



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 166 OF 2013

DAVID NYONGIO.....PLAINTIFF

VERSUS

PETER GITAU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 30th January 2013, the plaintiff seeks judgment against the defendant for.

(a) An order of permanent injunction restraining the defendant, his servants and or agents from trespassing on the property known as Title Number Ngong/Ngong/32949 and or from occupying, selling, charging, transferring, demolishing any premises erected on the property and or in any manner interfering with the plaintiff's quiet occupation and possessing of Title Number Ngong/Ngong/32949.

(b) Special damages for the value of the demolished house.

(c) Costs of the suit.

(d) Such further order which the honourable court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of G. N. Thiongo Advocates on the 22nd February 2013. He also filed a statement of defence dated 22nd February 2013. In his statement of defence he denied that he is a trespasser as he is the registered owner land parcel Ngong/Ngong/32948. He stated that he has no claim over Land Parcel known as Ngong/Ngong/32949.

3. It is the plaintiff's case that he is the registered owner of land parcel known as Ngong/Ngong/32949 (hereinafter referred to as "the suit property"). He told the court that he bought the same from Margaret Antonyi Chumba and was issued with a Certificate of Title. He took possession and constructed a two bedroomed house but the same was demolished by the defendant.

4. The defendant on the other hand contends that he is the registered owner of land parcel known as Ngong/Ngong/32948. He denied that he sold the suit property to the plaintiff. he stated that he does not know Margaret A. Chumba. He did not sell to her any land. He further stated that he does not know and does not have any dispute in respect of the suit property.

The evidence of the plaintiff

5. PW1, David Nyongio, the plaintiff herein, testified on 17th March 2021. He adopted his witness statement dated 30th January 2013. He also relied on his bundle of documents dated 30th January 2013. The documents in the said bundle were produced as exhibit p1 to p7. In his case he told the court that he is the registered owner of the land parcel known as Ngong/Ngong 32949 ("the suit property").

6. He further stated that he bought it from Magaret Antonyi Chumba in the year 2009 who was the registered owner. He did a search and confirmed Margaret was the registered owner. He produced a certificate of official search dated 9th November 2009 as exhibit P2. He stated that the land was transferred to him and he took occupation. The land was already fenced with barbed wire and posts.

7. He further stated that in January 2013, he put up a structure but the defendant demolished it claiming that he had not sold the land to Margaret A. Chumba. He stated that the structure was made of iron sheets.

8. He further stated that he had earlier bought another parcel from the defendant in 1999. This is where he has put up a home. He stated that the suit property is adjacent to the earlier parcel. It is his testimony that he saw Margaret fencing the suit property. He prays that the defendant be restrained from interfering with his possession of the suit property.

9. When cross examined by Miss Mugo for the defendant, he confirmed that the suit property belonged to the defendant at one time but he had sold it to Margaret Chumba. He also admitted that the defendant lodged a complaint with the District Officer about land parcel Ngong/Ngong/32948 which is not the suit property.

10. PW2 Caleb Mogire Ondieki adopted his witness statement dated 21st July 2020. He told the court he knew the defendant in 1997 when he moved into the area. He said both the plaintiff and the defendant are his neighbours. He stated that he was a witness to a sale agreement between the defendant and Margaret Chumba. The said Margaret bought the suit property from the defendant. The other witness was one Mutundu who is now deceased.

11. When cross examined by Miss Mugo for the defendant he told the court that the sale agreement was in writing. He also confirmed that he was a witness to the sale agreement between the plaintiff and Margaret. He confirmed that he saw the plaintiff pay the purchase price to Margaret Chumba but he cannot recall how much it was.

The Evidence of the Defendant

12. DW1, Peter Gitau Muthui, the defendant testified on 17th March 2021. He adopted his witness statement dated 22nd February 2013. He also relied on the list of documents dated 22nd February 2013 and 16th October 2020. The documents were produced as exhibits D1 and D2 respectively.

13. He told the court that he has known the plaintiff for more than ten years. That he had earlier sold to him another parcel of land known as Ngong/Ngong/22571. The same was transferred to the plaintiff and it has no dispute.

14. He further stated that all was well until year 2012 when the plaintiff fenced his other plot. He reported the matter to the District Officer, Ngong. He told the court he is the registered owner of Ngong/Ngong/32948 which he inherited from his father. He stated that he does not know Margaret Chumba nor did he sell to her any land. He told the court that he has no interest on the suit property. He prays that the plaintiff's suit be dismissed.

15. When cross examined by Miss Mathenge for the plaintiff, he told the court that did not know the suit property. Further that his elder brother was the one who had all the Titles and that he may have sold the parcel of land. He said he did not know Margaret Chumba. He denied that Eric Gitau, a surveyor prepared any Survey Report.

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

The Plaintiff's submissions

17. They are dated 23rd April 2021. They raise three issues for determination:-

(i) Whether the plaintiff is the registered proprietor of the suit property Ngong/Ngong/32949.

(ii) Whether the defendant's evidence is credible.

(iii) Whether the plaintiff is entitled to the reliefs sought.

18. The plaintiff is the registered owner of the suit property having bought the same from Margaret A. Chumba who was the previous owner. He produced the Certificate of Title as exhibit P1 in this case. The certified copy of Green card produced as exhibit P2 confirms this position. He has relied on Section 26(1) of the Land Registration Act, 2012, Section 24 and 25 of the Land Registration Act, 2012. He has also put forward the case of **Nelly Wanjiru Njenga vs Robinson Maina & 3 Others [2020] eKLR**.

19. The oral and documentary evidence tendered by the defendant is contradictory. The defendant sold the suit property to Margret Chumba who later sold to the plaintiff. The sequence of the Title is clearly captured in the register that was derived from the records held at the Land Registry.

20. His averments that he does not know Margaret Chumba cannot be true. The two entered into a sale agreement in the year 2004, as confirmed by the testimony of PW2. He defendant evidence lacks credibility and ought to be disregarded by the Honourable court.

21. The plaintiff is entitled to an order of permanent injunction. He has relied on the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** and **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2014] eKLR**; **Mrao Ltd vs First American Bank Ltd & 2 Others [2003] eKLR**. The plaintiff is the legally registered proprietor of the suit property having acquired the title procedurally. His constitutional right has been infringed when the defendant trespassed onto the suit property and demolished the two-bedroomed house. The trespass might continue unless the defendant is permanently restrained.

22. Unless the defendant is restrained the plaintiff will not be able to make any developments in his property which is detrimental to his right to property that cannot be compensated by an award of damages. He has put forward the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR** as quoted in **Kenya Electricity Transmission Company Limited vs Kibotu Limited [2019] eKLR**.

The Plaintiff's suffering is greater compared to that of the defendant's.

23. The plaintiff's case has met the test and threshold for grant of an order of injunction. He is entitled to damages for the value of the demolished house and the costs of the suit. He prays that the prayers in the plaint be granted.

The Defendant's Submissions

24. They are dated 21st June 2021. The District Land Surveyor Kajiado North, noticed that the suit property should have come from Ngong/Ngong/10548. The map in the defendant's further list of documents shows a subdivision of 10548 and the suit property does not appear on the map. It is not clear why it was necessary to amend the map.

25. Ezekiel Mutundu, an elder brother to the defendant is deceased. He died before testifying in this case. Margaret A Chumba was said to be deceased but no proof of such death was adduced by the plaintiff.

26. The defendant was at no time the proprietor of the suit property and thus was not capable of parting with it as alleged or at all. This could only be explained by the fact that the land parcels do not exist on the ground.

27. The plaintiff did not produce any sale agreements for the two transactions he claims happened. He has relied on section 3(3) of the Law of Contract Act (Cap 23 Laws of Kenya). There is no evidence of consent of Land Control Board. He has relied on the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR**. The plaintiff ought to have done due diligence before buying this suit property.

28. The Plaintiff has failed to prove his case to the required standard of proof and it ought to be dismissed with costs to the defendant.

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

(i) Whether the plaintiff is the registered proprietor of the land parcel known as Ngong/Ngong/32949 ('the suit property').

(ii) Is the defendant's evidence credible?

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs of this suit.

30. It is not in doubt that the plaintiff is the registered owner of the suit property. He produced a Certificate of Title as exhibit P1. He told the court that he bought the same from Margaret A. Chumba in 2009. The title in his name was issued on 3rd December 2009.

31. He called one witness PW2 Caleb Mogire Ondieki, confirmed that he witnessed a sale agreement between Margaret Antonyi Chumba and the plaintiff. He confirmed that money changed hands though he does not recall how much it was. He also confirmed that he was a witness to the sale agreement between the plaintiff and Margaret A. Chumba. The other witness was Ezekiel Mutundu who is now deceased though he had recorded a witness statement.

32. By an order of the court dated 3rd November 2015 this matter was referred to the Land Registrar, Kajiado North to give his input. He filed an undated report in court. From the proceedings before the Land Registrar Margaret A. Chumba the previous owner was present and so was Mutundu Muthui, the defendant's elder brother. In those proceedings, Margaret A Chumba confirmed that she bought the suit property from the defendant in the year 2004. She fenced the land with barbed wire and posts. By the time she sold the land to the plaintiff the fence was intact.

33. The defendant in those proceedings tried to deny the sale to Margaret A. Chumba. Mutundu Muthui his elder brother confirmed that the defendant sold the land to Margaret A. Chumba. He further stated that the defendant sold the land willingly.

34. The Land Registrar observed the suit property was a subdivision of Ngong/Ngong/27487. The other parcel is 32948 measuring 0.05 hectares in the name of the defendant. The suit property was first registered in the defendant's name on 19th August 2004 and transferred to Margaret A. Chumba the same day. This confirms what Margaret, told the Land Registrar. On 27th November 2009, the same was transferred to David Nyongio. This confirms what the plaintiff told the court. The Land Registrar confirmed that there was no boundary dispute between the suit property and 32948 but rather it was a claim of ownership.

35. From the totality of this evidence tendered, I find that the plaintiff is the registered owner of the suit property having bought the same from Margaret A. Chumba. **Section 26(1)** of the Land Registration Act, 2012 provides that:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

36. In his pleadings and evidence the defendant has stated that he does not know the suit property. He said he does not have interest in the same. Apart from merely denying that he sold the land to Margaret A. Chumba he was unable to explain how the land was transferred to Margaret Chumba and later to the plaintiff. He was unable to rebutt the plaintiff’s evidence that the suit property was fenced from the year 2004. I find that the defendant told this court lies. He did not plead any fraud on the part of the plaintiff or the Land registry’s officials who effected the transfers. The entries on the land register speak for themselves. The defendant’s evidence cannot be believed. He must have changed his mind when he learnt that Margaret A. Chumba had passed on. His evidence is full of contradictions. I find that his evidence is not credible.

37. Having found that the plaintiff is the registered owner of the suit property, he is entitled to an order of permanent injunction. He told the court that the defendant demolished the two bedroomed iron sheet structure he had put up. He is likely to suffer irreparably if the defendant is not restrained.

38. The plaintiff also sought special damages being the value of the demolished house. In his submissions he states that the house was valued at about Kshs.420,000/-. It is trite law that special damages must be specifically pleaded and specifically proved. The plaintiff did not call evidence to confirm the value of the demolished house. He ought to have availed evidence in the form of a valuation report to confirm the value of the said demolished house. I find that this prayer must fail.

39. In conclusion, I find that the plaintiff has proved his case as against the defendant on a balance of probabilities. Cost follow event. The plaintiff is entitled to costs of the suit.

40. Accordingly judgement is entered for the plaintiff as against the defendant as follows:-

(a) That an order of permanent injunction is hereby issued restraining the defendant, his servants and or agents from trespassing or occupying, selling, charging, transferring, demolishing any premises erected on the suit property and or in any manner interfering with the plaintiff’s quiet occupation and possession of land parcel known as Ngong/Ngong/32949.

(b) That costs of this suit be borne by the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28th day of October 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mathenge for the Plaintiff

Ms Mugo for the Defendant

Steve - Court Assistant