



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 239 OF 2018

JOSEPH MUTURI KURUTU.....PLAINTIFF

VERSUS

JAMES MANASSEH SIMIYU.....1ST DEFENDANT

JOSEPH NDIRANGU T/A NDIRANGU STORE.....2ND DEFENDANT

JUDGEMENT

By a **Plaint** dated 26th September 2018, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for:-

a) An order of permanent injunction do issue against the Defendants by themselves, agents, or anyone claiming through them, eviction and demolition orders of all or any illegal structures erected on the land parcel known as Thika Municipality Block 6/1088, by the Defendants or their agents or anyone claiming through them so as to ensure and grant vacant possession.

b) Costs and interests of the suit.

In his statement of claim, the Plaintiff averred that on diverse dates in the year **2016 and 2017**, the Defendants illegally encroached or trespassed into the suit property, without his consent and erecting illegal permanent structures. He further averred that his claim against the Defendants is an eviction order and demolition of all the illegal structures on the suit property.

The suit is contested and the 1st and 2nd Defendants filed a Defence on **17th May 2019**. They denied all the allegations made in the **Plaint** and contended that the suit land is not registered in their own names and they are total strangers to the Plaintiff's claim for eviction and demolition and they prayed that the suit be dismissed with costs.

The matter proceeded via *viva voce* evidence on the **10th November 2020**.

PLAINTIFF'S CASE

PW1 - Joseph Muturi Kurutu, the Plaintiff herein, adopted his witness statement dated **26th September 2018**, and list of documents dated **28th September 2018**, and a further Supplementary list of documents dated **23rd July 2019**, as evidence. It was his further testimony that the Defendants have encroached on his land without his consent and he has never seen the title of **Mumagari Company**. He further testified that he was allocated the land by the Ministry of Lands.

On Cross-examination, he stated that he was allocated the land and he paid **Kshs. 78,000/=** for unsurveyed Plot No. F in Thika, and that the Defendants have been on the suit land since **2017**. It was his further testimony that he wrote a request for allotment of the suit plot and was allocated the land with a letter of allotment in the year 1999. Further, he stated that the registration of the new lease was done in 2016.

On Re-examination, he testified that he has a receipt to show that he paid for accepting the allotment letter, and that his certificate of lease approves **0.7950 Ha**, while the allotment letter states **0.80Ha**, which by then was not surveyed.

DEFENCE CASE

DW1 - James Manasseh Simiyu, adopted his witness statement and his list of documents. He testified that they bought the land from **Mumagari Company Limited** in 2008 and built a School. He also stated that there is a list of members of **Mumagari Company**

Limited.

On Cross-examination, he stated that he bought the land from **Mumagari Company Limited**, and he has no title deed. Further that his plot is **No.84 Block A** and there is no parcel number of the suit property in his documents.

On Re-examination, he testified that he did not see the mother title and he bought the land from **Mumagari Company Limited**, having occupied the suit property since 2008. He further testified that he paid **Mumagari Company Limited** and was issued with a certificate of ownership.

DW2- Joseph Ndirangu, adopted his witness statement as part of his evidence. He testified that the plot is owned by himself and he lives in plot **No.80**. That he exchanged the said plot with plot **No.88**. He further testified that his mother was a member of **Mumagari Land buying Company**, and she bought the plot in 2006, and she was issued with a receipt and a share certificate.

On Cross-examination, he stated that he has built rental houses on the suit property and has not seen any agreement between **Mumagari Land buying Company**, and his mother. He testified that **Ruth Wanjiru Kamau**, was his mother and further, he has not called **Mumagari Investments** as his witness in Court.

On Re-examination he testified that his mother bought the land from **Mumagari Investments Company Ltd**, and he was not present. He further testified that he does not have a title deed to show that the land was for **Mumagari Investments Company Ltd**.

The Court directed the parties to file written submissions and in line with the said directions, the Plaintiff through the **Law Firm of Kanyi Kiruchi & Co. Advocates**, filed his written submissions on the **24th June 2021**. It was submitted that the Defendants cannot prove how the land devolved to them and that they do not have an Agreement or title document in support of the same. He relied on **Sections 26(1) and Section 24 of the Land Registration Act of 2012**, and further relied on the case of **Margaret Njeri Wachira v Eliud Waweru Njenga(2018) eKLR**.

The **1st** and **2nd** Defendants through the **Law Firm of J.K Ngeresa & Co. Advocates**, filed their written submissions on **24th June 2021**, and submitted that the Plaintiff only produced documents without any authentication or back up from the Land Registrar and has failed to prove his case on a balance of probabilities. They made reliance on the case of **Colombus Opio Adeti v Alexander Oyiolo Odongo t/a Atema Service Station (2018)**.

Having summarized the pleadings and evidence before this Court, and the submissions in general, the Court finds that the main issues for determination are;

a) **Who between the Plaintiff and the Defendants is the rightful owner of land parcel Thika Municipality Block 6/1088.**

b) **Whether the Plaintiff is entitled to the reliefs sought**

(a) Who between the Plaintiff and the Defendants is the rightful owner of land parcel Thika Municipality Block 6/1088.

Before the Court is **Plot No.084 Block A, Thika Municipality Block 6/1088** and **Kiganjo 80 Block A**. Parties have not significantly elaborated if the said parcels of land represent one parcel of land, which is termed as the suit property.

The discrepancies set above were not explained and the Court is left wondering whether all the conversion or subdivision or mutation transactions were ever done and more so, done legally. Further, this Court will rely on the pleadings filed and evidence adduced. It is trite law that parties are bound by their pleadings. The Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano...Vs... Stephen Mutinda Mule & 3 Others (2014) eKLR**, which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

The Plaintiff having challenged the title held by the Defendants, it was then upon him to show the root of his 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.”

This Court will therefore determine who between the Plaintiff and the Defendants' showed the root of their title so that the Court can

determine whether the prayers in the Plaint are merited.

The Court has examined the evidence on record as given by the Plaintiff. He produced a letter of Allotment dated **18th July 1999**, the reference being **Uns.Industrial Plot No.F Thika Municipality**, and same measuring **0.8 Hectares** and a Certificate of Lease dated **7th January 2016**, approximate area of **0.7950 Hectares**. The Plaintiff never called the Land Registrar as vital witness. while the Defendants produced documents from **for Mumagari Investments without calling the makers too**.

A party approaching the Court must disclose all material facts especially when he/she appears before the Court, for a Court is bound to make a decision based on the relevant material tabled before it, and it is improper for a party to attempt to sway the decision of the Court by failing to disclose all facts.

For the Plaintiff to establish the real root of his title, he was bound to produce other supporting documentation including a Search, indicating that he is the legitimate owner, a Green Card indicating the history of the parcel of land, a Surveyor's report indicating **acreage**, as there is a discrepancy in the letter of allotment indicating **0.8 Hectares** and a Certificate of Lease dated **7th January 2016**, indicating an approximate area of **0.7950 Hectares**. Further, the Plaintiff had an obligation to summon any official at the Ministry of Lands or Land Registrar to appear as a witness and support his claim or clarify the grey areas.

The Court is, therefore, of the view that even though it has the legal power to issue the orders prayed for in the Plaint, it can only do so where it has been demonstrated that the Plaintiff has sufficiently discharged the legal burden of proof as placed upon him. **Section 107 of the Evidence Act** and on the decided cases in **Reginah Nyambura Waitathu vs Tarcisio Kagunda Waitathu [2016] eKLR** and **Joseph Karisa Mutsonga vs Johnson Nyati [1984] eKLR**, state that the burden of proof in a civil case rested on the Plaintiff and at no time did it shift to the Defendants who were under no obligation to prove.

(b) Whether the Plaintiff is entitled to the reliefs sought

This Court holds and finds that the Plaintiff has not discharged the onus of proving his case on the required standard of balance of probability and therefore he is not entitled to the reliefs sought. Since the Court already came to a conclusion that the Plaintiff has failed to establish the real root of his title through calling of sufficient evidence, there would therefore be no reason as to why his title should not be cancelled.

Section **80 (1) of the Land Registration Act** provides that: -

“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.”

The Court is of the view that the said title held by the Plaintiff ought to be cancelled and it directs so.

The upshot of the foregoing is that the Plaintiff has failed to prove his case on the required standard of balance of probabilities. Consequently, the Plaintiff's **claim in his Plaint dated 26th September 2018** is hereby dismissed with costs to the Defendants.

Further, the Court direct that the Plaintiff's certificate of title should be cancelled forthwith.

It is so ordered.

Dated, signed and Delivered at Thika this 30th day of September, 2021.

L. GACHERU

JUDGE

Court Assistant –Kuiyaki