



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 220 OF 2018

JAMES MWANGI KAMAU.....PLAINTIFF

VERSUS

WESON INVESTMENT LTD.....DEFENDANT

JUDGMENT

1. By plaint filed on 22nd June 2018, the plaintiff averred that in 1973 he joined a company known as Kiamunyi Limited and acquired shares thereof. He averred further that by virtue of his membership, he was allocated six acres of land which later became known as land parcel No. Njoro/Ngata Block 1/296 and ¼ acre which later became known as land parcel No. Njoro/Ngata Block 1/432. He added that titles were issued to him in respect of the parcels.

2. The plaintiff further averred that he was in possession of land parcel No. Njoro/Ngata Block 1/432 from 1973 to 2016 when he went to the United States of America and that when he came back after two years, he found a fence erected on two sides of his plot and maize crops planted in it. That he learnt that the green card in respect of the parcel was plucked out and replaced with another in the name of the defendant. He added that he has never transferred the plot to the defendant and that the defendant's title was fraudulently and irregularly obtained.

3. The plaintiff therefore prayed for judgement against the defendant for:

(a) *A declaration that parcel LR Njoro/Ngata Block 1/432 belongs to the plaintiff.*

(b) *An order for cancellation of the title deed issued to the defendant and an amendment of the register to reflect the plaintiff as the owner of parcel LR Njoro/Ngata Block 1/432.*

(c) *An order of injunction restraining the defendant, its agents or servants from entering, alienating, transferring, charging or in any way dealing with title No. Njoro/Ngata Block 1/432.*

(d) *Damages for loss of use of LR Njoro/Ngata Block 1/432.*

(e) *Costs of this suit.*

4. In its statement of defence, the defendant stated that it purchased the suit property through sale agreement dated 18th August 2011 after conducting due diligence. It added that it had been in peaceful occupation since 2012 and denied the plaintiff's other averments. It urged the court to dismiss the plaintiff's suit with costs.

5. At the hearing, the plaintiff testified as PW1. He stated that in 1973 he and others formed a company known as Kiamunyi Ltd, a land buying company. That as a shareholder he was allocated a six-acre plot and another plot measuring a quarter of an acre. That the latter plot was Njoro/Ngata Block 1/432 and that he was issued with a lease and a certificate of lease, both dated 19th April 1985. He added that around April or May 2018, he went to the plot and found it fenced with maize planted on it and a water tank placed on it. That he tried to conduct a search at the land registry without success. He put up a notice on the suit property indicating that it was for sale and that is when the defendant's director called him. They later went to the land registry where he was informed that the green card for the suit property was missing from the parcel file.

6. He further testified that Kiamunyi Ltd had a members register where his name was included. Under cross examination, he conceded that there was an alteration on the date of the lease and that he did not have any allotment letter from the government.

7. Hellen Kharemwa, the District Land Registrar Nakuru testified as PW2. She stated that she had in her records a white card for plot No. Njoro/Ngata Block 1/432 which showed the first owner to have been David Kiprono Towett who was issued with a Certificate of Lease on 7th January 2000. That David Kiprono Towett transferred the suit property to the defendant on 22nd March 2012 and that a certificate of lease was issued to the defendant on 30th March 2012. That the size of the property was indicated as 0.0799 hectares and that she was not able to retrieve the registers for Kiamunyi Ltd from the records at the registry. She nevertheless produced a certified copy of members register for the company which was in the plaintiff's bundle and added that she could not confirm its authenticity. She also had with her in court, the parcel file for the suit property. She stated that there was in the file a lease registered on 19th April 1985 and that the lessee in the lease was the plaintiff. That the information on the lease was not reflected on the white card and that there was no other lease in the file besides that in favour of the plaintiff.

8. The District Land Registrar further testified that the usual process of registration of a lease starts with allocation of land after which a lease is prepared by the Land Administration Department of the Ministry of Lands. That the lease is then forwarded to the Land Registrar for registration and issuance of certificate of lease to the allottee.

9. The plaintiff's case was then closed.

10. Titus Wesonga Lusaka, a director of the defendant, testified as the only defence witness. He stated that the defendant acquired the suit property through sale agreement dated 18th August 2011, after conducting a search dated 5th August 2011 which confirmed that the land was owned by David Kiprono Towett. That the defendant paid the purchase price then executed transfer dated 22nd March 2012 and was issued with a certificate of lease dated 30th March 2012. He added that he only became aware of the dispute on the property on 12th May 2018, some six years after the defendant had obtained title. That he conducted a search on the suit property and obtained a certificate of search dated 14th May 2018 which showed that the defendant was the owner.

11. Mr Lusaka further testified that David Kiprono Towett did not show the defendant any lease in his name in respect of the property. When shown the certified copy of members register of Kiamunyi Ltd which had been produced, he stated that he had no comment on it.

12. The defendant then closed its case.

13. Parties filed and exchanged their written submissions. The plaintiff in his submissions pointed out that the certificate of lease produced by the defendant dated 30th March 2012 as defence exhibit 4 shows that the register was opened on 7th January 2000 directly to David Kiprono Towett as the first registered owner from the government and the defendant as the third owner. That the transfer in favour of the defendant is not supported with documentation from the parcel file as most documents are missing including the cancelled lease that had been issued to David Kiprono Towett before the purported transfer and that therefore the sanctity of the title of the suit property in favour of the defendant is tainted. He relied on **Sections 7 and 31** of the **Land Registration Act** and the case of **Elijah Makeri Nyangw vs Stephen Mungai Njuguna & Another [2013] eKLR**

14. The plaintiff further argued that Kiamunyi Ltd surrendered the land to the government in terms of **section 9(2)** of the **Land Act**. He also submitted that the Land Registrar confirmed that the lease which he produced was in the parcel file and that the members register also confirmed that he was a member of Kiamunyi Ltd. That the names of the defendant and David Kiprono Towett do not appear on the register. The plaintiff further submitted that his interest in the suit property preceded the defendant's. He relied on the case of **Harison Mwangi Nyota vs. Naivasha Municipal Council & 20 Others [2019] eKLR** and argued that the documents produced by the defendant have unexplained discrepancies. He prayed that the orders sought in the plaint be granted.

15. In its submissions, the defendant argued that it followed the right procedure in acquiring the suit property and that it had produced all the necessary documents to support the transfer to its name. It added that since it is the plaintiff who is alleging fraud, the burden of proof is on him. Citing the case of **Central Bank of Kenya v Trust Bank Limited & 4 Others [1996] eKLR** and **Warson Limited v Richard Mwangi Wachira & 5 others [2019] eKLR** as well as **Section 107 (1)** of the **Evidence Act**, it argued that it is a bona fide purchaser and that the plaintiff had failed to prove its allegations of fraud.

16. It further submitted that there were discrepancies in the documents produced by the plaintiff and that the plaintiff's certificate of lease was not reflected in the white card whereas the defendant's was duly captured therein. Relying on **Section 32** of the **Registered Land Act** (repealed) and the case of **Trustees Chrisco Church Nakuru v Samwel Kibowen Towett & 4 others [2017] eKLR**, it argued that the white card is prima facie evidence of its contents. Regarding the issue of documents missing from the parcel file, it argued that it was incumbent upon the Land Registrar to offer an explanation. It concluded its submissions by praying that the plaintiff's suit should be dismissed with costs.

17. The plaintiff filed further submissions and argued that the defendant did not meet the legal threshold of being an innocent purchaser for value without notice. He placed reliance on the case of **Weston Gitonga & 10 others vs. Peter Rugu Gitonga & Anor [2017] eKLR** and argued further that David Kiprono Towett, the purported seller of the suit property, did not testify before the court to vouch for his title. He also argued that the defendant did not demonstrate that it conducted due diligence.

18. I have carefully considered the parties' pleadings, evidence and submissions. Only two issues arise for determination: whether any of the parties' titles was fraudulently or irregularly obtained and whether the plaintiff is entitled to the reliefs sought.

19. As a starting point, it is important to restate that fraud is a serious allegation which must be proven on a standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. Those general principles were reiterated by the Court of Appeal in **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR** as follows:

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a

balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...

20. The plaintiff’s case is built around the argument that he has a good title to the suit property and that the defendant’s title is tainted by fraud and irregularities. The particulars of fraud pleaded against the defendant are that it obtained title without conducting due diligence, that it obtained transfer from a person who was not the owner of the suit property, having the property transferred to himself without registration of requisite transfer documents and failing to provide transfer documents to the land registrar. The defendant has equally asserted that it has a valid title.

21. In essence, the parties herein are challenging each other’s title. In such circumstances, they must establish their root of title. They cannot just dangle the title documents. See Munyu Maina v Hiram Gathiha Maina [2013] eKLR. Further, the plaintiff herein who is seeking orders that his title be upheld and that the defendant’s be nullified can only succeed on the strength of his case and not on the weakness of the defence. See Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others [2019] eKLR.

22. I have examined the parties’ respective documents of title. I have noted multiple grave discrepancies on both sides as I now enumerate below.

23. Both the plaintiff and the defendant have in their possession certificates of lease in respect of the parcel of land known as Njoro/Ngata Block 1/432, the suit property. The plaintiff’s certificate of lease is dated 19th April 1985 while the defendant’s certificate of lease is dated 30th March 2012. The plaintiff’s certificate of lease is premised on a lease dated 19th April 1985. The District Land Registrar who testified as plaintiff’s witness stated in her testimony that the said lease was in the parcel file and that it was registered on 19th April 1985. According to her, both the date of registration of the lease and the date in the plaintiff’s certificate of lease tally. I have compared both documents and I note that there is evidence of erasure on the day of the month in the date in plaintiff’s said certificate of lease. Further, I note that the lease is dated 12th April 1986, a date which is a year after the date on the certificate of lease! Further, the lease does not bear the land registrar’s signature as proof of date of registration.

24. The plaintiff’s case is that he acquired the suit property by virtue of being a member of Kiamunyi Limited, a land buying company. In support of his claim of acquisition from Kiamunyi Ltd, the plaintiff relied on a certified copy of a hand-written register said to be of the said company. It was produced by the District Land Registrar who stated that it was certified by M. V. Bunyoli, her predecessor in office. A perusal of the said register does not reveal anything showing that it emanated from the company. The plaintiff’s case being that he was a shareholder of the company, nothing has been availed to demonstrate such membership and how it translated to entitlement to the suit property.

25. Additionally, the plaintiff’s title is a leasehold title with the lessor being the Government of Kenya. It has not been shown how the property transitioned from Kiamunyi Ltd to the Government of Kenya. An attempt was made in the plaintiff’s submissions to explain that there was a surrender from Kiamunyi Ltd to the Government of Kenya. No evidence was led to demonstrate such a surrender. Even assuming there was a surrender, no evidence was led to demonstrate an allotment to the plaintiff prior to execution of the lease document. A lease from the government can only arise following an allocation by the government.

26. The defendant’s case on the other hand is that it is a bona fide purchaser without notice of any fraud. It contends that it purchased the suit property from David Kiprono Towett through sale agreement dated 18th August 2011 after obtaining a certificate of search dated 5th August 2011. The documents relied on by the defendant include a certificate of lease said to have been issued to David Kiprono Towett on 7th January 2000 under the **Registered Land Act** (now repealed). The lessor is indicated as the Government of Kenya.

27. As happens with all government leases, David Kiprono Towett’s certificate of lease had an express restriction stating that no disposition shall be registered without the written consent of the Government of Kenya. The restriction was based on **Section 48** of the **Registered Land Act** (now repealed) which provided thus:

Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar: ...

28. Although the defendant produced several documents in a bid to justify the transaction between it and David Kiprono Towett, no consent of the Government of Kenya required under the aforesaid **Section 48** was produced. Needless to state, a transfer from David Kiprono Towett to the defendant could not be validly registered in the absence of the consent.

29. Further, the defendant did not produce any letter of allotment or any lease in favour of David Kiprono Towett. Those are elementary documents that the defendant should have produced to demonstrate the root of its title. The land registrar’s testimony was that there was no lease in favour of David Kiprono Towett in the parcel file. One then wonders how a certificate of lease was issued in his favour in the absence of a lease. I found it telling that when questioned about documents that would establish root of its title, the defendant’s director was least concerned and was content to wave the defendant’s certificate of lease and the certificate of search.

30. The transactions that the parties claim to be the foundations of their respective claims to the suit property all took place during the regime of the **Registered Land Act** (now repealed). Under **Section 6 (1)** of the Act, the land registrar was required to keep in the registry a register, a parcel file containing the instruments which support the entries in the register and a presentation book containing a record of all

applications numbered consecutively in the order in which they are presented to the registry.

31. Despite all those elaborate provisions as to the records to be kept by the registrar, the registrar's testimony did not assist the court at all. She testified that standard procedure in regard to government leases is that an allocation is done followed by a lease document, all of which are forwarded to the land registrar from the Land Administration Department at the Ministry of Land headquarters. That the registrar then registers the lease and issues a certificate of lease. One then expects that the parcel file would contain the letter forwarding the lease, a copy of the lease and a copy of the letter of allotment.

32. Additionally, the presentation book should provide details about receipt of the lease document at the registry. Since the lease document is usually forwarded to the land registrar from the Land Administration Department at the Ministry of Land headquarters, it follows that there must be a correspondence file and other related files at the headquarters which can be queried internally within the ministry to justify or disprove competing claims. The registrar failed to offer any details as whether all those essential steps and if so, the outcomes thereof.

33. Although the registrar stated that she had in her file a white card which supported David Kiprono Towett's certificate of lease, she did not produce the said white card or offer any explanation as to why she had in the same file a white card suggesting that David Kiprono Towett became the first proprietor on 7th January 2000 and a lease indicating that the plaintiff became proprietor much earlier, on 19th April 1985. Obviously, the registrar's parcel file besides being incomplete, did not make any sense. This is one more case in which the land registry and the ministry have failed both the litigants and the court.

34. Although the plaintiff maintains that the property he is claiming is the same one that the defendant is also claiming, I note that the size of the property is stated in the plaintiff's title as 0.0969 hectares while the size as per the defendant's title is 0.0799 hectares. Worse still, a perusal of the lease document that the plaintiff produced reveals that the size of the property was captured therein as 0.0960 hectares. Neither the registrar nor any of the parties offered any explanation as to the discrepancies in size. If indeed we are dealing with the same property, it cannot possibly be different sizes on the ground. If I was to, for example, declare that the plaintiff has a better title to the property, which property size would I be referring to now that the plaintiff's own documents have conflicting sizes?

35. I have said enough to demonstrate that there are serious shortcomings in the title documents presented before the court by both parties. As the one moving the court, the plaintiff must be aware of the rule under **Section 107 (1)** of the **Evidence Act** that he who alleges must prove as well as the provisions of **Section 108** of the same Act which place the burden of proof squarely on him.

36. In view of the discussion above, the plaintiff has not discharged the burden of proof. He has not demonstrated why his title should prevail over the defendant's. For those reasons, the plaintiff is not entitled to the reliefs sought.

37. As noted above, the defendant's title is equally questionable. Even though the plaintiff's case fails, that in no way signals that the defendant has a good title to the suit property. It may even turn out that none of the parties herein are entitled to the suit property.

38. I am aware that the outcome herein will leave the parties exactly where they were at the commencement of this litigation. The court cannot shut its eyes to the discrepancies on both sides. Parties formulate and prosecute their respective cases and the court decides. If the case brought does not merit the relief sought then the case fails, regardless of the consequences of the failure. It is up to the parties to formulate a case that actually resolves the problem at hand.

39. In the end, I dismiss the plaintiff's case. Since the defendant has not demonstrated any better title, I order that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF JUNE 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Nancy Njoroge for the plaintiff

Mr Wekhomba for the defendant

Court Assistants: B. Jelimo & J. Lotkomoi