



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 623 OF 2017

(FORMERLY ELC NRB 394 OF 2015)

MARY NYOKABI MURIRA.....PLAINTIFF

VERSUS

ZACHARY GICHIRI KARIUKI.....DEFENDANT

JUDGMENT

By a Plaint dated **13th May 2015**, the Plaintiff filed this suit against the Defendant and sought for the following orders;

a) A permanent order of injunction restraining the Defendant, his servants, employees and or agents from entering, building or interfering in any manner with Ballot Number 1439 within Nyakinyua Investments Limited.

b) Costs of this suit

c) Any other relief this Honourable Court may deem fit to grant.

In her statement of claim, the Plaintiff averred that she is the legal proprietor of the suit property having bought it on **24th October 2008**. She further averred that on the payment of the transfer fee to **Nyakinyua Investments Limited, a sum of Kshs.2, 000/=** a transfer was effected in her favour. Further that she paid a further **Kshs. 11,000/=** to the company for the processing of a title deed. It was her contention that the Defendant encroached onto the suit property and has set up a permanent perimeter wall. That the Defendant has started construction of a permanent house on the suit property despite numerous attempts by the Plaintiff to get the Defendant to cease his destructive actions against the suit property.

The suit is contested and the Defendant filed a Defence dated **25th May 2015**, and denied all the allegations made in the Plaint. He averred that his wife **Tabitha Njanja Gichiri Nee Tabitha Njanja Kamura** is the registered owner of **L.R Ruiru/Mugutha Block 1/T.1439**. He urged the Court to dismiss the suit.

The Matter proceeded by way of Viva voce evidence wherein the Plaintiff herein testified for herself and the Defendant also testified and closed his case.

PLAINTIFF'S CASE

PW1 Mary Nyokabi Murira adopted her witness statement dated **5th May 2015** as her evidence. She further produced the list of documents as Exhibit 1 and **ballot No. 1439** as Exhibit 2(a), receipt for the title deed dated **28th March 2012** as Exhibit 2 (b), receipt for payment for ballot number dated **20th February 2009** as Exhibit 2 (c) . A copy of the **share Certificate** dated **23rd November 1998** as Exhibit 2(d), a Copy of the Identity Card for **Rosemary Marugu Nyuki** as Exhibit 2(d) (i) , Share Certificate for **Mary Nyokabi** as Exhibit 2(e), Receipt for payment of the plot number as Exhibit 2f. Sale agreement dated **24th October 2008**, exhibit 2g, Clearance certificate dated **24th July 2015** as Exhibit 2h. She urged the Court to order for demolition of the structure in the suit property. She denied wrongfully suing the Defendant and further testified that she had rightfully sued the person who had taken her land. She acknowledged having procured the Clearance Certificate during the pendency of the suit. She further testified that the suit property was **Ruiru Mugutha Block 2/1439**, as she is claiming a Title without a T. It was her testimony that she bought the suit property from one **Rosemary Marugu Njuki**. That in **2008**, while still in school, she got a gift from her father and she got registered at Nyakinyua Investments and that she left everything with her grandmother who is deceased.

DEFENCE CASE

DW1 Zachary Gichiri Kariuki, adopted his witness statement dated 25th May 2015, and testified that he is occupying L.R Ruiru/Mugutha Block 1/T 1439, which is registered in the name of Tabitha. It was his evidence that the Plaintiff is claiming Block 1/1439 and that T.1439 is a small plot and not the one that the Plaintiff is claiming. He produced his list of documents as exhibit 1 and 2. He further testified that in the Title Deed, Tabitha Njanja Gichiri who is the registered owner is not a party to the suit herein. That he had also been sued in ELC 362 of 2015 over the same subject matter, but that the same was never concluded. He produced the pleadings in ELC 362 as Exhibit 3. He further testified that he lives with his wife in L.R T 1439.

The Parties filed written submission which the Court has now carefully read and considered. The issue for determination is *whether the Plaintiff is entitled to the orders sought.*

The Defendant has in his pleadings and evidence averred that the suit property being claimed by the Plaintiff is not the one that he resides in with his wife. That the one claimed by the Plaintiff is L.R 1439, while the one registered in his wife's name and also the one that they are currently in occupation of is L.R T.1439. There is no evidence that the two properties are distinct. However, the official search produced by the Defendant in his evidence indicates that the search was conducted for L.R 1439, and that the search that came out was for L.R T. 1439, and therefore the Court concurs with the Plaintiff's submission and is satisfied that the property claimed by the Plaintiff and the one occupied by the Defendant are one and the same.

The Plaintiff has laid claim to the suit property and to this effect the Plaintiff has produced a sale agreement dated 24th October 2008 indicating that she bought the suit property from one Rosemary Marigu. In the sale agreement, the sale was with regards to ballot 1439. The Plaintiff has also produced a Plot ownership certificate dated 23rd November 1988, for Rosemary Marigu, a transfer receipt has also been produced dated 23rd November 1998. Further the Plaintiff has produced an Ownership Certificate for Mary Nyokabi for Ballot No. 1439 issued on 20th February 2009. The Court has also seen a Survey & Title Deed payment receipt from Nyakinyua Investments Limited dated 28th March 2012, issued to the Plaintiff herein. From the above available evidence, it is clear that the Plaintiff has been able to prove the root of her title ranging from 1988, when the person who sold to her the suit property had been allocated the suit said property.

Though the Defendant has claimed that he was wrongly sued, he has admitted that he lives on the suit property and therefore an injunction against him would be well in order if the Court was to find that the Plaintiff is the legal owner of the suit property. However, it is not in doubt that the registered owner of the suit property is one Tabitha Njanja Gichiri. The Plaintiff has sought for orders of injunction against the Defendant herein. However, the Defendant has rightly pointed out that he is not the registered owner of the suit property. Though the Court has already held that the Plaintiff has been able to establish the root cause of her title, it is clear that the registered owner of the suit property has not been sued. For the Court to find and hold that the Plaintiff is the legal owner of the suit property and even grant her the injunction, it must first impeach the title held by the other registered owner. And for the Court to impeach the title, it must then first establish which title is valid by establishing the root of the registered owner's title.

The Court notes that the title to the Defendant's wife Tabitha Njanja Gichiri was issued in the year 2015. The Court further acknowledges that the Defendant as the registered owner's husband may have been able to show the root of his wife's title. However, it is not in doubt that the Rules of Natural justice require that a person must be given a chance to be heard before any adverse orders are made against them. See the case of Edward Mwangi Irungu ...Vs... Chief Land Registrar & 3 others [2018] eKLR where the Court held that;

“Besides, there are other parties, like Equity Bank, who have interest in the suit property and who were not made parties to this suit. Their interest in the suit property cannot be lawfully interfered with without giving them an opportunity to be heard.”

Further in the Case of Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS [1197]eKLR where the Court of Appeal stated that:

*“... The respondents could not have established *aprima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "*audi alteram partem*", which literally means hear the other side, is a rule of natural justice. According to *Jowitts Dictionary of English Law (2nd Edition)**

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

“However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief”.

In granting the orders sought, the Court would first be acknowledging that the Plaintiff is the legal owner of the suit property and impeaching the title of the registered owner without affording her an opportunity to be heard. Therefore, the Court finds that the joinder of the other Registered owner would have been necessary for the determination of the issues that arose. Consequently, this court finds and holds that the prayers sought by the Plaintiff are **not merited** and cannot be granted.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions, the Court finds that the Plaintiff has **not** proved her case on the required standard of balance of probabilities; and therefore her claim is not merited. The same is dismissed entirely with each of the party herein to bear her/his own costs.

It is so ordered.

Dated, signed and Delivered at Thika this 25th day of June 2020.

L. GACHERU

JUDGE

25/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent and virtual appearance via zoom

M/s Karanja holding brief for M/s Machua for the Plaintiff

No Consent for the Defendant

L. GACHERU

JUDGE

25/6/2020