



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.111 OF 2017

ANTHONY NDUNG'U MAINA.....PLAINTIFF

VERSUS

FAITH WANJIKU MAINA.....DEFENDANT

JUDGMENT

By a Plaint dated **15th February 2017**, the Plaintiff sought for Judgement against the Defendant for the following orders:

a) An eviction order directing the Defendant to demolish her illegal structure , remove the debri thereof , and to vacate all that property known as L.R No. Ruiru Kiu/Block 4/458, share certificate Number 1512/ Mwihoko Housing Company Limited.

b) Damages for trespass and mesne profits.

c) Costs and Interest at Court rates.

The Plaintiff had averred that he is the lawful proprietor of the suit property and that without any lawful cause or justification, the Defendant entered onto his land and is constructing a house and other structures thereon. The Plaintiff averred that he has used all amicable means to have the Defendant vacate the property but that the Defendant has refused to do so.

The Plaintiff averred that he purchased the suit property at a substantial consideration vide a sale agreement dated **16th February 2011**. However, the Defendant has since converted the land to her own use and profit to his detriment.

The suit is contested and the Defendant filed a Statement of defence and Counter claim dated **29th February 2019**, and denied all the allegations made in the Plaint.

In her statement of Defence, the Defendant denied the existence of a sale agreement over the suit property and averred that if an agreement exists in writing, the same is apparently a forgery and does not bind her. It was her contention that she is the legal owner and / or allottee of the suit property, as she entered into a contract of sale of the suit property on **4th July 2013**, with **Joseph Gakahu Githii**, who was the previous legal owner at a consideration of **Kshs.690,000/=** which she paid in full. She further averred that she paid **Kshs. 30,000/=** to **Mwihoko Housing Company Limited** as charges for the transfer thereof. That the said **Joseph Gakahu Githii**, caused his clearance certificate issued to him by **Mwihoko Housing Company Limited** to be cancelled and she was issued with a new certificate of ownership after paying valuable consideration.

That she acquired the suit property lawfully and followed due process and that the Plaintiff has never existed in **Mwihoko Housing Company Limited's** register. It was her contention that the suit discloses no cause of action against her, and the same is incurable defective as the Plaintiff's Advocate had not obtained a Practising Certificate at the time of filing the present suit.

In her Counter claim, the Defendant sought for orders that;

a) A declaration that the Defendant is the legal owner of land parcel Known as L.R No. Ruiru/Kiu/Block 4/458.

b) Costs of the claim and the Counter Claim.

She averred that she sought to fence off the suit property in **November 2016**, and put up dwelling structures, but that the Plaintiff resisted and claimed ownership. She contended that the Plaintiff has fraudulently caused himself to be registered as the owner. She particularized fraud by the Plaintiff as; misrepresenting to the **Commissioner of Lands** as the allottee of the suit property, misrepresenting to the **Municipal Council of Ruiru** as the legal owner , purporting to pay the rate in respect of the suit land to **Municipal Council of Ruiru**,

causing himself to be fraudulently issued with rate payment receipts by Municipal Council of Ruiru; Converting the suit land, using forged documents to cause himself to be issued with rate payment receipts.

The Defendant further averred that the Plaintiff's actions are causing her loss and she particularized loss as; preventing her from dealing with the suit land as the owner thereof, wasting the suit land and trespassing on the suit land.

After close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for herself and called one witness. The Defendant testified for herself and closed her case.

PLAINTIFF'S CASE

PW1 Anthony Ndungu Maina, adopted his witness statement dated **15th February 2017**. He further produced his list of documents as Exhibits 1 to 4. He testified that after he purchased the suit property from **Susan Wanjiru**, he went to **Mwihoko Hosuing Company Limited** to process the title deed, and found that the Company had sold the suit property to another person. That the Company referred him to the DCIO and he later paid to the Municipal Council of Ruiru. It was his testimony that the suit property is his, having bought it from **Susan Wanjiru Kimani** and having paid all the purchase price .

It was his testimony that he bought the suit property for **Kshs.250,000/=** and that he first paid **Kshs. 210,000/=** and later **Kshs.40,000/=** and that he was given all the original documents. That he was told that the purchase was done through a police abstract and that the abstract documents were given to **Faith Wanjiru** and not **Susan Wanjiru** who sold the suit property to her. He urged the Court to direct that he be given back his parcel of land as he would like to obtain title deed for the said parcel of land. He further testified that the suit property had initially been sold to **Susan wanjiru** who sold the said land to him.

Further that the agreement showed that he paid **Kshs. 210,000/=** though he bought the land for **Kshs. 250,000/=**. It was his testimony that he paid **Kshs.40,000/=** on **22nd September 2011**, and he was given an acknowledgement receipt for the plot, but that it did not show it was for how much. That he obtained a clearance certificate from **Susan Wanjiru** and not **Mwihoko**. It was his evidence that he found the land had been sold to one **Gakuha**, and that he has not sued him because he is not the one on the suit property but **Faith** is the one thereon. He further testified that he was not a member of **Mwihoko Housing Company Limited**, and acknowledged that he had not produced the share certificate as he went to pay for the share certificate and found that the land had been sold to someone else.

PW2 Susan Wanjiru Kimani, adopted her witness statement as her evidence in Court . She testified that she sold her plot at **Mwihoko 1512** which is in **Githurai** . It was her testimony that she sold the suit property to the Plaintiff in **February 2011**, and she had a share certificate. That the Plaintiff paid her **Kshs. 210,000/=** in **February 2011** and **Kshs. 40,000/=** in **September 2011** and she gave the purchaser all the documents. She denied losing any of the documents.

That she asked the Plaintiff to go to the Lands office and process the title deed, but that in **2013**, the Plaintiff called her and informed her that there was another person on the suit property. That she went to **Mwihoko Housing Company**, to Identify herself. Her name was on the register but the passport photo was not hers, but the name was hers. That the Company referred her to the police in Ruiru. That **Mwihoko Housing Company** recorded a statement that the plot was hers. That she sold the land to the plaintiff and denied selling it to anyone else.

It was her testimony that she obtained the plot in **1987** from **Mwihoko Housing Company** and gave all the documents to **Ndungu**. That she bought the suit property for **Kshs.9000/=** and did not remain with any documents as she gave all of them to the Plaintiff. She further testified that she had a share certificate.

DEFENCE CASE

Faith Wanjiku Maina adopted her witness statement dated **28th February 2017**, as her evidence. She testified that she bought the suit property from **Joseph Gakahu Githii** for **Kshs. 690,000/=** in the year **2013**, vide a sale agreement dated **4th July 2013**. She produced her Sale agreement as Exhibit 1. She further testified that she paid **Kshs. 30,000/=** as transfer fees and produced the receipt for transfer as Exhibit 2. That **Gakahu** gave her a Certificate of Ownership that was cancelled and dated **19th April 2013**, and she produced it as Exhibit 3. She further produced a clearance certificate dated **5th July 2013**, as Exhibit 4. That she was given a copy of the register to show that he was the owner and produced it as Exhibit 5. It was her testimony that the plot is hers as she had all the documents.

Further that she was shown the plot by **Joseph Gakahu** and that **Mwihoko Housing Company Limited** assured her that the plot was for **Joseph Gakahu**. That she did not see the letter from **Mwihoko Housing Company Limited**, and that the Plaintiff demolished her wall and she reported the matter to the police. Further that she is on the suit property and she has built **6 units** for **rentals** which are all occupied. She further testified that the Plaintiff has never been charged with a criminal case.

After close of **viva voce** evidence, the parties filed written submissions which the Court has now carefully read and considered and renders itself as follows;

It is not in doubt that the suit property initially belonged to **Mwihoko Housing Company Limited**, and that the same was allocated to **Susan Wanjiru**. It is the Plaintiff's contention that he bought the suit property from the said **Susan Wanjiru** and **Susan Wanjiru** who was PW2 testified that she sold the suit property to the Plaintiff and denied selling the same to any other person or losing her documents.

However, the Defendant has also contended that she bought the suit property from one **Joseph Gakuha**, who had bought the same from **Susan Wanjiru**. Vide a letter produced in evidence, **Mwihoko Housing Company Limited** contended that an old woman pretending to be the said **Susan Wanjiru**, went to their offices with a police abstract claiming that she had lost her documents and they in turn facilitated her transfer of the suit property to **Joseph Gakuha**. That they later learnt that the said woman was an imposter. The Defendant further

contended that the suit is incompetent as it was filed by an Advocate who did not have a practising certificate and the suit ought to be struck out.

The issues for determination are;

1. *Whether the suit is incompetent*
2. *Who is the Legal Owner?*
3. *Whether the plaintiff is entitled to the orders sought*
4. *Whether the Defendant is entitled to the orders sought*
5. *Who Should bear the costs of the suit*

1. *Whether the Suit is Incompetent*

The Defendant has averred that the suit is incompetent as the Plaintiffs Advocate had not taken out a practising certificate by the time the said Firm of Advocates prepared the suit papers. Section 2 of the Advocates Act defines an **unqualified person** as follows:

“a person who is not qualified under section 9 and includes an Advocate who—

- (a) is not qualified under section 9;*
- (b) is not exempt under section 10; and*
- (c) fails to take out a practising certificate.”*

Further Section 9 of the Advocates Act provides as follows:

Subject to this Act, no person shall be qualified to act as an Advocate unless?

- (a) he has been admitted as an Advocate;*
- (b) his name is for the time being on the roll ; and*
- (c) he has in force a practicing certificate;*

Further Section 34 provides as follows:-

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument

- (a) relating to the conveyancing of property; or*
- (b) for, or in relation to, the formation of any limited liability company, whether private or public; or*
- (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or*
- (d) for the purpose of filing or opposing a grant of probate or letters of administration; or*
- (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or*
- (f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument: Provided that this subsection shall not apply to—*
 - (i) any public officer drawing or preparing documents or instruments in the course of his duty; or*
 - (ii) any person employed by an Advocate and acting within the scope of that employment; or*
 - (iii) any person employed merely to engross any document or instrument.*

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the

same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to—

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.”

In the case of National Bank of Kenya Limited...Vs... Anaj Warehousing Limited [2015] eKLR the Court held that :

“The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an Advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-Advocates, or Advocates whose names have been struck off the roll of Advocates, shall be void for all purposes.” (emphasis added)

It is not in doubt that the said Advocate who prepared the Plaintiff’s pleadings is **not** an **unqualified** person as he has been Admitted to the and the only contention by the Plaintiff herein is that he had not taken out a practising certificate by the time the suit was being filed . Further it is not in doubt that the said Advocate’s name has not been struck off the roll of Advocates. Guided by the above provisions of law, and the above case law, the Court finds and holds that the suit is not incompetent.

2. Who is the Legal Owner of the suit property

It is not in doubt that both the Plaintiff and the Defendant are claiming title to the suit property. However, only one of the parties can be the legal owner of the suit property. To be able to determine who is the legal owner of the suit property, it is the Court’s considered view that it should first determine who amongst the two parties was able to show the root of his/ her title. See the case of Munyu Maina ...Vs... Hiram Gathiha Maina, Civil Appeal number 239 of 2009, where the Court of Appeal held as follows;-

“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 would not be noted in the register.”

Further in the case of Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR, the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

It is not in doubt that **Susan Wanjiru** was the allottee of the suit property as both parties acknowledge this. In his evidence, the Plaintiff called the said **Susan Wanjiru** who testified as PW2 and confirmed that she indeed sold the suit property to the Plaintiff. To this effect, the Plaintiff produced a sale agreement and the said **Susan Wanjiru** confirmed that she was paid the requisite consideration to which she transferred the suit property to the Plaintiff.

The Defendant however contends that she bought the suit property from one **Joseph Gakuha**, who allegedly had bought the suit property from one **Susan Wanjiru**. In its letter dated 2nd December 2016, **Mwihoko Housing Company Limited** confirmed that the **Susan Wanjiru** who had allegedly sold the suit property to the said **Joseph Gakuha**, was an **imposter** who had fraudulently misrepresented to them that she had lost her documents. Therefore, it follows that the said imposter did not have any title to pass to the said **Joseph Gakuha**, who passed the title to the Defendant. As a party cannot pass a title which it does not have, it is the Court’s considered view that the said **Joseph Gakuha** could not pass a good title to the Defendant since he did not have a good title himself. See the case of Esther Ndegi Njiru & Another ...Vs... Leonard Gatei (2014)eklr where the Court held that;

“Having held and found that the 2nd Defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass. The 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the Plaintiffs.”

It is thus the Court’s considered view that the Plaintiff has been able to establish the root of his title and therefore, the Court finds and holds that the Plaintiff is the legal owner of the suit property.

3. Whether the Plaintiff is entitled to the orders Sought

The Plaintiff has sought for eviction orders against the Defendant. It is evident that the Plaintiff is the owner of the suit property. From the above, the Court has upheld Plaintiff's ownership and affirmed it. Therefore, the Plaintiff is as the owner of the suit property is entitled to all the rights and privileges that appertain to the suit property as provided by **Sections 24 and 25 of the Land Registration Act**.

The said rights include the right to peaceful and quiet occupation and possession of the suit property; the right to utilize his property as he deems fit and thus the orders of eviction of the Defendant is **merited** so that the Plaintiff can quietly and peacefully utilize his property. The Plaintiff must have possession of the suit land in order to attain enjoyment of his rights.

The Plaintiff has also sought for **General damages** for trespass and mesne profit. **Trespass** has been defined by **Clerk and Lindsell on torts**, 18th edition at **Pg 23** as:-

“an unjustifiable intrusion by one person upon the land in possession.”

The Defendant bought the suit property from one **Joseph Gakuha Githii** and the said sale led her to believe that she is the owner of the suit property. It is the Court's considered view that considering the circumstances of this case, it cannot be said that the Defendant was trespassing on the suit property as she actually bought the said property though fraudulently. The Court finds and holds that the said prayer is **not merited**. Mesne profits are special damages that must be specifically pleaded and proved. On this case non was pleaded and therefore the Plaintiff is not entitled to the said prayer.

4. Whether the Defendant is entitled to the orders Sought

The Defendant has sought for a Declaration that she is the bonafide owner of the suit property. However, the Court has already held and found that she did not acquire a good title as the said **Joseph Gakuha** could not pass a good title as he did not have a good title himself. Therefore, the Court further finds and holds that the Defendant is not entitled to the orders sought in the Counter claim.

5. Who Should bear the costs of the suit.

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs. It is trite that costs usually follow the events unless there are special circumstances to deny costs. In this Case, it is the Court's considered view that the Plaintiff is the successful party and he is thus entitled to the costs of the suit.

Having now carefully considered the pleadings, the available evidence as adduced by the parties herein and the written submissions, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendant as pleaded in the Plaint dated **15th February 2017**, which is found **merited**. The same is allowed in terms of **prayer No. 1**, with costs to the Plaintiff.

However, the Defendant's Counter Claim is **not merited** and the same is dismissed entirely with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at Thika this 19th day of November 2020

L. GACHERU

JUDGE

19/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff (Though Judgment date taken

in the presence of the parties'

No appearance for the Defendant (legal representatives)

L. GACHERU

JUDGE

19/11/2020