



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 403 OF 2017

PRISCILA WANJIKU MBIYU PLAINTIFF

VERSUS

JOSEPH MUIGAI KAMAU DEFENDANT

JUDGMENT

By an Undated Plaint, the Plaintiff brought this suit against the Defendant and sought for orders that;

- a) A permanent injunction against the Defendant, his servants, agents, beneficiaries and/or any persons claiming through him from entering, encroaching, constructing, barricading, occupying, trespassing, destroying, alienating or in any manner whatsoever dealing with UNS Residential Plot No. 407 Thika Municipality or in any other way obstruct the Plaintiff's use of the afore referenced land parcel.***
- b) Eviction of the Defendant from land parcel UNS. Residential Plot No. 407 Thika Municipality and mesne profits thereof at the rate of Kshs. 4,000/= per calendar month from March 2017 till determination of the suit.***
- c) Costs of this suit with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.***
- d) Any such other relief or further relief as this Honorable Court may deem appropriate.***

In her statement of Claim, the Plaintiff averred that she is the registered owner of the suit property and entitled to possession thereof. That in **March 2017, the** Defendant unlawfully erected structures and has thereby trespassed on the suit property occasioning severe mental anguish to her premised on a wrongful claim of ownership and malice. That by virtue of the Defendant's willful trespass of the suit property, the defendant has interfered with the usage of the suit property as the Plaintiff has been deprived off the use and enjoyment of the suit property and suffered loss. That the Defendant does not have any exclusive rights either as to possession and or ownership of the suit property.

The Plaintiff averred that she has suffered loss and damage and particularized them as; being deprived off the use and quiet enjoyment, misuse of the property by the Defendants to her detriment and the Defendant' actions have threatened to deface and devalue the same.

The suit was Contested and the Defendant filed a Defence dated **26th May 2017**, and denied all the allegations made in the Plaint. He averred that the suit discloses no reasonable cause of action and further averred that he has been the original allottee of the suit property from the Government of Kenya. That he was allocated the suit property on **7th May 1998**, vide a letter of allotment even dated **reference No. 23136/XXXL**. He further averred that he has been in occupation since **1998** and in the **year 2007**, he laid down a foundation of a permanent structure on the suit property and the same has not been questioned by anyone and by virtue of his allocation, he was granted full possession and rights over the suit property.

Further that the letter of allotment purportedly issued to the Plaintiff on **4th September 1998**, is a forgery having been procured fraudulently through collusion and conspiracy perpetrated by the Plaintiff in conjunction with local authorities. He particularized fraud by the Defendants as Converting his property, colluding to defraud him of his legally allocated land, unlawfully manufacturing and / or causing to be manufactured documents and records to beef up the Plaintiffs false claim to the suit land. Fraudulently obtaining documents to the suit land, Plaintiff purporting to hold a new allotment letter while knowing or having reasonable cause to believe that acquisition of the suit land was tainted with fraud and illegality.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for herself and closed her case while the Defendant

also testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 Priscilla Wanjiku Mbiyu adopted her witness statement dated **3rd April 2017** and produced her list of documents dated as Exhibit 1. She testified that she did not have a title deed over the suit property as the acquisition of one is an ongoing process. She urged the Court to give her back her land and **Kshs. 4,000/=** as the Defendant has prevented her from using her land.

That her plot is **407** and she bought it from a surveyor called **Kanutha**. That **Derrick Onyango** was the name on the allotment letter and after she purchased the plot, it was changed to her name. That though **Kanutha** sold to her the land, the owner was **Derrick Onyango**. Further that though she bought the land in **2005**, the Sale Agreement is dated **6th November 2004**. That she bought plots **401 and 407** at **Kshs.140,000/=**. That the letter of allotment reads her name and it states it was given on **4th September 1998**, but she got the allotment letter from **Dennis Onyango**, who had an allotment letter. That the Beacon Certificate was issued by **Kanutha**. Further, that she paid **Kshs. 9000/=** and accepted the allotment. That she took photographs of the construction in **2014**. That she got the letter from the Ministry letter so that she could get the Registry Index Map.

DEFENCE CASE

DW1 Joseph Mungai Kamau, adopted his witness statement dated **26th May 2017**, and further produced the latter of allotment and list of documents as Exhibits 1 and 2. He testified that he was allotted the suit property on **7th May 1998**, by the Commissioner of Lands. That he paid **Kshs. 16, 210/=** and accepted the offer. That there is a letter dated **27th September 2018**, from the Director of Survey for processing of the title deed which is underway. That he took possession of the suit property in **1998**, and erected the foundation in **2007**.

Further that the original balloting was done at the stadium by the Thika planning office in **1998**, and the Commissioner of Lands office was in existence. That he produced a document dated **15th March 2018**, for payment of the standard premium of **Kshs.16,210/=** that was paid after the suit was filed on **4th April 2017**.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court has also considered the pleading, the evidence adduced and the various provisions of law and finds that the issue for determination is **whether the Plaintiff is entitled to the orders sought**.

The Plaintiff has sought for orders of eviction and Permanent Injunction against the Defendant. It is not in doubt that both the Plaintiff and the Defendant lay claim to the suit property. It is the Plaintiff's contention that she bought the suit property from a surveyor, That as per the Sale Agreement, one **Peter Onyango** was authorized to sell to her plot **401 and 407 in 2005** and then she was granted an allotment letter.

The Defendant on the other hand also lay claim to the suit property, It is his contention that he was allotted the suit property by the Government of Kenya, vide an allotment letter dated **7th May 1998**, and the same has never been cancelled. Further, that he paid for the same on **15th March 2018**.

As there are two people laying claim to the suit property, it is not in doubt that each of them has to show root of his/her title. See the case of **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.'

In the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, 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."

The Plaintiff being the person who had brought the claim has the onus of proving her claim. The plaintiff contends that she bought the suit property from one **Peter Onyango**, who supposedly had authority of one **Derrick Nyaga**. The Plaintiff produced in evidence a Sale agreement dated **6th December 2004**. It is trite that he who alleges must prove. The Plaintiff being the person who had alleged therefore had the onus of proving that the suit property belonged to the said **Derrick Nyaga**. From the onset, it is rather suspicious that the Plaintiff who claims to have bought the suit property also has a letter of allotment. A letter of allotment in the Court's considered view is only issued to the person who has been allocated the land and if for any other reason the person decided to sell the said property, his allotment cannot be cancelled and or transferred as the person only transfers the land and documentation and not change of name in the allotment letter. While the Plaintiff claims to have bought the suit property in **2004**, she has produced in evidence an allotment letter dated **4th September 1998**. In all honesty, this cannot in any way be possible and it is outright fraud that has been perpetrated. There is no way a letter

of allotment can be backdated .

Further while the Plaintiff contends that she bought the suit property from **Derrick Nyaga**, no evidence has been adduced that the said **Derick Nyaga** was ever an owner of the suit property nor is there evidence that has been adduced that the said **Peter Onyango** had been authorized to sell the suit property. Therefore, the Court finds and holds that the chain of acquisition of the suit property by the Plaintiff is out rightly marred by irregularities and therefore the Plaintiff could not have acquired a good title from a person she has failed to prove, even had a title in the first instants. The Court finds that the Plaintiff has failed to show the root of her title.

In claiming ownership over the suit property, the Defendant has produced in evidence a letter of allotment dated **7th May 1998**. The Defendant has further produced in evidence a letter dated **4th September 2013**, from the **National Land Commission** being an Application for late payment of letter of allotment and ultimately a receipt for payment of Stand Premium dated **15th March 2018**, indicating that he had made payments. In the case of **Republic versus City Council of Nairobi & 3 Others (2014) eKLR**, the Court held that;

“once 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 absolute right of ownership 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 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.”

In this instant the Defendant has been able to prove that he was allotted the suit property and he has further met the conditions. The Court notes that the conditions for payment were met late in the day. However, no evidence has been adduced that his allotment was ever cancelled and or issued to another party and it is not in doubt that only the allotting authority can cancel the allocation. The above coupled with the fact that the Plaintiff has failed to prove that she was ever allotted the suit property procedurally and or the said **Derrick Nyaga** was ever allotted the suit property, the Court finds and holds that the Defendant has satisfactorily proved his root of title and therefore he is the absolute and indefeasible owner of the suit property. Being the rightful owner of the suit property, the Defendant cannot be evicted nor injunctioned from his own property.

The upshot of the foregoing is that the Court finds and holds that the Plaintiff has failed to prove her case on the required standard of balance of probabilities and therefore her claim as contained in the undated Plaint is **not merited** and the same is dismissed with costs to the Defendant.

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

No appearance for the Plaintiff

Mr. Warutere for the Defendant

L. GACHERU

JUDGE

15/7/2021