



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 805 OF 2017

PETER KAGUNYU KIRAGU.....PLAINTIFF

VERSUS

ANNE H.G MUCHUNKU.....DEFENDANT

JUDGMENT

By a Plaint dated **19th October 2017**, the Plaintiff sought for Judgment against the Defendant seeking the following orders;

a. An order of eviction over title LR.No. Ruiru /Ruiru East Block 2/24631.

b. An order of permanent injunction restraining the Defendant, her agents workers, heirs, personal representatives or any other persons claiming through her from entering, trespassing or in any manner whatsoever occupying Ruiru/ Ruiru East Block 2/24631,24632, 24633, 24634, 24635, 24636, 24636, 24637, 24638, 24639, 24640, 24641, 24642, 24643 and 26644 in any manner inconsistent with the Plaintiff's Title.

c. Damages for Trespass

d. Aggravated Damages

e. Costs of the suit.

f. Interest on (c) to (e) above at Court rates.

The Plaintiff averred that he is the registered proprietor of the suit properties. That the suit property was borne out of subdivision of a larger property known as **Ruiru/ Ruiru East Block 2/4867**, in which he was also the registered owner. That upon Subdivision of the larger block into the 14 distinct parcels, they were demarcated with distinct beacons outlining the boundaries of each and he has been enjoying quiet possession prior and subsequent to subdivision. That in **October 2017**, when he set out to inspect the properties, he found a semi-permanent structure on one of the suit properties and the beacons to their properties vandalized and mutilated without his consent. He contended that the said acts amounted to trespass which trespass is continuing by the Defendant.

Further that the Defendant carried out the acts maliciously and out of spite for the Plaintiff with the intention of injuring his feelings. That he has suffered damages for the said trespass and incurred costs which he now claims for. He particularized special damages as Construction and affixation and surveyor fees.

The suit is contested and the Defendant filed a statement of Defence dated **9th February 2018**, and denied all the allegations made in the Plaint. She averred that she together with her sister **Judy Makena** and her brother **Fanuel Murage** are the registered owners of **L.R 2/4867**, which property was given to them as a gift by their mother. That her mother purchased the suit property in **1996**, through a bank loan and a sale agreement was duly executed. That her family has owned and occupied the suit property for the last 21 years. The Court was therefore urged to dismiss the suit.

After Close of pleadings, the matter proceeded by way of Viva voce evidence wherein the Plaintiff called one witness and the Defendant called two witnesses.

PLAINTIFF'S CASE

PW1 Peter Kagunyu Kiragu, adopted his witness statement dated **19th October 2017**, as his evidence. He produced the Original title deed as Exhibit 1 and his list of documents as Exhibits 2 to 7. He further produced the further list of documents filed on **2nd July 2018**, as

Exhibits 8 to 11 and urged the Court to allow his claim.

That he bought the suit property from the shareholder one **Esther Wairira**, who had bought it from **Lucy Waithera Kageni**, but who did not have a title deed, but she had a share Certificate from the original allottee. That **Waithera** is Deceased and the sons did succession and then sold the suit property to **Esther Wariara** in 1987. That the Sale Agreement is between **Esther Wairiara**, who sold the land to **Virginia Wairimu** on his behalf in 2013, which he bought for **Kshs. 1.5 million**. That he did not conduct a search.

Further that he paid **Kshs. 30,000/=** to **Nyakinyua Investment** to process the title deed, and the title deed was first processed in 2017, in his name. That he has subdivided the land into **14 portions** and placed the beacons and the original title was **4867**, and the built up plot is **24631**. That they attended the **Land Control Board** and he signed the transfer. That the land was owned by ladies and that was why the sale agreement was in his sister's name.

DEFENCE CASE

DW1 Anne Hilda Gatakaa, adopted her witness statement and relied on it entirely. She further produced her list of documents as Exhibits 1 to 7 and the further list of documents as Exhibit 8. She testified that her sister and herself got the land from their mother, who purchased the suit property in 1996. That her mother bought the land from **Teresiah Nyokabi** on **5th March 1996**, and title deed was issued on **16th May 1996**, and a transfer of land between the parties was done on **16th May 1996**. That she conducted a search in 2011. Further that the suit property is in her possession and there is a tenant on the said property and the land is registered in her name, her brother and sister and they have been in possession for over **18years**. That the tenants were on the suit property in 2013, and the land has never been transferred to anyone. That they have fenced the suit property and there is a gate and there are no new beacons nor has the Plaintiff ever subdivided it. She urged the Court to dismiss the suit.

That she is the daughter of **Mercy Kagendo**, who lives in the **U.S.A** though she did not have any documents to prove the same and she went to the County Surveyor in 2017. That their mother transferred the suit property to them and that the land was first owned by **Teresiah Nyokabi**. That she reported the matter to the police once the case was filed. That the tenant is on a section of her property and the other section is leased for farming to her neighbor and he has also planted trees.

That her efforts to conduct a search were denied and she has the green card which has the history of the land.

DW2 Robert Mugendi Mbuba testified that he is the Land Registrar Ruiru. That the Plaintiff was registered as proprietor of the suit property and a green card was opened on **28th March 2017**, in the name of **Nyakinyua Limited** and on the same day, it was allocated to **Virginia Wairimu Mahinda** of **I.D No. [particulars withheld]**, and she was issued with a title deed. That thereafter the land was transferred to **Peter Kagunya Kiragu** on the same day and he was issued with a title deed. That on **30th August 2017**, the land was subdivided to produce title **Nos. 631 to 24644**.

That there are two parcels files and the content of one parcel file shows there was an earlier title in the name of **Teresiah Nyokabi** and **James Gitu**. That the title was issued on **15th August 1994**, and the record was opened on **10th May 1988**. That on **16th May 1996**, it was transferred to **Mercy Kagendo**, and attached to the transfer are original title, consent to transfer dated **25th March 1996**, a charge in favour of National Bank of Kenya Ltd for **Kshs. 500,000/=**. That there is a consent to charge dated **25th April 1996**, in the same parcel file and a discharge of charge. That there is a document from **Mercy Kagendo to Fanuel Murage, Anne Hilda Gataka and Judy Makena**. That the transfer was registered on **11th July 2002**, and it was document **No. 142 of July 2002**, That there were original title deed for **Mercy Kagendo** consent to transfer and official paying receipts **No. 084038**, and there is a valuation report. That there is a Caution in favour of **Esther Wariara Muturi** presented as document **No. 53 of 2012**. That there was no indication whether it was registered.

Further, that there is another parcel file with mutation form which subdivided **L.R 2/4867**, to produce **24631-24644** annexed to the mutation form is the original title of **Peter Kagunyi Kiragu**. That there is an original consent to transfer and original Application form for consent. That there are Summons to the parties. That he did not have a green card evidencing the Certificate of **Peter Kagunya** for subdivisions and he produced the certified copies as Exhibit 9. That the file was in their custody. That he did not have the green card for **Kahengeri** that was opened on **10th May 1988**, nor did he have the green card for the subdivisions. That the Original title deed issued to **Teresiah Kahengeri** and **James Kahengeri** and later transferred to **Mercy Kagendo** has a similar signature to what is in the parcel file and also the date. That he did not know which one was genuine and that there is no other Block 2 in Ruiru.

Further that parcel file No. 15 was in custody, but 2nd parcel file was not in custody. That folder 15 is for generic parcels of land. That the Defendant has a green card, though she has filed a copy. That there is a caution dated **28th February 2012** before the Plaintiff got a title to land but it was never registered but it was paid for. That with regard to the Plaintiff, there is a green card from their office. That there were Summons sent out but for **Anne Judy** and **Fanuel** were returned though it was the address in the document.

Thereafter, the parties filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings, the evidence adduced relevant and the provisions of law.

It is not in doubt that both the Plaintiff and the Defendant are laying claim over the suit property. While the Plaintiff contends that through his sister, he bought the Suit property from one **Esther Wairiara**, the Defendant also contends that together with her siblings, they got the suit property from their mother one **Mercy Kagendo**, as a gift and that their mother had bought the suit property from **James and Teresiah Kahengeri**. DW 2, who is the Land Registrar, Ruiru testified that according to their records, there are two parcel files and that one of the parcel file which was in custody relates to land transaction involving the plaintiff and the other land parcel file relates to the transaction involving the Defendant. It therefore follows that since there are two people laying claim to the suit property and it appears that that they both have documentations relating to the suit property, the Court must determine who between the two has been able to show the root of his/her title and if in any case both title are genuine, then which one was the first in time. This is so because when a person's title to

property has been challenged, it is incumbent upon the person to then show their root of title. See the case **Hubert L. Martin & 2 Others ...Vs... 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.”

Further in the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court 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.”

The Plaintiff contends that through his sister **Virginia Wairimu**, he bought the suit property from one **Esther Wairira**, who had bought the suit property from one **Waithira Kageni**. The Plaintiff has produced in evidence an Affidavit by **Virginia Wairimu**, sworn on **16th February 2015**. The Plaintiff has also produced in evidence a Sale agreement dated **5th May 1987**, evidencing the purchase by **Esther**. The Plaintiff has further produced in evidence a receipt dated **1976**, from **Nyakinyua Investment**, a transfer of ballot and a clearance letter whose date is not clear from **Nyakinyua Investment Company Limited**, confirming that the said **Esther** was the owner of the suit property. The plaintiff also produced in evidence a green card produced by DW2 confirming that the green card was opened in **2017**. Further that there was indeed a time when a caution was issued in favour of **Esther** and paid for though there was no evidence whether it was registered.

The court is thus satisfied that the Plaintiff has been able to show the root of his title as his title emanated from **Nyakinyua Investment Limited**.

The Defendant was also required to show the root of her title. It is her evidence that she got the suit property from her mother who had bought it from **James and Teresiah Kahengeri**. That the two had gotten the suit property from **Emily Mbaire**. DW2 testified that in their parcel file, a green card which is essential does not exist. That in the said file there is an earlier title that was issued on **15th August 1994**, and that there is a caution in favour of **Esther**. For the Defendant to have a good title, it follows that she ought to prove that she got the title from a person who had good title. As per the green card produced in evidence by the Defendant, the initial owner of the suit property was one **Emily Mbaire**. No evidence has been produced as to how the said **Emily Mbaire** acquired the suit property. The Court therefore can not ascertain if she acquired through allocation directly from the government or from **Nyakinyua Investment company Limited**. Further, it is not in doubt that while the said **Emily Mbaire** allegedly acquired the suit property in 1988, **Waithira Kageni** had already acquired the same as early as **1976**, and sold the said suit property to **Esther Wairira** in 1987. Therefore as the suit property had already been located, it could not then be allocated again to the said **Emily Mbaire**.

From the evidence adduced, the Court is satisfied that while the Plaintiff has been able to show the root of his title and the acquisition of the same, the Defendant has failed to show how the initial owner in her alleged green card acquired the suit property. Therefore the chain of her root of her title has been broken. In as much as her mother may have been a bonafide purchaser, it is quite clear that she bought the suit property from someone who did not have a good title and therefore could not pass a good title to her and subsequently to the Defendant. Further the Court is also satisfied that by the time **Emily** was acquiring the suit property the same had already been allocated and thus could not be reallocated without cancellation and or following the due process, and thus could not be reallocated.

The Plaintiff has sought for various orders including a permanent injunction and evictions of the Defendant from the suit property. The Court has already held and found that the Plaintiff has been able to prove the root of his title and therefore he is the rightful owner of the suit property. It is not in doubt that **Section 26 of the Land Act** provides that a title held by a person to a property is absolute and indefeasible. However, it is also not in doubt that the same can be impeached if it is found to have been acquired unprocedurally. In this instant the Certificate of title held by the Defendant was acquired unprocedurally and it must therefore be impeached.

Further **Section 24 and 25 of the Land Registration Act** provides for the rights and interests of the owner of a property. The Court having held and found that the Plaintiff is the rightful owner of the suit property and upheld his title, it is not in doubt that he is entitled to enjoy all the rights and privileges that appertain to the same and consequently the orders of eviction and permanent injunction sought are merited.

The Plaintiff has also sought for damages for trespass and aggravated damages. Trespass has been defined as unjustifiable intrusion of another person’s land. The circumstances of this case are that the Court finds that the Defendant occupied the suit property based on the belief that she received the same as a gift from her mother who was an innocent purchaser for value. The Court finds that the Defendant’s possession of the suit property though unjustifiable, as at the time of possession it was reasonably justifiable and therefore the Plaintiff is not entitled to the orders sought.

Section 27 of the Civil Procedure Act gives the Court discretion to grant costs. However, costs usually follow the event unless special circumstances present themselves. In this instant case, the Court finds that by virtue of being an innocent purchaser, the Defendant should not be subjected to costs. The Court therefore orders that each party should bear its own costs of the suit.

Having now carefully read and considered the pleadings, the evidence adduced, written submissions and provisions of law, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probability and therefore is entitled to the orders sought. The Court finds the Plaintiff's claim as contained in the Plaint dated **19th October 2017**, partially merited and the same is allowed in terms of prayers **a** and **b** only. Each party to bear its own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF JULY 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

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

Mr. Ocholla holding brief for Mr. Nyakeri for the Plaintiff

M/s Nchogu for the Defendant

L. GACHERU

JUDGE

15/7/2021