



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 33 OF 2008

SAMUEL KIMANI NGUGI

ESTHER WANJIRU NGUGI

(Suing as administrators of the estate

of RAPHAEL NGUGI GITHUKU)..... PLAINTIFFS

VERSUS

DAVID THUO.....DEFENDANT

JUDGMENT

The plaintiffs are the legal representatives of the estate of Raphael Ngugi Githuku, deceased (hereinafter referred to only as “the deceased”). The deceased was at all material times the registered owner of all those parcels of land known as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998(hereinafter referred to as “the suit properties”). The deceased brought this suit against the defendant on 7th February, 2008 seeking; a permanent injunction restraining the defendant from interfering with, disposing, occupying, constructing on or in any way dealing with the suit properties, a declaration that the deceased was the registered owner of the suit property and a mandatory injunction compelling the defendant to demolish any structures he had put up on the suit property.

In his plaint dated 7th February, 2008, the deceased averred that at all material times he was a shareholder of Githunguri Constituency Ranching Company Limited. The deceased averred that by virtue of his membership of the said company, he was allocated two parcels of land known as Plot H 8 and Plot H 9 which were subsequently given Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties) respectively. The deceased averred that on 18th June, 2003, he was issued with title deeds for the suit properties. The deceased averred that he was in peaceful possession of the suit properties from 1998 until 3rd February, 2008 when he received information that someone was digging building foundation trenches on the property. The deceased averred that upon investigation, he learnt that it was the defendant who was behind the excavation. The deceased averred that as the registered owner of the suit properties, he had absolute title to the same and that the defendant had no right to carry out construction on the same. The deceased averred that he would suffer loss and damage unless the defendant was stopped from continuing with construction on the suit property.

The defendant filed a defence on 14th January, 2010 in which he denied the deceased’s claim in its entirety. The defendant averred that the parcels of land on which he was carrying out construction belonged to him having purchased the same from Githunguri Constituency Ranching Company Limited.

The deceased died on 6th January, 2013 and the plaintiffs herein were granted Limited Grant *ad litem* on 3rd September, 2013 in respect of his estate. On 25th September, 2014, the plaintiffs were substituted as plaintiffs in the suit in place of the deceased. Following that substitution, the plaint was amended on 18th February, 2015. On 29th November, 2016, the defendant was granted leave to amend his statement of defence. The defendant filed amended statement of defence on 1st December, 2016.

In the amended statement of defence, the defendant reiterated that the parcels of land that he was occupying and on which he was carrying out construction belonged to him and that he purchased the same from Githunguri Constituency Ranching Company Limited. The defendant averred further that the parcels of land on which he was carrying out construction were known as residential plot numbers PM 118, PM 119, PM 120 and PM 121. The defendant averred that the four parcels of land were also known as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties). The defendant averred that through agreement of sale dated 27th April, 1993, he purchased four (4) shares that one, Waira Kamau owned in Githunguri Constituency Ranching Company Limited. The defendant averred that the four shares entitled the said Waira Kamau to the said residential plot numbers PM 118, PM 119, PM 120 and PM 121 which were also known as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties).

The defendant averred that pursuant to the said agreement, he did not only purchase the shares held by Waira Kamau in Githunguri

Constituency Ranching Company Limited but also the suit properties. The defendant averred that after purchasing the said shares, he was issued with share certificates by Githunguri Constituency Ranching Company Limited and instruments of transfer that entitled him to take possession of the suit properties.

The defendant averred that he had never been in occupation of the parcels of land claimed by the plaintiffs and that the documents of title held by the plaintiffs in respect of the suit properties were not genuine. The defendant averred further that as the legal owner of the suit properties, he had a right to deal with the same as he wished. The defendant denied that he was a trespasser on the suit properties and urged the court to dismiss the plaintiffs' suit with costs.

The plaintiffs filed a reply to amended defence on 17th February, 2017. In their response to the amended defence, the plaintiffs reiterated that the deceased was the registered owner of the suit properties. The plaintiffs averred that the deceased was issued with genuine title deeds in respect of the suit properties and denied the defendant's claim that the title documents held by the deceased were fake. The plaintiffs urged the court to enter judgment for them as prayed in the amended plaint.

At the trial, Samuel Kimani Ngugi (PW1) gave evidence for the plaintiffs. PW1 testified as follows: Esther Wanjiru Ngugi and he were the legal representatives of Raphael Ngugi Githuku (the deceased). The deceased was allocated the suit properties as Plot No. H 8 and Plot No. H 9 by Githunguri Constituency Ranching Company Limited (hereinafter referred to only as "Githunguri Ranching"). The deceased was subsequently issued with title deeds for the two plots that were given Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties). Before the deceased was issued with the said title deeds, he was issued with Clearance Certificates by Githunguri Ranching. The suit properties were adjacent to each other. He stated that the suit properties were registered in the name of the deceased but occupied by the defendant. He urged the court to restore the suit properties to the plaintiffs. He produced as exhibits copies of; ballot cards for Plot No. H 8 dated 14th April, 1998 and Plot No. H 9 dated 18th April, 1998, Clearance Certificates for the two plots dated 17th June, 2003, title deeds for the suit properties dated 18th June, 2003, a survey plan showing the location of the suit properties and certificates of official search on the titles of the suit properties dated 2nd October, 2006.

The defendant, David Ndua Thuo (DW1) gave evidence after PW1. DW1 adopted the contents of his amended defence dated 29th November, 2016 and amended witness statement dated 7th October, 2016 as his evidence in chief and produced the documents attached to his list of documents dated 4th November, 2016 as exhibits. DW1 testified as follows: Waithira Ndua Thuo was his wife. The suit properties were owned by Waira Kamau. He purchased the same from Waira Kamau for his wife Waithira Ndua Thuo. Waithira Ndua Thuo entered into a written agreement of sale with Waira Kamau. The purchase price was paid by him. After the payment of the purchase price, his wife was issued with share certificates by Githunguri Ranching. DW1's wife, Waithira Ndua Thuo (DW2) gave evidence after DW1. DW2 reiterated the evidence of DW1. She confirmed that she signed the agreement of sale dated 27th April, 1993 between her and Waira Kamau and that Githunguri Ranching issued her with share certificates thereafter.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 3rd December, 2019. The defendant had not filed his submissions as at 20th February, 2020 when the court fixed a date for judgment. On that day, the defendant was given 21 more days to file submissions and handover the same to the Court Assistant. As at the time of writing this judgment, the court had not been supplied with the defendant's submissions which I presume were never filed.

I have considered the evidence tendered by the parties and the submissions on record. The following in my view are the issues that arise for determination in the suit before the court;

1. Who as between the deceased and the defendant is the lawful proprietor of Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties)?
2. If the deceased is the lawful proprietor of the suit properties, whether the defendant trespassed on the properties.
3. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
4. Who is liable for the costs of the suit?

Who as between the deceased and the defendant is the lawful proprietor of Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties)?

The plaintiffs led evidence that the deceased was a shareholder of Githunguri Ranching and that he was allocated the suit properties after a balloting exercise. The plaintiffs averred that the suit properties were initially known as Plot No. H 8 and Plot No. H 9 and that the same were given Title Nos. Ruiru West Block 1/2997 and Ruiru West Block 1/2998 respectively. The plaintiffs averred that the suit properties were registered in the name of the deceased after which he was issued with title deeds. The plaintiffs produced in evidence among others; the share certificates that were issued to the deceased by Githunguri Ranching, the ballots that were picked by the deceased during the balloting exercise at Githunguri Ranching, the Clearance Certificates that were issued to the deceased by Githunguri Ranching in respect of the suit properties, the title deeds for the suit properties in the name of the deceased and certificates of official search showing that the suit properties were registered in the name of the deceased. The plaintiffs also referred the court to a survey map showing the location of the suit properties.

For the defendant, he averred that on 27th April, 1993, he purchased for his wife, Waithira Ndua Thuo (DW2), four (4) shares that Waira Kamau held in Githunguri Ranching at a consideration of Kshs. 600,000/-. The defendant averred that the four shares entitled Waira Kamau to four residential plots namely, PM 118, PM 119, PM 120 and PM 121. The defendant averred that the four plots were the same as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties). The defendant produced in evidence among others; a copy of sale agreement dated 27th April, 1993, copies of two (2) share certificates dated 4th November, 1992 issued to Waira Kamau by

Githunguri Ranching, copies of four (4) share certificates all dated 22nd April, 1993 issued by Githunguri Ranching to Waithira Ndua Thuo(DW2), copies of four (4) instruments of transfer of land all dated 21st April, 1993 and a receipt for transfer fees of Kshs. 2000/- issued by Githunguri Ranching.

From the evidence adduced by the parties, I am persuaded that the deceased is the lawful owner of the suit properties. The plaintiffs have demonstrated on a balance of probabilities that the deceased was allocated Plot No. H 8 and Plot No. H 9 by Githunguri Ranching and that after the subdivision process was completed, the two plots were registered in his name as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties) respectively. The plaintiffs have demonstrated that as at time the deceased brought this suit, the suit properties were registered in the name of the deceased.

I find no evidence connecting the defendant to the suit properties. The defendant claimed to have acquired the suit properties for his wife from Waira Kamau on 27th April, 1993 through purchase of the four shares that Waira Kamau had in Githunguri Ranching. The defendant claimed that the four shares represented four residential plots. I have noted from the documents produced by the defendant that although he claimed to have purchased Waira Kamau's shares on 27th April, 1993, he was allegedly issued with four share certificates by Githunguri Ranching on 22nd April, 1993; that was before the date of the agreement. I have also noted that although the alleged transaction between the defendant, his wife and Waira Kamau took place in 1993, the fee of Kshs. 2000/- that was paid by the defendant's wife so that the said shares could be transferred to her name was paid on 21st April, 1975. The defendant also placed no evidence before the court showing that Plot Numbers PM 118, PM 119, PM 120 and PM 121 which Waira Kamau was allegedly entitled to by virtue of the shares he held in Githunguri Ranching are the same Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties). I did not quite understand how the four plots were reduced into two plots. Even if it is assumed that Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties) were two of the four (4) plots that the defendant bought for his wife from Waira Kamau, the court was not told which of the four plots were registered as Ruiru West Block 1/2997 and Ruiru West Block 1/2998 (the suit properties). I have also noted that in the instruments of transfer that were purportedly executed by Waira Kamau in favour of the defendant's wife, there was no reference to any land parcel leave alone the suit properties. The said instruments of transfer were also executed on 21st April, 1993 before the defendant's wife entered into a sale agreement with Waira Kamau.

The defendant had claimed that the titles held by the deceased in respect of the suit properties were fake. I am in agreement with the submission by the plaintiffs that the defendant did not place before the court any evidence in proof of fraud or forgery in relation to the said titles. In Black's Law Dictionary 9th Edition at page 731 fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

In Ratilal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

I find no merit in the allegations of fraud pleaded against the plaintiffs.

The suit properties were registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 27(b) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides that:

“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

Section 28 of the same Act provides that:

“The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act.....”

I find no basis upon which I can impeach the titles held by the deceased in respect of the suit properties. It is my finding therefore that the deceased is the lawful owner of the suit properties.

If the deceased is the lawful proprietor of the suit properties, whether the defendant trespassed on the said properties.

The plaintiffs' claim against the defendant is based on trespass. 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. I have already made a finding that the deceased is the lawful registered owner of the suit properties. As the administrators of the estate of the deceased, the plaintiffs are entitled to possession of the suit properties. The defendant did not deny that he entered the suit properties and commenced construction thereon. What I need to determine is whether the defendant had any justifiable cause for entering the suit properties and remaining in possession thereof. From the evidence on record, the only justification put forward by the defendant for his entry and occupation of the suit properties was that the property belonged to him having purchased the same for his wife from Waira Kamau. I have already made a finding that the defendant is not the lawful owner of the suit properties. Since the defendant had no interest in the suit properties recognized in law, he had no lawful justification for entering and occupying the suit properties. For the foregoing reasons, it is my

finding that the defendant is a trespasser on the suit properties.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.

As I have stated earlier in the judgment, the plaintiffs sought injunctive and declaratory reliefs in their amended plaint dated 18th January, 2015. From the findings I have made above, I am satisfied that the plaintiffs have proved their claim against the defendant and as such, they are entitled to the reliefs sought in the amended plaint. In their submissions, the plaintiffs had urged the court to award them KShs. 10,000,000/- as general damages for trespass. While I am in agreement with the plaintiffs that once trespass has been established it is not necessary for a party to prove that he has suffered any specific loss or damage to be entitled to an award of damages, the court cannot give an award or a relief that has not been sought in the pleadings. The plaintiffs did not seek general damages for trespass or mesne profits in their amended plaint. The issue of damages has been raised for the first time in the submissions. Since the relief was not sought in the pleadings, I am of the view that the court has no power to grant the same.

Who is liable for the costs of the suit?

As correctly submitted by the plaintiffs, costs are at the discretion of the court and as a general rule, costs follow the event. In the case before me, the plaintiffs have succeeded in their claim against the defendant. No reason has been put forward by the defendant that would disentitle the plaintiffs to the costs of the suit. I will therefore award the plaintiffs the costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendant as follows;

1. A permanent injunction is issued restraining the defendant by himself or through his agents, servants or employees from interfering with, disposing of, occupying, constructing on or in any way dealing with all those parcels of land known as Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 (the suit properties).
2. It is declared that Raphel Ngugi Githuku, deceased is the lawful registered owner of Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998 previously known as Plot No. H 8 and Plot No. H 9 respectively.
3. A mandatory injunction is issued compelling the defendant to demolish and remove all structures if any that he has put up on Title No. Ruiru West Block 1/2997 and Title No. Ruiru West Block 1/2998.
4. The plaintiffs shall have the costs of the suit.

Delivered and Dated at Nairobi this 1st Day of October, 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Mr. Kuria for the Plaintiffs

Mr. Tugee for the Defendant

Ms. C. Nyokabi-Court Assistant