



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO.744 OF 2017

JOSEPH OSIEMO NYAMWENO.....PLAINTIFF

VERSUS

GEORGE NGANGA GIKANGA.....1ST DEFENDANT

MWIHOKO HOUSING COMPANY.LIMITED.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated 18th September 2017, the Plaintiff herein sought for Judgement against the Defendants jointly and severally for; -

- a) An order of injunction restraining the Defendants herein whether by themselves, their agents, servants, employees, invitees and/or otherwise whosoever from entering, trespassing, constructing, offering for sale, selling, disposing of, charging, subdividing, dealing, alienating, managing, letting or otherwise, residing, remaining, interfering with the quiet possession and enjoyment over all that piece of land known as Plot No. 20747, Kahawa South of Ruiru.**
- b) An Order declaring that Plot No. 20747, Kahawa South of Ruiru belongs to the Plaintiff.**
- c) General damages and mesne profits.**
- d) Costs of this suit.**

In his statement of claim, the Plaintiff stated that he is the owner of **Plot No.20747**, which he exchanged with the 1st Defendant with **Plot No. 20900, Kahawa Kimbo** South of Ruiru. He further averred that he purchased **Plot No. 20900**, from one **Elizabeth Wambui Kimani**, on **31st October 2016**, for Kshs. **700,000/=** and Kshs **40,000/=** for transfer paid to the 2nd Defendant. That the certificate held by **Elizabeth Wambui Kimani**, was cancelled and he was issued with a new certificate in his name by the 2nd Defendant.

It was his contention that his **Plot No. 20900, Kahawa Kimbo**, was neighboring the 1st Defendant's parcel of land with a School and he (1st Defendant) approached him with an intention of purchasing it. That the 1st Defendant informed him that he had another parcel of land **Plot No.20747**, and would like to exchange/swap it with his parcel of land being **Plot No. 20900**, and he agreed.

That the 1st Defendant was purchasing **Plot No.20747**, from one **Harrison Gachuka Kimanga**, who could make a direct transfer once the last purchase price was paid. That accompanied by the 1st Defendant and **Harrison Gachuka Kimanga**, they visited the 2nd Defendant offices to verify the correctness of **Plot No.20747**, and found out that the details were proper necessitating swapping of his **Plot** and the 1st Defendant's **Plot**. That he surrendered his certificate of **Plot No. 20900**, and the same was cancelled and the 1st Defendant was issued with a new certificate of **Plot No. 20900**, bearing his name.

That on **25th August 2017**, the 1st Defendant in collusion with the 2nd Defendant hatched a Plot to defraud him of **Plot No.20747**, by informing him that **Plot No. 20900**, which he exchanged with the 1st Defendant **Plot No.20747**, is being claimed by somebody else and who had gone to Court and sued the 1st Defendant.

The suit is contested and the 1st Defendant filed a Defence and Counterclaim dated **1st February 2018**. He denied all the allegations made in the **Plaint** and contended in the Counterclaim that the exchange of **Plot 747** and **900** between the Plaintiff and 1st Defendant was **null** and **void** due to the reason that the Plaintiff misrepresented the ownership of **Plot No. 20900**, to the 1st Defendant and lack of transferable rights in **Plot No. 20900**, negated the presence of a consideration in the contract of transfer between him and the Plaintiff.

The Plaintiff further filed a Reply to the Defence and Counterclaim dated **4th March 2020**, and reiterated the contents in his Plaintiff.

The matter proceeded by way of *viva voce* evidence on the **22nd October 2019**.

Plaintiff's Case

PW1 - Joseph Osiemo Nyamweno, adopted his witness statement and his list of documents as part of his evidence and testified that he is claiming the suit property because he purchased **Plot No. 20900**, from one **Elizabeth Wambui Kimani**, and was allowed to purchase the same after paying **Kshs.40,000/=** for the transfer, and he was issued with a receipt and the name of **Elizabeth** was cancelled.

He further testified that the **1st Defendant** approached him so that they may exchange **Plot No.20747**, with **Plot No. 20900**, and Plaintiff No. **747**, was owned by **Harrison Gachuka Kimanga**, and they went to the offices of the **2nd Defendant** and did a sale agreement. That **Harrison's** certificate was cancelled and the Plaintiff became the owner of **Plot No.20747**. Further, that his **Plot No. 20900**, was cancelled and given to **George**. It was his further testimony that the said **George** told him that someone was claiming **Plot No. 20900**.

On Cross examination, he stated that he got **Plot No. 20900**, and exchanged it with George for expansion of his School. That he disputed the **1st Defendant's** Counterclaim and that he did not have any claim in **Plot No. 20900**. It was his further testimony that they checked and found everything was fine before the exchange of the Plots.

In re-examination, he testified that he gave **Plot No. 20900**, to George and he is now the owner of **Plot No.2074**.

Pw 2- Elizabeth Wambui Kimani adopted her witness statement recorded on **13th November 2017**, and further testified that **Plot No. 20900**, was for **Joyce Wambui Warui**, who wanted to sell it. That she confirmed that it belonged to **Joyce** after conducting a search at **Mwihoko Housing Company**. It was her testimony that she paid **Joyce Wambui** Kshs. **600,000/=** as purchase price and signed a sale agreement, which is before Court. It was her further testimony that she later sold the Plot to **Joseph** for **Kshs. 700,000/=**.

On Cross examination, she testified that she knows **Plot No. 20900**, but knows nothing about **Plot No.20747**, and she was not present during the exchange of the said Plots. She further testified that she did not know **Mercy Wanjiru**, who had claimed **Plot No. 20900**.

Defence Case

DW1 - George Nganga Gikanga, adopted his witness statement and his list of documents dated 1/2/2018, as part of his evidence. He further testified that he runs a school known as Tumaini Primary School and he approached the Plaintiff for a proposal to swap his Plot with Plot No.20747. That **Plot No. 20900**, belonged to the Plaintiff, while **Plot No.20747**, belonged to Harrison and after swapping, the Plaintiff was given **Plot No.20747** and he was given the certificate for **Plot No. 20900**.

It was his testimony that he received a demand letter that the Plot belonged to **Mercy Wanjiru**. That he was summoned to **Kimbo Police Station** and he was told that he was sitting on someone's land. He further contended that the chief wrote a letter requesting the **2nd Defendant** to take him back to his original Plot and he got back to **Plot No.20747**. That he is not in possession of **Plot No.20747**.

In Cross examination, he testified that the receipt paid for transfer reads the Plaintiff's name and that **Plot No.20900**, as told by the Police belonged to **Mercy Wanjiru**, and there were no documents to that effect. However, he believed that the Plot belongs to **Mercy Wanjiru**. It was his further testimony that he exchanged the Plot with the Plaintiff, after he discovered that the Plot was for **Mercy Wanjiru**, and he did not go to the Company, but he went to the chief.

In Re-examination, he testified that the receipts for transfer are not there because the issue of transfer was not in dispute at the **2nd Defendant's** office. He further stated that he did not create the said **Mercy Wanjiru**, and that his testimony is in furtherance to his pleadings in Court.

The Court thereafter directed the parties to file written submissions and in line with the said directions, the Plaintiff through the **Law Firm of Moindi & Co. Advocates**, filed his written submissions on the **31st March 2021**, and urged the Court to grant him the orders sought. He submitted that the Counter-claim was filed to hoodwink the Court that their cancellation and taking over of **Plot No.20747**, was illegal.

The **1st Defendant** through the **Law Firm of Njuguna Nganga & Co. Advocates**, filed his written submissions on the **24th June 2021** and submitted that the **1st Defendant** has no possession of any property as things stand for the reason that the **3rd Party** took up Plot No.20747.

The **2nd Defendant** although having been duly served, did not **Enter Appearance** nor file any pleadings in this matter and thus did not participate in the matter.

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

a) Whether the Plaintiff is entitled to the orders sought in his Plaintiff.

b) Whether the 1st Defendant is entitled to the prayers in his counterclaim.

c) *Who is to pay costs.*

Whether the Plaintiff is entitled to the orders sought in his Pleint.

The Court will take that **Plot 747** and **Plot 900** represent **Plot No.20747** and **Plot No.20900**, respectively, as parties have submitted. Plaintiff claims to have purchased **Plot No. 20900**, from one **Elizabeth Wambui Kimani**, on **31st October 2016**, for **Kshs.700,000/=** and **Kshs 40,000/=** for transfer paid to the 2nd Defendant and that the certificate held by **Elizabeth Wambui Kimani**, was cancelled and he was issued with a new certificate in his name by the 2nd Defendant. Thereafter, he did swap the Plots with the 1st Defendant and certificate was issued in his name by the 2nd Defendant.

On the other hand, the 1st Defendant claims that the exchange of **Plot 747** and **900**, was **null** and **void** due to the reasons that the Plaintiff misrepresented the ownership of **Plot No. 20900**.

It is not in dispute that the 2nd Defendant issued ownership Certificate to both parties. It is also not in dispute that the parties swapped Plots. 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 Court has seen the share certificate of **Plot No.20900**, which initially belonged to **Elizabeth Wambui Kimani**, sale agreement dated **31st October 2016**, and receipts for payment all in favor of the Plaintiff. Further, the Court has seen a sale agreement dated **18th January 2017** of **Harrison Gachuka Kimanga** selling **Plot No.20747**, to the Plaintiff and a share certificate to **Harrison Gachuka Kimanga**

Additionally, a sale agreement of **Plot No.20900**, between the Plaintiff and the 1st Defendant and a share certificate have been presented to this Court.

Notably so, **Joyce Wambui Warui's** sale agreement of **Plot No.20900**, to **Elizabeth Wambui Kimani**, then the resultant transfer to the Plaintiff has also been adduced as evidence. However, to be able to determine who is the legal owner of the suit property, that is **Plot No.20747**, it is the Court's considered view that it should first determine who amongst the two parties was able to show the root of his/ her title. See the case of **Munyu Maina ...Vs... Hiram Gathiha Maina, Civil Appeal No 239 of 2009**, where the Court of Appeal held as follows:-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and 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.”

Pw2 confirmed that she bought the suit property from **Joyce Wambui Warui** and later sold it to the Plaintiff. The 1st Defendant mentioned one **Mercy Wanjiru**, but never presented her as a witness or filed her Witness Statement.

It is the Court's considered view that one **Mercy Wanjiru**, would have been a key witness for the Defence to explain how she acquired the property. **Dw1** testified that he had never seen any documents relating to **Mercy Wanjiru**, ownership of **Plot No.20747**.

As a party cannot pass a title which it does not have, it is the Court's further considered view that the said **Mercy Wanjiru**, could not pass a good title to the 1st Defendant, since she did not have a good title herself. See the case of **Esther Ndegi Njiru & Another ...Vs... Leonard Gatei (2014)eklr**, where the Court held that;

“Having held and found that the 2nd Defendant fraudulently processed and acquired the title to the suit property in his name, my view is that he did not acquire a good title to the property and no interest in the property could pass. The 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the Plaintiffs.”

It is thus the Court's considered view that the Plaintiff has been able to establish the root of his title and therefore, the Court finds and holds that the Plaintiff is the legal owner of the suit property known as **Plot No.20747**.

Further the 1st Defendant is estopped from denying what he had already admitted in his Statement of Defence and Counterclaim in paragraph 5, which he strictly agrees with the contents of paragraph 10-16 of the Pleint.

The Plaintiff has also sought for **General damages**, for trespass and mesne profit. **Trespass** has been defined by **Clerk and Lindsel on torts, 18th edition at Pg 23** as; -

“an unjustifiable intrusion by one person upon the land in possession.”

It is the Court’s considered view that considering the circumstances of this case, it cannot be said that the 1st Defendant was trespassing on the suit property as there was swapping and resultant registration as evidenced in the share certificates. The Court finds and holds that the said prayer of general damages is **not merited**. Mesne profits are special damages that must be specifically pleaded and proved. In this case, non was pleaded and therefore the Plaintiff is not entitled to the said prayer.

Whether the 1st Defendant is entitled to the prayers in his counterclaim.

The 1st Defendant has sought for reinstatement of the ownership of **Plot 747**. However, the Court has already held and found that he did not acquire a good title as the said **Mercy Wanjiru**, could not pass a good title as she herself did not have a good title. Therefore, the Court finds and holds that the 1st Defendant is not entitled to the orders sought in his Counter claim.

Who Should bear the costs of the suit.

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs. It is trite that costs usually follow the events and unless there are special circumstances to deny such costs. In this Case, it is the Court’s considered view that the Plaintiff is the successful party and he is thus entitled to the costs of the suit.

Having now carefully considered the pleadings, the available evidence as adduced by the parties herein and the written submissions, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities.

Consequently, the Court enters Judgment for the Plaintiff against the Defendants as pleaded in the Plaint dated **18th September 2017**, which claim is found **merited**. The Plaintiff’s claim is thus allowed in terms of **prayers No. a and b**, with costs to the Plaintiff.

However, the Defendant’s Counter Claim is **not merited** and the same is dismissed entirely with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki