



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 36 OF 2009

FRANCIS NJOROGI KIGUONGO.....PLAINTIFF

=VERSUS=

B MURAYA KIIGE.....DEFENDANT

JUDGMENT

Background

1. The plaintiff initiated this suit on 29/1/2009 through a plaint dated 29/1/2009. He contended that he was the registered proprietor of a 99 year lease from the Government of Kenya in respect of Land Title Number **Nairobi/Block 126/509** situated in Nairobi (**the suit property**). He alleged that the defendant had, without his authority, entered into the suit property and erected a semi-permanent structure on it. He sought the following verbatim orders against the defendant :

- a) *That the defendant be ordered to vacate the plaintiff's Land Reference Number Nairobi/Block 126/509 and at his own expense remove whatever structures he has put thereon.*
- b) *A permanent injunction to restrain the defendant from trespassing or re-entering the suit premises.*
- c) *General damages for trespass.*
- d) *Costs.*

2. The defendant filed a defence dated 27/3/2009 in which he contended that the suit property was allocated to one Jane Wambui Karuku on 18/12/1992. He further contended that the registration of the plaintiff as proprietor of the suit property was irregular, illegal and one induced through corruption by the plaintiff and ought to be cancelled. He added that the structures on the suit property belonged to Jane Wambui Karuku who was the owner and possessor of the suit property from 1992 when the Government of Kenya allocated the suit property to her. He further averred that he was a licensee of Jane Wambui Karuku and not a trespasser.

3. Subsequently, the defendant brought an application seeking leave of the court to amend the defence, join some other parties as defendants in the suit, and plead a counterclaim by himself together with one of the intended additional defendants, Jane Wambui Karuku. The application was heard and declined by Honourable P Gichohi, Deputy Registrar, on 26/10/2012.

4. Hearing of this case commenced on 21/2/2018. The plaintiff testified as PW1 and called one other witness, Daniel Mbugua Mari. The defendant testified as DW1 and did not call any other witness.

Plaintiff's Evidence

5. PW1 (**the plaintiff**) adopted his witness statement dated 13th February 2012 and filed on 5/7/2012. He produced the following 12 Exhibits: (i) Sale Agreement dated 7/1/2005; (ii) Payment Receipts for Purchase Price; (iii) Sub division Approvals; (iv) Transfer relating to Nairobi/Block 126/509; (v) Stamp Duty Receipt and other related Statutory Receipts; (vi) Certificate of Lease for Nairobi/Block 126/509; (vii) Register of Members of Ngundu Farmers Co-operative Society; (viii) Gazette Notice Number 838 of 8/2/2008; (ix) Copy of Notice in Daily Nation of 29/5/2008; (x) Copy of Public Notice in Daily Nation of 27/6/2008; (xi) Lease; and (xii) Land Rent Demand Note.

6. In summary, PW1 testified that he bought the suit property from Ngundu Farmers' Co-operative Society Limited, a land buying co-operative society which had bought a large tract of land and sub-divided it into numerous parcels some of which were sold to enable the society meet its expenses. Upon paying the purchase price in full, the society executed a transfer dated 6/7/2008 and caused the land to be

transferred to him. He was issued with a certificate of lease on 25/7/2007. When he went to fence the suit property, he learnt that the defendant who was a former District Officer of the area had erected a semi-permanent structure on the suit property. He then reported the matter to the Society's Committee and the Committee confirmed that the defendant did not own the suit property. He added that subsequent to the filing of defence by the defendant, he established from the Society that Jane Wambui Karuku was not a member of the Society and was not entitled to the suit property either through membership or through purchase. There was nobody in occupation of the suit property when he purchased it. He carried out a search and confirmed that the land belonged to Ngundu Farmers Co-operative Society before he purchased it. He added that the rental value of the suit property was Kshs 20,000 per month. In cross-examination, he maintained that there was no one in occupation of the suit property at the time of trial.

7. PW2 (Daniel Mbugua Mari) adopted his written statement dated 22/3/2012 and filed in court on 5/7/2012. His evidence was that he was the Chairman of Ngundu Farmers Co-operative Society from 2002 to 2008 when the Society was put in liquidation by the Commissioner of Co-operatives. Francis Njoroge Kiguongo (**the plaintiff**) purchased the suit property from the Society at Kshs 400,000. The Society thereafter executed transfer documents and transferred the land to him. At the time of the sale transaction, there was nobody else who had bought the suit property or who was in possession of the suit property. He added that he knew the defendant as a former District Officer of the Area where the suit property is situated. During the defendant's tenure as District Officer, the defendant who was not a member of the Society tried to interfere with the running of the Society and tried to allocate to himself, through proxies, various parcels of land. His efforts were however thwarted when the society's management went to court, stopped the interference, and annulled all attempts to defraud it of its land. Jane Wambui Karuku, the alleged proprietor of the suit land was never a member of the society and she never bought any land from the Society. She had not made any claim to the suit property.

Defendant's Evidence

8. The defendant adopted his witness statement dated 15/1/2014. His testimony was that he was the former District Officer of Embakasi Area whose mandate was to sort out underlying land issues affecting the area where the suit property is located. In October 1988, Jane Wambui Karuku purchased the suit property through the District Office from one John Njombo who had similarly acquired the land from one Mungai Karati. She got a letter of allotment in 1992 in her name and she made the requisite payments to the Commissioner of Lands. Subsequently, the Commissioner of Lands wrote to her to collect the Title from the Lands Office but due to her busy work schedule, she was unable to do so. Mrs Karuku licensed him to utilize the suit property from 1992 and he had erected structures on the land. In 2007, the plaintiff accompanied by the Area Chief and his security team visited the land and threatened to evict his workers. On learning about it, he visited the local Chief and produced to him documents of ownership. He added that in March 2008, due to her busy schedule, Mrs Karuku decided to give him a power of attorney to reclaim the suit property.

Submissions

9. The plaintiff, through written submissions by her counsel, Mr Mbigi Njuguna, submitted that the plaintiff had tendered evidence to demonstrate that he was the rightful owner of the suit property, having purchased it from Ngundu Farmers Co-operative Society in 2005. He added that under Section 28 of the repealed Registered Land Act, the rights of a proprietor acquired on first registration or subsequently acquired for valuable consideration or by an order of the court were indefeasible except as provided in the repealed Act. He further submitted that the defendant did not produce any certificate of lease to support the claim that Jane Karuku was the owner of the suit property. He added that the defendant had not demonstrated that Mrs Karuku or any of her predecessors were members of the Society or purchasers of land from the Society. Mr Mbigi argued that the defendant had not produced any evidence to demonstrate compliance with Section 3 of the Law of Contract Act. Counsel relied on Sections 24 and 26 of the Land Registration Act and argued that the plaintiff's title was indefeasible. On the claim for general damages. Mr Mbigi relied on the 4th Edition of the Halsbury's Laws of England and urged the court to award damages.

10. The defendant, through written submissions by her counsel, Ms Oloo, submitted that it was not in dispute that the defendant was not the owner of the suit property. She argued that what was in dispute was who the true owner of the suit property was, which if determined, would ascertain whether or not the defendant lawfully appointed his employees to stay on the suit property. The defendant itemized the following as the three issues falling for determination in the suit: (i) who is the lawful owner of the suit property; (ii) whether the defendant is rightfully on the suit property; and (iii) whether the plaintiff is entitled to the orders sought.

11. The defendant submitted that because the plaintiff had opposed the joinder of Jane Wambui Karuku as a defendant in this suit, the burden of producing the instruments of transfer, sale agreement, and certificate of title relating to Jane Wambui Karuku should not be shifted to the defendant. He added that the plaintiff's title was marred with irregularities relating to the consideration he paid to Ndungu Farmers Co-operative Society and was therefore impeachable under Section 26 of the Land Registration Act. He further submitted that at the time he assisted Jane Wambui Karuku to acquire the suit property, he was part of the Management Commission for Ngundu Farmers Co-operative Society appointed by the Commissioner of Co-operative Societies who was exercising his powers under Section 64 of the Co-operative Societies Act, 1960 (now repealed). The defendant added that the letter from the Commissioner of Lands inviting Jane Wambui Karuku to go and collect her lease was sufficient and credible proof that the suit property belonged to Jane Wambui Karuku. He further argued that as holder of a duly registered power of attorney, he had authority to be on the suit property. Lastly, the defendant submitted that, having demonstrated that he was lawfully on the suit property by virtue of a power of attorney granted to him by Jane Wambui Karuku, there was no basis for granting the plaintiff the orders sought against him.

Issues

12. Mr Mbigi, counsel for the plaintiff submitted that on 3/7/2012 parties filed an agreed list of issues. The court record does not, however, bear any list of agreed issues. The correct position is that on 5/7/2012, the plaintiff's advocates, Mbigi Njuguna & Co Advocates, filed a list of issues dated 3/7/2012. The said list of issues was not executed by the defendant's advocates. It is therefore not an agreed list of issues.

13. Having considered the parties' pleadings, four key issues fall for determination in this suit. The first issue is whether the plaintiff is the legitimate proprietor of Land Title Number Nairobi/Block 126/509. The second issue is whether the defendant is a trespasser on the said piece of land. The third issue is whether the reliefs sought by the plaintiff should be granted against the defendant. The fourth issue relates

to the costs of the suit.

Analysis & Determination

14. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the four issues falling for determination in this suit. I will make brief sequential pronouncements on the four issues.

15. The first issue is whether the plaintiff is the legitimate proprietor of Land Title Number Nairobi/Block126/509. The defendant contends that the suit property belongs to his sister, Jane Wambui Karuku. The said Jane Wambui Karuku was not called as a witness. Secondly, whereas there is common ground that the suit property is surveyed and registered, there is no registered instrument of title produced by the defendant to support the claim that Jane Wambui Karuku is the registered proprietor of the suit property. On his part, the plaintiff produced a lease registered on the 25/7/2007 in the name of Ngundu Farmers Co-operative Society Ltd, a transfer to the plaintiff, and a certificate of lease in the name of the plaintiff. In addition, he produced evidence to support the claim that he bought the suit property from Ngundu Farmers Co-operative Society in 2005. PW2 testified that he was the chairman of Ngundu Farmer's Co-operative Society between 2002 and 2008. He confirmed that the Society sold and transferred the suit property to the plaintiff. There is therefore evidence to support the claim that the plaintiff is the legitimate proprietor of the suit property. The converse is the position relating to the defendant's contention that the suit property belongs to Jane Wambui Karuku. No documentary evidence has been tendered to support the claim of ownership of the suit property by Jane Wambui Karuku. Under Sections 27 and 28 of the repealed Registered Land Act and Section 26 of the Land Registration Act, in the absence of proof of any of the vitiating grounds, the court is obligated to uphold the title of the plaintiff. It is therefore my finding that based on the evidence before court, the plaintiff, Francis Njoroge Kiguongo, is the legitimate proprietor of the suit property, Land Title Number Nairobi/Block 126/509.

16. The second issue is whether the defendant is a trespasser on the suit property. The defendant contends that he is the legitimate holder of a power of attorney granted to him by his sister, Jane Wambui Karuku. Firstly, Jane Wambui Karuku was not called as a witness to vouch for the authenticity of the document which the defendant is waving as a registered power of attorney. Secondly, I have looked at the purported power of attorney. It purports to have been registered as IP/A49970/1 under the Registration of Titles Act on 28/3/2008 at 10.06 hours. It does not bear the signature of the Registrar of Titles. The suit property is registered under the repealed Registered Land Act. There is therefore no way a valid power of attorney relating to a title registered under the repealed Registered Land Act would be registered under the repealed Registration of Titles Act. The purported power of attorney being waved by the defendant is, in my view, a fraudulent document intended to mislead the court. It does not confer any legitimate authority upon the defendant to enter the suit property. It is therefore my finding that the defendant is a trespasser on the suit property.

17. The third issue is whether the plaintiff is entitled to the reliefs sought in the plaint. The first prayer sought by the plaintiff is an eviction order. The second prayer is a permanent injunction. In my view, the plaintiff having demonstrated on a balance of probabilities that he is the proprietor of the suit property, the two prayers are merited.

18. The third prayer is a plea for damages. The plaintiff did not however lead evidence by a competent witness to assist the court arrive at a reasonable measure of damages for the defendant's trespass on the suit property. There is, however, evidence that the defendant trespassed on the suit property throughout the subsistence of this suit. In **Kimakia Co-operative Society v Green Hotel (1988) KLR 242**, the Court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not, he cannot have more than nominal damages. The principle was emphasized by the Court of Appeal in **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya (2015) eKLR**. In the present suit, the plaintiff had the opportunity to lead evidence by a professional who would have given a fair estimate of the loss or damages suffered by the plaintiff. He did not lead that kind of evidence. In the circumstances, I will award the plaintiff nominal damages assessed at Kshs 600,000 against the defendant. Lastly, the plaintiff will have costs of the suit.

Disposal Orders

19. In light of the above findings, I make the following disposal orders in this suit in tandem with the prayers sought in the plaint:

a) The defendant shall forthwith vacate the plaintiff's land, Title Number Nairobi/Block 126/509, and at his own expense remove all structures he has put on the land.

b) A permanent injunction is hereby issued restraining the defendant against trespassing on or re-entering the suit property, Land Title Number Nairobi/Block 126/509.

c) The defendant shall pay the plaintiff nominal damages of Kshs 600,000 for trespass.

d) The defendant shall pay the plaintiff costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Muturi holding brief for Mr Macharia Advocate for the defendant

