



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 552 OF 2017

(FORMELY NAIROBI ELC CASE NO. 1101 OF 2013)

AVID DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

BLUE HORIZON PROPERTIES LIMITED.....1ST DEFENDANT

THE DIRECTOR OF SURVEYS OF KENYA.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

JUDGMENT

By an *Amended Plaintiff* dated 15th February 2019, and filed on 23rd July 2019, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders:-

- a) *A permanent injunction order restraining the 1st Defendant whether by itself, or through its agents/servants and/or workmen or otherwise howsoever from doing any of the following acts that is to say selling, transferring, disposing off, charging, trespassing, leasing out and/or in any manner interfering with the plaintiff's right of ownership and legal interests in all that parcel of land known as Land Reference 20150 LR 64049, Mavoko, Machakos (suit property).*
- b) *A declaration be issued that the plaintiff herein is the rightful indefeasible owner of the suit property.*
- c) *A mandatory injunction be issued directing the 1st Defendant to surrender with immediately effect the grant, Deed Plan and all other title documents in its possession for the property known as Land Reference Number 20150 IR 120373 to the 3rd Defendant for cancellation.*
- d) *A mandatory injunction be issued directing the 2nd and 3rd Defendants to cancel the Grant, Deed Plan and other title documents in the 1st Defendant's possession and to amend their records to reflect the Plaintiff as a rightful owner of the suit property.*
- e) *The counterclaim filed by the 1st Defendant be dismissed with costs.*
- f) *A permanent mandatory injunction to order the 1st Defendant to forthwith remove any and all beacons it has put on the suit property.*
- g) *A mandatory injunction to order the 1st defendant to make good all damages done on the suit property as a result of the fraud.*
- h) *General Damages for trespass and attempted wrongful occupation by the 1st Defendant at rates to be assessed by the court.*
- i) *Costs of this suit.*
- j) *Any other or such further relief as this Honorable Court may deem just and fit to grant.*

In its *Statement of Claim*, the Plaintiff averred that it is the registered owner of the suit property known as *Land Reference Number 20150*

IR 64049, situate in **Mavoko Municipality** in Machakos County measuring **5 hectares**, having purchased it in the year **2010**. That the Plaintiff has discovered that the **1st Defendant** has been purporting to be the owner and attempting to subdivide and dispose off the suit property and has trespassed by putting beacons. That the **1st Defendant** has used **fraudulent, unlawful and illegal** means to stake a claim on its property by obtaining a fake title through unscrupulous means and that the **2nd and 3rd Defendants** have issued a second title and Deed Plan over the suit property.

In the Amended Plaintiff, the Plaintiff denied all the allegations made in the Amended Counter Claim and averred that the suit property was validly purchased from the registered owner for valuable consideration. That the Plaintiff having the first title is the **absolute and indefeasible** owner of the said suit property and that the Plaintiff's Deed Plan relates and corresponds to the suit property. The Plaintiff denied being involved in any fraud and averred that it is the **1st Defendant** who has trespassed upon its land.

The suit is opposed and the **1st Defendant** filed an Amended Defence and Counter Claim dated **18th December 2017**, and filed on **17th May 2018**, and denied all the allegations made in the Plaintiff. It contended that the Plaintiff lack proprietary rights over the suit property as it is the rightful and sole owner.

That the Plaintiff does not have any title over the suit property and its title is the first and only one. It denied engaging in any **fraudulent** activities and particularized fraud by the Plaintiff as; failing to conduct due diligence; purporting to purchase fraudulently acquired land with actual notice of the fraud or constructive fraud; purporting to purchase a non-existent land; carrying away its container, holding fake documents and conniving with the lands officers to fraudulently procure title to land. It was the **1st Defendant's** further contention that it had authority to deal with the land as it deemed fit.

In its Counter Claim, the **1st Defendant** averred that it met all the requisite conditions for issuance of title to the grant and it was issued with a title document to the **Land Reference Number 20150 IR 120373**, and that the Plaintiff does not have any probative proof of the ownership of the land. That the Deed Plan do not relate to its land, but relates to another parcel of land. Further that it has never **sold, ceded, transferred or disposed** off its land. Further that the land claimed by the Plaintiff does not correspond to its land and that the Plaintiff cannot procure title to land without a valid Deed Plan. The **1st Defendant** particularized fraud as against the Plaintiff being that the Plaintiff forged documents to obtain registration in its favor, obtaining registration without following lawful procedure, failing to disclose illegal activities; failure to conduct due diligence prior to purchasing the land; obtaining registration while they had not paid government levies and backdating documents.

It was further contended that the **2nd Defendant** has maintained in its records more than one Deed Plan contrary to the law and the **3rd Defendant** has maintained more than one title in respect to the same **L.R No. 20150**, even when **IR Numbers** are different. That the same is negligent and intended to perpetuate fraud.

It also particularized illegality on part of the **2nd and 3rd Defendants** and the Plaintiff and averred that the Plaintiff has illegally and unlawfully trespassed on its land and as such it has suffered having been deprived the use and enjoyment of its property. Further that it has suffered special damages of **Kshs.470,000/= and Kshs.15,000/=** for payment of workers.

The **1st Defendant** sought for orders that;

- a. **The Plaintiff suit against the 1st Defendant be dismissed with costs.**
- b. **the 1st Defendant counterclaim be allowed with costs,**
- c. **A declaration that the 1st Defendant is the rightful owner of the suit land known as Land Reference Number 20150 IR 120373, Municipal Council of Mavoko.**
- d. **A Declaration that the title and all documents relating to the ownership of L.R No. 20150, I.R No. 120373 Municipal Council of Mavoko held by the Plaintiff were irregularly obtained and are therefore null and void ab initio.**
- e. **A Declaration that the Plaintiff forcefully and unlawfully and illegally occupied and took possession of the property L.R No. 20150 IR No. 120373, Municipal Council of Mavoko which acts amounts to trespass.**
- f. **An order for the eviction of Plaintiff from the suit premises and the correction of any records interfered with by the Plaintiff at the land register and the survey of Kenya.**
- g. **A Permanent injunction to restrain the Plaintiff whether by himself, or by his servants or agent or any of them or otherwise dealing with the property known as L.R No. 20150 I.R No. 120373, Municipal Council of Mavoko in any manner whatsoever by trespassing, constructing, occupying, selling, alienating disposing, charging, mortgaging or creating or placing a lien charge, caveat or any other illegal encumbrance on the said property.**
- h. **An order directed to the **2nd and 3rd Defendants** to rectify respective records to reflect the **1st Defendant** as the owner of L.R No. 20150, I.R No. 120373, Municipal Council of Mavoko and to cancel the title held by the Plaintiff and its predecessor in title and or title held by any other person or entity.**
- i. **An award of General Damages to be awarded to the **1st Defendants** for the sum to be assessed by this Honorable Court for trespass and violation of the **1st Defendants** right to property guaranteed under Article 40 of the Constitution**

j. Special Damages as tabulated and proven herein

k. Such other or further relief that this Honourable Court may deem fit and just to grant

l. Costs of this suit and Counter Claim

m. Interest in (i) (j) and (k) above

The 2nd and 3rd Defendants filed their Defence to Counter Claim dated 17th August 2018, and denied all the allegations made in the Amended Defence and Counter Claim, and averred that the 1st Defendant and Plaintiff must strictly prove their claims and denied conniving with any party.

The suit proceeded by way of *Viva Voce* evidence and the Plaintiff called three witnesses. Pw 1 testified on 10th March 2016, but was later recalled and testified on 8th June 2016. The 1st Defendant despite being served, failed to call witnesses.

PLAINTIFF'S CASE

PW1 – James Mwangi Kamau testified that he is a Director of the Plaintiff Company. He adopted his witness statement dated 16th September 2013, and produced his list of documents. It was his testimony that the suit property is registered in the name of **Avid Developers**. That he purchased the land from **Gum Chem Limited** for **Kshs.12,000,000/=** and the Plaintiff was issued with a transfer dated 12th November 2010, and was later issued with a title deed. That the title Document is grant No. **I.R 64049**. That the Plaintiff is in possession of the suit property and there was someone living on the said property.

Further that when he learnt that someone had demarcated the suit property, his Advocate advised him to advertise that the suit property was not for sale. That he received a letter from the 1st Defendant's Advocate who claimed that the suit property belonged to the 1st Defendant. That he then reported the matter to the Police. He acknowledged that the 1st Defendant also had a title deed dated 20th March 2009, and that their title deed was issued earlier.

That he has been paying rates and the accounts are in the name of **AVID DEVELOPERS LTD** but **BLUE HORIZONS** altered the said accounts. He further stated that he has seen the 1st Defendant's title deed dated 20th March 2009, while their title was issued earlier. He stated the grant was transferred to them in **December 2010**, while the 1st Defendant's title was issued in **2009**, and that he pays rates to **Mavoko County Council**. He further stated that he bought the land from **GUM CHEM LIMITED**. It was his testimony that he signed the agreement through **Christine Githii Advocate** and paid through **RTGS** for the purchase price. That though the transfer document is indicated as **Kshs.8,000,000/=** he testified that he paid **Kshs. 12,000,000/=**. He denied hatching a plan with his lawyers and the lands office and denied that his title is under investigations. That the Grant under Investigations is the 1st Defendants title of **I.R 120373**. That he saw the suit property before buying it, That he was not aware of the process of allotment and he did not pay **Kshs. 173,760/=** on 10th December 1993. That **IR NO 20150** and **IR 64049** are two numbers that refer to the same title and the reference title is **LR 20150 and IR 12037**. He averred that his title was issued on 2/12/1994, while the 1st Defendant's title was issued on 4/11/2009.

PW2 – Joseph Wangombe Kamuyu, testified that he is the Land Registrar based at the Ministry of Lands. That the summons were issued by the office of Land Registrar to the 1st Defendant dated 31/10/2013, upon receipt of a Complaint from the **Law Firm of Kiarie Githii Advocates** as there existed another title in respect of their client's parcel of land. That the 1st Defendant was to bring all the documents as it is the standard procedure noting that the parties were claiming the same parcel of land. However, the 1st Defendant did not attend to the summons.

That he did not serve the summons personally and did not know if they were received, but the same were sent to their last known address. That there were criminal investigations ongoing and as per the letter dated 16th September 2013, the 1st Defendant complained about the land

PW3 – EDWIN MUNOKO WAFULA, testified that he is a Land Registrar based at **Athi House, Nairobi**. He stated that the letter dated 2nd April 2014, was issued by their office which stated that there was unsuccessful resolve of the issue of double allocation. He stated that their office was unable to resolve the issue.

On cross examination, he stated that he does not have mail records to show that the letter was delivered to the 1st Defendant and that his duty was only to confirm that the letter emanated from the lands office and to produce the letter.

The Plaintiff closed his case on the 26th October 2016, and through the **Law Firm of Kiarie Kariuki & Githii Advocates**, filed its written submissions dated 19th February 2021, and submitted that his evidence has not been contradicted and that he has proved his entitlement for relief sought.

It is noteworthy that from **October 2016**, the matter had been adjourned severally at the instance of the 1st Defendant. It is also important to note that this suit was filed in 2013 and by 8th December 2020, it was over 7 years in the Court system.

The Court has carefully read and considered the Pleadings by the parties, the evidence adduced and the written submissions and renders itself as follows;

Though the 1st Defendant filed an Amended Defence and Counterclaim, and the 2nd and 3rd Defendants filed their Defence, they did not adduce any evidence in support of their claims and therefore all the averments in their Defence remains mere allegations as averments in pleadings are not evidence. In this instant therefore, the Plaintiff's evidence remained uncontroverted. See the case of **Shaneebal Limited... Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007,** where the Court held that:-

“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein . The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations.... Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

However, it is trite that ***‘he who alleges must proof’*** and uncontroverted evidence, is not automatic evidence, as the law places on the Plaintiff the obligation of proving its case.

Having considered the pleadings herein and the available evidence, the Court finds the issues for determinations are;

- 1) ***Whether, the Plaintiff is entitled to the orders sought.***
- 2) ***Whether the 1st Defendant's Counter claim has been proved and whether 1st Defendant is entitled to prayers sought in the Counter claim.***

The Plaintiff has sought for Permanent Injunction, a Declaration that it is the absolute and indefeasible owner and further for General Damages for trespass. For the Court to find in favour of the Plaintiff, it is not in doubt that the Plaintiff ought to prove that it is deserving of the orders sought.

It is evident herein that both the Plaintiff and the 1st Defendant are in possession of a grant over the suit Property **L.R 20150**. However the **I.R Nos** that they both hold are different as the Plaintiff's grant bears the **I.R No. 64049**, while the 1st Defendant holds a grant with **I.R No. 120373**.

When a party's title to land is called into question, the Party has an obligation to show the root of its title. See the case of **Munyu Maina...Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009,** where the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

As already noted above, the 1st Defendant did not support its averments and therefore its Defence and Counter claim remained mere allegations and the Court finds and holds that the 1st Defendant did not prove the root of its title.

The Plaintiff on the other hand testified that it bought the suit property from **Gum Chem Limited**. The Plaintiff has produced in evidence a transfer dated **12th November 2010**, indicating the transaction between it and **Gum Chem Limited**. The Plaintiff has further produced in evidence a letter dated **30th May 1992**, from **Gum Chem Limited** to Commissioner of Lands seeking allocation of land. That vide an allotment letter dated **4th January 1993**, the said **Gum Chem Limited** was issued and allotted with land upon payments of certain monies which on **17th November 1993**, the Commissioner of Lands confirmed receiving. It therefore followed that once the said **Gum Chem Ltd** was allotted the said land, no one else could be allotted. See the case of **Rukaya Ali MohamedVs... David Gikonyo Nambacha & Another (Kisumu HCCA No. 9 of 2009:-**

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was out rightly illegal or it was against the public interest.”

In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.

The Plaintiff having been able to show the root of its title, the Court finds and holds that it has then proved that it is the absolute and indefeasible owner of the suit property. See the case of **Hubert L. Martin & 2 OthersVs... Margaret J. Kamar & 5 Others[2016] eKLR, where the Court held that;**

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they

hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

Even assuming the 1st Defendant was able to show the root of its title, from the documentation attached to the pleadings, the 1st Defendant was allotted the suit property way after **Gum Chem Ltd** had already been allotted. It is evident that where there is a double allocation, there is no doubt that the first in time will prevail. The court finds that the Plaintiff’s title was first in time and the Court will rely on the Maximum of Equity which states that, **“when two equities are equal, the first in time shall prevail”**. See the case of ***Gitwany Investment Ltd. Vs. Tajmal Ltd & 3 Others (supra)***.

Having found that Plaintiff is the absolute and indefeasible owner of the suit property, then the Court finds that the Plaintiff is entitled to enjoy the rights of an absolute owner of the property as is provided by **Sections 24 and 25 of the Land Registration Act. Section 24(a)** of the said Act provides as follows:-

Subject to this Act:-

“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:”

Further as an absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by **Section 25(1)** of the **Land Registration Act** which provides as follows:-

25.(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 leased, 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 and to require noting on the register, unless the contrary is expressed in the register.**

As the Court finds that the Plaintiff acquired its allocation and registration regularly and without any evidence of fraud, then it is evident that the **Plaintiff is entitled to protection of its property as provided by Article 40** of the **Constitution** and therefore entitled to the Injunction orders sought.

There was no evidence availed by the 1st Defendant to prove that the Plaintiff acquired the suit land illegally. However, the Plaintiff has proved on the required standard what it had alleged – that the suit land known as **Land Reference Number 20150 IR 64049** belongs to itself. This therefore concludes that the registration of the suit land in respect of 1st Defendant was tainted with **irregularity** and was **null and void**, and the Court finds that it has no option but to cancel the 1st Defendant’s proprietorship of the suit property as per the provisions of **Section 80 of the Land Registration Act**, having **failed to give evidence of the process through which it was allocated the suit land**.

The Plaintiff has also sought **General Damages for Trespass**. Trespass has been defined by **Clerk and Lindsell on Torts, 18th edition at Pg.23** as;

“any unjustifiable intrusion by one person upon the land in possession.”

The court is satisfied on the material placed before it that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the 1st Defendant of encroaching upon its land and putting beacons. This evidence has not been controverted. The 1st Defendant having entered onto the Plaintiff’s suit land without any lawful or justifiable cause while the Plaintiff was in possession, the 1st Defendant was therefore a trespasser in law. As to whether the Plaintiff is entitled to General Damages for trespass, the Court will be persuaded by the case of ***Park Towers Limited versus 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.”

Plaintiff’s evidence that the 1st Defendant did enter upon the suit land and demarcate it have not been rebutted, its actions caused interference with the Plaintiff’s use and occupation of the suit land. However, the Plaintiff did not provide the value with which the Court is to work with. The Court therefore proceeds to award a figure of **Kshs.1,000,000/=**.

Consequently, after careful analysis of the available evidence, the Court finds that the Plaintiff has proved its case on the required balance of probabilities and therefore is entitled to the prayers sought in its Amended Plaintiff. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally in terms of **prayer No. (a), (b), (c), (d), (e), (f), (g) (h) and (i)**.

In terms of **prayer No.(h)**, the Court awards the Plaintiff General Damages for trespass in the tune of **Kshs.1,000,000/=**. The 1st Defendant has however failed to prove its Counter Claim and the same is dismissed with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at Thika this 6th day of May 2021.

L. GACHERU

JUDGE

6/5/2021

Court Assistant – Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Githii for the Plaintiff

M/s Kimathi holding brief for Mr. Mwangi for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

L. GACHERU

JUDGE

6/5/2021