



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT THIKA

E.L.C SUIT NO. 202 OF 2017

(FORMERLY NAIROBI MILIMANI ELC NO. 655 OF 2011)

DAVID KIRUTHI KAMOCHE.....PLAINTIFF

-VS-

THE COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

SONA PROPERTIES LIMITED.....4TH DEFENDANT

JUDGMENT

1. The initial plaint was filed on 21.11. 2011 against the Municipal council of Ruiru, the Chief Land Registrar and the Attorney General. The plaint was severally amended culminating in the final amendment on 18.10.2018, whereby the 1st defendant was replaced with the County Government of Kiambu, while a fourth defendant, Sona Properties limited were added in the suit.

2. The background of the dispute is that plaintiff had bought land parcel no. Ruiru Town/496 sometime on 21.4.2010 from Sona properties limited. In 2011, plaintiff embarked on developing the land after getting all the requisite approvals. However, on 18.11.2011, he received a notice from the municipal council of Ruiru instructing him to stop the developments otherwise he would be arraigned in court.

3. The notice is what triggered the filing of this suit where the plaintiff is seeking for the following reliefs;

- a. A declaration that the plaintiff is the legal owner of the suit property being a purchaser for value without notice.**
- b. An order restraining the 1st, 2nd, 3rd and the 4th defendants together with their agents, employees and/or servants from interfering with the plaintiff's occupation and developments on the suit property.**
- c. An award for payment by the 1st defendant for the loss of rental income at the rate of Kshs 109,000/= per month from June 2012 until the lifting of the notices issued by the 1st defendant to stop further development and demolish the developments on the suit property.**
- d. An award of general damages against the 4th defendant for trespass on the suit property.**
- e. Costs of the suit together with interest thereon at court rates from the date of filling this suit until payment in full.**

4. The 1st defendant filed its Amended Statement of Defence on 6th December 2016, denying the plaintiff's claim and contended that the suit property was public land reserved for construction of a septic tank and sewer which was under its control as a public utility property for the benefit of members of the public.

5. The 2nd and 3rd defendants (The Attorney General) did not file any documents, neither did they participate in the trial. The 4th defendant filed a memorandum of appearance on 14.8.2017 through Messrs. Simiyu Opondo Kiranda advocates, but no further documents were filed. This defendant too did not participate in the trial.

6. **PW1, David Kiruthi Kamoche** testified and he adopted his statement recorded on 21.11.2011 as his evidence. He also produced as his exhibits, the documents in his list filed on 3.6.2016 from page 3 to 61 as Exhibit one. The documents are in a paginated bundle. It was his evidence that he is the owner of the suit property, having bought the same from Sona properties Limited (the 4th defendant herein) and that he paid Kshs 2,000,000/= for the same pursuant to an agreement of 21.4.2010. It was his further evidence that upon purchase, he started to develop the property, whereby he wanted to construct 3 floors. He had obtained development plans as well as all the necessary approvals and payments including an Environmental Impact Assessment report from NEMA.

7. He further testified that on 13th November 2011, he got an enforcement legal notice from the 1st defendant requiring him to demolish the building which he was told was a nuisance.

8. PW1 engaged the services of a valuer who testified as **PW2**. He is one **Cyrus Kariuki Kanyi**, a licensed valuer who stated that he had inspected the suit property and he produced a report to that effect as plaintiff exhibit 3. He gave advise on the current market value and the loss of income in respect of the suit property.

9. Pw2's further evidence is that construction on the suit land started in the year 2012 and completion thereof was projected to take 2 years. Since construction was stopped, the total loss due to the stoppage was Kshs 6,322,000/= and that in his view the stoppage of the development was not legal as there was a title issued by the land registrar. He averred that the sewer line was nowhere near the suit property.

10. The 1st defendant's case was advanced by **DW1, James Njuguna** who is an administrative officer with the 1st defendant. He adopted as evidence the witness statement filed by Lesley Khayadi dated 9.3.2012 who by then was a clerk with the 1st defendant and who had since left employment. In that statement, it is contended that the suit land had been reserved for public use for construction of septic tanks and sewer which was controlled by the then Municipal Council of Ruiru. It was further contended that the title produced by the plaintiff was procured in a fraudulent manner.

11. It was submitted for the plaintiff that the 1st defendant's enforcement notice dated 18th November 2011 was illegal, arbitrary, irrational, null and void for all intents and purposes for the reasons inter alia that the Government of Kenya duly issued a Certificate of Lease to the suit property on 16th February 1996, for a tenure of 99 years from 1st January 1995, that the 1st defendant had been levying rates against the same which rates were duly received by the 1st defendant, that the 1st defendant approved the developments thereon and that the plaintiff was an innocent purchaser for value without notice of any impropriety on the land register. It was further submitted that prior to the plaintiff's purchase of the suit property from the 4th defendant, he carried out an official search and confirmed that the title to the land was validly issued by the Chief Land Registrar.

12. Plaintiff avers that he bought the land for valuable consideration and is therefore entitled to protection. He relied on the provisions of Section 27 of the Registered Land Act CAP 300 of the Laws of Kenya (repealed), which is replicated in section 24 (b) of the Land Registration Act. 2012 No. 3 of 2012.

13. On proof of actual loss, it was contended that arising from the 1st defendant's illegal interference with the plaintiff's quiet possession and enjoyment over the suit property, the proposed development stalled in the year 2011 and consequently, the plaintiff had incurred loss of rental income which he would be deriving from the proposed development.

14. In his submissions, plaintiff has tabulated the loss in paragraph 22 of his submissions where it is stated as follows;

“The approved development was for a three (3) storeyed multi-user building comprising of a shop and two one bedroom apartments on the ground floor and four (4) one bedroom apartments on each of the three (3) other floors. The approved development is at pages 33 to 38 of the plaintiff's exhibit 1”.

15. On the other hand it was submitted for the 1st defendant that this court lacked jurisdiction to entertain this matter since the same was in contravention of section 38 (4) of the Physical Planning Act (CAP 286 of the Laws of Kenya) and that the provisions of the said Section were very clear since the same provided where an enforcement notice was issued, then a person had to appeal to the liaison committee under Section 13 and that nothing had been placed before the court to show that the provisions of section 38 (supra) had been followed.

16. It was further submitted that there were glaring contradictions in the documents filed in court by the plaintiff in that the Certificate of Lease quotes the suit property to be Ruiru Town/496, the receipt dated 14th September 2010 indicated Plot No. 496 Ruiru Township whereas the receipt dated 28th October 2010 quotes the title as Ruiru Township/496 and that it was not possible to tell whether this was one and the same property. It was further submitted that the building plans produced before court were not fully approved and that the suit land was part of land reserved for public use.

Determination

17. I have carefully considered the pleadings, the evidence adduced by the parties and the rival submissions thereof. The plaintiff's case was that he was the owner of the suit property having bought the same from Sona properties Limited (the 4th defendant herein) and that he paid Kshs. 2,000,000/= for the same. It was his further evidence that he had commenced development of the property, whereby he was to construct a building with 3 floors. That he had obtained development plans as well as all the necessary approvals including an Environmental Impact Assessment report from NEMA. On 13th November 2011, he did get an enforcement legal notice requiring him to demolish his building. Plaintiff's evidence was not shaken throughout the trial.

18. DW1 on the other hand contended that the suit land was part of land reserved for public use namely construction of septic tanks and

sewers controlled by the 1st defendant as public utility for the benefit of the members of the public and that in view of this fact the title produced by the plaintiff was procured in a fraudulent manner. However DW1 did not adduce any evidence to support allegations of fraud, and neither were such allegations pleaded. In cross examination DW1 stated inter alia that he was not aware of any measures initiated by the 1st defendant to surrender the title. He further stated that he did not know how the 4th defendant acquired the suit property and that he had never visited the same. He further admitted that indeed the plaintiff had got the necessary approvals from the 1st defendant and NEMA but he however insisted that the suit property was public property.

19. From the evidence tendered in court, it is evident that indeed the plaintiff bought the suit property from the 4th defendant and commenced construction thereof. It is also not in dispute that he got the necessary approvals and payments from the 1st defendant and NEMA but later on got an enforcement notice dated 18th November 2011 from the 1st defendant requiring him to stop further developments and further demolish all the developments on the suit property within 3 days.

20. As I alluded to earlier, the 1st defendant did not refute that they issued the necessary approvals to the plaintiff to commence development on the suit property. Similarly there was evidence that they had received payments for the same. They however insisted that the suit property was public land. One therefore wonders how 1st defendant issued the approvals to the plaintiff if indeed the suit property was public property. Even if this was a case where 1st defendant came to discover that the suit was public land after the issuance of such approvals, still the 1st defendant was duty bound to adduce evidence to support such conclusions.

21. The conduct of 1st defendant certainly smacks of impunity. Their own witness stated in court that he did not know how the 4th defendant acquired the suit property. Similarly the allegations that the title produced by the plaintiff was procured in a fraudulent manner were not supported by any evidence.

22. The 1st defendant appear to have relied on what Dw1 calls the fact finding mission report which is dated 17.5.2011. The team in the fact finding mission is the one which came up with the notion of the suit land being public land. If that was the case, and 1st defendant believed in such findings, then the logical trend to have been undertaken was to pursue the cancellation of the title. However, even up to the time the court was hearing the matter, DW1 was not aware of any steps under taken by the 1st defendant to rectify the situation. Even in the latest Amended statement of defence (filed on 6.12.2018), the 1st defendant was not seeking for the cancellation of the title. It is rather surprising that the witness for defendant can claim that the suit land is public land when even a simple task like that of knowing the scene has not been undertaken by him.

23. In the case of *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996(UR)* the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.

24. Likewise in *Rosemary Wanjiku Murithi v George Maina Ndinwa NYR Civil Appeal No. 9 of 2014 [2014] eKLR*, the Court of Appeal held that;

“Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud”.

25. The certificate of lease was issued to Sona properties limited in 1996. That title is prima facie evidence that the holder there of is the absolute proprietor of the land. In the present case, Sona properties had passed on their lease hold interest to the plaintiff via a sale agreement but completion of the transfer was allegedly frustrated by the first defendant who had declined to issue a clearance certificate.

26. I have also analyzed the issue raised by the 1st defendant, that this court lacked jurisdiction to entertain this matter, since the plaintiff did not follow procedure on how to challenge an enforcement notice issued by a Local Authority pursuant to section 38 (4) of the Physical Planning Act CAP 286 of the laws of Kenya. A careful perusal of the plaintiff's pleadings reveal that he is not only challenging the said notice, but he is also seeking inter alia a declaration that he is the legal owner of the suit property for value without notice and he also desires to be compensated for loss of income. Likewise, 1st defendant's pleading is that the suit land is public land, reserved for public utilities. Thus the parties wanted the court to determine the issue of ownership. The provisions of Section 38 (4) of CAP 286 of the Laws of Kenya are therefore not applicable in the present case.

27. With regard to the contention by the 1st defendant that there were glaring contradictions in the documents filed by the plaintiff in that the same referred to the suit property as Title Number Ruiru Town/496 while others referred to the same as Plot No. 496 Ruiru Township, it is my considered opinion that these contradictions were not material and did not go to the root of the matter since the suit property was sufficiently and adequately described by the plaintiff and there was no evidence whatsoever that he was referring to another parcel of land other than the suit property. Consequently nothing turns on this point.

28. With regard to the loss of income, PW2 Cyrus Kariuki Kanyi a licensed valuer filed his report which indicates that the proposed development was to take six months to complete and would have been completed by May 2012 with an expected monthly rent/ income of Kshs 11,000/= for the shop and Kshs 7,000/= for each of the residential units commencing 1st June, 2012 translating to a monthly expected income of Kshs.109,000/=. The total loss computed up to November 2018 is Kshs.6,370,000.

29. I have no doubts that plaintiff had a legitimate expectation to earn a tidy sum from his project. This loss has been captured in point d) of

plaintiff's amended plaint of 24.10.2018. I am however not in agreement with the assessment of loss contained in the report of Pw 2. Firstly, the loss has been calculated from 1.6.2012, yet in his evidence, Pw2 stated that **"I was to advise on the current market value and loss of income from 2014 to date. 2012 is when he started constructing, but it would have taken 2 years to complete a 3 storey building in 2014"**. It is also sheer logic that such a project, unless it is a substandard project, cannot surely be completed within 6 months!

30. The second issue I have with the figures is with regard to the size of the land vis a vis the type of development that was to be put up. The title of the suit land is 0.0242 hectares which amounts to 0.0598 acres (1 hectare is 2.471 acres). These measurements are in tandem with pw2's contention that the land is 1/16 of an acre (half of an eighth of an acre). I am struggling to figure out the size of a one bed roomed apartment whereby, four of such units will fit in one floor! The plaintiff or his witness (PW 2) could have at least given a breakdown of these measurements in simple terms for the court to appreciate the figures.

31. I have also taken into account the adversaries of the elements, that there is no guarantee that tenants would always be available, or that they would pay up. Giving allowance for all these uncertainties, I am inclined to give a round figure of three units instead of four in each floor including the ground floor, thus having 12 units in total. 12 units times shs.7,000 per month would give a sum of sh. 84,000, hence shs.1,008,000 per year. Calculating this loss from year 2014 to 2018, then it would amount to sh. 1 008 000 for five years which gives a figure of shs.5,040 000.

32. With regard to the award of general damages against the 4th defendant for trespass, save for the plaintiff contending that he had bought the suit property from the 4th defendant, he did not state how the 4th defendant had trespassed on the suit property. The claim must fail.

33. Taking into totality all the circumstances in this case, I am satisfied that the plaintiff has been able to prove his case as against the 1st defendant on a balance of probability. Accordingly, judgment is hereby entered for the plaintiff as against the 1st defendant in the following terms;

- 1) A declaration is hereby issued that the plaintiff is the legal owner of land parcel No. Ruiru Town/496.**
- 2) The 1st and 2nd defendants are hereby directed to facilitate the registration of the suit land into plaintiffs name forth with.**
- 3) The notice issued by the 1st defendant on 18.11.2011 is hereby declared as null and void.**
- 4) An order is hereby issued restraining the 1st, 2nd, 3rd and 4th defendants together with their agents, employees and or servants from interfering with the plaintiff's occupation and developments on the suit property no RUIRU TOWN/496.**
- 5) The plaintiff is awarded damages for loss of income to be paid by 1st defendant calculated at the sum of Kshs.84,000 per month from January 2014 until the date of delivery of this judgment which amounts to Shs.5,460,000.**
- 6) The plaintiff is awarded the costs of this suit together with interest thereon, at court's rates to be paid by 1st defendant.**

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

Mr. Muturi H/B for Mr. Kihika for Plaintiff

M/s Vundi H/B for Mr. Manyara for 1st Defendant

Miss Ndundu for Attorney General.