



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 531 OF 2011

PAUL OGANGA OGADA.....PLAINTIFF

=VERSUS=

PHILIP M GRISHON KAMAU & ANOTHER.....DEFENDANTS

JUDGEMENT

1. By an amended plaint dated 25th October 2011, the plaintiff seeks the following reliefs against the defendants.

- i. An order of injunction to restrain the defendants whether acting by themselves or through their agents, servants or anybody acting for or claiming any right through them from trespassing into, developing or continuing with any development or construction on any part of all that parcel of land known as LR NO.13804 (I.R 50811) Karen , Nairobi and from purporting to or transferring the stated parcel of land to any other third party.*
- ii. A declaration that he defendants are illegal trespassers upon the plaintiff's parcel of land LR NO. 13804(I.R 50811) Karen, Nairobi.*
- iii. An order for the defendants to immediately cease the trespass aforesated and any development and construction upon the plaintiff's parcel of land aforesated and to vacate the same.*
- iv. An order for the defendants to be forcefully evicted and for the demolition of any developments of constructions made upon the plaintiff's parcel of land at the defendant's cost.*
- v. An order for the Officer Commanding Station (OCS) Karen Police Station to supervise and ensure that the orders herein are effected.*
- vi. An order for the defendants to pay to the plaintiff general damages for the illegal trespass upon the plaintiff's parcel of land and for inhibiting the plaintiff's use and development of his property.*
- vii. The defendants to pay the plaintiff's costs of this case.*

2. The defendants filed a defence to the plaintiff's claim and raised a counter claim in which they seek the following reliefs:-

- 1. A declaration do issue that the parcel known as L.R 13804 Karen Plains is the lawfully acquired property of the said counter claimants P.M.G Kamau Geoffrey Kiiru Macharia and the same could not have been available for alienation to the respondent Paul Oganga Ogada any time after the counter claimants' lawful acquisition thereof.*
- 2. A permanent injunction do issue restraining the respondent Paul Oganga Ogada from interfering with the counterclaimant's possession, ownership, and proprietary rights over his parcel known as L.R 13804 Karen Plains.*
- 3. Costs of the suit and counterclaim be awarded to the counterclaimants.*

3. The property which is the subject of the suits herein is LR No.13804 Karen Plains Nairobi (suit property) which is about 1.1 acres. It is the plaintiff's case that he was allotted the suit property by the Government after which he paid the requisite fees and thereafter obtained title to the same. In or around 2010, he visited the suit property on routine check when he found building materials on the same. There were people constructing on it. He sought to know who was building on his land and was told that it was the first defendant. The foreman of the

first defendant later called him to the site where he met the plaintiff. The first defendant told the plaintiff that he had purchased the suit property from Paul Oganga Ogada through an Advocate in town. Paul Oganga Ogada is the plaintiff but the first defendant told the plaintiff that he was not the Paul Oganga Ogada who sold the suit property to him.

4. The defendant's case is that they saw an advertisement in the press that a property at Karen Plains in Nairobi was being sold. The two defendants who were business partners went to the offices of the lawyer who had put up the advert and the process of purchase started after they engaged a lawyer to act for them. After payment of the agreed purchase price, the two defendants took possession of the suit property each occupying half of the suit property. The first defendant has since constructed a house where he lives with his family. The second defendant has fenced his portion and has erected a gate.

5. I have carefully considered the evidence adduced by the plaintiff and that of the defendants. I have also considered the submissions by the plaintiff. Counsel for the defendants was given time to file his submissions but at the time of writing judgement, he had not filed his submissions and if any were filed, then the same are not in the file. The issues which emerge for determination in this matter are first, whether the suit property was allotted to the plaintiff and if he has a title to the same. Second, whether the plaintiff is the one who sold the suit property to the defendants. Third, whether the defendants are entitled to remain on the suit property. Fourth, whether the plaintiff and the defendants are entitled to the prayers in the plaint and counter claim and lastly, which order should be made on costs.

6. On the first issue, there is evidence that the plaintiff was allotted an un-surveyed plot No.7 –LR 11641/R on 24th September 1985. He was expected to pay Kshs.72500/=. The plaintiff produced a receipt No.72878 dated 30th January 1986 which shows that he paid Kshs.72500/=. The plaintiff was later asked to pay Kshs.33000/= for processing of title. The demand was made vide letters dated 1st November 1989 and 25th May 1990. On 6th August 1990, the plaintiff paid Kshs.33000/=vide receipt number B 895675. The plaintiff was thereafter issued with title to the suit property. The original title got lost but a provisional one was issued after following the required procedures.

7. A witness from the Lands Office came and produced an official search in respect of the suit property. The witness is PW5 Edwin Munoko Wafula who stated that as at 27th June 2016, the suit property was registered in the name of the plaintiff. The defendants in their replying affidavits in opposition to the application for injunction questioned the allotment given to the plaintiff and opined that he may have not met the conditions of the letter of allotment. The defendants relied on their affidavits as their evidence. From the documents produced by the plaintiff, he met all conditions in the allotment and title was processed after he paid the requisite fees. The search done in 2016 showed that he is the registered owner of the suit property. I therefore find that he is the registered owner of the suit property.

8. The defendants stated that it is one Paul Oganga Ogada who sold the suit property to them. The two however are clear that the said Paul Oganga Ogada is not the plaintiff herein. The plaintiff called PW3 Jacob Oduor a forensic document examiner who examined a transfer form dated 22nd July 2010, the identity card and photographs on the transfer. He compared the known signature of the plaintiff as against the signatures on the transfer. He found that the signature on the transfer in favour of defendants was not made by the plaintiff. The photographs on the transfer which were purported to be those of the plaintiff were not his.

9. The plaintiff also called PW4 Evans Mangaa Oyori who is a finger print officer. He found that the ID Card which was presented in the transaction was not genuine and did not exist in their records. He however found that the ID by the plaintiff existed in their system. The respective reports were produced in evidence. It is therefore clear that it is not the plaintiff who sold the suit property to the defendants. The ID number against the photographs in the transfer is that of plaintiff but the photograph is not that of the plaintiff.

10. The defendants are seeking to remain on the suit property on the ground that they purchased the same after they had conducted due diligence and they seem to suggest that they are innocent purchasers for value without notice. The defendants claim that they saw an advert in the press calling for buyers. They responded to the advert by going to the offices of Angara Nyakundi & Co. Advocates who were acting for the vendor. The defendants have not produced the said press advert. The defendants did not adduce evidence that they paid the entire purchase price of 8.1 million as they claim. The defendants were asked to pay penalties for late payment. In their evidence they claim to have paid Kshs.400,000 as penalty. They were even ready to pay penalty of Kshs.50,000/= per month until they cleared the balance of purchase price. Despite the defendants having a lawyer, they went ahead with a suspect deal and paid penalties which were not in the agreement.

11. The defendants were represented by the firm of Gatitu Wang'oo & Co. Advocates. The advocate from that office recorded a statement but he never came to testify. He simply stated in his statement that he was convinced that the transaction was procedural. There were all indications that all was not well but the defendants went on with the transaction. The defendants did not conduct due diligence otherwise they would have known that they were dealing with a fraudster. The record in this file shows that the said Angara Nyakundi had a series of fraud cases and was at some stage in remand. The defendants even wanted to have third party proceedings against him but the proceedings were not carried through. The plaintiff went to the suit property when the first plaintiff had just started construction. Despite being informed that the land belonged to the plaintiff, he still went on to construct. The defendants cannot claim to have been innocent purchasers for value and in any case, the fraudster had no property or title to pass to the defendants. Attempts by the defendant's lawyer to register the transfer could not succeed. This was enough reason for defendants not to make any further move on the property. I find that the defendants have no ground to remain on the suit property.

12. It is clear from the above analysis that the suit property lawfully belongs to the plaintiff. The defendants were conned by a fraudster. They had every reason to suspect the deal but they chose not to. The first defendant even went ahead to finish constructing his house despite injunctive orders being in force. The defendants cannot therefore seek to sanitize the illegal transaction by seeking a declaration that the purchase was lawful and that an injunction to issue restraining the plaintiff from interfering with their possession of the suit properly.

13. The plaintiff has been kept out his property for almost 10 years. The defendants have adamantly remained on the same notwithstanding the fact that they have no title and that they were clearly conned by a fraudster masquerading as the plaintiff. The plaintiff is entitled to general damages. In sum therefore, I make the following final orders:

a. A declaration is hereby given that the defendants are trespassers to the plaintiff's land known as LR No. 13804 (I.R 50811) Karen plains Nairobi.

b. An order that the defendants do cease the trespass and stop any further developments or construction on LR No. 13804(I.R 50811) Karen plains Nairobi.

c. The defendants are granted 60 days within which to vacate from the suit property failing which the plaintiff to start eviction process including demolition of structures without further recourse to court at the defendants cost.

d. The OCS Karen police station to supervise the eviction of the defendants if they will not voluntarily vacate within 60 days.

e. An order of injunction is hereby given restraining the defendants or their agents from ever interfering with LR No. 13804 (I.R. 50811) Karen plains Nairobi after they vacate voluntarily or upon eviction.

f. The defendants to pay the plaintiff general damages of Kshs 3,000,000/=.

g. The defendants' counter claims is dismissed with costs to the plaintiff.

h. The defendants shall pay costs of the main suit to the plaintiff.

Dated, Signed and delivered at **Nairobi** on this **21st** day of **February 2019**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Mulaku for Mr Namada for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE