs from the 2nd defendant, and the 2nd defendant will also pay the plaintiff's costs of the suit. No orders as to costs will be made for or against the Commissioner of Lands.

18. I now make the following final orders:-

(i) That as between the plaintiff, Elizabeth Wanjira Evans, and the 1st defendant, Richard Kipchilat, it is hereby declared that it is Richard Kipchilat who has a better title to the land parcel Nakuru/Municipality Block 12/210.

(ii) That the leasehold title and the Certificate of Lease held by Elizabeth Wanjira Evans, to the land parcel Nakuru/Municipality Block 12/210, is hereby nullified and the same is cancelled forthwith.

(iii) That a permanent injunction is hereby issued barring Elizabeth Wanjira Evans, and her servants/agents from entering, being upon, or in any other way interfering with the 1st defendant's use and occupation of the land parcel Nakuru/Municipality Block 12/210.

(iv) That judgment is hereby entered in favour of Elizabeth Wanjira Evans, against the 2nd defendant, Francis Gachanja Mwangi, for the liquidated sum of Kshs. 2,184,510/= and the said sum to attract interest at court rates from 29 May 2008, which is the date of filing suit, till satisfaction in full.

(v) That the plaintiff will pay the 1st defendant's costs of this suit and of the counterclaim, but is at liberty to claim the same from the 2nd defendant, and the plaintiff will have the costs of her suit as against the 2nd defendant. There are no orders as to costs for or against the Commissioner of Lands.

19. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Opar holding brief for Mr. Okiro for the plaintiff.

Mr. Andama present for 1st defendant.

No appearance on the part of M/s Wekhomba & Aim for the 2nd defendant.

No appearance on the part of the State Law Office for the 3rd defendant.

Court Assistants: Nancy Bor & Alfred Cheron

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU