



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KAJIADO

CASE NO. 182 OF 2017

(Formerly Machakos ELC No. 304 of 2011)

PAUL NGIGI KARANJA..... PLAINTIFF

VERSUS

ALLAN SCHEMEKHER..... DEFENDANT

JUDGEMENT

By a Plaint dated the 27th October, 2011 and amended on 9th July, 2012, the Plaintiff prays for judgement against the Defendant for:

- i) That since the Defendant has indicated in his Defence that he has not constructed his house or any permanent building or trespassed at all on the Plaintiff's L.R. No. Title No. NGONG/NGONG/4530 this honorable court be pleased to order/decree that the Plaintiff is at liberty to demolish any building constructed on his land without the Defendant raising any issue at all.
- ii) That this Hon. Court do order the Defendant to demolish his house built on the Plaintiff LR. Title No. NGONG/NGONG/ 4530 without the Plaintiff's consent and/or knowledge at his costs, alternatively
- iii) The Defendant do give to the Plaintiff his actual LR Title No. NGONG/NGONG/ 4531 measuring 1 ½ acres and pay the Plaintiff for one half (1 ½) Acre at current market value as compensation.
- iv) This honorable court do order that if the Defendant does not want to demolish his house and/or all developments on the Plaintiff's L.R Title No. NGONG/NGONG/4530, this Honourable court do order that the Defendant do compensate the Plaintiff's 2 acres land at the current market value to be determined by a recognizable valuer appointed by this Honourable court at the cost of the Defendant.
- i) Any other such other/ further relief as Honourable court may deem fit/just to grant;
- ii) Cost of this suit and interest

The Defendant entered appearance on 20th December, 2011 and filed his Defence on 17th January 2012. He confirms that he is the owner of land title number NGONG/NGONG 4531. Further, that he subdivided the said land into six portions which were registered in his name but later legally sold and transferred three portions out of the said six portions to different individuals while he retained the other three portions which he occupies to date. The Defendant denies constructing a building on the Plaintiff's land parcel number L.R.NO. NGONG/NGONG/4530 and states he has no interest in the said property. He concurs with the Plaintiff that the Land Disputes Tribunal was devoid of jurisdiction to adjudicate upon issues of title hence the Award therefrom was invalid and adoption of the same in the Senior Resident Magistrate court null as well as void.

The Defendant though duly served as evident in the affidavit of service sworn by Arthur Kimamo on 11th December, 2019 which was filed in Court on 16th December, 2019, failed to participate in the Hearing and it is only the Plaintiff who proceeded with his case.

Evidence of the Plaintiff

The Plaintiff as PW1 adopted his witness statement as evidence in chief and produced his list and bundle of documents dated 27th October, 2011 as exhibit No. 1- 6. It was his testimony that he is the registered owner of L.R. Title No. NGONG/NGONG/4530 measuring two (2) acres hereinafter referred to as the 'suit land' which was a resultant subdivision of NGONG/ NGONG/ 1825. He confirmed that he was yet to develop his land. He testified that in 2010 when he visited the suit land, he was shocked to find that the Defendant had built thereon. Further, that upon inquiry, the Defendant informed that he purchased one and a half acres of land known as L.R.NO. NGONG/NGONG/4531 and was shown the suit land as its location. It is the Plaintiff's testimony that, the Defendant started developing the suit land and not his actual

piece of land by way of building a house and other structures thereon without his consent. PW1 further testified that in 2009, he lodged a complaint with the Land Dispute Tribunal Kajiado North District which decided that he moves to the Defendant's land L.R.NO. NGONG/NGONG/4531 which measures about one and a half acres and leave the Defendant with the suit land which he had developed. Further, that the District Surveyor was to amend the mutation forms and rectify the boundaries. PW1 explained that he opted to institute this suit as the court had jurisdiction to determine ownership of the suit land as opposed to the Land Disputes Tribunal which did not, hence the Award therefrom was not adopted as judgment of the Senior Resident Magistrate's Court. The Plaintiff produced the following documents: Certificate of Title for LR No. Ngong/ Ngong/ 4530; Search Certificate for LR No. Ngong/ Ngong/ 4530; Mutation Forms for LR No. Ngong/ Ngong/ 1825; Award of the Kajiado North District Land Disputes Tribunal dated 3rd February, 2011; Proceedings in Kajiado LDT Case No. 41 of 2011 and Plaintiff's demand letter to Defendant dated the 15th September, 2011 as his exhibits.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Plaintiff's testimony and exhibits, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff submitted that his evidence remained uncontroverted and urged the court to enter judgement in his favour and grant the reliefs sought in the amended Plaintiff. He relied on the **Court of Appeal decision of Checkers Trading Ltd & Another V Fatuma Kimathi Mombasa CA No. 317 of 2003** to buttress his arguments. On the issue whether the Plaintiff is the registered and absolute proprietor of the suit land, he tendered a Certificate of title obtained on 9th December, 1982 issued under the repealed Registered Land Act Cap 300 at the Kajiado Land registry. The Defendant did not challenge this evidence. In addition, the Plaintiff tendered a mutation form which showed that the suit land was a resultant subdivision from L.R. No. Ngong/Ngong/1825 and a Certificate of official Search from Kajiado district Land Registry dated the 5th August, 2011 confirming that he is still the registered proprietor of the said land. The Defendant failed to tender evidence of ownership over the suit land. I wish to make reference to section 27(a) of the Registered Land Act Cap 300 (now repealed) and section 24 (a) of the Land Registration Act that is a direct import of the aforementioned statute, which provides thus: "**The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.**"

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

Further in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

Based on my analysis above, I find that the Plaintiff's Certificate of Title remains undisputed, as it was not indicated that the same was issued on the basis of fraud, misrepresentation or through a corrupt scheme. Further, that the Certificate of title tendered as evidence is conclusive and prima facie evidence that the Plaintiff is indeed the registered and absolute proprietor of the suit land, L.R. No. Ngong/Ngong/4530, with vested rights and interests therein and the Defendant should refrain from interfering with the same. In associating myself with the two decisions cited above, as well as the evidence before me, I find that the Plaintiff is indeed entitled to protection of the law in accordance with the provisions of section 24, 25 and 26 of the Land Registration Act.

As to whether the Defendant encroached on the Plaintiff's parcel of land. The Plaintiff's contention is that the Defendant illegally and unlawfully entered into the suit land and erected a house including other structures thereon. PW1 confirmed that he went for prolonged periods of absence without visiting the suit land and because of his indolence the Defendant encroached thereon.

Encroachment is defined in the Black's law dictionary, 2nd edition, as, "**to gain unlawfully upon the lands, property or authority of another...**". The Plaintiff's allegation of encroachment on the suit land remained uncontroverted. Further, in his Defence, the Defendant merely denied encroaching on the suit land but failed to make a concrete rebuttal and instead contended that he owned L.R. No. Ngong/Ngong/4531 which is an adjacent piece of land. In relying on the evidence before me, I find that the Defendant indeed encroached on the suit land and interfered with the Plaintiff's use including occupation by developing as well as constructing structures thereon.

On who should bear the costs of the suit, since the Plaintiff is the inconvenienced party, I will award him the costs of the suit.

It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability and will proceed to enter judgement for him as against the Defendant and make the following final orders:

- a) The Defendant be and is hereby ordered to demolish any building or structures constructed on the Plaintiff's LR. Title No. NGONG/NGONG/ 4530 without the Plaintiff's consent and/or knowledge, at his costs after 90 days from the date hereof failure of which the Plaintiff will be at liberty to do so.
- b) The costs of the suit is awarded to the Plaintiff.

Dated Signed and Delivered this 30th Day of June, 2020.

CHRISTINE OCHIENG

JUDGE