



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 261 OF 2017

DAVID MWANGI TATEL.....1ST PLAINTIFF

MARGARET NJERI WANJIKU.....2ND PLAINTIFF

VS

ABIGAEL WANJIRU TATEL.....1ST DEFENDANT

JOSEPH KIMANI TATEL.....2ND DEFENDANT

ANTHONY NJOGU TATEL.....3RD DEFENDANT

MBUGUA TATEL.....4TH DEFENDANT

ALICE MUTHONI MBUGUA.....5TH DEFENDANT

AND

JANE WAMBUI MUNGAI.....INTERESTED PARTY

PHILIP SALIM MUTUMA MBAYA.....INTERESTED PARTY

JUDGMENT

1. The Plaintiffs filed this suit on the 11/11/2015 against the Defendants seeking orders for eviction and damages for trespass *inter-alia*. The Plaintiff's case is that they are the registered owners of LOC 7/GAKAIGO/715 (the suit land) and the Defendants have trespassed onto the suit land. That the actions of the Defendants have caused and continue to cause loss and particulars of loss have been itemized under para 5 of the plaint, which loss includes *inter-alia*, loss of enjoyment and use of the land and waste of the suit land. They contend that as a result of the actions of the Defendants aforesaid, their land is losing its commercial appeal.
2. On the 28/10/16, the Court in its ruling issued a temporary injunction restraining the Defendants from committing any acts of waste or in any other way interfering with the Plaintiffs' possession and use of the suit land pending the hearing and determination of the suit.
3. The Plaintiffs disposed the land to the Interested Parties by way of sale in March 2017 and the suit land became registered in the names of Jane Wambui Mungai and Philip Salim Mutuma Mbaya on the 15/3/17. The Interested Parties proceeded to subdivide the suit land into 6 plots (parcel No.s 5125-5130) as shown in the mutation form on record.
4. On realizing the above change of status of the suit land, the Defendants sought joinder of the new owners and the Court in its ruling dated the 15/2/18 granted the orders *inter-alia* and to preserve the suit land, enjoined the new owners from disposing the suit land until the hearing and determination of the suit or such other orders of the Court.
5. The Defendants denied the Plaintiffs claim vide their amended defence and Counterclaim filed on the 13/3/18. They contend that the Plaintiffs obtained an invalid title as it was issued without the 1st Defendant who they claim to be the administrator of the estate of Johana Tatei, signing the transmission forms. They claim that they are entitled to the suit land as the wife and children of the said deceased. By way of Counterclaim, the Defendants averred that the Plaintiffs and the sale, transfer, unprocedurally acquired the suit land and subdivision of the same to the Interested Parties was irregular as the Plaintiffs lacked a good title to pass to the interested parties.
6. In the Counterclaim, the Defendants sought the following orders;

- a. A declaration the Defendants are the legal owners of the original land parcel No LOC7/GAKOIGO/715 and the resultant subdivisions thereof as the same belongs to the estate of their father Johana Tatei.
- b. The sale, subdivision and transfer of the original land Parcel No LOC7/GAKOIGO/715 be declared null and void and the title deeds for the resultant subdivisions into Land Reference Numbers LOC7/GAKOIGO/5125-5130 should be cancelled and the same to be reinstated to its original parcel number LOC7/GAKOIGO/715 and the register to be rectified so that the name of Johana Tatei can be reinstated as the proprietor thereof.
- c. A permanent injunction to restrain the Plaintiffs, the Interested Parties, their agents, servants or anybody claiming interest under them from intimidating and harassing the Defendants, alienating selling, transferring or dealing with the suit land and its subdivisions.
- d. The Plaintiffs' suit be dismissed with costs and the Defendants' Counterclaim be allowed as prayed with costs.
- e. Any other relief the Court may deem fit and just to grant.

7. The Interested Parties in their defence denied the allegations in the Defendants' statement of defense and Counterclaim and averred that they acquired the suit land from the Plaintiffs in a procedural manner having carried out due diligence which determined the suit land was lawfully registered in the names of the Plaintiffs pursuant to a confirmation of grant issued in favour of the Plaintiffs in Succ Cause No 133 of 1998.

8. At the hearing of the suit, David Mwangi Tatei testified and adopted his witness statement dated 30/11/18. He stated that Johana Tatei deceased, was his father who died in 1981. He had 3 wives; the 1st wife is deceased, the second lives at her land at Ititu village in Murang'a and the 3rd wife, Margaret Njeri Tatei (deceased) was his mother. That the 2nd Plaintiff is his niece, being the daughter of his sister Mary Wanjiku, who is mentally challenged.

9. It is his evidence that his late father shared his properties among his wives in his lifetime. The 1st house got land at Ikundu, Maragwa and are not involved in the dispute. The 2nd House (the Defendants) got their share of land at Ititu Village Gakoigo location next to the suit land. That the said Johana Tatei lived on the suit land with his mother. Upon the demise of their father, the Plaintiffs filed succession cause No.133 of 1998, Nyeri and obtained letters of grant of administration. Though the 1st Defendant filed a protest, the same was dismissed and the confirmation of grant issued in the names of the Plaintiffs and the court order that the suit land be shared equally between the Plaintiffs. By way of transmission, the suit land was registered in the names of the Plaintiffs on the 19/3/15.

10. He informed the Court that the suit land was sold to the Interested Parties immediately the grant was confirmed and obtained land control board consent in 2016. The suit land became registered in their names on the 17/1/17. In response to counsel for the Defendants, he stated that he did not attempt to forcefully evict the Defendants before filing this suit in Court. He confirmed that he sold the suit land whilst the Defendants were in occupation.

11. PW2- Margaret Njeri Wanjiku stated that she is the granddaughter of Johana Tatei and the 1st Plaintiff's niece. She informed the Court that she grew up with her late grandmother, mother and uncle on the suit land. She reiterated the evidence of PW1 that the suit land was sold before the filing of this suit and the purposes of filing the suit was to seek the eviction of the Defendants to enable the Interested Parties take vacant possession of the suit land.

12. She averred that after the sale of the suit land to the interested parties, the Defendants lodged a caution and threatened her and 1st Plaintiff forcing them to move out of the land. That the Defendants are trespassers on the suit land.

13. The defence led evidence through Abigael Wanjiru Tatei who stated that she is the 2nd wife of Johana Tatei and the co-Defendants are her children. That her husband's first wife died leaving 2 children who live at Ititu Village. She contended that her husband never married a third wife and denied that the said Margaret Njeri, the mother of the 1st Plaintiff was a wife to her husband. She averred that she was a casual labourer in their family land. That in November 1981 after the demise of Johana she came to the land accompanied with the chief claiming that Johana had bequeathed her the only land that he owned and had left it to her and her children where they reside to-date. She contended that at the instigation of Margaret Njeri, she was locked up in Thika prisons to pave way for her to enter the suit land. She claimed that she does not know the Plaintiffs. She is however aware that the suit land was sold by the Plaintiffs to third parties.

14. DW2- Anthony Njogu Tatei led evidence that the 1st Defendant is his mother and the co-Defendants are his siblings. He informed the Court that his late father Johana Tatei owned the suit land where he and the whole family settled. After his demise one Margaret Njeri accompanied by the chief of Nganda Location visited the suit land and informed them that his father left 3.9 acres of the suit land to Margaret Njeri, the mother of the 1st Plaintiff and 2.0 acres to him. He later learned that a succession cause had been filed in Thika, Succ cause No 19/1982 and a grant of letters of representation issued. That upon filing an objection, which was upheld, his mother, the 1st Defendant was issued with a grant. That later the succession file disappeared for more than 10 years and later the grant was issued to the Plaintiffs. He stated that the Succ cause 133/1998 was determined without his mother being given an opportunity to be heard. Her mother filed a review, which was dismissed. He confirmed that they did not appeal the dismissal of the protest nor the review.

15. Philip Mutuma testified on behalf of the Interested Parties and stated that he bought the land from the Plaintiffs. That before he entered into agreement with the Plaintiffs, he carried out a search at the Lands office and confirmed that the Plaintiffs were the registered owners of the suit land. That the Plaintiffs introduced them to the Defendants who assured him that they did not have any interest in the suit land and would vacate once he completed the process of purchase. That indeed Joseph Kimani Tatei, the 2nd Defendant, after harvesting bananas and other crops, vacated the suit land and moved to his parcel of land a few meters from the suit land. He stated that the Defendants did not object to the land control board consent being issued in respect to the transfer of the suit land to him. That later the Defendants changed their

minds and despite demand to vacate the suit land, they are still in occupation. He confirmed that he subdivided the suit land into 6 plots and the Defendants raised no objection to the said subdivision and consent. They however destroyed beacons and a fence.

16. At the close of the hearing, the parties filed written submissions, which I have read and considered.

17. The Plaintiffs and the Interested Parties filed joint written submissions in which they sought to persuade the Court that they have proved trespass on the part of the Defendants. That eviction should be granted to enable the Interested Parties take possession of the suit land. In respect to general damages they submitted that once trespass is proven damages become due even if a party has not suffered any actual loss. Reliance was placed on the decision in the case of **Ochako Obunchu Vs Zacharia Oyoti Nyamongo (2018) EKLK** in which the Court quoted Halsbury's 4th Edition Vol 45 at para 26 which stated that if the Plaintiff proves trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. The Plaintiff sought Kshs 500,000/- in form of general damages for trespass. They pleaded that the Counterclaim should be dismissed for want of evidence on the ownership or any such propriety of the suit land by the Defendants.

18. The Defendants in their submissions stated that the Plaintiffs hold no interest in the suit land and therefore not entitled to the prayers sought. The Interested Parties did not receive a valid title from the Plaintiffs. They aver that the transmission, transfer and subdivision of the land is tainted with illegality and the titles should be cancelled and reverted to the name of Johana Tatei. Further that the claim of trespass and general damages is not sustainable. In support of their position, they relied on the following cases; **ELC No 61 of 2015- Peter Mwangi Kabui Vs Rural Electrification Authority and CA 46 OF 1996-Pekeshe Ndeje Ndara Vs Ngale Sago** where the Courts found that the Plaintiff and the appellants were unable to prove trespass and general damages.

19. The issues for determination are;

- a. Whether the Plaintiffs acquired the suit land unprocedurally?
- b. Whether the Interested Parties acquired the suit land unprocedurally?
- c. Whether the Defendants have a valid claim on the suit land?
- d. Whether the Plaintiffs are entitled to the orders of eviction?
- e. Who pays the cost of the suit?

20. The background of the suit land is that Johanna Tatei Kagiki originally owned it. Upon his death in 1981, a Succession cause was filed where the Plaintiff s were appointed administrators in Succession cause No 133 of 1998 at Nyeri. It is the case for the 2nd Defendant that his mother the 1st Defendant was appointed the administrator in a Succession cause No 19 of 1982 at Thika. However, no evidence was presented before this Court to support the existence of such cause. It is not in dispute that on the 3/6/10 the grant was confirmed with the deceased estate comprising of the suit land being shared equally between the Plaintiffs. The record shows that prior to the confirmation of the said grant the 1st Defendant had filed a protest in the Succession cause No 133 of 1989 which was dismissed. Later in July 2010, the 1st Defendant filed a review of the ruling dismissing the protest but the said review suffered the same fate. It was dismissed on the 31/7/15. There is no evidence that the Defendants appealed the dismissal of the protest nor the review. Effectively the estate of the said Johana fell in the hands of the Plaintiffs vide transmission and the Plaintiffs became registered owners on the 19/3/15.

21. The Defendants have contested that the transmission of the title to the Plaintiffs was procured unprocedurally. They aver that their mother was the administrator of the estate as per the Succession cause No 19/82 at Thika. To them the Court file in Thika disappeared for over 10 years and later learnt that the letters of grant had been issued to the Plaintiffs in Nyeri. They have not tendered any evidence to support the loss of the file nor that was the mother an administratrix at all. Their contention therefore that the transmission forms were processed without the 1st Defendant who according to them was the legal representative executing the forms is unsupported. It is undisputed that the orders confirming the grant have not been set aside, appealed or vacated.

22. Section 26 of the Land Registration Act states as follows;

“Certificate of title to be held as conclusive evidence of proprietorship

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

23. The Plaintiffs as the registered owners of the suit land then were entitled to the rights conferred on a proprietor of land by law subject only to the limitations as contemplated by law. Section 25 of Land Registration Act states as follows;

“ (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

24. To the extent that the Defendants failed to exhibit evidence of any fraud, misrepresentation, and or that the title was acquired illegally, unprocedurally or through a corrupt scheme, the Defendants claim as set out in the Counterclaim is untenable. It is undisputed that the Plaintiffs acquired the suit land through a Court order, that is to say a certificate of confirmation of grant dated the 3/6/2010. There is no evidence that the same has been set aside varied or appealed against. The Defendants bear the responsibility to prove their case, which they have failed to do so.

25. In respect to the 2nd issue, it is admitted on record by the Plaintiffs that they sold the suit land to the Interested Parties as a result of constant harassment by the Defendants. It is not in dispute that the suit land was sold with the Defendants in occupation. The Plaintiffs presented the Land Control Board consent dated the 7/12/16 approving the transfer of the suit land from the Plaintiffs to the Interested Parties at the consideration of Kshs 3 Million.

26. It is the evidence of the Interested Parties that they carried out due diligence on the suit land including getting in touch with the Defendants, most of whom assured them that they had no interest in the suit land and would vacate as soon as the process of acquisition was complete. That indeed the second Defendant vacated the suit land and moved to his land next to the suit land. This evidence was not controverted by the 2nd Defendant who happens to be a party in the case. The Defendants have contended that they have no other land except the suit land. It is difficult for the court to determine the veracity of this averment.

27. The Court is of the view that the Defendants have not laid before the Court evidence to challenge the title of the interested parties. No evidence of irregularities have been showed and the Court is unable to find any ground to impeach the title of the Interested Parties.

28. As regards the 3rd issue, the Defendants have stated that they are entitled to the suit land because it belonged to their father Johana Tatei. That they are the rightful heirs to inherit the suit land. This claim is in the realm of succession law. It is not disputed that the land was transmitted to the Plaintiffs pursuant to a confirmed grant of representation given to the Plaintiffs. There is no evidence that the said grant has been vacated, set aside or appealed. The Court is of the view that the Defendants have not demonstrated any rights or pleaded any rights on the land, which are capable of protection by the Court. Prima facie, the Defendants have not disclosed any interests in the suit land.

29. In the case of **Charles Ogejo Ochieng - v- Geoffrey Okumu, (1995) eKLR** the appellate Court held that trespass is an injury to a possessory right and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass

30. As to whether the Plaintiffs are entitled to the prayers of eviction, it is on record that the Plaintiffs sold the suit land to the Interested Parties as at January 2017. The claim of the Plaintiff s is that the Defendants have trespassed onto the suit land. Their prayers are for eviction of the suit land. As at the time of divesting themselves of the interest in land, the Plaintiff s lost the right to seek eviction, as they no longer have any interest in the land. The Interested Parties have not sought any orders for eviction either. The claim of the Plaintiffs for eviction is therefore untenable. It is dismissed.

31. In the upshot the Court makes the following orders;

- a. The Plaintiffs case is dismissed.
- b. The Defendants' Counterclaim is dismissed.
- c. Each party to pay its own costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF JUNE 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimani James HB Narangwi for the 1st & 2nd Plaintiffs

Mshila HB for Kebuka Wachira for the 1st – 5th Defendants

Kimani HB for Narangwi for the 1st & 2nd Interested party.

Kuiyaki and Njeri, Court Assistants