



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 129 OF 2017

(FORMERLY MACHAKOS ELC NO. 377 OF 2011)

KITTS INVESTMENT LIMITED.....PLAINTIFF

VERSUS

DAVID KIMITI.....1ST DEFENDANT

MR. MWACHALE.....2ND DEFENDANT

MRS. GLORIA.....3RD DEFENDANT

MR.CHARLES.....4TH DEFENDANT

MRS. AWORA.....5TH DEFENDANT

MRS. CECILIA.....6TH DEFENDANT

MR. MOSES SANGANGI.....7TH DEFENDANT

EVERLYNE ALUSHA.....8TH DEFENDANT

COUNTY COUNCIL OF OL-KEJUADO.....9TH DEFENDANT

JUDGEMENT

By a Plaintiff dated the 16th December, 2011, the Plaintiff prays for judgement against the Defendants in the following terms:

- a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the premises known as L. R. No. 19163 NoonKopir Township (formerly industrial plot no. 115)
- b) An order of injunction restraining the defendants either by themselves, their employees, servants and/or agents from trespassing on, continuing being in occupation, purporting to sell, erecting structures and/or in any other manner interfering with the Plaintiff's quiet possession of L. R. No. 19163 NoonKopir Township (Formerly Industrial plot no. 115).
- c) Costs of the suit
- d) General damages for trespass
- e) Further or other relief as may be just and expedient in the circumstances of the case.

The 1st Defendant filed a Defence where he denied the allegations in the Plaintiff except for the descriptive and the court's jurisdiction. He contended that it was lawfully allotted the suit land by the 9th Defendant. He averred that he did not cause any fraudulent subdivision to the suit land but undertook one that was duly authorized by the 9th Defendant. He denied the particulars of fraud and trespassing on the suit land. He confirmed selling the suit land to the 2nd to 8th Defendants. He claimed the Plaintiff is using the Provincial Administration to harass them and is not entitled to damages. He insisted the Plaintiff ought to be compensated by the 9th Defendant.

The 2nd to 8th Defendants filed their joint Defence with the 2nd to 6th Defendants claiming they have been wrongly sued. The 2nd to 8th Defendants claimed they legally purchased the suit land from the 1st Defendant after he had undertaken subdivision and their letters of allotment were legally transferred to them by the 9th Defendant. They denied trespassing on the suit land including causing fraudulent subdivisions. They claimed the Plaintiff is using the Provincial Administration to harass them and is not entitled to damages sought. They insist the Plaintiff ought to be compensated by the 9th Defendant.

The 9th Defendant filed its Defence dated the 13th June, 2012. It denied the allegations in the Plaintiff's Complaint except for the descriptive and the court's jurisdiction. It averred that it had never issued any other letters of allotment in respect of the suit land to anyone except SAMCON Enterprises Limited.

This matter proceeded for hearing *ex parte* where only the Plaintiff's witness testified as the Defendants' Counsel though duly served failed to attend court.

The Plaintiff thereafter filed its submissions but the Defendants never filed theirs.

Evidence of the Plaintiff

It was the Plaintiff's testimony through PW1 one Austin Salmon Kitololo that the Plaintiff company acquired the suit premises from SAMCON Enterprises Ltd having purchased the same, with a transfer being effected to it on 9th August 1994. PW1 produced the Certificate of Title in the Plaintiff's name; transfer documents prepared by the County Council of Ol Kejuado, including a letter of allotment issued to SALMON Enterprises Ltd. PW1 contended that the 9th Defendant purported to issue fresh letters of allotment to the 1st Defendant and allocated the plot new numbers to wit: 195A and 195B respectively. Further, the 1st Defendant fraudulently sold the subdivided portions to the 2nd to 8th Defendants. It was PW1's testimony that the Defendants' conspired to unlawfully dispossess it of the suit land. Further, they have trespassed on the suit land and interfered with the Plaintiff's enjoyment of the same. PW1 sought for various orders against the Defendants as itemized in the Plaintiff's Complaint.

The Plaintiff thereafter closed its case and filed submissions.

Analysis and Determination

Upon perusal of the materials presented in respect of the suit herein, the following are the issues for determination:

- Whether the Plaintiff is the registered proprietor of LR No. 19163 Noonkopir Township (Formerly Industrial Plot No. 115).
- Whether the Defendants have trespassed on the suit land and should be permanently restrained from doing so?
- Whether the Plaintiff is entitled to damages against the Defendants.
- Who should bear the costs of the suit.

As to whether the Plaintiff is the registered proprietor of LR No. 19163, Noonkopir Township (Formerly Industrial Plot No. 115).

It was the Plaintiff's contention through PW1 that it bought the suit land from SAMCOM ENTERPRISES LTD and was issued with a Certificate of Title to that effect. The Plaintiff submitted that it had demonstrated being the registered owner of the suit land having acquired the Certificate of title legally and it is hence an absolute and indefeasible titleholder. The Plaintiff relied on various provisions of the law including Section 23(1) of the Registration of Titles Act (now repealed) and Section 26(1) of the Land Registration Act and Section 20 and Section 22(2) of the Registration of Titles Act to support its arguments. It submitted that it was still in possession of the original certificate of title and thus any transfer that was done without compliance with Section 22(2) of the Registration of Titles Act, was void and had no effect. Further, that the 1st Defendant could not have acquired any title to the suit land unless through collusion and fraud to enable him subdivide the plots and proceed to sell to the 2nd to 8th defendants herein. The Plaintiff relied on the case of **Alice Chemutai Too vs. Nickson Kipkirui Korir & 2 Others [2015] eKLR** to buttress its arguments.

It was PW1's testimony that there were illegal structures on the suit land despite a court order issued on 14th December 2012. Further, that the said structures were built without its consent or authority thus denying it the right of exclusive possession and occupation of the suit land. It is in that regard that it sought for damages against the Defendants. To support the claim on trespass it relied on the cases of **Park towers Ltd. vs. John Mithamo Njika & 7 Others [2014] eKLR** and **Duncan Nderitu Ndegwa vs. KP & LC LTD & Anther [2013] eKLR**.

PW1 also produced documentation showing how it had acquired the land from SAMCON Enterprises Ltd that had been the original allottee of the suit land. This fact is corroborated by the 9th Defendant that had stated in its Defence that it only allocated SAMCON Enterprises Ltd the suit land and no one else. I note in this suit, the evidence of the Plaintiff is not controverted and further, SAMCON Enterprises Ltd has not come forward to change the title.

PW1 produced various documents including a Certificate of Title, which was issued by the Land Registrar to confirm the Plaintiff owns the suit land. Vide a letter dated the 14th March, 2011 from the Chief Land Registrar to the District Land Registrar, it confirmed that the suit land was initially allocated to SAMCON ENTERPRISES LIMITED and later transferred to the Plaintiff on 9th August, 1994. The 1st Defendant insisted that he was allotted the suit land which he subdivided and sold to the 2nd to 8th Defendants who all insist they have letters of Allotment in respect of their plots. None of the Defendants demonstrated that the Plaintiff had acquired the title fraudulently.

Section 26(1) of the Land Registration Act provides as follows:

‘(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ‘

In the **Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

Further, in the case **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** Kimondo J held that:

“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”

In the circumstances and based on the facts as presented, and in relying on the authorities as well as legal provisions cited above, I hold that the Plaintiff is the registered owner of the suit property and the 2nd to 8th Defendants’ alleged Letters of Allotment cannot supersede it. Since the Defendants failed to attend court and controvert the plaintiff’s evidence, and in relying on section 25(I) of Land of Land Registration Act, I find that the Certificate of Title held by the Plaintiff is prima facie evidence that it is the proprietor of the suit land and is hence entitled to legal protection.

As to whether the Defendants have trespassed on the suit land and should be permanently restrained from doing so.

It was PW1’s evidence that the 2nd to 8th Defendants had trespassed on the Plaintiff’s land and put up structures thereon. Since I have already held that the Plaintiff is the registered proprietor of the suit land, I opine that the 2nd to 8th Defendants’ presence thereon is an illegality. From PW1’s uncontroverted evidence, I find that the 2nd to 8th Defendants have indeed trespassed on the Plaintiff’s land. In the circumstances, I hold that the Defendants should hence be permanently restrained from interfering with the Plaintiff’s peaceful possession and occupation of the suit land.

As to whether the Plaintiff is entitled to damages against the Defendants. It was PW1’s testimony that they were unable to utilize the suit land due to the Defendants acts of trespass. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR P. Nyamweya J.** held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

Insofar as the Plaintiff failed to adduce evidence in respect of the damages it had suffered as a result of the 2nd to 8th Defendants’ acts of trespass, but in being persuaded on the above cited judicial authority, I find the Plaintiff indeed suffered damages as a result of the Defendant’s acts of trespass. I note since 1994, the plaintiff having been transferred to, the suit land by Samcon Enterprises Limited, has been denied its usage. In the circumstance I will proceed and award it Kshs. 1, 000,000 as general damages.

Who should bear the costs of the suit.

Costs generally follow the cause and since the Plaintiff has been inconvenienced with the Defendants’ acts, I will award it the costs of the suit.

In the circumstances, I find that the Plaintiff has proved its case on a balance of probability and proceed to enter judgment in its favour and make the following final orders:-

(a) That judgement is hereby entered for the plaintiff against the defendants in the sum of Kshs. 1,000,000/= as general damages for trespass;

(b) That a declaration be and is hereby issued, that as against the defendants, the plaintiff is the absolute proprietor of land parcel number as L. R. No. 19163 NoonKopir Township (formerly industrial plot no. 115)

(c) The Defendants either by themselves, their employees, servants and/or agents are hereby permanently restrained from trespassing on, continuing being in occupation, purporting to sell, erecting structures and/or in any other manner interfering with the Plaintiff's quiet possession of L. R. No. 19163 NoonKopir Township (Formerly Industrial plot no. 115).

(d) The Costs of the suit are awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 16th day of May, 2019

CHRISTINE OCHIENG

JUDGE