



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO.327 OF 2015

EUNICE WAIRIMU KURIA.....PLAINTIFF

=VERSUS=

NORMAN MUTUOTA.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

MARGARET WANGARI MUTUOTA.....3RD DEFENDANT

JUDGEMENT

Background

1. By an amended Complaint dated 22nd October 2015 the Plaintiff sued the Defendants claiming the following reliefs:-

a) An order of Declaration that the Plaintiff is the legal and beneficial owner of the property known as plot No.1369 (formerly H.24) located in Embakasi Ranch measuring quarter (1/4) of an acre by reason whereof he is entitled to the registration, occupation and possession thereof as proprietor to the exclusion of 1st Defendant and any other person whatsoever.

b) An order of declaration that the Plaintiff is the legal and beneficial owner of the property known H.24B located in Embakasi Ranch measuring quarter (1/4) of an acre.

c) An order of permanent injunction restraining the Defendants, whether acting by themselves, their servants ,agents, contractors and/or any other persons whatsoever ,from entering upon, trespassing upon, taking over, remaining ,damaging, developing, transferring ,charging or registering in the name of the 1st Defendant or any person other than the plaintiff or in any other manner howsoever interfering with the plaintiffs occupation, possession and quiet enjoyment of the property known as plot No 1369 (formerly H.24) located in Embakasi Ranch measuring quarter (1/4) of an acre.

d) An order directing the 2nd Defendant to procure, execute ,release and deliver to the Plaintiff ,lease instruments of transfer and certificate of lease in respect of that property known as plot No.1369 (formerly H.24) as well as Plot No. H 24 B both located in Embakasi Ranch measuring quarter (1/4) of an acre.

e) General damages against the Defendants ,jointly and severally,

f) General damages for trespass against the 1st Defendant and 3rd Defendants.

g) Costs of this suit against Defendants, jointly and severally, and interest thereon at court rates from the date of Judgement until settlement thereof in full.

h) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances of the case.

2. The 3rd Defendant filed an amended defence to the Plaintiff's claim and raised a counter-claim in which she sought the following reliefs:-

a) A declaration that the 3rd Defendant is the legitimate owner /allottee of plot No.V4392 (1392) map c Embakasi Ranching.

b) A permanent injunction does issue against the 2nd defendant, her agents, servants and/or employees from trespassing, alienating, damaging and/or transferring the Plaintiff's parcel of land known as Plot V4392 91369 map c situated in Ruai within Embakasi Ranching Scheme and/or otherwise howsoever from interfering with the parcel of land.

c) In the alternative to (a) and (b) above compensation of the suit plot by the 2nd Defendant at the current market price of Kshs.2,000,000/=

d) Special damages for development Kshs.204,000/=

e) Any other or further relieves that this court may deem fit to grant.

3. On 17th April 2018, the 3rd Defendant made an oral application to amend paragraph (C) of the counter claim to read **Kshs.4000,000/=** . The 2nd Defendant which was duly served with summons to enter appearance and file a defence neither entered appearance nor filed defence.

Plaintiff's case

4. The Plaintiff used to reside in the United States of America (USA) but she is currently residing in Canada. She granted a power of attorney to her brother PW2 Peter Kabui Kuria who gave evidence on her behalf. The Plaintiff's evidence is that her father PW1 Joseph Kuria Gathu was a shareholder of the 2nd Defendant whereby he acquired one share in 1978. One share was equivalent to one plot measuring 100x100ft that is to say ¼ an acre.

5. The Plaintiff's father was allocated ¼ acre by the 2nd Defendant which was a land buying company. The Plaintiff's father was later given a bonus plot of an equivalent plot that he had been allocated. when the Plaintiff's father retired from the employ of Kenya Litho Ltd , he transferred his interest in the plot plus the bonus plot to his daughter. The share certificate which the Plaintiff's father had been given was surrendered and a new share certificate in the name of the Plaintiff was issued and her name was accordingly put in the records of the 2nd Defendant Company.

6. Prior to the transfer of the plots to the Plaintiff, the Plaintiff's father had put up a small structure on plot known as plot 1369 formerly H.24 (suit property). The Plaintiff then entrusted her brother PW2 to look after the suit property. In or around 2009, an unknown person whom the Plaintiff's brother came to know as the 1st Defendant attempted to take over possession of the suit property by destroying the fence and a pit latrine which was on the suit property.

7. The Plaintiff's brother caused a demand letter to be addressed to the 1st Defendant who is husband to the 3rd Defendant asking him to cease the trespass. The trespass ceased until 2015 when the Plaintiff's brother during one of his routine visits to the suit property noticed that a site house had been put up in the suit property. He was informed that the 1st Defendant was claiming that he had been allocated the suit property by the 2nd Defendant.

8. The Plaintiff's brother made several attempts to have the 2nd Defendant process title in the name of the Plaintiff but the 2nd Defendant did not co-operate . This is how this suit was filed against the 1st and 2nd Defendants and when the 1st Defendant filed a defence stating that he had no interest in the suit property and that the suit property was in the name of his wife (3rd Defendant) , the Plaintiff was amended bringing in the 3rd Defendant.

Third Defendant's case.

9. The 3rd Defendant stated that she purchased the suit property which was known as plot 4392 from Fredrick Wachira Mwangi on 24th February 2011. She paid Kshs.400,000/= for the plot. The plot initially belonged to her brother Hurun Mutuota who sold it to Fredrick Wachira Mwangi. She was taken to the site by the surveyor of the 2nd Defendant by name Nyika who showed her the plot. She put up a semi-permanent structure on the plot. In the year 2015 , she was informed that someone had gone to the plot claiming that it belonged to him.

10. The 3rd Defendant testified that the suit property which according to the Plaintiff is plot C 1369 and which according to her is plot V 4392 is the same plot on the ground. She testified that when the government recently gave a directive that the 2nd Defendant processes titles to plot owners, the 2nd Defendant informed her that she is the one earmarked for processing of the title. The Plaintiff further testified that she had caused the suit property to be valued whose value is Kshs.4000,000/=. She stated that should the Court find that the suit property does not belong to her the court should order the 2nd Defendant to pay her compensation because it is the 2nd Defendant which confirmed to her that the suit property belonged to Fredrick Mwangi Wachira and that it is the officials of the 2nd Defendant who signed the share certificate held by Fredrick Wachira Mwangi and that it is the same officials who signed her certificate of ownership upon transfer into her name.

Analysis of evidence and issues for determination.

11. I have carefully gone through the evidence adduced by the Plaintiff as well as the evidence adduced by the 3rd Defendant. The Plaintiff's father was issued with certificate No.2138 on 1st August 1978. The certificate shows that the plot he was allocated is plot H.24. When the suit property was transferred to the plaintiff, the Plaintiff through her brother was given a new share certificate No.2019. The certificate clearly shows that the plot transferred was H24 for the initial plot and plot H24 B for the bonus plot. There is no contention that plot H 24 which is the suit property is the one which became plot C 1369 . The Plaintiff produced receipts which showed that he paid all the required amounts pertaining to the suit property and the bonus plot which is not the subject of this suit.

12. The 3rd Defendant produced sale agreement dated 24th February 2011 in respect of a plot described as V 4392 . She also produced a non-member certificate in respect of plot No V 4392 dated 10th July 2009 but at the back of the certificate, it is indicated that it is not known when the plot was allocated. The 3rd Defendant also produced a non-member certificate dated 18th May 2011 which at the back also indicates that the date of allocation is unknown. The 3rd Defendant also produced another non-member certificate of ownership in respect of plot V 4392 in the name of Harun Mutuota . This certificate is dated 13th December 2005.

13. The parties put forth the following issues for determination.

- a) *Was the Plaintiff's father the original allottee of the suit property? If so did he satisfy all the conditions for allocation?*
- b) *Whether the Plaintiff acquired interests on the suit property consequent upon the transfer of the shareholding of the Plaintiff's father in the 2nd Defendant to the Plaintiff?*
- c) *Was the suit property available for allocation by the 2nd Defendant to the 1st and 3rd Defendants or any other persons in or about the year 2011?*
- d) *As between the share certificate No.2019 held by the Plaintiff and the non-member certificate of ownership No.022248 held by the 3rd Defendant, which one takes precedence?.*
- e) *Whether the 3rd Defendant's actions in respect of her possession and construction of a site house on the suit property constitutes actionable trespass?*
- f) *Is there a case of double allocation in the instant case?*
- g) *Whether the 3rd Defendant is entitled to compensation from the 2nd Defendant*
- h) *Which order should be made on costs.*

Was the Plaintiff's father the original allottee of the suit property? If so did he satisfy all the conditions for allocation?

14. There is no dispute that the Plaintiff's father was a shareholder in the 2nd Defendant Company. He was given share certificate number 2138 on 1st August 1978. The suit property was allotted to the Plaintiff's father in 1982 as confirmed by letter of allotment dated 28th November 1982. The 3rd Defendant does not dispute this fact even in her submissions. DW3 Jack Kamau Wachira who is a surveyor working for the 2nd Defendant company claimed that the suit property was allocated to the Plaintiff in 1989 by a probe committee headed by Aggrey Mudinyu. This surveyor started working with the 2nd Defendant Company in 1992. The probe committee came in place in 1989. There is evidence that the Plaintiff's father was allotted the suit property in 1978. There is therefore no way the probe committee would have allocated the suit property to the Plaintiff in 1989. The Plaintiff had the suit property transferred to her by her father in 2008. The claims by DW3 are therefore baseless.

15. The Plaintiff's father made all the necessary payments that is why he was to be allocated the suit property as well as the bonus plot. The receipts issued to the Plaintiff's father were produced as exhibits. I therefore find that the Plaintiff's father was the original allottee of the suit property and that he met all the conditions for allocation.

Whether the Plaintiff acquired interests on the suit property consequent upon the transfer of the shareholding of the Plaintiff's father in the 2nd Defendant to the Plaintiff?

16. There is ample evidence that the Plaintiff's father transferred his interests in the suit property to the Plaintiff. As the Plaintiff was out of the country, her brother received the new certificate which was given on her behalf. The process of transfer was sanctioned by the 2nd Defendant Company. The certificate issued to the plaintiff was produced in evidence. It is certificate No.2019 issued in 2008. These facts are not disputed and indeed DW3 who works with the 2nd Defendant testified that the documents held by the Plaintiff are genuine.

Was the suit property available for allocation by the 2nd Defendant to the 1st and 3rd Defendants or any other persons in or about the year 2011

17. There is evidence that the suit property was allotted to the Plaintiff's father in 1978. He acquired a beneficial interest in it. The plaintiff's father transferred his interest to the Plaintiff in 2008. The suit property was therefore not available for allocation to any other person. The 3rd Defendant in her defence claimed that the suit property was previously owned by her brother Harun M Mutuota who sold it to Fredrick Wachira Mwangi who in turn sold it to her on 24th February 2011. The documents produced by the 3rd Defendant show that Harun M Mutuota had non-member certificate No.022248 dated 13th December 2005.

18. There is no evidence which the 3rd Defendant adduced to show when the said Harun M Mutuota transferred his interest in the suit property to Fredrick Wachira Mwangi. In 2005 when Harun M Mutuota obtained a non-membership certificate of ownership, already the suit property was in the name of the Plaintiff's father and was not available for allocation. As was held by myself in **Aster Holdings Limited Vs City Council of Nairobi & 4 Others (2017) eKLR**, once a property is allotted to an individual or entity, that land is no longer available for alienation to a third party.

As between the share certificate No.2019 held by the Plaintiff and the non-member certificate of ownership No.022248 held by the 3rd Defendant, which one takes precedence?

19. It is not difficult in answering the issue herein. There is evidence that the Plaintiff's father was allotted the suit property in 1978. He later transferred the suit property to the Plaintiff who was issued a certificate in 2008. The 3rd Defendant stated that she got her non-member certificate of plot ownership on 18th May 2011. Even if the court were to trace the certificate back to Harun M Mutuota in 2005, still the one held by the Plaintiff takes precedence. In the case of **African Inland Church –Kenya (Registered Trustees) Vs Catherine Nduku & 12 Others (2017) eKLR** which cited with approval the holding in **Gitway Investments Limited Vs Taj Mall Ltd & 3 Others** where the Court relied in the words of the Court of Appeal in **Wreck Motors Enterprises Vs Commissioner of Land C A No. 71 of 1997**, it was held as follows:-

“...like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the commissioner of lands issues two titles in respect of same parcel of land, then if both are apparently on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”.

20. In the instant case as I will demonstrate when ideal with another issue herein below, the case here was not that of double allocation as to call into play the issue of which certificate takes precedence.

Whether the 3rd Defendant's actions in respect of her possession and construction of a site house on the suit property constitutes actionable trespass?

21. The 3rd Defendant has admitted that she moved into the suit property and constructed a site house which in her own evidence is a semi-permanent structure. The law is clear that where trespass is proved a party need not prove that he/she has suffered any specific damage or loss to be awarded damages. The court in the circumstance is under a duty to assess the damages awardable depending on the unique facts and circumstances of the case. See **Park Towers Ltd Vs John Mithamo Njika & 7 Others (2014) eKLR**

22. The 1st Defendant herein is the one who first attempted to take possession of the suit property. He ceased the trespass after demand letter had been written to him requiring him to cease the trespass. The trespass again resumed in 2013 when the 1st Defendant moved and built a structure on the suit property. The Plaintiff had to move to court where she obtained injunctive orders against the 1st and 2nd Defendants. The 3rd Defendant was subsequently enjoined following the orders of the court. The 3rd Defendant in her evidence admitted that she put up a structure on the suit property. This constitutes trespass.

23. The Plaintiff has proposed general damages of Kshs.1,000,000/= and has relied on the case of Aster Holdings Ltd (Supra). I have considered the location of the suit property and the period the trespass has been in place. I find that an award of damages in the sum of Ksh.500,000/= is reasonable.

Is there a case of double allocation in the instant case?

24. The 3rd Defendant in her submissions stated that the case herein is a case of double allocation which occurred as a result of an error on the part of the 2nd Defendant. The Plaintiff on the other hand submitted that the allocation of the suit property to Patrick Wachira Mwangi or Harun M Mutuota was not lawful as the suit property was not available. The 3rd Defendant in cross examination stated that she did not carry out due diligence before she purchased the suit property.

25. Though the plaintiff did not attribute any fraud on the part of the Defendants, a scrutiny of the documents relied upon by the 3rd Defendant show that she was not an innocent purchaser for value without notice and that the certificates in the name of Harun M Mutuota and Fredrick Wachira Mwangi May not have been lawfully obtained. To begin with, there is no evidence on how Harun M Mutuota was allocated plot Vs 4392 which they claim is the suit property. This is the person who is said to have sold the suit property to Fredrick Wachira Mwangi who in turn sold the same to the 3rd Defendant.

26. At the back of both the non-member certificates of ownership held by Fredrick Wachira Mwangi and the 3rd Defendant, the date of the allocation of the plot they claim to own is indicated as being unknown. It is therefore clear that a property whose date of allocation is unknown cannot be said to have been acquired lawfully. The suit property which was allocated to the Plaintiff's father is clearly indicated that it was allocated on 28th November 1982. It is therefore clear that the case herein is not a double allocation but an allocation which was done irregularly with the sole aim of depriving the Plaintiff of her lawfully acquired plot. The suit property was only assigned plot No.V 4392 so as to deceive that it was a separate plot from plot c 1369 when actually the 3rd Defendant is claiming the same plot on the ground.

27. The 3rd Defendant called DW3 a surveyor from Embakassi Ranching Company Ltd (2nd Defendant) who claimed that the documents held by the 3rd Defendant were genuine as were those held by the Plaintiff. This witness insisted on the case being left to the parties to sort it out of court. It is important to note that the 2nd Defendant did not file a defence and there was no basis upon which the witness could purport to give evidence on behalf of the 2nd Defendant. This witness in fact came to give evidence in favour of the 3rd Defendant whom he said had been earmarked for processing of title by the 2nd Defendant.

28. The 3rd Defendant produced a sale agreement dated 24th February 2011. Clause 3 of the said agreement is that the vendor (Fredrick Wachira Mwangi) acknowledged receipt of payment of the entire purchase price on execution of the agreement. The 3rd Defendant produce a banker's cheque in favour of Fredrick Wachira Mwangi which is dated 1st March 2011. One wonders why the full purchase price was being

acknowledged as having been received on 24th February 2011 when in fact a bankers cheque in favour of Fredrick Wachira Mwangi was issued on 1st March 2011.

Whether the 3rd Defenant is entitled to compensation from the 2nd Defendant

29. The 3rd Defendant produced copies of two bankers cheques in favour of the 2nd Defendant. The first one is for 30,000/= issued in 2011. The second one is for Kshs.22,000/= issued on 3rd February 2009. The 3rd Defendant testified that she paid Kshs.30,000/= to the 2nd Defendant as confirmation fee on being taken to the site. The confirmation of the site was by the surveyor of the 2nd Defendant Mr Nyika. She testified that the amount of 22,000/= was for transfer and site visit.

30. The evidence of the 3rd Defendant was not controverted. She testified that in case the court found that the plot did not belong to her, she should be compensated Kshs.4,000,000 /=- payable by the 2nd Defendant being the value of the suit property. A valuation report was produced by DW 1 Stephen Boniface Murathi Wamae . The suit property was valued at Kshs.4,000,000/= .

31. DW3 a surveyor who works with Embakassi Ranching Company Ltd (2nd Defendant) did not disown any of the documents relied upon by the 3rd Defendant. He only insisted on the issue being sorted out of court. This offer however came too late in the day and was made tongue in cheek. This same witness stated that the 2nd Defendant was keen on having the title processed in the 3rd Defendant's name. It therefore appears that the 2nd Defendant is aware about what is going on. As the 2nd Defendant accepted payment from the 3rd Defendant for a plot they knew was not available, I find that he 2nd Defendant is liable to compensate the 3rd Defendant. There was no evidence adduced by the 3rd Defendant to prove her claim for Kshs.204,000/= being special damages for development on the suit property . There is also no basis for grant of prayers (a) and (b) against both Defendants in the counter claim.

Conclusion.

I therefore enter judgement for the plaintiff as follows:-

a. An order of Declaration that the Plaintiff is the legal and beneficial owner of the property known as plot No.1369 (formerly H.24) located in Embakasi Ranch measuring quarter (1/4) of an acre by reason whereof she is entitled to the registration, occupation and possession thereof as proprietor to the exclusion of 1st Defendant and any other person whatsoever.

b. An order of declaration that the plaintiff is the legal and beneficial owner of the property known H.24B located in Embakasi Ranch measuring quarter (1/44) of an acre.

c. An order pf permanent injunction restraining the Defendants, whether acting by themselves, their servants ,agents contractors and/or any other persons whatsoever ,from entering upon, trespassing upon, taking over, remaining ,damaging, developing, transferring ,charging or registering in the name of the 1st Defendant or any person other than the plaintiff or in any other manner howsoever interfering with the plaintiffs occupation, possession and quiet enjoyment of the property known as (formerly H.24) located in Embakasi Ranch measuring quarter (1/4) of an acre.

d. An order directing the 2nd Defendant to procure, execute ,release and deliver to the Plaintiff ,lease instruments of transfer and certificate of lease in respect of that property known as plot 1369 (formerly H.24) as well as Plot No. H 24 B both located in Embakasi Ranch measuring quarter (1/4) of an acre.

e. General damages of Kshs.500,000/- against the 1st and 3rd Defendants.

f. Costs of the suit and counter-claim

32. I enter judgement in favour of the 3rd Defendant against the 2nd Defendant in the counter claim as follows:-

1. Compensation in the sum of Kshs.4,000,000/=

2. Costs and interest on (1) above at the rate of 14% with effect from the date of this Judgement.

Dated, Signed and delivered at Nairobi on this 23rd day of January 2020.

E.O.OBAGA

JUDGE

In the presence of:

M/S Mukiri for Mr Njoroge for plaintiff

Court Assistant: Hilda

E.O. OBAGA

JUDGE