



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 541 OF 2016

JAMES GICHUKI MUGAMBI.....PLAINTIFF

VERSUS

AYUB MUNYIFWA.....1ST DEFENDANT

MARGARET MUNYIFWA.....2ND DEFENDANT

CAROLINE GATHONI MUCHIRI.....3RD DEFENDANT

JACKSON MUTURI MUCHEMI.....4TH DEFENDANT

EUSTAUS NYAGA MUCHEMI.....5TH DEFENDANT

JAMES NGUGI KAMAU.....6TH DEFENDANT

JUDGMENT

The plaintiff is the registered owner of all that parcel of land known as Nairobi/Block 63/736 (hereinafter referred to as “the suit property”). The plaintiff title is a leasehold interest from the defunct City Council of Nairobi for a term of 99 years with effect from 1/6/1968. The suit property measures 0.0782 ha. and the same was registered in the name of the plaintiff on 3rd August, 2005 on which date he was also issued with a certificate of lease. Through a plaint dated 4th November, 2008 that was amended on 12th November, 2008, the plaintiff brought this suit against the defendants seeking a permanent injunction to restrain the defendants from occupying, excavating, building on, or developing, leasing, charging or committing any acts of waste on the suit property; a mandatory injunction compelling the defendants to vacate the suit property forthwith and to stop interfering in any manner whatsoever with the plaintiff’s rights over the property; a declaration that the plaintiff is the legal owner of the suit property which is located between L.R No. NBI/Block 63/309 and L.R No.NBI/Block 63/737; an order for the demolition of any illegal structures erected upon the suit property by the defendants; costs of the suit and interest.

The plaintiff averred that the 1st and 2nd defendants were the legal owners of all that parcel of land known as LR No. Nairobi/Block 63/293 (measuring 0.2014 ha. (hereinafter referred to as “Plot No. 293”). The plaintiff averred that plot No. 293 owned by the 1st and 2nd defendants is situated in a different part of Jamuhuri Estate where the suit property and Plot No. 293 are both located. The plaintiff averred that the defendants jointly and severally fraudulently altered the Registry Index Map (R.I.M) for Nairobi Block 63, sheet No. 2 at the Survey Department and deleted the suit property from its location on the R.I.M and replaced it with Plot No. 293. The plaintiff averred that the two properties are separate and distinct on the ground in the original Registry Index Map (R.I.M).

The plaintiff averred that on 27th October, 2008, the 4th, 5th and 6th defendants accompanied by hired goons entered the suit property forcefully with excavation tractor and without any right to do so, demolished the fence the plaintiff had erected around the suit property and damaged the timber shelter the plaintiff had constructed on the property where he had kept timber and other properties valued at over Kshs. 1,000,000/= thereby occasioning great loss and damage to the plaintiff.

The plaintiff averred that he was in occupation of the suit property that he had charged to NIC Bank to secure a loan advanced to him by the said bank. The plaintiff averred that he reported the invasion of the suit property by the defendants at Kilimani Police Station where the incident was recorded in the Occurrence Book.

The defendants filed a joint statement of defence on 22nd October, 2012 in which they denied the plaintiff’s claim in its entirety. The defendants averred that the 3rd defendant was at all material times the registered owner of Plot No. 293 and that she sold the said parcel of

land to the 1st and 2nd defendants at a consideration of Kshs.3,600,000/= through an agreement for sale dated 3rd June, 2008. The defendants averred that the 1st and 2nd defendants were registered as the owners of Plot No. 293 on 14th August, 2008. The defendants averred that the 1st and 2nd defendants were the bona fide owners of Plot No. 293 and that they had no interest in the suit property. The defendants averred that after Plot No. 293 was registered in their name, the 1st and 2nd defendants took possession and commenced construction thereon.

The defendants averred that the structures which the 1st and 2nd defendants had put up on Plot No. 293 were demolished by the plaintiff before he brought this suit seeking injunction against them. The defendants averred that the 3rd defendant delivered vacant possession of Plot No. 293 to the 1st and 2nd defendants and as such the 1st and 2nd defendants had a right to send their agents to the suit property to commence construction which is the subject of the plaintiff's complaint. The defendants denied that there were any structures on the Plot No. 293 when the 1st and 2nd defendants took possession thereof which could have been demolished by the defendants. The defendants averred that the plaintiff's suit herein discloses no cause of action against them because the suit property claimed by the plaintiff is different from Plot No. 293 owned by the 1st and 2nd defendants.

When the suit came up for hearing on 26th June, 2014, the plaintiff gave evidence and closed his case. The defendants advocate informed the court that the defendants did not wish to tender any evidence. The defendants' case was therefore closed without the defendants having adduced any evidence. The plaintiff relied on his witness statement dated 18th May, 2012 and gave a brief oral testimony. He also relied on his bundle and supplementary bundle of documents filed in court on 18th May, 2012 and 17th July, 2013 respectively. In his witness statement, the plaintiff reiterated the contents of the amended plaint. He stated that in 2005, he applied to the defunct City Council of Nairobi to be allocated land. His application was allowed and he was allocated the suit property. A lease was subsequently issued by the City council of Nairobi in his favour which was registered and a certificate of lease issued to him on 3rd August, 2005. He stated that on 29th November, 2005, he charged the suit property to NIC Bank to secure a loan of Kshs.1,750,000/=. He stated that he enjoyed quiet possession of the suit property and honoured his legal obligations to the City Council of Nairobi by paying land rates and other charges. The plaintiff stated that he stored timber on the suit property which he intended to use for construction. He stated that on 27th October, 2008, the 4th, 5th and 6th defendants forcefully entered the suit property accompanied by hired goons claiming to be acting under instructions from the 1st and 2nd defendants and using an excavator proceeded to destroy the fence he had put up around the suit property and the shelter he had put up for the timber that was stored on the suit property. The plaintiff stated that the cost of the damage occasioned by the defendants during the invasion was over Kshs.1,000,000/=. The plaintiff stated that the defendants used the said hired goons to keep him off the suit property as they continued with excavation and construction works on the property. The plaintiff stated that he reported the incident to Kilimani Police Station and the defendants continued with construction despite a warning from the police for them to stop pending determination of the dispute. The plaintiff stated that since the said construction was being carried without approval from the City Council of Nairobi, he reported the defendants' activities to the City Council who came and brought down the structures the defendants had put up on the suit property.

The plaintiff stated that he learnt later that the 1st and 2nd defendants were the owners of Plot No. 293 that was situated on a different part of Jamuhuri Estate according to the original R.I.M. He stated that the defendants had fraudulently altered the R.I.M for Nairobi Block 63 where both properties are found by deleting the suit property and replacing it with Plot No. 293. He stated that upon learning of this development, he lodged a complaint with the Director of Surveys and the police. He stated that the Director of Surveys acted on the anomaly and reinstated the suit property in its rightful place in the R.I.M. The plaintiff stated that the Director of Surveys had earlier confirmed in the letters dated 3rd October, 2008 and 4th November, 2008 that the suit property had been fraudulently replaced by Plot No. 293 in the R.I.M and that Plot No. 293 had been replaced by Plot No. 748 in the same R.I.M. The plaintiff referred the court to the forged R.I.M which had erasures and insertions and the corrected R.I.M.

The Plaintiff told the court that the suit property was in his possession and that he was putting up a commercial building thereon. He stated that the illegal structures that had been put up on the suit property by the defendants were demolished by the City Council of Nairobi and that it took him 1½ years to have his title over the suit property restored.

In cross-examination the plaintiff stated that the 1st and 2nd defendants were husband and wife and that the forged title was in their joint names. He stated that the defendants interfered with the title of the suit property in October 2008 and that he had the suit property restored to him in 2010. He stated that after the illegal structures were demolished, the same were not put up again and that he had been in continuous possession of the suit property since July, 2010. After the testimony of the plaintiff and the close of the defendant's case, the parties made closing submissions in writing. The plaintiff filed his submissions on 5th November, 2014 while the defendants filed their submissions on 15th November, 2017.

The parties did not file a list of agreed issues for determination by the court. From the pleadings, the evidence on record and the submissions of counsel, the following in my view are the issues that arise for determination in this suit:

1. Whether the defendants fraudulently altered the Registry Index Map (R.I.M) for Nairobi Block 63, sheet No. 2 by deleting the suit property therefrom and replacing it with Plot No. 293.
2. Whether the defendants forcefully entered the suit property and caused damage to the plaintiff's properties.
3. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
4. Who should bear the costs of the suit.

Whether the defendants altered the R.I.M for Nairobi Block 63 sheet No. 2:

The plaintiff led evidence that the R.I.M for Nairobi Block 63 sheet No. 2 was fraudulently interfered with by the defendants. The plaintiff

stated that the suit property was deleted from the R.I.M and Plot No. 293 owned by the 1st and 2nd defendants inserted in its place. The effect of this move was to enable the 1st and 2nd defendants to acquire ownership of the suit property which measures 0.0782 ha. instead of Plot No. 293 which is registered in their names which measures 0.0214 ha. The plaintiff produced in evidence a letter dated 31st October, 2008 from the Director of Surveys in which the Director of Surveys stated that his investigations discovered that the R.I.M for Nairobi Block 63, sheet No. 2 and Survey Plan F/R 235/13 had some erasures and additions/replacements thereon. The Director of Surveys stated that the said discovery pointed to some fraudulent activities which needed further investigation. The Director of Surveys confirmed that the suit property was on Survey Plan No. F/R 235/13, while Plot No. 293 was on Survey Plan F/R No. 217/6 and that, the original records for Survey Plan No. F/R 235/13 and R.I.M for Nairobi Block 63, Sheet No.2 had the suit property and not Plot No. 293. The plaintiff also produced a letter dated 4th November, 2008 from the Director of Surveys addressed to the Commissioner of Lands in which the Director of Surveys confirmed that the suit property was fraudulently replaced by Plot No. 293 while Plot No. 293 was replaced by Plot No. 748 in R.I.M for Nairobi Block 63. In the letter, Director of Surveys also indicated that he had addressed the anomaly by correcting the R.I.M. The plaintiff also produced in evidence a copy of the forged R.I.M in which the suit property was replaced with Plot No. 293 between Plot No. 309 and Plot No. 737 and Plot No. 293 is replaced by Plot No. 748 next to Plot No. 292. Also produced in evidence was the amended R.I.M in which the suit property and Plot No. 293 were returned to their right places in R.I.M for Nairobi/Block 63 sheet No. 2.

The defendants did not adduce evidence at the trial. The evidence that was adduced by the plaintiff was not controverted. I am satisfied that the plaintiff has proved that through fraud, the suit property was deleted from the R.I.M for Nairobi/Block 63, sheet No. 2 and replaced with Plot No. 293. I am also satisfied that the deletion of the suit property from the said R.I.M was carried out fraudulently. The plaintiff did not adduce direct evidence as to who was involved in the fraud. There is no dispute that the defendants were the beneficiaries of the fraud. In the absence of any evidence from the 1st, 2nd and 3rd defendants as to the circumstances under which Plot No. 293 was inserted in the R.I.M for Nairobi/Block 63, sheet No. 2 in place of the suit property, the only inference the court can make is that they were involved in the fraud.

Whether the defendants forcefully entered the suit property and damaged the plaintiff's properties:

The evidence that was given by the plaintiff that he was in possession of the suit property when the same was invaded by the 4th to 6th defendants in the company of hired goons was not challenged. The evidence by the plaintiff that the 4th to 6th defendants were acting on behalf of the 1st and 2nd defendants was also not challenged. The defendants did not also challenge the evidence that was adduced by the plaintiff that he had erected a fence around the suit property and had assembled timber in readiness to commence development on the property. The plaintiff also produced evidence in the form of photographs showing the defendants and their agents carrying out construction on the suit property. It is my finding that the defendants entered the suit property forcefully and in the process damaged the plaintiff's fence and other properties which were on the suit property.

Whether the plaintiff is entitled to the reliefs sought in the amended plaint:

As I have stated earlier in this judgment, it was not disputed that the plaintiff is the owner of the suit property. The plaintiff has proved that through fraud, the defendants deleted the suit property from the R.I.M for Nairobi/Block 63, sheet No. 2 and replaced it with Plot No. 293 with the intention of depriving the plaintiff of the property. The plaintiff has also proved that in furtherance of the said fraud, the defendants forcefully entered the suit property and evicted the plaintiff therefrom in the process of which they destroyed the plaintiff's properties. I am satisfied that the plaintiff has proved his case against the defendants and as such he is entitled to the reliefs set out in the amended plaint dated 12th November, 2008. I therefore enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (b), (c) and (d) of the amended plaint. I also award the plaintiff a sum of Kshs.100,000/= as general damages for trespass together with interest at court rate from the date hereof until payment in full.

Who shall bear the costs of the suit?

Costs normally follow the event. No reason has been given to warrant a departure from this rule. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 5th Day of July 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Ndungu for the Plaintiff

N/A for 1st, 3rd, 4th, 5th and 6th Defendants

N/A for 2nd Defendant

Catherine Court Assistant