



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1829 OF 2007

(FORMERLY HCCC NO. 318 OF 2006)

SAMUEL MAINA WANJIHIA..... PLAINTIFF

=VERSUS=

ABDIRAHMAN MUHAMED ABDI.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

At all material times, the plaintiff and one, Caroline Wairimu Wanjihia were the registered proprietors of all that parcel of land known as L.R No. 209/10736 measuring 0.1032 hectares registered as Grant No. I.R 51163/1 on 28th December, 1990 (hereinafter referred to as the “suit property”). In 2002, the plaintiff agreed to surrender a portion of the suit property measuring 0.0372 hectares for an access road to Amboseli and Friends Court Estates in Nairobi. In consideration of that surrender, the plaintiff was to be allocated another parcel of land measuring 0.1 hectares and was also to retain the remainder of the portion of the suit property measuring 0.066 hectares. The plaintiff was required to surrender his title for L.R No. 209/10736, Grant No. 51163/1 (“suit property”) so that he could be issued with a new Grant for the remainder of the suit property after the excision of the land that was surrendered for the access road as aforesaid.

On 11th February, 2003, the plaintiff was allocated a parcel of land measuring 0.1 hectares by the Commissioner of lands as compensation for part of the suit property that he had surrendered for public access road. On 31st July, 2003, the Commissioner of Lands wrote to the plaintiff to re-survey the suit property and surrender the title for the property together with a sum of Kshs. 3,733/= so that he could be issued with another grant for the remainder of the suit property. The plaintiff did not surrender the original title for the suit property so that he could be issued with a new title for the remainder of the said property. In circumstances which are not clear, the remainder of the suit property aforesaid was purportedly amalgamated with L.R No. 209/10735 to form L.R No. 209/14389. L.R No. 209/14389 was thereafter purportedly allocated by the Commissioner of Lands to the 1st defendant. The 1st defendant was purportedly issued with Grant No. I.R 96751 in respect of the property on 2nd August, 2002. The said grant in favour of the 1st defendant was registered on 14th January, 2004.

In or about May, 2005, the 1st defendant took possession of and fenced the remainder of the suit property aforesaid that had now become part of his parcel of land, L.R No. 209/14389. The plaintiff brought this suit through a plaint dated 29th March, 2006 that was amended on 2nd May, 2006. In the amended plaint, the plaintiff averred that Grant No. 96751 that was issued to the 1st defendant in respect of L.R No. 209/14389 was fraudulent and void since a portion of the suit property that remained after the plaintiff surrendered part of the suit property for an access road belonged to the plaintiff and was not unalienated Government land that could be allocated to the 1st defendant. The plaintiff sought judgment against the defendants jointly and severally for; an injunction restraining the 1st defendant from entering, possessing, constructing on, occupying or in any other way howsoever interfering with the plaintiff’s quiet enjoyment of the suit property; an order for vacant possession of the suit property; cancellation of Grant No. 96751 for LR No. 209/14389; general damages for trespass and costs of the suit.

The 1st defendant filed a defence on 12th May, 2006. The 1st defendant averred that the suit property was non-existent and as such could not be trespassed on by the 1st defendant. The 1st defendant denied that its title to L.R No. 209/14389 was fraudulent and void as claimed by the plaintiff. The 1st defendant averred that the plaintiff’s claim was fraudulent, null and void. The 1st defendant averred that he was occupying L.R No. 209/14389 lawfully and that he could not be enjoined from enjoying quiet possession of the property.

The 2nd and 3rd defendants filed a joint statement of defence and counter-claim on 14th May, 2008, which was amended on 4th August 2009. In their amended defence, the 2nd and 3rd defendants admitted that the plaintiff was the owner of the suit property a portion of which he surrendered for public access road for which he was compensated with another parcel of land. The 2nd and 3rd defendants admitted further

that the plaintiff was to retain the remainder of the suit property after the excision of the portion thereof that was surrendered for the access road. The 2nd and 3rd defendants averred that on 31st July, 2003 the plaintiff was asked by the Commissioner of Lands to surrender the title for the suit property so that he could be re-granted the remainder of the suit property aforesaid measuring 0.066 hectares but the plaintiff failed and/or neglected to comply with the request.

With regard to the 1st defendant's title, the 2nd and 3rd defendants averred that L.R No. 209/14389 came about as a result of amalgamation of L.R No. 209/10735 and the remainder of the suit property. The 2nd and 3rd defendants averred that the said amalgamation was unlawful as it was done without an approved Part Development Plan. The 2nd and 3rd defendants averred that the Grant in respect of L.R No. 209/14389 was fraudulent and that the same was wrongfully obtained by the 1st defendant who was a party to the fraud. The 2nd and 3rd defendants averred further that the purported Deed Plan No. 236626 that gave rise to L.R No. 209/14389 did not exist in the records of the Director of Surveys and that L.R No. 209/14389 was never allocated to the 1st defendant. In their counter-claim, the 2nd and 3rd defendants reiterated the contents of their amended defence and sought an order compelling the plaintiff to deliver the title for the suit property to the Registrar of Titles for correction. The 2nd and 3rd defendants also sought the dismissal of the plaintiff's suit with costs of the suit and the counter-claim.

The plaintiff filed a reply to the 2nd and 3rd defendants' amended defence and counter-claim on 27th October, 2009. The plaintiff denied that he had been asked by the Commissioner of Lands to surrender the title for the suit property so that he could be issued with a re-grant for the remainder of the property. The plaintiff urged the court to dismiss the 2nd and 3rd defendants' counter-claim and to enter judgment for the plaintiff as prayed in the amended plaint.

At the trial, the plaintiff adopted his witness statement filed in court on 23rd November, 2011 as his evidence in chief and produced his supplementary bundle of documents dated 31st May, 2010 as an exhibit. The plaintiff told the court that he sued the 1st defendant because the 1st defendant fenced the suit property in 2005 when he wanted to develop the same. He stated that the 1st defendant had no proprietary right over the suit property. He stated that the 1st defendant claimed to own L.R No. 209/14389 that was disowned by the Commissioner of Lands. He stated that the Commissioner of Lands was joined in the suit so that he could confirm who held a valid title over the property in dispute. In cross-examination, he stated that he had no claim against the 2nd and 3rd defendants and that his complaint was against the 1st defendant who had entered into his land. In re-examination, the plaintiff stated that he had no objection to surrendering the title for the suit property so that he could be issued with a title for the remainder thereof.

The 1st defendant did not attend court for the trial. The 2nd and 3rd defendants called one witness; Cyrus Kiogora Mburugu (DW1). DW1 adopted his witness statement dated 6th March 2015 as his evidence in chief and produced as an exhibit the 2nd and 3rd defendants bundle of documents dated 31st May, 2010. In his statement, DW1 reiterated the contents of the 2nd and 3rd defendants' defence. DW1 stated that the plaintiff had surrendered a portion of the suit property for an access road and was compensated for the same. He stated that the plaintiff was to retain the remainder of the suit property after the excision of the portion thereof that he had surrendered for access road. He stated that the plaintiff never surrendered the title for the suit property for the necessary amendment. DW1 stated that the title held by the 1st defendant in respect of L.R. No. 209/14389 was fake since the same was not supported by an approved Part Development Plan. He stated further that the Deed Plan on the strength of which the said title was issued did not exist in the records of the Director of surveys.

After the conclusion of evidence, the court directed the parties to make closing submissions in writing. None of the parties filed submissions within the time that was set by the court. I have considered the evidence that was tendered by the parties in support of their respective cases. The issues that arise for determination in this suit in my view are the following;

1. Whether the 1st defendant trespassed on the suit property.
2. Whether the plaintiff was supposed to surrender the title for the suit property to the 2nd defendant and whether he is so.
3. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
4. Whether the 2nd and 3rd defendants are entitled to the reliefs sought in the amended statement of defence and counter-claim.
5. Who should bear the costs of the suit?

Since the issues arising for determination in this suit are intertwined, I will consider the same together. It was not disputed that the portion of the suit property that remained after the plaintiff surrendered part of the suit property for an access road belonged to the plaintiff. It was also not disputed that although the land that was surrendered for the access road was excised from the suit property, the plaintiff did not surrender the title for the suit property so that he could be re-granted the portion thereof that remained. It was also not disputed that the said portion of the suit property that remained was taken over and amalgamated with L.R No. 209/10735 to form a new parcel of land known as L.R No. 209/14389 which the 1st defendant claimed to be owned by him. It was also not disputed that on the strength of the said title for L.R No. 209/14389, the 1st defendant entered into the said portion of the suit property that remained after the excision of part of the suit property that was surrendered by the plaintiff for the access road and fenced the same claiming to be the owner thereof. The 2nd defendant who at all material times was the custodian of the land records disowned the 1st defendant's title to L.R No. 209/14389 and declared it illegal. The 1st defendant did not give evidence in defence of its title to L.R No. 209/14389. I am in agreement with the plaintiff and the 2nd and 3rd defendants that the 1st defendant's purported title to L.R No. 209/14389 is illegal. The suit property belonged to the plaintiff. After the plaintiff surrendered a portion thereof for an access road, the remainder of the property belonged to the plaintiff. The plaintiff never surrendered that remainder of the suit property to the Government neither did he sell the same to the 1st defendant. In the circumstances, the 1st defendant could not have obtained a valid title to the said portion of the suit property that was amalgamated with L.R No. 209/10735 to form L.R No. 209/14389. Trespass has been defined as any intrusion by a person on the land in the possession of another without any

justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. The plaintiff and the 2nd and 3rd defendants established that what remained of the suit property after the excision of a portion thereof for the access road belonged to the plaintiff and that the same was illegally amalgamated with L.R No. 209/10735 to form L.R No. 209/14389. The plaintiff established further that the 1st defendant entered into the said portion of the suit property that was illegally amalgamated with L.R No. 209/10735 to form L.R No. 209/14389.

The 1st defendant had a duty to prove that he had a justifiable cause for entering the suit property. Since the 1st defendant did not tender evidence in his defence at the trial, the only conclusion the court can make is that the 1st defendant had no justifiable reason for entering the portion of the suit property that remained after the plaintiff surrendered part of the property for the access road. The 1st defendant's title to L.R No. 209/14389 that he claimed to be the basis for his occupation of the suit property has been found by the court to be illegal. It is my finding therefore that the 1st defendant is a trespasser on the portion of the suit property that remained after the excision of part of the said property that was surrendered for the access road.

On the issue of surrender of the title for the suit property by the plaintiff to the 2nd defendant, I am of the view that the plaintiff had an obligation to surrender the title for the suit property to the Commissioner of Lands so that a new grant could be issued to the plaintiff for the remainder of the suit property after the excision of the portion that was surrendered for the access road. In P Exh. 1, I have seen a copy of a letter dated 31st July, 2003 that was addressed to the plaintiff by the Commissioner of Lands requesting for the surrender of the title for the suit property for the purposes of re-grant. The plaintiff admitted that he did not surrender the title and that the same was still in his possession. He told the court that he had no objection to surrendering the title.

From the findings above, I am satisfied that the plaintiff has proved his case against the 1st defendant and that he is entitled to the reliefs sought in the amended plaint. With regard to the counter-claim, by the 2nd and 3rd defendants, the same was conceded by the plaintiff who agreed to surrender the title for the suit property to the 2nd and 3rd defendants. On the issue of costs, I am of the view that in the circumstances of this case, the 1st defendant should bear the costs of the suit. For the counter-claim, a fair order would be for each party should bear its own costs.

Conclusion:

In conclusion, I hereby make the following orders:

1. An injunction is issued restraining the 1st defendant from entering, occupying, constructing on or in any other way interfering with the plaintiff's quiet enjoyment of the portion of L.R No. 209/10736 that remained after the excision of part of the said property for an access road.
2. The 1st defendant shall forthwith deliver vacant possession of the said portion of L.R No. 209/10736 in his occupation to the plaintiff.
3. Grant No. 96751 in respect of L.R No. 209/14389 is cancelled. The original thereof shall be surrendered to the Chief Lands Registrar for cancellation.
4. Kshs.100,000/= is awarded to the plaintiff against the 1st defendant as general damages for trespass.
5. The plaintiff shall forthwith surrender Grant No. I.R 51163 for L.R No. 209/10736 – Nairobi to the Chief Land Registrar for re-grant of the portion that remained after the excision of part of the said property that was surrendered for access road together with such fees and other documents as may be advised by the Chief Land Registrar.
6. The plaintiff shall have the costs of the suit to be paid by the 1st defendant.
7. Each party shall bear its own costs of the counter-claim.

Dated and Delivered at Nairobi this 8th Day of October, 2020

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

N/A for the 1st Defendant

Mr. Kamau for the 2nd and 3rd defendants

