



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 757 OF 2017

EDWIN KAGO KAGWI PLAINTIFF

=VERSUS=

SIMON KAHIA..... DEFENDANT

JUDGMENT

1. The plaintiff, **Edwin Kago Kagwi**, initiated this suit through a plaint dated 28/9/2017. His case was that he was, and he still is, the registered proprietor of **Land Title Number Ruiru/Mugutha Block 1/ T. 2068**. Without his consent, authority, reasonable excuse, or justification, the defendant unlawfully entered, invaded, encroached into, and/or trespassed into the said parcel of land, and started constructing stone structures thereon. Aggrieved, he made a report at Mugutha Police Post and he was advised to initiate civil proceedings against the defendant.

2. Consequently, he brought this suit, seeking the following verbatim reliefs against the defendant:

a) Permanent injunction restraining the defendant whether by himself, servants, workmen, agents, clients or otherwise howsoever from trespassing on to parcel of land known as Title Number Ruiru/Mugutha Block 1/T.2068.

b) An order of mandatory injunction compelling the defendant whether by himself, servants, workmen, agents, clients or otherwise, howsoever, to remove all the structures and building he has put up on the plaintiff's parcel of land known as Title Number Ruiru/ Mugutha Block 1/T.2068.

c) An order that the defendant gives vacant possession of parcel of land known as Title Number Ruiru/ Mugutha Block 1/T.2068 to the plaintiff or in default the plaintiff be at liberty to secure the defendants forceful eviction from parcel of land known as Title Number Ruiru/ Mugutha Block 1/T. 2068 with the assistance of relevant law enforcement authorities.

d) Costs of the suit.

3. The defendant filed a statement of defence dated 20/3/2018. He denied the allegations of trespass. He averred that the plaintiff had sued "the wrong parties." Further, he averred that the plaintiff did not have the *locus standi* to bring this suit against him because he (the defendant) was the registered proprietor of the suit property. He urged the court to dismiss the plaintiff's suit.

4. When the matter came up for hearing on 7/10/2021, neither the defendant nor his advocate attended the hearing. An affidavit of service sworn by one Boniface Ndimba on 16/6/2021 indicated that the defendant's advocates were served with a hearing notice on 10/6/2021. Consequently, hearing proceeded ex-parte on 7/10/2021. The case now falls for determination.

5. The plaintiff testified as **PW1**. He adopted his written statement dated 28/9/2017. He produced the following documents: (i) Copy of title deed for the suit property; (ii) copy of an official search relating to the suit property; (iii) copy of Certificate No 3600 issued by M/s Nyakinyua Investment Ltd, showing that **Ms Wambui Komu** was the initial allottee of the suit property; and (iv) copy of the ballot paper.

6. In summary, **PW1's** evidence was that he purchased the suit property from **Wambui Komu** who was a shareholder of **Nyakinyua Investment Ltd**. He was subsequently issued with a title deed dated 9/1/2009. In 2017, he visited the suit property and found that someone was in the process of erecting stone structures on the suit property. A search in the Lands Registry revealed that the land was still registered in his name. He reported the matter at Mugutha Police Post. The police summoned him and the defendant and asked both of them to provide ownership document. He provided his documents. The defendant did not provide any document. Despite his objection, the defendant continued with the construction, prompting him to initiate this suit.

7. Mr **Robert Mugendi Mbuba**, Land Registrar – Ruiru Lands Registry, testified as **PW2** upon being summoned by the court at the request of the plaintiff. His evidence was that the land register relating to the suit property was opened on 25/9/1992. The suit property measures approximately 0.125 of a hectare and it is found on Land Registry Map Sheet No 3. The parcel register was opened in the name of the

Government of the Republic of Kenya and on the same day it was allocated to Monica Wambui Komu of ID No 4923877/67. She was issued with a title deed on the same day, 25/9/1992. On 5/1/2009, Monica Wambui Komu transferred the suit property to Edwin Kago Kagwi of ID No 13654745. On 9/1/2009, Edwin Kago Kagwi was issued with a title deed. On 22/2/2021, a title deed was re-issued to Edwin Kago Kagwi. PW2 produced a total of 20 documents, including copy of the parcel register and documents in the relevant file, among them, a transfer dated 4/12/2008 and registered on 5/1/2009, conveying the suit property from Monica Wambui Komu to Edwin Kago Kagwi. The plaintiff closed his case at that point.

8. Subsequently, the plaintiff filed written submissions through the firm of *M/s Oyomba Mosota & Wamwea Advocates*. Counsel submitted that the following two issues fell for determination in the suit (i) *Is the plaintiff the legal owner of the suit property and if so, is he deserving of the prayers sought?*; and (ii) *who should bear the costs of this suit*. Counsel submitted that it was crystal clear from the evidence prosecuted to the court that the plaintiff was the registered proprietor of the suit property. Counsel added that, as registered proprietor, the plaintiff was protected by Sections 24, 25 and 26 of the Land Registration Act. Counsel urged the court to find in favour of the plaintiff and award the plaintiff costs of the suit.

9. I have considered the pleadings, evidence and submissions in this suit. I have also considered the relevant law. Although the defendant filed a statement of defence, he did not bother to participate in the proceedings by cross-examining the plaintiff's witnesses and by leading evidence. In the circumstances, I agree with counsel for the plaintiff that the two issues falling for determination in this suit are: (i) Whether the plaintiff is the legal owner of the suit property and if so, whether he deserves the reliefs sought against the defendant; and (ii) Who should bear costs of this suit.

10. In his defence dated 20/3/2018, the defendant contested the plaintiff's

ownership of the suit property and contended that he (the defendant) was the registered proprietor of the suit property. However, he did not file any document to support that contention. Similarly, he did not file any witness statement. Thirdly, he neither attended the hearing nor led evidence in this suit.

11. On his part, the plaintiff led evidence demonstrating that he acquired the suit property from Monica Wambui Komu at a consideration of Kshs 8,000,000 and he was subsequently registered as proprietor of the suit property on 5/1/2009. Further, the defendant led evidence demonstrating that Monica Wambui Komu was the proprietor of the suit property at the time she sold it to her. Further, he demonstrated that he was the registered proprietor of the suit property. His evidence was uncontroverted. In the circumstances, the court is satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities.

12. The court is in agreement with the submissions made by counsel for the plaintiff that, as a registered proprietor, the plaintiff's rights are protected by the framework in **Sections 24, 25 and 26 of the Land Registration Act**. Above all, Article 40 of the Constitution protects the right to property. The net result is that the court finds that the plaintiff is entitled to the appropriate reliefs in tandem with the prayers made in the plaint.

13. On costs, under **Section 27 of the Civil Procedure Act**, costs follow the event. The defendant will therefore bear costs of the suit.

14. In the end, the court hereby enters judgement in favour of the plaintiff against the defendant in the following terms:

a) *A permanent injunction is hereby issued, restraining the*

defendant whether by himself, his servants, workmen, agents, or otherwise, howsoever, against trespassing on Land Parcel Number Ruiru/Mugutha Block 1/T. 2068;

b) *An order of mandatory injunction is hereby issued compelling the defendant by himself, his servants, workmen, agents or otherwise, howsoever, to remove all the structures and buildings erected on the suit property, Parcel Number Ruiru/Mugutha Block 1/T. 2068;*

c) *An order is hereby issued that the defendant gives the plaintiff vacant possession of the suit property, Land Parcel Number Ruiru/ Mugutha Block 1/T. 2068 within 30 days from today [excluding the period running from 21/12/2021 to 6/1/2022] and in default, the plaintiff shall forcefully evict the defendant together with his servants/agents.*

d) *The National Police Officer Commanding the Area Police Division shall ensure maintenance of law and order during the eviction.*

e) *The defendant shall bear costs of this suit.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON

THIS 6TH DAY OF DECEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Wamwea for the Plaintiff

Court Assistant: Lucy Muthoni