



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1575 OF 2000

(CONSOLIDATED WITH ELC NO 2314 OF 1999)

JANE WANJIRU KIMANI.....1<sup>ST</sup> PLAINTIFF

GEORGE KIMANI NG'ANG'A.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

MUCHATHA HOUSE CO. LTD.....DEFENDANT

JUDGEMENT

1. This Judgement is in respect of consolidated suits being ELC 1575 of 2000 and ELC 2314 of 1999. In ELC 2314 of 1999, by a plaint dated 1<sup>st</sup> December 1999 the plaintiff George Kimani Ng'ang'a seeks judgment against the defendant for:-

- a. An injunction restraining the defendants whether by themselves, their agents, servants or howsoever otherwise from trespassing on the said property and also from erecting any structures, whether temporary or permanent on the said property.
- b. An injunction restraining the defendants whether by themselves, their servants, agents or howsoever otherwise from permitting illegal structures which have erected on the said property to remain thereon.
- c. Damages for trespass to property.
- d. Costs of this suit.
- e. Interests on (c) and (d) above.
- f. Any other and further reliefs this honourable court deem it fit and just to grant.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of Njogu and Ngugi Advocates. It also filed a statement of defence dated 17<sup>th</sup> December 1999. In the said defence the defendant states that it is the rightful owner of the suit property. It denies each and every allegation of trespass in the plaint. It prays that the plaintiffs' suit be dismissed with costs.

3. In HCCC 1575 of 2000, the plaintiff Jane Wanjiru Kimani, by a plaint dated 22<sup>nd</sup> September 2000 seeks a judgment against the defendant for:-

- a. An injunction restraining the defendants whether by themselves, their agents servants or howsoever otherwise from trespassing on the said property and also from erecting any structures, whether temporary or permanent on the said property.
- b. An injunction restraining the defendants whether by themselves, their servants, agents or howsoever otherwise from permitting illegal structures which they have erected on the said property to remain thereon.
- c. Damages for trespass to property.

**d. Costs of this suit.**

**e. Interest on (c) and (d) above.**

**f. Any other and further relief this honourable court deem it fit and just to grant.**

4. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance and filed a statement of defence and counterclaim dated 28<sup>th</sup> May 2004. The same was amended on 26<sup>th</sup> June 2000. This counterclaim seeks orders:-

**i. That the plaintiffs suit against it be dismissed with costs.**

**ii. That the court do issue a declaration that the certificate of lease in respect of the plaintiffs is invalid and directs the Commissioner of Lands to Cancel the same.**

**iii. That the court do issue a declaration that Kiambaa/Muchatha/T381/36 belongs to the defendant and direct the Commissioner of Lands to issue a certificate of lease to the defendant.**

**iv. Costs and interests.**

5. It is the 1<sup>st</sup> Plaintiff (George Kimani Ng'ang'a) case that he is the registered owner of the property known as Kiambaa/Muchatha/T.381/36 pursuant to a certificate of lease dated 6<sup>th</sup> February 1997.

6. PW1, George Kimani Ng'ang'a testified that he bought the said plot with the intention of developing it. The building plans were drawn but when he went to the said plot he found someone else digging trenches. He stated that he bought the plot from one Charles Ngugi Muthama in 1994 – 1995 for Kshs.80,000/-. The said Charles Ngugi had a letter of allotment and a receipt. He further stated that the defendant was the one digging trenches on the said plot.

7. He stated that after buying the plot, he and Charles Ngugi went to Karuri Urban Council where the plot was transferred to his name and a letter of allocation issued to him. He also made annual rates in respect of the said plot. Later he was issued with a certificate of lease on 6<sup>th</sup> February 1997. He further stated that the defendant is the owner of the an adjacent plot which it has developed. He told the court that he stopped paying rates pending the determination of this suit.

8. He prays that the plots revert to him as the defendant has no title. He also prays for damages for the loss suffered. He adopted his witness statement and the bundle of documents. The documents were produced as exhibits in this case.

9. PW2, Jane Wanjiru Kimani, the 2<sup>nd</sup> plaintiff in this case adopted her witness statement. She testified on 6<sup>th</sup> May 2019. She told the court that she was relying on the bundle of documents. She told the court that she is the owner of plot known as Kiambaa/Muchatha/T.381/35. That the defendant has constructed on the said plot. She was allocated the plot by Karuri Town Council in 1992. She paid annual rates in respect of the said plot. She produced the receipt as exhibits in this case. She was issued with the certificate of lease on 18<sup>th</sup> September 1996.

10. It is here case that the defendant entered her plot in the year 2000 and she has been unable to put up a commercial building as she intended. The suit plot is at Muchatha Market. It is adjacent to the defendant's plot. She states that the suit plot was vacant when it was allocated to her. She prays that the defendant be restrained from interfering with her plot. She also seeks damages for trespass.

11. It is the defendant's case that the plaintiffs fraudulently acquired the respective certificates of leases in respect of the suit properties. That it has been in occupation of the suit properties for almost forty (40) years before the plaintiff's appeared purporting to have obtained certificate of leases. That it had built a club house that offered social amenities to the local people.

12. The defendant called three witnesses. DW1, Fred Ndungu Kangethe, the Chairman of the defendant testified on 23<sup>rd</sup> July 2019. He told the court that the defendant was in occupation in the 1960s. He produced the certificate of incorporation as exhibit D1. It shows the defendant was incorporated on 6<sup>th</sup> October 1969. DW1 adopted his witness statement and relied on the defendant's bundle of documents filed on 19<sup>th</sup> August 2020. The documents in the said bundle were produced as exhibit D1 – D8 in this case.

13. DW1 further stated that the defendant was in occupation of the suit properties. It had structures thereon and had sunk a borehole. That by a resolution of 17<sup>th</sup> August 2000, the Karuri Urban Council allocated the suit properties to the defendant. Building plans were approved on 24<sup>th</sup> August 2000. It started construction but stopped following orders from this court. He told the court that the plaintiffs do not own the plots. The defendant is the genuine allottee of the plot. He prays that the plaintiffs' leases be canceled and that the plaintiffs' case be dismissed with costs.

14. DW2, James Gitau Mungai, told the court he is the treasurer of the defendant. The adopted his witness statement dated 18<sup>th</sup> June 2012. He told the court that the two plots belonged to the defendant. It laid the foundation in 1997 as it intended to put up a commercial cum residential building. He also prays that the plaintiff's suit be dismissed.

15. DW3, Charles Ngunjiri Kimani, a land surveyor with Kiambu County Government told the court that he went through the documents in the Lands Office. He checked the records of Charles Muthama Ngugi whose letter of allocation is dated 7<sup>th</sup> April 1992. He checked Minute No 17/92 and found the extract of the minute. The actual minutes do not indicate that Charles Muthama Ngugi was allocated the plot. The resolution was to re-plan new survey areas, those in occupation to apply. He further stated that the minutes do not mention the plot number

and allottee. Further that the allocation letter was collected on 12<sup>th</sup> December 1995 which was a public holiday.

16. He also stated that the 1<sup>st</sup> plaintiff claimed his allocation was vide minute 74/96 of 13/12/1996. He searched the said minute and found that it referred to “an application for a licence to operate a general kiosk on Plot 232 Gathanga, by Stephen K. Njoroge. He confirmed that the Minute did not allocate Plot 36 to George Kimani on 13<sup>th</sup> December 1996. He further stated that Min 74/96 was on 17<sup>th</sup> September 1996 at 11:30 am. The minute does not mention Plot 36 Muchatha.

17. On the claim by PW2 that she was allocated Plot NO 35 vide Minute 2/92 dated 7<sup>th</sup> April 1992. He found the said minute refers to Min 37/92- Dispute between Patrick M Odipo and Kigundu Mbeke who were asked to apply jointly. The said minute does not mention Jane Wanjiru Kimani or Plot 35.

18. As to Minute 233/2000, he confirmed there is an application for Plot No 35, 36 by Muchatha Housing Company Limited. The same was approved on 17<sup>th</sup> August 2000. The Minute corresponds with the letter of allocation. He produced the extract of minute No 233/2000 of 17<sup>th</sup> August 2000 as exhibit D10. Extract of Min 74/92 of 7<sup>th</sup> April 1992 Exhibit D11, Minute of 17<sup>th</sup> September 1996 Exhibit D12. Min 7<sup>th</sup> April 1992 Exhibit D13 and the Report Exhibit D14.

19. DW4, Bernard Wanjau Taiku, is a finger print assistant at the National Registration Bureau. He said he was requested to confirm the status of ID No 12085902/75. He said he went to the National Registration data base and did not get any records in respect of the above identification number. The said number does not exist. He prepared a report dated 25<sup>th</sup> February 2020 and produced it as exhibit D15.

20. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiffs’ Submissions**

21. They are dated 30<sup>th</sup> June 2020 and the submissions in reply to the defendant’s are dated 23<sup>rd</sup> October 2020. The 1<sup>st</sup> plaintiff George Kimani Ng’ang’a is the registered owner of LR NO Kiambaa/Muchatha/T.381/36 pursuant to a certificate of lease dated 6<sup>th</sup> February 1997. The 2<sup>nd</sup> plaintiff is the registered owner of LR NO Kiambaa/Muchatha T.381/35 pursuant to a certificate of lease dated 19<sup>th</sup> September 1996.

22. It is the plaintiffs’ case that sometimes in 1998 the defendant trespassed on the said properties, fenced the same and constructed a temporary structure. PW1 stated that he bought the suit property from Charles Muthama Ngugi for Kshs.80,000/=.

23. The relevant law applicable to this suit is the Registered Land Act, Cap 300 (now repealed). These properties were registered in 1996 and 1997. These proceedings commenced in 1999 and Registered Land Act is applicable.

24. They raise three issues for determination. They are:-

**i. Who between the plaintiffs and the defendant is the owner of the suit property.**

**ii. Whether the plaintiffs are entitled to the prayers sought.**

**iii. Whether the defendants are entitled to the prayers sought in their counter-claim.**

**iv. Who pays the costs of this suit?**

25. The plaintiffs are the owners of the suit properties as shown in the letters of allocation and certificates of leases respectively. They are entitled to the absolute rights, privileges and benefits appurtenant to such registration as provided under the law. They have relied on section 27 and 28 of the Registered Land Act. Their title cannot be defeated under section 143 of the Registered Land Act (Repealed). They have put forward the case of **Joseph Marisin vs Joseph Kibalat S Bargalliet Civ. Appeal No 306 of 1997; Leonida Nekesa vs Musa Wanjala [1995] eKLR.**

26. It is a requirement in law and in practice that a party pleading fraud must not only plead it specifically with particulars but also prove it strictly. In this case no particulars of fraud were pleaded. They have put forward the cases of **Emfil Ltd vs Registrar of Titles Mombasa: John Mbogua Getao vs Simon Parkoyiet Mokare & 4 Others [2017] eKLR; Rosemary Wanjiku Muriithi vs George Maina Ndirwa [2014] eKLR.**

27. The defendant herein simply alleged in their amended defence and counterclaim that the plaintiffs acquired the properties through fraud. No particulars of such fraud were provided and no evidence was adduced to prove such allegations.

28. The defendant did not prove ownership of the suit property. DW2 stated that they were issued with a letter of allotment on 13<sup>th</sup> September 2000. The plaintiffs acquired their certificate of titles in 1996 and 1997 respectively. The defendant applied for allocation after the plaintiffs’ title had been issued. They have put forward the cases of **Aster Holdings Ltd vs City Council of Nairobi (2017) eKLR; Benja Properties Ltd vs H. H. Dr Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR.** The suit properties were not available for allotment to the defendant. They pray that the defendant’s counterclaim be dismissed.

29. The letter of allotment issued to the defendant has no value and could not convey any interest on land. The defendant trespassed on the suit properties and built a fence and a temporary structure. The plaintiff is entitled to the reliefs sought as against the defendant.

30. Evidence was led to demonstrate that the defendant has trespassed on the suit properties since 1997. The defendant erected a fence around the property, dug a borehole and built a temporary structure thereon. These actions amount to trespass to private property and are actionable per se. They have put forward the case of **Park Towers Ltd vs John Mithamo Njika & 7 Others [2014] eKLR: Joseph Kipchirchir Koech vs Philip Cheruiyot Sang [2018] eKLR**.

31. The plaintiffs stated that they intended to develop the suit properties by building commercial units but were unable to do so due to invasion of the defendant. They pray that they be awarded Kshs.1,500,000 in general damages for trespass. They have put forward the case of **Baghwani Singh Kalsi vs National Housing Corporation [2017] eKLR**.

32. A resolution was passed by the council to allocate open spaces in Karuri, Muchatha and Ruaka to individuals. The district planner was directed to survey the areas to have them formally allocated. By the time the defendant applied for allocation of the suit properties the plaintiffs were already registered owners. They pray that their titles be upheld.

### **The Defendant's Submissions**

33. They are undated. The 1<sup>st</sup> plaintiff alleged that he was allocated the plot vide minute WTPEH & SS 74 of 1996. He has annexed a letter of allotment stating so. This minute produced in court by DW3 refers to another matter involving an application for a Kiosk Licence by one Stephen K. Njoroge. The said licence was approved. The minute refers to a meeting of 17<sup>th</sup> September 1996 which addressed empty kiosk spaces and not allocation of plot to the plaintiff. It is also in evidence that identity card said to belong to Charles Muthama Ngugi does not exist. The 1<sup>st</sup> plaintiff alleges to have bought the plot from the said Charles Muthama Ngugi.

34. DW3 also produced MIN WTPEH & SS 17/92 which discusses open spaces:-

**“.....around trading centers mainly Karuri, Banana, Muchatha, Ruaka Kiharu.....given to individuals to operate Kiosks”**

These minutes did not allocate the plot to Charles Muthama. The postal address given by the said Charles Muthama raises a lot of questions as it belonged to Hon. Njoroge Buiya Advocate.

35. The documents issued by PW2, Jane Wanjiru Kimani, did not emanate from Karuri Urban Council. DW3 confirmed that Plot NO 35 was not allocated to the 2<sup>nd</sup> plaintiff. The postal address P. O. Box 98 Karuri which belongs to one Githunguri Silas Mwaura. The 2<sup>nd</sup> plaintiff alleged that she was allocated the plot vide MIN. WTPEH & SS 2/92 of 7<sup>th</sup> April 1992. DW3 produced the extract of this minute which refers to something else. It concerned Plot NO 61 and reads:-

**“The committee noted that the dispute between Kigundu Mbeke and Patrick Odipo were resolved and they have written a joint letter requesting the council to allocate the plot to them jointly”**

36. The letter of allotment present to the District Lands Office Kiambu by the 2<sup>nd</sup> plaintiff was not genuine. The said letter is alleged to have been collected on 20<sup>th</sup> June 1992 which was a Saturday. The allocating authority had never allocated Plot Nos 35 and 36 to the plaintiffs. Their purported acquisition is false.

37. MIN WTPEH & SS 233/2000 is the record of the Town Council of Karuri allocation of plot Nos 35 and 36 to the defendant on 17<sup>th</sup> August 2000. DW3 confirmed this minute exists. The evidence of DW3 has not been controverted. The fact that the plaintiffs have produced receipts for payment of rates in respect of the plots cannot avail them any assistance.

38. There was no allocation of any plot to the plaintiffs. It has put forward the case of **Dr. Joseph Arap Ngok vs Justice Moijo Ole Keiwua & 5 Others; KACC VS Wilson Gachanja & 4 Others ELC 709 OF 2015; Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR; Martha Chelal & Another vs Elija Kipkemoi Boiywo & 2 Others [2019] eKLR**.

39. The plaintiff's suit ought to be dismissed and judgment entered in favour of the defendant in its counterclaim

40. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

**i. Whether the plaintiffs were allocated LR Nos Kiambaa/Muchatha, T.381/35 and Kiambaa/Muchatha/T.381/36 respectively.**

**ii. Are the plaintiffs entitled to the reliefs sought?**

**iii. Is the defendant entitled to the reliefs sought in its counterclaim?**

**iv. Who should bear costs of this suit?**

41. The 1<sup>st</sup> plaintiff George Kimani Ng'ang'a stated that he bought plot no 36 from Charles Muthama Ngugi for Kshs.80,000/=. Charles Muthama Ngugi had been allocated the plot vide MIN NO 17/1992. DW3 a surveyor checked the extract of the minute and found that it did not refer to Charles Muthama Ngugi. The letter of allotment was also said to have been collected on 12<sup>th</sup> December 1995 which was a public holiday. The letter of allocation allegedly issued to George Kimani Ng'ang'a was vide WTPEH & SS 74/96 of 13<sup>th</sup> December 1996. DW3

told the court that the said minute refers to another subject altogether. It refers to application for a licence to operate a kiosk on plot 232 Gathanga by Stephen K. Njoroge. Further that the sitting of the minute was on 17<sup>th</sup> September 1996. The dates do not correspond. The said minute does not allocate plot NO 36 to George Kimani Ng'ang'a. It is not in doubt that there are no records within Karuri Urban Council allocating Plot No 36 to the 1<sup>st</sup> plaintiff. It is not in dispute that Karuri Urban Council was the allocating authority of the suit plots. DW3 has availed records to show that the 1<sup>st</sup> plaintiff was not allocated plot No 36 as stated. The 2<sup>nd</sup> plaintiff June Wanjiru Kimani, stated that she was allocated Plot Nos 3 5 vide Min 2/92 dated 7<sup>th</sup> April 1992. DW2 on checking the said minute extract found that it refers to a different subject. It refers to Plot NO 61 and reads ***“The Committee noted that the dispute between Kigundu Mbeke and Patrick Odipo was resolved and they have written a joint letter requesting the council to allocate the plot to them jointly”***. It is clear therefore that the 2<sup>nd</sup> plaintiff was not allocated Plot No 35 as she stated. As stated earlier Karuri Urban Council was the allocating authority.

42. DW3 has confirmed there are no minutes allocating Plot Nos 35 and 36 to the plaintiffs herein. The fact that they were issued with certificates of leases does not mean that this court will sanitize the same. The plaintiffs have failed to show the root of their titles. They have failed to show how they acquired the same. The plaintiffs presented to this court title to the suit properties. However, the process of acquiring the said title was proved to be irregular. In the case of **Munya Maina vs Hiram Gathiha Maina Civ. Appeal No 239 of 2009**, the Court of Appeal held that:-

***“We have stated that when a registered proprietor’s 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”***.

43. The evidence of DW3 was not controverted despite extensive cross examination by the plaintiffs’ counsel. There are no records at Karuri Urban Council showing that the plaintiffs were allocated plot Nos 35 and 36 being LR numbers Kiambaa/Wachatha T.381/35 and Kiambaa/Muchatha/T381/36 respectively. Having found that the plaintiffs cannot show how they acquired the two plots they are not entitled to the reliefs sought in their respective plaints.

44. The defendant on the other hand stated that it was allocated Plot Numbers 35 and 36 at the Committee Sitting of 17<sup>th</sup> August 2000. DW3 confirmed that MIN WTPEH & SS 233/2000 is what confirms allocation of the two plots to the defendant. As stated earlier DW3’s evidence has not been controverted. DW1 Fred Ndung’u Kangethe told the court that the defendant was in occupation of the suit plots from the 1960s. there is evidence that the defendant had put up structures on the suit plots. It had also sunk a bore hole and erected a fence on the plots. DW1 stated that the 1<sup>st</sup> plaintiff and the area chief pulled down the fence. The plaintiff’s admitted that the defendant had commenced construction by putting up a foundation before it stopped in obedience of orders of this court. I find that the defendant has proved on a balance of probabilities that it is in occupation of the suit properties. I find that the defendant is the genuine owner of the suit plots.

45. Having found that the plaintiffs leases were not obtained regularly making them invalid. Though they relied on the doctrine of first registration. Section 143 of the Registered Land Act which provides that:-

***“(1) Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended when it is satisfied that any registration other than a first registration has been obtained in order or omitted by fraud or mistake”***.

Section 80 of the Land Registration Act, provides that:-

***“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

***(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”***

46. The plaintiffs in the instant suit had knowledge that they had not been allocated the plots by the allocating authority, which was Karuri Urban Council. It therefore means that they cannot benefit from the import of Section 143 of the Registered Land Act (now repealed).

In the case of **Joyce Muthoni Waciuma vs Cabinet Secretary for Lands & 3 Others [2015] eKLR** it was held that:-

***“24. Section 28 of the Act provides that the rights of proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in the Act.***

***25. The instances where the rights of a proprietor can be defeated are provided for under Section 143(1) of the repealed Act which is the same in all respects with Section 80 of the Land Registration Act.***

***26. The difference between Section 143(1) of the repealed Act and Section 80 of the Land Registration Act is that under the repealed Act the court would not rectify a register even where fraud or mistake has been proved, if it is a first registration. In the latter Act, it does not matter that the court is dealing with a first registration.***

27. I have always held the view that the exception provided under the provisions of Section 143(1) of the repealed Act in respect to the circumstances under which the court cannot order for rectification of a register even when fraud has been proved to be unconstitutional in view of the provisions of Article 40(6) of the Constitution.

28. I say so because Article 40(6) of the Constitution clearly provides that the right to acquire and own property does not extend to any property that has been found to have been unlawfully acquired, whether it is a first registration or not.”

29. Once it is shown that a person unlawfully acquired land, it does not matter that he was the first registered owner of the same”.

47. In **clerk & Lindsell on Torts 18<sup>th</sup> Edition** it defines trespass as “any justifiable intrusion by one person upon the land in possession of another”.

The plaintiffs have failed to prove that they are the legal owners of the suit properties are not entitled to any damages for trespass. The defendant could not possibly trespass on the same as it is the rightful owner and in possession.

48. The upshot of the matter is that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities. The plaintiffs suit is dismissed with costs to the defendant.

49. Consequently, the defendant counterclaim succeeds. Accordingly judgment is entered for the defendant as prayed in the counterclaim in the following terms:-

**a. That the plaintiffs suit is dismissed with costs.**

**b. That a declaration is hereby issued that the certificate of leases in respect of the plaintiffs, George Kimani Nganga and Jane Wanjiru Kimani respectively are invalid and the Chief Land Registrar is hereby directed to cancel the same.**

**c. That a declaration is hereby issued that LR No Kiambaa/Muchatha/T.381/35 and LR No Kiambaa/Muchatha/T.381/36 belong to the Defendant and the Chief Land Registrar is hereby directed to issue certificate of leases to the defendants.**

**d. That costs of the suit are awarded to the defendant.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22<sup>ND</sup> DAY OF JULY 2021**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Juma for the Plaintiffs

Mr. Gathaara for the Defendant

Phyllis - Court Assistant