



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 586 OF 2008

JOSEPH MBAU GITAU.....PLAINTIFF

=VERSUS=

JORETH LIMITED.....1ST DEFENDANT

ESTHER WACHEKE MWANGI.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit against the Defendants in which he seeks the following reliefs: -

i. An order for permanent injunction restraining the Defendants, their servants, employees, agents or whomsoever from transferring, delineating, transmitting or registering any transfer which may have been executed between themselves and/or other parties or in any way interfering with the ownership and peaceful occupation and enjoyment of plot No.409 and/or LR No.13330/ 171 at Thome Farmers No.5 Limited by the Plaintiff.

ii. The 1st Defendant be ordered to execute a transfer in favour of the Plaintiff in respect of L R No.1330/171 and/or plot No.409 at Thome Farmers No.5 Limited.

iii. Costs of this suit.

2. The Plaintiff testified that he is the son of William Gitau Kimani who was a shareholder of Thome Farmers No.5 Limited (Thome Five) which had subdivided its land into half acre plots and gave the same to its members. The Plaintiff's father had been allocated plot No.409 which later became LR No.1330/171 upon registration of the subdivisions (suit property).

3. The Plaintiff's father later transferred the suit property to him and the records held by Thome Five were accordingly changed to reflect the transfer and the Plaintiff was given a share certificate in his name. The Plaintiff then asked a neighbor to take care of the suit property. The Plaintiff's neighbor planted napier grass on the suit property.

4. In 2007, the Plaintiff's neighbor who was taking care of the suit property called him and told him that someone was fencing his land. The Plaintiff proceeded to the suit property where he confronted those fencing. He was informed that the suit property had been repossessed and sold to the 2nd Defendant. He went and reported the incident to Kasarani Police Station. The 2nd Defendant stopped fencing the suit property following the confrontation.

5. The Plaintiff was informed that the suit property had been repossessed because he had failed to take advantage of a consent which was recorded in **HCCC No.6206 of 1992 Joreth Limited Vs Lewis Kibue & 23 Others**. The Plaintiff then made a cheque which he forwarded to his lawyers who in turn drew a cheque in favour of the Advocates for the 1st Defendant. The cheque of Kshs.200,000/= was however returned on the ground that the suit property had been sold to someone else.

6. The Plaintiff stated that he is the one in occupation of the suit property and that is why he is seeking a permanent injunction seeking to restrain the 1st Defendant from registering the 2nd Defendant as the owner of the suit property and for an order directed at the 1st Defendant to have the property registered in his name.

7. Though the 1st Defendant filed a defence, there was no evidence adduced in support of the defence. The 1st Defendant which participated in this hearing filed written submissions.

8. On her part, the 2nd Defendant who stated that she is based in Canada, testified that she purchased the suit property from the 1st Defendant on 22nd February 2007. In March 2007, she went to fence the suit property when she was confronted by the Plaintiff who claimed that he was the owner of the property. She went back to the 1st Defendant who assured her that she was the only lawful owner of the suit property. The 1st Defendant later executed transfer in her favour but the transfer has not been lodged for registration due to this case.

9. I have carefully considered the evidence adduced by the Plaintiff as well as that of the 2nd Defendant. It is trite law that pleadings per se are not evidence unless there is testimony to back them up. As the 1st Defendant did not adduce any evidence in support of their pleadings, there is little which can attach to the same.

10. In the submissions of the 1st and 2nd Defendants, the two defendants have cited my decision in **Kenneth Chege Kamau & 2 Others Vs Thome Farmers No.5 Limited & 3 Others (2019) eKLR** in which I extensively gave the background to the property known as LR No.13330 which was an amalgamation of two properties which is now registered in the name of the 1st Defendant. This is the property which resulted in the suit property upon subdivision. I do not wish to repeat the detailed background here.

11. In the instant case, there is no dispute that plot No. 409 which became the suit property had been allocated to the Plaintiff's father who in turn transferred it to the Plaintiff. It is also not in dispute that it is the Plaintiff who is in possession and that the transfer which was signed by the 1st Defendant and the 2nd Defendant has not been lodged for registration. The only issue for determination is whether the suit property was lawfully repossessed and sold to the 2nd Defendant.

12. There was no evidence adduced by the 1st Defendant to support their allegations in the defence that the suit property was repossessed as alleged. The 2nd Defendant while being cross – examined confirmed that she was not shown any title documents and that she did not carry out any due diligence as she trusted the directors of the 1st Defendant. She confirmed during cross – examination that when she went to the suit property, she found napier grass grown on it but she did not bother to ask who had planted it there.

13. As a diligent investor, she should have been alarmed and would not have gone ahead to purchase a property which was occupied. The 2nd Defendant cannot be said to have been an innocent purchaser for value without notice. As I have said hereinabove, there was no evidence adduced by the 1st Defendant to controvert his evidence that he lawfully owns the suit property. The allegations by the 1st Defendant in its defence that they did not know Thome Five or had no relationship with it was ably dislodged in the reply to the defence by the Plaintiff.

14. The 1st Defendant and the 2nd Defendant urged me to follow my findings in the **Kenneth Chege Kamau & 2 others Vs thome Farmers No.5 Limited and 3 Others (Supra)** and dismiss the Plaintiff's case. I must point out that the facts in the case referred to were quite different. The Plaintiffs therein were not in possession of the suit property. The 2nd and 3rd Defendants who had purchased the suit property had carried out due diligence and found out that the land was registered in the name of the seller and that there was no one in possession. The Plaintiffs in that case claimed that the property was fraudulently registered which was not the case. This is unlike in the present case where there was no due diligence undertaken and no evidence was adduced that the suit property had been repossessed.

15. Following the above analysis, I find that the Plaintiff has proved his claim on a balance of probabilities. I allow his claim and make the following final orders: -

i. An order of permanent injunction is hereby given restraining the Defendants, their servants, employees, agents, or whatsoever from transferring, delineating, transmitting or registering any transfer which was executed between themselves or any other parties or in any other manner interfering with plot No.409 now known as LR No.13330/171 other than transfer to the Plaintiff.

ii. An order is hereby given directing the 1st Defendant to execute a transfer in favour of the Plaintiff in respect of LR No.13330/171.

iii. Costs of this suit to be paid by the Defendants.

Dated, Signed and Delivered at Nairobi on this 29th day of October 2020.

E.O.OBAGA

JUDGE

In the absence of advocates who were aware of the time and date of delivery of the Judgement.

Court Assistant: Hilda

E.O.OBAGA

JUDGE