



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT , NAIROBI
(MILIMANI LAW COURTS)

ELC CASE NO. 694 OF 2012

CAROLINE AWINJA OCHIENG.....1ST PLAINTIFF

DAVID ZAKARIA OYOLO.....2ND PLAINTIFF

VERSUS

JANE ANNE MBITHE GITAU1ST DEFENDANT

PETRONILLA NJERI NGAARA2ND DEFENDANT

CITY COUNCIL OF NAIROBI3RD DEFENDANT

JUDGMENT

Introduction

1. The dispute herein concerns an unregistered parcel of land. Both the Plaintiffs on the one hand and the 1st Defendant on the other hand claim the same piece of land. They both claim to be the owners of that property known as Plot No. C255 – Kayole Plot No 242. The Plaintiffs set up a claim and the 1st Defendant counterclaimed.
2. The main issue between the antagonists herein is the sort that consistently emerges in cases involving unregistered land. It concerns proof of ownership. Unlike in the case of registered land where the register easily and on a prima facie basis reveals the owner, the burden and task is always heavier for the court to carry when the court has to trace the true owner of the unregistered parcel of land. The parties are never co-proprietors and neither do they so will. The court has to perform the rather delicate task of sorting out a muddle which has potentially long term serious consequences as only one party is to be determined as having the better title.

The Plaintiffs' Case

3. The Plaintiffs' claim is contained in a Complaint filed on 10 October 2012.
4. Put shortly, the Plaintiffs who are husband and wife claim to have bought the suit plot from one Martin Kitambi Robert on or about 27 November 2008. The purchase price was Kshs 180,000/=. The Plot was originally known as Plot number C.255 but the 3rd Defendant being the title paramount holder changed the Plot's designation to Number 242 Kayole. The suit plot was originally under the auspices of Matopeni Squatters & Police Station Resettlement Scheme. The Plaintiffs state that prior to the purchase the Plaintiffs conducted the requisite due diligence and

- under the supervision of the 2nd Defendant, the Plaintiffs were issued with the relevant scheme card as evidence of ownership upon payment of all the requisite fees. The Plot was then vacant.
5. The Plaintiffs claim to have taken possession and developed their matrimonial house on the suit plot. The house built on the plot was a semi-permanent house. By reason of such purchase and possession the Plaintiffs claim ownership of the suit plot.
 6. Prior to commencement of trial in September 2014, the Plaintiffs were granted leave by the court to amend and claim the amount of Kshs. 1,500,000/= in special damages. An amended Plaint was duly filed.

The Defendants' case

7. The 1st Defendant, who is an employee of the 3rd Defendant, filed a Defense statement together with a counterclaim. The 1st Defendant claimed to be the owner of the suit plot since the year 2001. The 1st Defendant stated that the suit plot had been allocated to her in the year 2001. The 1st Defendant also denied that the Plaintiffs ever took possession of the suit plot whilst insisting that the 1st Defendant had always been in possession and had allowed an elderly lady known as Margaret Wagichu to reside thereon.
8. The 1st Defendant also denied colluding with the other Defendants to cause the suit plot to be transferred to the 1st Defendant whilst the Plaintiffs were in possession. By way of counterclaim, the 1st Defendant sought not only vacant possession but also Kshs. 30,000/= as damages and being the value of the 1st Defendant's property allegedly destroyed by the Plaintiffs. The 1st Defendant also sought mesne profits from the month of November 2008 till delivery up of vacant possession
9. The 2nd Defendant also filed a statement of defence and denied ever colluding with the 1st Defendant to divest the Plaintiffs of any interest in the suit plot. The 2nd Defendant further denied playing any role in the Plaintiff's transaction.
10. The 3rd Defendant's position is that evidence points to the Plaintiffs having been allocated a plot already owned by the 1st Defendant. In its defence filed on 8 July 2013, the 3rd Defendant was clear that at no time did the 3rd Defendant conspire or collude with any person to divest the Plaintiffs of the suit plot. The 3rd Defendant was firm that the suit plot had always been owned by the 1st Defendant who was a bona fide legal owner.

Evidence

11. The Plaintiffs called three witnesses while the 3rd Defendant did not call any witness. The 1st and 2nd Defendants also testified on their own behalf. The evidence by the Plaintiffs' fourth witness was expunged from the record on 21 Oct 2014 following discovery that the witness had not only perjured himself but had also impersonated another person altogether.
12. PW1, the 2nd Plaintiff, testified that in November 2008 after inspecting the plots' register at the offices of Matopeni Scheme and ascertaining that one Martin Katambi was the owner of the suit plot, the Plaintiffs decided to buy the suit plot from Martin Katambi. PW1 further testified that they paid Kshs. 180,000/= as the purchase price in cash to the vendor and also Kshs. 10,000/= to the Scheme's officials. Thereafter the Plaintiffs took possession of the suit plot and erected thereon a corrugated iron sheet house. Then in June 2009, some police officers came calling and sought that the Plaintiffs produce documents of ownership. The Plaintiffs were then charged with the offence of forcible detainer. PW1 testified that all the documents of ownership were retained by the police officers. PW1 denied having destroyed the 1st Defendant's property and insisted that the 1st Defendant had colluded with the 2nd and 3rd Defendants as well as some unnamed police officers not only to divest the Plaintiffs of the suit plot but also to have the Plaintiffs arraigned before the court on trumped up charges.
13. In cross-examination, PW1 insisted that the suit plot was vacant and not occupied by any person when the Plaintiffs took possession. Further it was PW1's testimony that the 2nd Defendant did not participate in the transaction but only assisted the PW1 in going to collect the purchase amount from PW1's house. PW1 however confirmed that apart from the receipt for Kshs. 5,000/= and the

- Sale Agreement dated 27 November 2008, the Plaintiffs did not have any document to show that the Purchase Price had been paid and received by the Vendor Martin Katambi.
14. PW2, a cobbler and resident of Kayole since 1994, testified that he brokered the transaction between the Plaintiffs and the ultimate vendor through one Davie. The original purchase price, the court heard, was Kshs. 350,000/= but was negotiated. He testified that he was present when the sale Agreement was drafted and executed. He also testified that he witnessed the Plaintiffs pay Kshs. 15,000/= to Matopeni Scheme officials and youth. He also testified that he witnessed the Plaintiffs pay the purchase price of Kshs. 180,000/= and further that he witnessed the Plaintiffs undertake construction on the suit plot.
 15. In cross examination, PW2 stated that he did not know the 1st Defendant and that he was only a broker. Then he also stated that the purchase price was paid to the 2nd Defendant.
 16. PW3, the 1st Plaintiff, testified along the same lines as PW1. She added that all the Plaintiffs were waiting for following purchase of the property was the processing of their title. PW3 added that the Plaintiffs had borrowed the purchase price from Equity Bank but that there was no acknowledgement by the vendor of the payment apart from the Sale Agreement. PW3 insisted that the 1st Defendant had never occupied the suit plot and merely processed fake title documents. She however confirmed that only the 2nd Defendant and the vendor could tell who had processed the title documents to the suit plot first.
 17. DW1, the 1st Defendant gave sworn testimony. Confirming that she was an employee of the 3rd Defendant, DW1 testified that she was allocated the suit plot in substitution of her plot A 230. The allocation card was duly cancelled to read C255 instead of A230. She testified that her plot was occupied by a lady she had permitted to occupy the same. Due to medical reasons she had permitted an elderly lady to occupy the suit plot. She then travelled abroad but when she returned in the year 2009 she found the Plaintiffs had occupied the suit plot. The Plaintiffs had also destroyed her structures on the suit plot which structures had cost the 1st Defendant Kshs. 30,000/=. She insisted she had never sold the suit plot to any person. She also testified that when the Plaintiffs failed to move out of the suit plot, she made a report to the police for the malicious destruction of her property and trespass.
 18. In cross examination, DW1 testified that she did not keep any receipts to show that she had spent the Kshs 30,000/= in developing the suit plot.
 19. DW2, the 2nd Defendant, basically testified as an independent witness with no interest in the suit plot. Stating that she did not understand why the Plaintiffs had sued her in her personal capacity, DW2 testified that the suit land from where the suit plot was to be excised is owned by the 3rd Defendant. She testified further that as the chairperson of the organization that was allocating the subplots to the squatters she was certain that the suit plot had been allocated to the 1st Defendant. She also testified that the Plaintiffs had been allocated Plot number 2058 in substitution of the suit Plot as there had been an incident of double allocation. The Plaintiffs allegedly declined the second plot.
 20. In cross examination, DW2 confirmed that the suit plot was never allocated to any other person but to the 1st Defendant. She also denied that she had issued any receipts to the Plaintiffs.
 21. Both parties availed documentary evidence in support of their respective cases. The 1st Defendant availed nine documents which were all filed in court on 17 July 2013. The same included photographs of the suit plot both in 2009 and 2012 as well as proceedings in the Makadara Criminal case No. 2985 of 2009. The 1st Defendant also availed a receipt as well as a Plot Allotment card and a Plot Card for Plot No. C255. The Plaintiffs on the other hand availed a copy of the Sale Agreement dated 27 November 2008. The Defendants also availed a Plot Formalization Card issued by the 3rd Defendant.

Issues

22. The parties did not agree on the issues to be determined by the court. From the reliefs sought by both the Plaintiffs and the 1st Defendant, it would be appropriate to isolate the main issue simply as follows: Who between the Plaintiff and the 1st Defendant is the owner of the suit plot?

Law and Discussion

23. I have carefully considered the pleadings. I have also considered the submissions filed by the parties herein on 22 January 2015 (the 2nd Defendant), 9 December 2014 (the Plaintiffs) and 8 December 2014 (the 1st Defendant). I have further considered the evidence laid before the court.
24. In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
25. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically '*the essential indicia of title to unregistered land*': per Nourse LJ in **Sen v Headley [1991] Ch 425 at 437**.
26. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount , notices, et al.
27. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiffs on the one hand and the 1st Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.
28. The Plaintiffs' claim is pegged on a Sale Agreement dated the 27 November 2008. The Agreement was made between one Martin Katambi and the Plaintiffs. The Plaintiffs say they paid the said Martin Katambi an amount of Kshs. 180,000/= as consideration of the suit plot. The Plaintiffs however did not avail any other evidence to show that Martin Katambi owned the suit plot. Neither did the Plaintiffs avail any evidence to show that the Plaintiffs actually paid Martin Katambi for the suit plot.
29. It is not in controversy that the title paramount rests with the 3rd Defendant. Unfortunately or fortunately, depending on either party, the 3rd Defendant failed to testify in these proceedings. The 3rd Defendant's intermediary however testified. I state so because the intermediary being the 2nd Defendant testified without contradiction that that the 2nd Defendant alongside other officials had the power to allot the plots within the squatters scheme including the suit plot. Testimony by the 3rd Defendant would perhaps have assisted in a faster resolution of the dispute at hand.
30. The Plaintiffs also testified that their deeds or documents showing ownership to the suit plot were kept by the Police department following the arrest and ultimate arraignment of the Plaintiffs in court. I have read the entire typed proceedings in Criminal case No 2985 of 2009 (Makadara). I was unable to identify any instance or reference by any of the witnesses to documents belonging to the Plaintiffs except for the reference to a Sale Agreement. It is also to be noted that the Sale Agreement was presented to the court in the criminal case, yet the Plaintiffs were still able to obtain a copy for use in these proceedings. The Plaintiffs must have had a copy elsewhere but not for the other documents like the Plot Card. I also hasten that the Plaintiffs did not illustrate to the court the steps taken to retrieve the documents of ownership from the police department or otherwise. I must consequently not speculate but conclude that the Plaintiffs' case rested on the Sale Agreement only as attempts to produce a plot allotment card in its copy form were rejected by the Defendants. Is that enough to prove an unbroken chain to the root of title? I sincerely would not so conclude. The Plaintiffs were never the original owners of the suit Plot. It is unclear how the vendor himself obtained ownership of the property. I hold the view that the chain was broken

- the moment the paper trail ceased.
31. A sale Agreement alone in the absence of any other documentation would not and does not prove ownership of an unregistered parcel of land. There is no link between the Plaintiffs and the title paramount except for the finding by the subordinate court in the criminal proceedings that the Plaintiff had been erroneously allocated the suit plot (see the penultimate paragraph of the judgment). Yet this too is doubtful. The Plaintiffs' own testimony was to the effect that the suit plot had been allocated to one Martin Katambi from whom they bought the plot. It is not stated when this happened. Effectively, it meant that the chain was broken in the absence of evidence to show when and if Martin Katambi actually owned the suit plot. Doubts are also raised in the Plaintiffs testimony when they state that they had their own plot allotment cards, yet by the same breath they also state that they had bought the plot from Martin Katambi. The Plaintiffs were never allottees.
32. On the other hand, the 1st Defendant stands in better stead. Through the proceedings in the criminal case, the 1st defendant established a dominion over the suit property when Margaret Wagichu testified that she had been in possession of the suit property at the behest of the 1st Defendant. This fact was established by the court in the criminal proceedings and though not conclusive for the purposes of the proceedings herein would be certainly corroborative.
33. The 1st Defendant also testified with documents in support that she owned the suit plot. The documents availed by the 1st Defendant were receipts as well as an allotment card issued by the intermediary of the title paramount. The allotment card confirmed that the 1st Defendant had been allocated the plot. A plot card issued by the title paramount, the 3rd Defendant, continued the chain leading to the root of title. Alongside the plot card issued by the 3rd Defendant were also copies of the Rates Payment receipts to the 3rd Defendant. I perused the documents and I have no doubt as to their authenticity. In my view, these documents were adequate to establish on a balance of probabilities that the 1st Defendant was the owner of the suit plot. This fact was further confirmed by the 3rd Defendant's position in this matter as reflected from the statement of defence. The 1st Defendant's position was also corroborated by the 2nd Defendant's testimony.
34. With regard to the claim for Kshs.1,500,000/= by the Plaintiffs, the same being a special damages claim, I find that the same was not strictly pleaded and proved as required by the law :see **Ouma v Nairobi City Council [1976] KLR 297** , **Kenya Bus Services v Mayenda [1991] 2 KAR 242** and the recent Court of Appeal decision of **Paul N.Njoroge v Abdul Sabuni Sabonyo [2015] eKLR**. The same would apply to the 1st Defendant's claim for Kshs. 30,000/=. The 1st Defendant did not lead any evidence to show what had been destroyed and neither did the 1st Defendant lead any evidence to show the actual value of the loss if any. In cross examination the 1st Defendant also expressly admitted that she had no evidence to prove that she had spent Kshs. 30,000/=. Like the Plaintiff the 1st Defendant failed to strictly prove her special damages claim. I would dismiss both claims.
35. There is also the 1st Defendant's claim for mesne profits. My understanding as far as mesne profits are concerned is that as damages it arises out of a relationship of a landlord and tenant where the latter becomes a trespasser: see **Inverugie Investments V Hackett [1995] 3 All E R 842**. As stated Stroud's Judicial Dictionary 4th Edition Vol 3 mesne profits is

“Another term for damages for trespass arising from particular relationship of landlord and tenant”

In other words, mesne profits is a special type of damage incurred by the landlord when his tenants decides to hang on despite notification to vacate and is then dubbed a trespasser. It is not damages awarded for trespass *quare clausum fregit*. The latter is always awarded as general damages for the tort of trespass. The court may not however award both: see **Kenya Hotel Properties Limited v Willesden Investments Limited [2013] eKLR** .

36. The 1st Defendant was duty bound to show loss by first illustrating the relationship and then the loss suffered by way of prove of the exact or reasonable rent ordinarily payable under the

circumstances and during the period the unlawful occupier who was previously a tenant was in occupation . The 1st Defendant did not lead any evidence along the lines of proving a claim for mesne profits as I have outlined above. I am not satisfied that the 1st Defendant is entitled to mesne profits. I would dismiss that claim. Even though the Plaintiffs in my view were unlawfully on the suit plot the 1st Defendant did not seek damages in trespass and I will consequently not award the same.

Disposal

37. By way of disposal, having been satisfied that the 1st Defendant has proved part of her counter-claim to the required standards and that the Plaintiffs have failed to prove their claim, I make the following final orders by way of final judgment;

- a. By declaration, that the 1st Defendant is the owner of the suit plot being plot no C 255 Kayole Matopeni Squatters & Police Station Resettlement Scheme also known as Kayole Plot No.242.
- b. The Plaintiffs will deliver up or cause to be delivered up the suit plot to the 1st Defendant within the next thirty days, and in default eviction orders to issue.
- c. The Plaintiffs will remove and/or cause to be removed all the Plaintiffs' property on the suit plot within the 30 days time limit.
- d. The Plaintiffs' suit is dismissed.

Costs

38. The 1st and 2nd Defendants will have costs of the suit and of the counterclaim to be paid by the Plaintiffs.

Dated Delivered and Signed at Nairobi this 7th day of May 2015

J.L.ONGUTO

JUDGE

Mr Nyende instructed by the firm of Nyende & Co. Advocates for the Plaintiff

Mrs Njuguna instructed by the firm of Lilian Njuguna & Co Advocates for the 1st Defendant

Mr Nyandieka instructed by the firm of Nyandieka & Co. Advocates for the 2nd Defendant