



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 46 OF 2009

THE REGISTERED TRUSTEE OF LADY

MURIEL JEX BLAKE MEMORIAL GARDEN.....PLAINTIFF

VERSUS

ANTHONY NJEHU BORO.....1ST DEFENDANT

QIAN QUO JUN.....2ND DEFENDANT

(CONSOLIDATED WITH ELC NO. 296 OF 2009)

ANTHONY NJEHU BORO.....PLAINTIFF

=VERSUS=

THE COMMISSIONER OF LANDS.....DEFENDANT

JUDGEMENT

1. By a plaint dated 6th February 2009 and amended on 18th February 2009 and further amended on 17th September 2010. The plaintiff seeks judgment against the defendant jointly and severally for:-

- (a) An injunction restraining the defendants whether by themselves, their agents and/or servants or whosoever from entering, using, occupying and/or in any other manner whatsoever interfering with the plaintiff's property.*
- (b) A declaration that the defendants are trespassing on the plaintiff's property.*
- (c) Damages for trespass.*
- (d) Special damages amounting to Kshs.3,311,137/55.*
- (e) Costs of the suit.*
- (f) Interest in (c), (d), and € above.*
- (g) Any other or further orders that the court may deem necessary to make.*

2. In paragraph 8 of the plaint the particulars of loss and damage are given as:-

- (a) The plaintiff has been deprived of the use of its property as intended under the trust.*
- (b) The plaintiff has been deprived of the enjoyment of the garden in its natural state.*
- (c) The defendants have by felling of indigenous trees caused substantial damage to the suit property.*

3. The 1st defendant entered appearance and filed a statement of defence dated 16th February 2009, denying each and every allegation in the plaint and prayed that the plaintiff's suit be dismissed with costs. The plaintiff filed a reply to 1st defendant's defence on 19th February 2009.

4. The 2nd defendant enter appearance and filed a statement of defence and counterclaim dated 24th February 2009. In his counterclaim, he seeks general damages for police harassment over a subject matter he is a stranger to and loss of business time. He prays that the plaintiff's suit be dismissed with costs and judgment entered as per the counterclaim. The plaintiff field a reply to 2nd defendant's defence and counterclaim on 29th September 2020.

5. In ELC 296 of 2009, the plaintiff, Antony Njehu Boro has sued the defendant (the commissioner of lands) seeking orders:-

(a) A declaration that the plaintiff is the absolute and indefeasible owner of Plot NO. 209/11295 pursuant to a certificate of title NO. IR 106817 issued by the defendant on 23rd May 2007.

(b) An order compelling the defendant to make or revise any such entries made against the plaintiff's title to LR No. 209/11295 so as to give effect to the plaintiff's absolute and indefeasible interest.

(c) A permanent injunction restraining the defendant, whether by himself, his servants and/or agents or other persons from interfering with the plaintiff's claim and interest over Plot NO. LR 209/11295.

(d) General damages

(e) Costs of the suit and interest.

(f) Any other or further relief that this honourable court may deem fit and just to grant.

6. The defendant entered appearance and field a statement of defence dated 11th September 2009 denying each and every allegation in the plaint.

7. On the 5th December 2013 the Honourable Lady Justice Nyamweya directed that ELC 46 of 2009 be consolidated with HCCC 296 of 2009 and that ELC 46 of 2009, be the lead file.

8. PW1, Mrs. Susan Deverell, told the court she is the treasurer with Kenya Horticultural Society. That previously she was the Chairman from 2010 to 2013. She told the court that the plaintiff was a founder member of the Kenya Horticultural Society and when she died, the Society wanted to do something in her memory. It decided to open a memorial garden in her honour. The trust deed is in (page 7 of the plaintiff's bundle of documents). The trust was incorporated in Kenya and a certificate issued (it is on page 5 of the plaintiff's bundle of documents). A grant was issued (page 7 of the plaintiff's bundle). The grant was signed by the Governors on 22nd May 1956. She told the court that the trustees have never transferred or subdivided the land. The suit property is situated between Haille Selassie Avenue and the Corner of Lower Hill Road.

9. In October 2008, a fence appeared on the suit property. It had not been erected by the Kenya Horticultural Society. Overnight indigenous trees were cut down. The matter was reported at Kilimani Police Station. There is a letter from M/S Kaplan & Statton Advocates to the officer commanding Kilimani Police Station (page 21 of the plaintiff's bundle of documents). The letter is dated 18th December 2008. The police advised the society to deploy security guards on the suit property which they did. There is a letter from the Society to Aksher Security Limited to put guards on the land. They also made complains to the Lands Registrar (page 22 of the plaintiff's bundle). The Society also engaged a surveyor Mr. Hime to go and resurvey and confirm the beacons were in place. The letter from the Chief Land Registrar to M/S Kaplan & Stratton Advocates is on (page 28 of the plaintiff's bundle). The security guards who had been deployed on the suit land informed the Society that some goons had attacked them and drove them out of the property. The letter from the Security firm to the Chairman of the Society David Gray is in (page 31 of the plaintiff's bundle). All trees on the suit property were cut.

10. The surveyor who went to confirm the position of the beacons found only four in the original parcel in place. The others were missing. The surveyor discovered there was another title which was overlapping on the plaintiff's suit land. The map is in (page 20 of the plaintiff's bundle). That the defendant's title is LR No. 209/11295 was issued on 1st March 1999. She told the court that the Society engaged a firm which fenced the suit property at a cost of Kshs.85,080 (page 35 of the plaintiff's bundle). It paid Kshs.83,300/- to the surveyor and Kshs.96,597.55 to the security firm. The garden had been completely destroyed. Restoration would cost Kshs.3,046,160/-. It seeks that they be paid these amounts. It also seeks the prayers in the plaint. She also produced the documents in the plaintiff's list of documents as exhibit P1 to P18 respectively.

11. PW2, Fredrick Hime a land surveyor, told the court that he practices in the firm of Hime & Zimeplin. He said he is familiar with this case. He said he was commissioned by the Kenya Horticultural Society in 2009 to establish the boundaries of LR No. 209/4322. He used the deed plan (page 3 of the plaintiff's bundle). He was able to locate the four beacons. He also reestablished the missing beacons. He said there had been a lot earth movement and a lot of boulders were lying there. He then created a diagram to show an overlap encroachment on to the original property LR No. 209/4322.

12. He also told the court that the 1st defendant's deed plan is a copy which shows to the North is LR 209/4322/R. R stands for Remainder of the original title LR 209/4322 and to the South East is LR No 209/6843. He told the court LR 209/1/11296 is part of LR No. 209/4322. He wrote a letter to the Director of Surveys submitting a record of the reestablished survey. He produced the survey plan as exhibit P9.

13. DW1 Anthony Njeru Boro told the court that he is the registered owner of LR No. 209/11295. He said he has sued the commissioner of

lands in ELC 296 of 2009. He was issued with a letter of allotment dated 4th January 1999. He produced it as exhibit D1. He paid the stand premium vide cheque no. 216865 for Kshs.1,344,830. He was issued with a receipt dated 15th January 1999. He produced it as exhibit D2. He got a letter from the Ministry of Land dated 26th July 2006. It was produced as exhibit D3. He was informed a deed plan would be obtained from the Director of Surveys. The forwarding letter is dated 7th May 2009. A valuation was done and he paid Kshs.5280 stamp duty. He was issued with a certificate dated 31st May 2007. He produced it as exhibit D 4. A title deed was issued after he paid registration fee of Kshs.250,000. That thereafter he took possession of the suit property. No one claimed it.

14. He later got a buyer for the suit property. He obtained a consent to transfer the suit property. It is dated 25th June 2008. He produced it as exhibit D7. He said before he sold he sought and got permission from the City Council to cut the trees. The letter to the Director of Environment dated 11th September 2002 is produced as exhibit D8. He produced the receipt and certificate as exhibit p9, p10 respectively. He also produced a certificate for holding and the receipt as exhibits D11, 12 respectively. He said he gave the buyer all the documents. Seven months later he learnt that someone was claiming the property. He said he was charged with an offence of forgery among other charges but he was found not guilty and acquitted. He produced the proceedings in the criminal case as exhibit D 14. That thereafter he sued the commissioner of lands seeking a declaration that LR 209/11295 is his. He said he followed due process in acquiring this title.

15. DW2, Silas Kiogora Mburugu, a Principal Land Administration Officer at the National Land Commission adopted his witness statement dated 29th November 2013. He also relied on the 2nd defendant's list of documents dated 29th November 2013 which he produced as exhibit D 15 to 17 respectively. He told the court that he used to work in the Ministry of Lands department of commissioner of lands before. He stated that there are no documents in respect of the 1st defendant's parcel in the records at the Ministry of Lands. He also confirmed that no two genuine titles can be issued for one parcel of land.

16. At the end of the testimonies parties tendered written submissions.

The plaintiff's submissions

17. They are dated 16th April 2019 and filed on 23rd April 2019. It raises three issues for determination:-

(a) Whether the defendant can lawfully encroach upon the plaintiff's suit property.

(b) Whether the 1st defendant's title was improperly issued and is liable to be cancelled.

(c) Whether the defendants trespassed on the suit property.

Once land is allocated to an individual or entity, it is unavailable for allocation. It has put forward the case of **Aster Holdings Ltd vs City Council of Nairobi and 4 others [2017] eKLR; Eliud Njoroge Gachiri vs Stephen Kamau Ng'ang'a [2018] eKLR.**

18. The allocation to the 1st defendant is improper and the impugned title is not genuine because, according to the testimony of PW2 and DW2, it was not possible for a title to be issued for a property that overlaps on existing title. It was also not possible to have two genuine titles for the same parcel of land. Even if a trespasser mistakenly believes that the land is his, this would not be an excuse for him to trespass. It has put forward the case of **M'Ikiara M'Mukanya & Another vs Gilbert Kabere M'Mbijiwe [1983] eKLR.** No licence can authorize anyone to trespass on someone else's property. The said licence was valid for one week from 4th October 2007. It had expired by October 2008. When the 1st defendant cut down trees on the suit property. The plaintiff is entitled to the special damages as particularized.

The 1st defendant's submissions

19. They are dated 27th May 2019 and filed on 30th May 2019. The copy of title produced by the 1st defendant shows that at the time of allotment the suit property was governed by the repealed Registered Title Act (Cap 281 Laws of Kenya) Section 21(1) of Registered Titles Act makes provision for the sanctity of title, thus the 1st defendant's title can only be challenged on the grounds of fraud, misrepresentation. It must be proved that he was a party to the fraud or the illegal activities that led to him being registered as proprietor. He has put forward the case of **Shimoni Resort vs Registrar of Titles and 5 others [2016] eKLR. Esther Ndege Njiru & Another vs Leonard Gatei [2014] eKLR.**

20. The plaintiff did not implicate the 2nd defendant with any wrong doing for issuing the 1st defendant with the title. The said title is therefore valid, legal sacrosanct and impeachable. Such acts of fraud and/or misrepresentation must be specifically pleaded and proved. Such acts should not be inferred from the facts. He has put forward the case of **Nancy Kahoya Amadiva vs Export Credit Limited & Another [2015] eKLR.** Based on the provisions of Section 26 of the Land Registration Act, 2012, the plaintiff did not either on its pleadings specifically plead, the particulars of fraud neither did it distinctly prove in its evidence.

21. The 1st defendant is a bonafide purchaser for value without notice. He has put forward the case of **Arthi Highway Developers Ltd & 6 Others vs West End Butchery Ltd [2015] eKLR. Compar Investment Ltd vs NLC & 3 Others [2016] eKLR.** DW2 testified that the 1st defendant's file does not exist at the Lands Registry. It was also stated that the records do not exist at the Director of Surveys. However the plaintiff did not show how it acquired the suit property. He prays that the plaintiff's suit be dismissed with costs and that the 2nd defendant's counterclaim be allowed.

The Defendants' (In ELC 296/2009 Submissions)

22. They are dated 10th June 2019 and filed on 11th June 2019. It raises three issues for determination:-

(i) Whether the plaintiff is the registered owner of the suit property.

(ii) Whether the 1st defendant has any legal right to enter and make developments on the suit land.

(iii) Whether any party is entitled to damages.

23. The plaintiff is the registered proprietor of the suit property due to the prior registration in the 1950s and the fact that there has been no known transfer or sub-division of the same. The 1st defendant has documents which are suspicious and can only be a forgery since they were not issued by the commissioner of lands. They have irregularities which point towards fraudulent activities in the part of the 1st defendant. Issues to do with fraud are inferred from the surrounding circumstances and in this case there is every indication that there was fraud. They have put forward the case of **Charles Karathe Kiarie & 2 Others vs Administrator of the Estate of John Wallace Mather (Deceased) & 5 Others [2013] Eklr**. The acquittal of the 1st defendant in the criminal case does not absolve him of fraud because he was acquitted under section 215 of the Criminal Procedure Code for lack of sufficient evidence. The acquittal was based on the fact that the fraudulent documents could not be connected to the 1st defendant as the maker but the court made a finding that the same were fraudulent.

24. The suit property was already alienated and not available for allocation to the 1st defendant. The letters of allotment and grant is not sufficient. He has to show how he acquired the property and that it was done procedurally and lawfully. They have put forward the case of **Munya Maina vs Hiram Gathita Maina [2013] eKLR**. No registration of ownership can occur where subsists another registration and that title has not been cancelled. The 1st defendant's registration was unlawful. They have put forward the case of **Funzi Island Development Ltd & 2 Others vs County Council of Kwale & 2 Others [2014] eKLR**.

25. The grant held by the 1st defendant is alleged to arise from the subdivision of LR No. 209/4322 to give rise to LR 209/11295 yet there is no evidence of the existence of any subdivision of the suit proeprty in the records of the commissioner of lands. The 1st defendant cannot thus claim to be registered proprietor of the whole or portion of the original parcel which now bears a different number without evidence of the proper procedures having been carried out. They have relied on the case of **Francis Kaguma Muhoi vs Regina Wamuyu Kanyi [2016] eKLR**.

26. Like in equity the first registration in time prevails. It was held so in the case of **Lawrence P. Mukiri Mungai Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others [2017] eKLR**. The 1st defendant has no locus in this matter having informed the court that he transferred the suit property to Qian Quo Jun. The 1st defendant had no right to enter the suit property and interfere with the structures and trees because the documents of approval were illegitimate. Anything that stems from them would be void. They have put forward the case of **Omega Enterprises (Kenya) Ltd vs Kenya Tourists Development Corporation Ltd & 2 Others [1998] eKLR**. A legally registered proprietor of land is entitled to enjoy the land and use to the exclusion of everyone else. They have put forward the case of **Penina Wanjiru vs John Waweru Mwiria [2014] eKLR**. The plaintiff is entitled to damages from the 1st defendant. The 1st defendant would only be entitled to damages from the commissioner of lands under the doctrine of indefeasibility of title. The documents held by the 1st defendant are not legitimate hence no protection can be accorded to the 1st defendant and any damages to the 1st defendant would amount to sanctioning an illegality. They have put forward the case of **Funzi Island Development Ltd (Supra)**.

27. The commissioner of lands made it clear in a letter dated 22nd April 2009 that the title documents held by the 1st defendant are not valid. The activities of the 1st defendant on the suit property amount to trespass. They have put forward the case of **Charles Mbuvi vs Vincent Nganga [2008] eKLR**. The 1st defendant had no authority to enter the suit property, demolish existing structures and fell trees to that extent he committed the tort of trespass. It does not matter whether the 1st defendant believed that the land was his. They have relied on the case of **M'Kiriara M'Mukanya & Another vs Gilbert Kabere M'Mbijiwe [1984] eKLR**. They pray that the suit be determined in favour of the plaintiff with costs against the 1st defendant.

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

(i) Whether the plaintiff is the registered owner of the suit property.

(ii) whether the 1st defendant's title was issued unprocedurally and if so should it be cancelled?

(iii) whether the 1st defendant had any legal right to enter and make developments on the suit land.

(iv) Is the plaintiff entitled to the damages?

(v) Who should bear costs?

29. The plaintiff is the registered owner of the suit property. The title was issued in the 1950's. The grant was issued in 22nd May 1956. Since then there has been no transfer or subdivision of the suit proeprty. The 1st defendant on the other hand has a title which is suspicious.

30. DW2 Silas Kiogora Mburugu told the court that he used to work with the Ministry of Lands in the commissioner of land's office. He confirmed that LR NO. 209/4322 is registered in the name of the plaintiff. He told the court that there cannot be two genuine titles for same

parcel of land. The plaintiff's title was issued on 1st July 1951. From the proceedings in the criminal case produced by the 1st defendant P. M Mutwiwa, Judith Okungu and J. K. Wanjau have denied signing the documents which led to the issuance of the title to the 1st defendant. DW2 told the court there were no records showing the 1st defendant was issued with the said title deed.

31. The 1st defendant's letter of allotment and deed plan shows the commencement date as 1st March 1999. It was submitted by the Attorney General that this was not possible since the grants usually start on the first day of the year. This clearly shows that the documents did not originate from the commissioner of lands. In the letter of allotment the size is indicated as 0.2673 hectares while the deed plan indicates 0.59 45. It is not clear whether the measurements in the deed plan are in hecatres or acres. The letter of allotment is alleged to have been signed by P. M Mutwiwa who has denied signing it. The 1st defendant claims to have paid Kshs.1,344,830 and was issued with a receipt on 15th January 1999 No Rec/EO85602. However the accounts analysis book held by the commissioner of lands does not have an entry with this number. The amounts collected on that day are way below what the 1st defendant alleges to have paid. This could only mean his documents are not authentic.

32. The plaintiff was issued with a letter of allotment for LR NO. 209/4322 measuring approximately 0.59 hectares on 1st July 1951 for 99 years. A deed plan no. 51912 was signed on 29th April 1953. A grant was prepared and presented on 22nd February 1956. It is the plaintiff's case that there has been no transfer or subdivision on the said proeprty. It therefore means the documents held by the 1st defendant are forgeries. I find that the plaintiff is the registered proprietor of the suit property. In the case of **Aster Holdings Ltd vs City Council of Nairobi & 4 Others [2017] eKLR** it was stated:-

“The position in law is that once land has been allotted to an individual or an entity, that land is no longer available for alienation to a third party”

It is clear that the suit property was not available for allocation to the 1st defendant.

33. The Registrar of titles J. K. Wanjau denied that he signed the said title. In the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**, The Court of Appeal held that:-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.

The 1st defendant has failed to show how he acquired the said title. He also ought to have demonstrated that he acquired it legally and procedurally. He therefore deserves no protection from this court.

34. It is the plaintiff's case that it has neither transferred nor subdivided the suit property that is LR NO. 209/4322 to give rise to LR No. 209/11295. There is no evidence of the existence of any sub division of the suit property in the records of the commissioner of lands. The 1st defendant cannot claim to be a registered proprietor of LR No. 209/11295. PW2, Fredrick Hime, a licensed surveyor told the court that it was not possible for a title to be issued for property that overlaps another existing property. One of the title must have been irregularly obtained. As stated from the foregoing paragraphs it is the 1st defendant's. The same cannot stand it ought to be cancelled. The evidence of PW2 was not controverted by the 1st defendant at all. DW2 confirmed the plaintiff's title was the valid one.

35. It therefore follows that the 1st defendant had no legal right to enter and make developments on the suit property. This amounted to trespass and the plaintiff is entitled to general damages. In the case of **M'Ikiara M'mukanya & Another vs Gilbert Kabere M'Mbijiwe [1983] eKLR** the High Court found that the defendant's had committed trespass even though they believed that the property was theirs. In upholding the decision of the High Court, Judge, the Court of Appeal stated:-

“ M'Mukanya and Nyamu are liable for trespass if M'Mbijiwe has the right to possess and they intentionally entered his plot even though they honestly believed the land was their own and they had a right of entry on it or they did so under an inevitable mistake of law or fact. There are findings of the magistrate and the judge that M'Mbijiwe had the right to immediate possession of it from the time the full council allocated and identified this large plot to him which was in June 1970 and when he went on to it thereby a legal fiction he was in possession of it from the date of the accrual of his right of entry.....”

The 1st defendant has not denied having entered into the suit property or cutting down the trees on the property. His response was that he believed the property was his based on the allotment and title. The licence from the City Council of Nairobi could not give him a right of entry into the property. PW2 confirmed the state of the suit property after the activities of the 2nd defendant on the land.

36. I find that the plaintiff is entitled to general damages for trespass which I asses at Kshs.500,000. I rely on the case of **Kenya Power & Lighting Co. Ltd vs Fleet Wood Enterprises Limited [2017] eKLR**.

37. The 1st defendant is not entitled to the damages from the defendant (in ELC 296 of 2009) as his title was not legitimate. He deserves no protection from this court. Consequently this suit is dismissed with costs to the defendant (in that case). It follows that the 2nd defendant is not entitled to any damages and the counterclaim is dismissed with costs.

38. The plaintiff gave the particulars of special damages in paragraph 8A of the further amended plaint. I find that the same have been specifically proven and I award the same at Kshs.3,311,137/55.

39. In conclusion, I find that the plaintiff (in ELC 46/2009) has proved its case against the defendants on a balance of probabilities. Accordingly, judgment is entered in favour of the plaintiff as against the defendants jointly and severally as follows:-

(a) That an order of injunction is hereby issued restraining the defendants, whether by themselves, their agents and or servants or whosoever from entering, using, occupying and/or in any other manner whatsoever interfering with the plaintiff's property known as LR No. 209/4322.

(b) That a declaration is hereby issued that the defendants are trespassing on the plaintiff's property known as LR No. 209/4322.

(c) That general damages of Kshs.500,000 are awarded to the plaintiff.

(d) Special damages of Kshs.3,311,137/55.

(e) Costs of the suit and interest to be borne by the 1st defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd defendant

.....Advocate for the defendant in ELC 296 of 2009

.....Court Assistant