



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 276'B' OF 2017

PERPETUA NYAWIRA GATUMUTA.....PLAINTIFF

VERSUS

JOHN KURIA MUNGAI.....DEFENDANT

JUDGMENT

By a **Plaint** dated **16th February 2017**, the Plaintiff herein brought this suit against the Defendant and sought for orders that;

- a) An injunction restraining the Defendant whether by themselves, their employees, servants or agents or through any other person claiming under him or otherwise howsoever from trespassing into constructing upon or in any other manner interfering with the Plaintiffs rights of occupation use and ownership of parcel of land known as Title Number Kiambu/Municipality Block 5(Kiamumbi)3256.*
- b) An injunction compelling the Defendant to remove and demolish forthwith any structures illegally erected on parcel of land known as Title No.Kiambu/Municipality Block 5 (Kiamumbi) 3256 or in default thereof the Plaintiff does forthwith proceed and remove such structures at the cost of the Defendant.*
- c) General Damages for trespass.*
- d) Costs of the suit.*
- e) Any further or other orders as this Honourable may deem fit.*

In her statement of claim, the Plaintiff averred that she is the registered owner of the suit property, having purchased it sometimes in **March 2014**, from **Naomi Gathoni Kuria** and was registered as proprietor and issued with a title deed on **19th August 2015**. Further averred that she paid the full purchase price and obtained the **Land Control Board Consent** as required prior to registration of the transfer. Further that she visited the property and established for a fact that the Defendant has trespassed on the suit property and had erected thereon unlawful structures and therefore as a result she has not been able to commence construction on the suit property and thus depriving her the right to use the property. It was her contention that the Defendant intended to defeat her proprietary rights through his actions and though she has sought the intervention of the Kenya Police and National Administration Police to prevent the continuing trespass, the Plaintiff has refused to stop the trespass.

The suit is contested and the Defendant filed a Statement of Defence dated **13th November 2017**, and denied all the allegations made in the Plaintiff and averred that he is the lawful proprietor of the suit property since the land form part of their ancestral land and the dealings were done behind his back. Further that the suit property dealings are subject to investigation vide Kiambu Police Station **O.B No.40/6/4/17**, and the investigations are still ongoing. He averred that the Plaintiff's suit as pleaded is a mere sham, an illegality and outright abuse of the Court's process.

PLAINTIFF'S CASE

PW1 - Perpetua Nyawira Gatumuta adopted her witness statement dated **16th February 2017**, and produced her list of documents as exhibits in Court. She testified that her property is **L.R Kiambu/Municipality Block 5 (Kiambu) 3256**, that is adjacent to the Defendant's which is **3257**. She denied that her land belongs to the Defendant. Further that she conducted a search before purchase and it was clear that there were no permanent structures on the suit land but they were on the fence. She denied knowledge of any dispute before she purchased the suit property and further that there was no complaint at the Police at the time of purchase. That when she bought the land, she wanted to develop it but she however found an intruder on the said land who is the Defendant. She urged the Court to restrain the Defendant from trespassing unto the land and sought for police protection.

On cross examination she stated that she has been out of the Country though she was around when the transaction took place. Further that she secured the **Land Control Board Consent**, but she was not aware of any caution as the land was clear. She denied perpetuating any fraud and that she has attached a transfer form which was not signed. She alleged that she signed the transfer forms as required. She acknowledged seeing the title of the vendor **Naomi Gathoni Mungai**, who sold the land to her. It was her testimony that she has a copy of the sale agreement and that she bought the land for **Kshs.2.6 million**. However she produced the bank slips but not the **Sale Agreement**. Though she did not have any paper trail, the purchase money was from her savings. That the payments were done by **Patrick Wachira**, but she was present when the payments were done.

It was her testimony that there was no value submitted by the parties and that the land did not pass to her as a gift and that the Ministry of Lands did not indicate the value of the land. She further acknowledged that there was no stamp from the District Valuer nor was she able to see the comment from the Valuer. She denied that the title was acquired fraudulently. That she presented the documents three months before the transfer form and a month before the **Land Control Board Consent** and she paid stamp duty though she did not have any evidence.

On re-examination, she testified that the dispute was about an intruder who trespassed on her land. Further that the documents were prepared by her Advocate and not her. That there is a registration Application dated **27th May 2014**, that does not correspond to what was shown to her. She further testified that the Vendor was the one who was to provide the spousal consent as she is the Defendant's Mother and that she did not know there was a dispute. Further that the Vendor did not complain to the **Land Control Board** before she obtained the Consent.

DEFENDANT'S CASE

DW1 - John Kuria Mungai, adopted his witness statement dated **4th December 2017**. He further produced his list of documents as exhibits. He testified that he has lived on the suit land for 10 years and that initially it belonged to his grandfather **Josphat Waithaka**. That when he conducted a search, he noted that the suit land had been transferred to his mother **Naomi Gathoni Mungai**, who later allegedly sold it to the Plaintiff. That he lives in his grandfather's land.

On cross examination, he stated that the land was initially one piece but it is currently in several pieces. Further that before the transaction, he had cautioned the two parcels of land due to family disputes. It was his testimony that there are structures and a toilet on the suit land and the photographs produced are for the suit land. He however testified that the photographs were taken while there were no structures. He acknowledged that he had not put up any structures on the suit land as there are restraining orders. He further testified that he lives in the disputed piece of land and that the Plaintiff cannot develop where he lives. He alleged that his mother sold the suit property even after he had cautioned it and he reported the matter to the police.

Thereafter, the parties filed written submissions which the Court has now carefully read and considered. The issues for determination are;

- 1. Whether the Plaintiff has a valid Title**
- 2. Whether the Plaintiff is entitled to the orders sought**

1. Whether the Plaintiff has a valid Title

The Plaintiff has averred that she bought the suit Property from one **Naomi Gathoni Mungai**, who was the registered proprietor of the suit property and to this effect, she has produced a transfer document and a copy of the Title that confirms that indeed the said **Naomi Gathoni Mungai** was the registered proprietor of the suit land before the transfer was effected. She has further produced a Letter of Consent from the Land Control Board and a Title Deed confirming that she is currently the registered owner of the suit property.

Circumstances upon which a title to land can be impeached have been set out in law under **Section 26(1)** of the **Land Registration Act** that provides;

“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.”***

From the above provision of law, it is very clear that the circumstances under which a title to land can be impeached are very clear;- that is if the title was acquired through **fraud** or **misrepresentation** of facts or through a **corrupt scheme**, then the said title can be impeached. It is not in doubt that the suit property was registered to one **Naomi Gathoni Mungai**, who is the mother to the Defendant herein.

The Defendant has alleged that the suit property belongs to him and the family and that it is an ancestral land and therefore his mother had no right to sell the same. From the evidence produced in Court, the Defendant in his list of documents has produced a Plaint in a suit that was between **Naomi Gathoni Mungai** and himself. Further he testified that the suit was heard and dismissed and they were advised that the dispute is between family members and that the same ought to be settled among themselves. It is therefore not in doubt that the ownership of the said **Naomi Gathoni Mungai**, was never impeached or terminated and therefore she held a good title that she could transfer to the Plaintiff

Further the defendant has produced minutes of a meeting that was held between the family members with regard to the suit property. This Court has carefully gone through the minutes that dealt with subdivision of the plot in Kiambu belonging to **Naomi Gathoni Mungai**, the mother to the Defendant herein. The said minutes were signed by all the children of **Naomi Gathoni Mungai** but the Defendant was absent without apology. The court has noted thus:-

“KBU/MUN/BLOCK 5 KIAMUMBI 250 to be shared by Josphat Waithaka and John Kuria as 3256 and 3257 respectively.”

From the above wording, this Court notes that the suit premises was allocated to **Josphat Waithaka** and property 3257 was allocated to the Defendant. This would therefore mean that the properties would be adjacent to each other and the allegations by the Defendant that there were indications that the suit property would be his portion are unfounded. The Plaintiff has alleged that the Defendant lives on the adjacent property which allegations have not been refuted by the Defendant. Therefore the court finds and holds that the Defendant lives on his share and has no reason to claim ownership of the suit property on account of it being ancestral land as he had already been given his share and the share being claimed does not belong to him.

This Court is not privy to the sequence as to why the said **Josphat Waithaka** did not take possession of the suit property but finds that since the said **Naomi Gathoni Mungai** was the registered owner of the suit property and having passed the same to the Plaintiff then a good title passed to the Plaintiff. **Section 107** of the **Evidence Act**, provides:-

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

Allegations of fraud being extremely serious and which must be strictly proved, the Court finds that the Defendant herein has failed to discharge that duty as provided by **Section 109** of the **Evidence Act**, which states as follows:-

“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 that fact shall lie on any particular person.”

Further, **Section 25** of the **Land Registration Act** states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

- a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

It is therefore not in doubt that the rights of a proprietor can only be defeated in Circumstances as provided for by **Section 26(1) of the Land Registration Act** and the Defendant having failed to prove existence of any fraud or misrepresentation to warrant impeachment of the Plaintiff's title, then the Court finds and holds that the Plaintiff herein holds a good title.

Consequently, the Court finds and holds that the Plaintiff has proved that she has a valid title and the Defendant has not proved any facts that warrant the impeachment of the said Title and in this regard therefore, the Plaintiff is the lawful owner of the suit property. See the case of **Joseph Kipchirchir Koech ...Vs... Philip Cheruiyot Sang [2018] eKLR**

“The burden of proving that the suit property was family property therefore fell on the Defendant once he questioned the legitimacy of the Plaintiff's title. The Defendant failed to produce any substantive evidence to prove his allegation whereas the official search indicated the Plaintiff as the registered owner. All the evidence adduced in court indicates that the Plaintiff is in fact the proprietor of the land parcel known as KERICHO/KAITET/460. I therefore find and hold that the issue of trust does not arise.”

1. Whether the Plaintiff is entitled to the orders sought.

Section 24 of the **Land Registration Act** provides that subject thereto:—

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and;**
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.**

This Court has already held and found that the plaintiff holds a valid title to the suit property and is therefore the lawful owner of the suit

property. It therefore follows that she has all the rights to the suit property and therefore is entitled to the orders of Permanent Injunction and the Defendant has an obligation to remove all the illegal structures that has been erected on the suit property.

The Plaintiff has urged the Court to also grant her General damages for trespass. According to **Black's Law Dictionary 8th Edition**, '**Trespass**' is defined, in the strict sense, as:

"An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property"

Further in the case of **Simon Njage Njoka ...Vs...Simon Gatimu Kanyi (2007) eKLR, the Court of Appeal in Nyeri**, in allowing the Appeal, held as follows:

"The appellant having provided a valid title to the piece of land and the respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should then have proceeded to evict the respondent."

As to whether the Plaintiff is entitled to General Damages for trespass. In the case of **Park Towers Limited ...Vs...John Mithamo Njika & 7 others (2014)eKLR**, where the Court held that:-

"I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case."

In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, the Court held as follows:-

"..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less"

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...."

Having not provided the value of the land before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.50,000/=** as general damages for trespass.

Ultimately after a careful consideration the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff's suit is merited. For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in terms of **prayer No.(a), (b) (c) and (d)**.

In terms of **prayer No.(c)**, the Court awards the Plaintiff General Damages for trespass to the tune of **Kshs.50,000/=** and on costs of the suit, since the Plaintiff is the successful litigant, she is awarded costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of November, 2019.

L. GACHERU

JUDGE

5/11/2019

In the presence of

Mr. Kamau holding for M/S Nderitu for Plaintiff

Mr. Maina holding brief for Mr. Nguringa for Defendant

Jackline - Court Assistant.

Court – Judgment read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

