



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.312 OF 2017**

**JOSEPH GATUBI KARIUKI.....PLAINTIFF**

**VERSUS**

**KIKUYU SUB COUNTY (FORMERLY TOWN**

**COUNCIL OF KIKUYU.....1<sup>ST</sup> DEFENDANT**

**GEORGE MWAI MBURU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a *Plaint* dated **14<sup>th</sup> March 2014**, the Plaintiff herein brought a claim against the Defendants and sought for the following orders against the Defendants jointly and severally:-

***a) Permanent injunction restraining the defendants, their agents, servants employees or persons acting under their direction from interfering with the quiet occupation and utilisation of the Plaintiff's Plot No.29 formerly known as 25 A, Kikuyu Kidfarmaco and any structures or development built on it or tenants as well as occupants of that plot.***

***b) General Damages for trespass.***

***c) Costs of this suit.***

***d) Any other reliefs the Court may deem fit and just.***

In his statement of claim, the Plaintiff averred that he is the proprietor of **Plot No.25A**, formerly known as **plot No.29 Kidfarmaco, Kikuyu** having acquired it from a purchase in **1999**, wherein he was issued with a duly executed transfer by the 1<sup>st</sup> Defendant. He then constructed semi-permanent residential structures and rented out and he has been paying rates and his possession, acquisition and occupation has not been disputed by anyone. However around **22<sup>nd</sup> May 2013**, the 2<sup>nd</sup> Defendant's agents acting under his instructions destroyed his wooden fence and a gate to the plot and subsequently erected iron sheets barring him and his tenants from access and issued a notice indicating that he is the owner of the plot and when he conducted a search at the 1<sup>st</sup> Defendant's offices he confirmed it.

He alleged that the 1<sup>st</sup> Defendant irregularly, illegally and fraudulently caused the transfer into the 2<sup>nd</sup> Defendant's name and it was vitiated by illegality. He particularized fraud, irregular and illegal dealings by the 1<sup>st</sup> Defendant as transferring the suit property to the 2<sup>nd</sup> Defendant and renumbering without prior notice to the Plaintiff, accepting payments in respect of a plot that had been transferred and renumbered, Failing to inform him of intention to renumber and thereby condemning him unheard, Issuing conflicting transfer forms to the Plaintiff and 2<sup>nd</sup> Defendant without due interests of parties concerned, colluding with the 2<sup>nd</sup> Defendant to issue an irregular notice forbidding the usage of the plot and asserting to be owned by the 2<sup>nd</sup> Defendant while he had been utilizing it, concealing and discreetly failing to inform him of revocation and the Defendants jointly and severally colluding to deny him the utilization and proprietorship rights of the plot without lawful basis.

He further averred that the 1<sup>st</sup> Defendant was obligated to make prior notification to the owners of any intended action against them and also declined to take payments. He alleged that the 2<sup>nd</sup> Defendant defeated the right to property and trespassed into his property without lawful cause when he demolished his fence and gate and denied and his tenant's peaceful occupation.

The suit is contested and the 1<sup>st</sup> Defendant filed a Statement of Defence dated **9<sup>th</sup> April 2015**, and denied the allegations made in the *Plaint*. The 1<sup>st</sup> Defendant reiterated the contents of the notice issued on **22<sup>nd</sup> May 2013**, and averred that its records indicate the 2<sup>nd</sup> Defendants is the legitimate owner of the suit property. It averred that it dealt within the confines of the law.

The 2<sup>nd</sup> Defendant filed his Defence together with a *Counter-claim* dated 20<sup>th</sup> January 2016 and sought for the following orders;

a) *The striking out and/or dismissal of the Plaintiff's suit.*

b) *An order of permanent injunction restraining the Plaintiff by himself, his servants or agents from interfering with the 2<sup>nd</sup> Defendant's quiet possession of Plot No. 29-Kidfarmaco in Kikuyu sub county and an order for the eviction of the Plaintiff and removal of any structures erected by the Plaintiff on the 2<sup>nd</sup> Defendant's Plot No. 29-Kidfarmaco Kikuyu Sub county by a bailiff at the Plaintiff's costs.*

c) *Costs of the suit and Counter-claim.*

d) *Such other or further relief as this Court may deem fit.*

He averred that he bought the suit property from one **John Muchiri Mbiriri** via a *Sale Agreement* dated 6<sup>th</sup> June 2011. Prior to the purchase and after the sale the matter was reported to the Town Council of Kikuyu and approval was given at a Council Meeting on 10<sup>th</sup> May 2012. He averred that he legally acquired the suit property and the Plaintiff has no rights.

In his *Counter-claim*, he averred that the Plaintiff is the one who has unlawfully encroached on his land and interfered with his quiet possession of his land and purported to rename it.

The Plaintiff filed a Reply to the Defendants Defence dated 20<sup>th</sup> May 2015, and reiterated the contents of his Plaint. He further filed a Reply to the 2<sup>nd</sup> Defendant's Defence and Defence to the Counter-claim dated 20<sup>th</sup> January 2016, and denied the averments in the statement of Defence and reiterated the contents of the Plaint and further averred that no encroachment ever occurred and at all instances any utilization or development on the suit plot was based on his ownership. He therefore urged the statement of Defence and Counter-claim be dismissed.

The matter was set down for hearing and the Plaintiff in support of his case called two witnesses and the 2<sup>nd</sup> Defendant on his part called one witness.

#### **PLAINTIFF'S CASE**

**PW1 - Joseph Gatumbi Kariuki**, the Plaintiff herein adopted his witness statement and testified that he purchased the suit property on 9<sup>th</sup> June 1998, being plot No.25A, Kidfarmaco Kikuyu from the registered owner **John Njoroge**, who surrendered the original allotment letter to him and marked it as exhibit 1. He testified that the original allotment letter was surrendered to the County Council of Kikuyu so that a change of ownership can be effected and thereafter the plot was transferred and change of ownership effected to his name on 27<sup>th</sup> September 2012, upon payment of the requisite fee and approval by the Council. He produced the minutes of the meeting as exhibit 2. He then developed it in July 1998, and put up semi-permanent structures that have been occupied and the allegations by the 2<sup>nd</sup> Defendant that he bought the land with vacant possession are untrue and he was not aware of any double allocation.

He further testified that he wanted to further develop the suit land and submitted the drawings from the Architecture for approval by the Public Health office and upon approval, he was unable to construct as someone trespassed and destroyed his wooden fence. He was notified by his tenant that someone was claiming ownership and came to know his name later and who had never had any previous claims against the suit land. He reported the matter to the police.

It was his evidence that in the year 1999, three unsuspecting buyers had come to inspect the suit land as they had been informed that the plot was on sale. He also only learnt of the change of the plot from 25A to 29A from the 2<sup>nd</sup> Defendant's submissions and was not aware of any double allocation. He further testified that over the years, he has been paying rates for Plot No.25A and payment has never been declined.

It was his evidence that he was never informed of any intended revocation or actual revocation or what brought about the revocation and stated that he should have been informed. He further testified that he had filed a previous suit with regards to the suit property but it was struck out as it was filed by an unqualified Advocate. He further testified that he was therefore unable to construct his permanent home and that he has never transacted with the 2<sup>nd</sup> Defendant and urged the Court to allow his claim. He produced the bundle of documents together with the supplementary list of documents as his exhibits. It was his testimony that his Plot is No.25A and not 29 and it has never been annulled. That there were rates payments for both plots and he has never seen a letter of allotment of Plot No.25A to **Booker Kungu**.

On cross examination by the Advocate for the 1<sup>st</sup> Defendant, he testified that before he bought the land he investigated the status and the Green card indicated **Jane Muthoni** sold the land to **John Njoroge** and there is a letter of allotment dated 11<sup>th</sup> March 1997 done by **the Kikuyu County Council**. He stated that the list of document from the Defendant refers to revocation of plot at **Kidfarmaco** and 25A was included and the minutes were signed by the Clerk and on 30<sup>th</sup> August 1999. The minutes were adopted by the full Council and he stated that he did not know about the minutes neither did he follow up with the Council after his purchase.

On Cross examination by the Advocate for the 2<sup>nd</sup> Defendant, he testified that he purchased the Plot in June 1998, but did not sign a sale agreement though he had witnesses. He further testified that he did not transfer the suit land to his name until 2012, as evidenced by the exhibits in his list of documents. That he filed an application for change of ownership dated 9<sup>th</sup> June 1998, which was signed by **John Njoroge** but other people did not sign. It was his testimony that he was not notified of the revocation, but when the revocation was done the transfer to him had not been effected. He further testified that his name appeared in the Green book as he paid all the dues but the receipt is in the name of the seller **John Njoroge** as it had not been changed and therefore that is the name that appeared in the Town Council as the changes were effected in 2004. He testified that he did not file a case to challenge the revocation but the Council approved the transfer to

him.

During re-examination, he stated that the form for change of names was done on **9<sup>th</sup> June 1998**, in his favour and he surrendered the original allotment letter and therefore he did not know why it took long. He gave evidence that in **2012**, arising from the meeting of the Council on **27<sup>th</sup> September 2012**, a transfer form in respect of **Plot No.25A** was signed and the Council has never interfered with him. He further testified that **John Njoroge** did not inform him that his plot had been revoked and he has never come across notice to vacate.

**PW2 - Agnes Mugure** testified that she is a shopkeeper and the Plaintiff is her landlord and she has been a tenant since **2010** and adopted her witness statement dated **21<sup>st</sup> March 2016**. She testified that she did not know the 2<sup>nd</sup> Defendant and only saw him when he told them verbally to move out and removed the fence and erected a new one.

On cross examination by the Advocate for the 2<sup>nd</sup> Defendant, she testified that she has never seen the title document nor conducted a search.

On Cross examination by the Advocate for the 2nd Defendant, she testified that she is a tenant and the Plaintiff is her Landlord and the 2<sup>nd</sup> Defendant only came in **2012** and told them he is the owner.

In re-examination she stated that being a tenant she had no reason to ask for the title deed and the 2<sup>nd</sup> Defendant had never approached them before.

### **The 1<sup>st</sup> Defendants Case**

**Mr. Kariuki** stated that he wished to rely on his statement of Defence and did not call any witness.

### **2<sup>nd</sup> Defendant's Case**

**DW1 - George Mwai Mburu** adopted his witness statement dated **20<sup>th</sup> January 2016**. He testified that he owns **Plot No.29 Kidfarmaco**. It was his evidence that he met the owner **John Muchiri Mbiriri** who had intentions to sell the land to him and the Town Clerk, Kikuyu confirmed to him that he was the owner. He then entered into a sale agreement and approached the Town Council of Kikuyu wherein the transfer was approved and effected.

It was his testimony that the documents that have been produced by the Plaintiff do not refer to **Plot No. 29 but 25A**, but he did not transact on the said **Plot 25A** and further that he was not aware that **Plot No.29** was also referred to as **Plot No.25A**. He further testified that he continues to pay Rates for **Plot No.29** and denied engaging in any irregularity. He further testified that the suit property belongs to him and that the Plaintiff's plot was revoked by the Town Council and there is no evidence of the revocation. He tried to take possession of his property but there were temporary structures and he told the owners to move out and he was given permission to fence it. He was later summoned by the CID. He stated that he had filed a counterclaim and asked for vacant possession from the Plaintiff as he is in the Plot illegally.

On cross examination by Advocate for the Plaintiff, he testified that he owned the plot in **2011**. He did not see that allocation letter to **Mr. John Mbiriri** who he bought the land from and only saw the letter from Kikuyu County Council. He further stated that he did not attend the meetings of the Kikuyu Town Council and therefore did not know the reason for the revocation. It was his evidence that there was a transfer from **Booker Kungu** to **John Muchiri Mbiriri**, and the acceptance by **Muchiri** was on **5<sup>th</sup> September 2011** a few days before he purchased the plot. He is not aware how **Muchiri** acquired the Plot from **Mr. Booker** and that when he bought the suit plot he was taken there by the Town Council Engineer and there were occupants and that he went alone to the plot in **2010** before he purchased it. He further testified that he has been paying rates in the name of **Booker Kungu** and the map of the area makes no reference to **Plot 25A**. He further testified that he tried to occupy the land in **2010** but fenced it in **2014**, but the Plaintiff obtained an injunction. He stated that **Plot 25A** was revoked in **1999** and the town council confirmed that he is the owner of the suit property and that the tenants are encroaching on his land.

On further cross examination by the Advocate of the 1<sup>st</sup> Defendant, he testified that he did his due diligence and he got information from the council and it was confirmed that he owned the plot.

During re-examination he stated that the receipt of **Kenya Shillings Twelve thousand Shillings (Kshs.12,000)** was payment of **10 years** but it does not talk of 10 years nor state the period. He further testified that the receipt was in the name of **Booker Kungu** and the arrears had to be cleared but it did not affect the fact that he had bought the plot.

On the **4<sup>th</sup> July 2018**, the Court directed parties to file written submissions and in compliance parties filed their submissions which the Court has now carefully read and considered.

The issues for determination in this matter are;

- a) **Whether Plot No. 25A and 29 are the same.**
- b) **Whether the 1<sup>st</sup> Defendant followed due process in revoking the latter of allotment granted to the Plaintiff.**
- c) **Whether the 2<sup>nd</sup> Defendant's Title can be cancelled.**

**d) Is the Plaintiff entitled to the prayers sought?**

The gist of the matter before me is that both the Plaintiff and the 2<sup>nd</sup> Defendant lay claim to the suit land. At the moment the 2<sup>nd</sup> defendant is the proprietor of the suit land while the Plaintiff is in possession. The Plaintiff claims to have bought the land from **John Njoroge** who had his letter of allotment and who had in turn bought it from **Jane Muthoni**. The 2<sup>nd</sup> Defendant on the other hand claims to have bought the suit land from **John Muchiri Mbiriri** and thus asserts good title to the suit.

The Plaintiff's claim to the suit land emanates from a letter of allotment given to **John Njoroge**, and when the suit land was sold to him he in turn acquired interests to the said letter of allotment and claimed to have returned the original letter of allotment to the Council for purposes of change of ownership and cancellation but produced a copy in Court. It is dated **11<sup>th</sup> March 1997**, and though the letter of allotment does not confer any property rights, unless there is acceptance and offer in terms of complying with the conditions, no evidence has been provided before this Court that the Plaintiff failed to comply with any of the conditions set out in the letter of allotment.

The 1<sup>st</sup> Defendant in a meeting resolved to revoke the title of various plots and amongst them was the suit property which according to the Repling Affidavit of one of the 1<sup>st</sup> Defendants officers **Stephen Nthenya Mwangi** tendered as evidence by the Plaintiff, indicates that that **Plot No. 25A** was revoked and was then renumbered to **Plot 29A**. Although the 2<sup>nd</sup> Defendant has denied that the Plot was renumbered and tried to argue that **Plot 29** and **Plot 25A** are different plots, the court is persuaded that the two are one and the same.

The evidence before Court is overwhelming that the **Plot 25A** and **29** is the same plot and indeed there is no evidence before the court that these are two different plots. The Defendants did not bring any witness to give evidence to state that these are different plots and do not refer to the same plot. It is the same land that is in issue in this case.

This Court has absolutely no doubt that this plot was allotted to **John Njoroge**, who in turn sold it to the Plaintiff. The Plaintiff continued to pay rent and rates to the County Council of Kikuyu. The **Kikuyu County Council** purported to revoke the allotment of the suit property being **25A**. The right to allocate property was protected under **Section 75** of the **former Constitution. Article 40** of the **Constitution** provides for the right to own property and **Article 47** of the **Constitution** provides for fair administrative action. A proprietor of land is entitled to be heard before action is taken to deprive him of the property a right that has been underpinned by the current constitution. There is no evidence that the 1st Defendant ever informed the **Plaintiff** or **John Njoroge** who was the allottee of the suit property of their intention to revoke the suit property or even give them a chance to be heard before purporting to revoke the land and thereby violating the rules of natural Justice. See the case of **Kuria Greens Limited....Vs... Registrar of Titles and Commissioner of Lands Nairobi.....**

**“Even if land had been unlawfully acquired, the state could not revoke the registered owners title without following due process and doing so was a violation of his rights.”**

The 1<sup>st</sup> Defendant in the minutes provided as evidence in Court, resolved that the occupants of the Plots of land should be served with a 14 days Notice to vacate. There is no evidence that the occupants were served with such a notice nor is there evidence that the co-owners of the plots were afforded a hearing before revocation of their allotments. Even though the Plaintiff may have not been the registered owner of the property, he appeared to have had certain interests in the property and which interest cannot be taken away anyhowly. The decision to revoke the title was taken in a blatant disregard of the rules of natural justice and the decision was therefore irregular and unprocedural and consequently the revocation was null and void. The revocation being null and void and the same having not been communicated to the Plaintiff, the Court finds that there was no way that the Plaintiff could have been able to challenge that which he knew nothing above.

Further, the Court finds and holds that the actions of the 1<sup>st</sup> Defendant was suspect. The 1<sup>st</sup> Defendant in the minutes produced by both the Plaintiff and the 2<sup>nd</sup> Defendant appears to have been signed by the same Clerk a **Mr. Wanyoike**, and who should have known about the revocation. As to how and why a Council would revoke a title and continue to accept payments for it and even go ahead and approve a transfer and building plans for the same still baffles this court. At what point was the Plaintiff supposed to be aware of the revocation. The 1<sup>st</sup> Defendant failed to call any witness and produce any evidence as to how and why they revoked the title and the process that they undertook in changing the name of the plot or renumbering the plot and therefore leaving the Court with very little to work with.

The 2<sup>nd</sup> Defendant has produced a map indicating the Survey Plan. The Court dare says that he is not an expert in this field and therefore his production of the map could if any be of very little important to his case.

In the case of **Mbau Saw Mills Ltd versus Attorney General (2014) eklr** the Court held that:-

**“Moreover that any purported transfer whether or not approved by a committee of the Karatina Council is void ab initio. No transferable interest in the property as the transfer was null and void.”**

The Court therefore finds that since the revocation of the suit property was irregular hence being *void ab initio*, the interest of the suit land still laid with the Plaintiff and could not be transferred to **Booker Kungu** and thereby the 2<sup>nd</sup> Defendant.

From the evidence produced in Court by the 2<sup>nd</sup> Defendant, **Mr. Booker Kungu** was succeeded as proprietor by **John Mbiriri** when he transferred the Plot to him and thereafter the suit land was transferred to the 2<sup>nd</sup> Defendant. No documentation nor process that resulted to the renumbering and further allotment of the suit property to the said **Booker Kungu** has been provided. The entry of **Booker Kungu** as proprietor was either fraudulent, erroneous or illegal. It is indeed telling that neither **Booker Kungu** nor **John Mbiriri** ever took steps to take possession of the suit property which all along was in the possession of the Plaintiff until the 2<sup>nd</sup> Defendant decided to evict the Plaintiff's tenants without prior notice. The Plaintiff produced as evidence building plans which were approved by the 1<sup>st</sup> Defendant and which indicates that he was the one in possession. Further the evidence by **PW2** has not been controverted and therefore there is no reason why the

Court should not believe that the Plaintiff has been in possession of the suit property.

**Section 26(1)** of the **Land Registration Act** does provide that certificate of title is to be taken as *prima-facie* evidence of proprietorship but that such title is subject to challenge if the same was acquired through **fraud**, or **misrepresentation**, or where the certificate of title has been acquired **illegally, unprocedurally** or through a **corrupt scheme**.

In the case of **Nancy Wanjiru Kunyihia...Vs...Samuel Njoroge Kamau (2018) eKLR**, the Court stated that:-

***“In my view when title is being attacked under subsection 26(1) (b) it is not necessary to be proved that the title holder is a party to the vitiating factors mentioned therein. In the circumstances of this case, it is apparent to me, that the title herein was acquired illegally, unprocedurally or through a corrupt scheme....”***

***“As I said title herein is liable to be cancelled following the provisions of Section 26(1) (b) of the Land Registration Act and it is not necessary to prove fraud on the part of the proprietor. The title of the defendant, as I have explained was not legally acquired”.***

The Court therefore finds that the title held by the 2<sup>nd</sup> Defendant is not a good title and therefore has no option but to cancel it and allows the Plaintiff’s claim, **Section 80(1)** of the **Land Registration Act** grants the court power to cancel a title acquired unprocedurally. The said Section states as follows:-

***(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

Having allowed the Plaintiff’s claim, the Court proceeds to dismiss the 2<sup>nd</sup> Defendant’s Counter-claim.

The Plaintiff also sought for damages for trespass. The 2<sup>nd</sup> Defendant did not actually deny any destruction caused. In tort damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful action on the part of the Defendant. The Court finds that the 2<sup>nd</sup> Defendant did actually trespass on the suit property. However the cost of the fence damaged and other incidental costs have not been provided before Court.

In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, the Court held as follows:

***“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less .....”***

***The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”***

Having not provided the value of the fence or of the land before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.100,000/=** as general damages for trespass.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds 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 Defendants jointly and severally in terms of prayers No.(a) and (b).** In regard to **prayer No.(b), general damages** is in the tune of **Kshs.100,000/=**.

**The Plaintiff is also entitled to cost of this suit and interest thereon from the time of filing of this suit to date of this Judgment.**

However, the Court finds that the 2<sup>nd</sup> Defendant has not proved his **Counter-claim** against the Plaintiff on the required standard of balance of probabilities. Consequently, the said **Counter-claim is dismissed entirely with costs to the Plaintiff herein.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 25<sup>th</sup> day of March 2019.**

**L. GACHERU**

**JUDGE**

**25/3/2019**

In the presence of

Mr. Kithiri holding brief for Mr. Wokabi Mathenge for Plaintiff

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Lucy - Court clerk

**Court** – Judgment read in open court.

**L. GACHERU**

**JUDGE**

**25/3/2019**