



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT NAIROBI

ELC SUIT NO. 384 OF 2010

PETER NJONJO KIBERA.....1ST PLAINTIFF

AGNES WAIRIMU NJONJO.....2ND PLAINTIFF

VERSUS

JACKLINE MWAI.....DEFENDANT

BY WAY OF COUNTER-CLAIM

JACKLINE MWAI.....PLAINTIFF

VERSUS

PETER NJONJO KIBERA.....1ST DEFENDANT

AGNES WAIRIMU NJONJO.....2ND DEFENDANT

STANLEY WAINAINA NJOROGE.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

JUDGMENT

The facts giving rise to this suit are straight forward and are to a large extent not disputed. The 4th defendant in the counter-claim, City Council of Nairobi is and was at all material times the leasehold proprietor of all that parcel of land known as Plot No. 239, Umoja Innercore Sector V (hereinafter referred to as “the suit property”). In the year 2001/2002, the 4th defendant in the counter-claim allocated to the 3rd defendant in the counter-claim, Stanley Wainaina Njoroge the suit property to hold for the residue of the 4th defendant’s leasehold term of 99 years on terms and conditions which were set out in the letter of allotment.

On 6th September, 2002, the 3rd defendant in the counter-claim sold to the defendant in the main suit, Jackline Mwai, the suit property at KShs.360,000/= on terms and conditions that were set out in the agreement for sale between the parties which was prepared by the firm of Seth & Wathigo Advocates who acted for both parties. The defendant in the main suit paid to the 3rd defendant in the counter-claim the purchase price in full. The 3rd defendant in the counter-claim thereafter gave to the defendant in the main suit the original letter of allotment dated 16th January, 2002 said to have been issued to him by the City Council of Nairobi, the 4th defendant in the counter-claim together with the original receipts for the payments that he had made to the 4th defendant in the counter-claim for the allotment and other charges. In addition, the 3rd defendant in the counter-claim gave to the defendant in the main suit an irrevocable power of attorney dated 6th September, 2002 appointing the defendant in the main suit as his attorney to transfer the suit property to herself or any other person and to do anything and everything that he could do in relation to the suit property. The said power of attorney was registered on 24th September, 2002. The suit property was sold to the defendant in the main suit with vacant possession and she took possession of the property and erected a fence around the same.

On 9th February, 2010, about 7 years after the suit property had been sold to the defendant in the main suit by the 3rd defendant in the counter-claim, the 3rd defendant in the counter-claim purported to sell the suit property again to the plaintiffs in the main suit (hereinafter referred to only as “the plaintiffs”) at a consideration of KShs.2,200,000/=. The 3rd defendant in the counter-claim was once again paid the full purchase of the suit property by the plaintiffs after which he released to them another letter of allotment dated 10th February, 2001 said to have been issued to him by the 4th defendant in the counter-claim. He also gave the plaintiffs photocopies of the receipts for the payments he

had made to the 4th defendant in the counter-claim originals of some of which he had earlier given to the defendant in the counter-claim. The 3rd defendant in the counter-claim also gave to the plaintiffs another irrevocable special power of attorney dated 9th February, 2010 through which he appointed the plaintiffs as his attorneys in relation to the suit property with power to manage, lease, sell and in any other way to deal with the suit property. This second power of attorney was registered on 23rd February, 2010. The 3rd defendant in the counter-claim also gave the plaintiffs a copy of a lease said to have been issued to him by the 4th defendant in the counter-claim in respect of the suit property.

Sometimes in July, 2010 or thereabouts, the defendant in the main suit entered the suit property and commenced excavation with the intention of putting up buildings thereon. The plaintiffs brought this suit against the defendant in the main suit on 16th August, 2010 seeking vacant possession of the suit property, an injunction restraining the defendant in the main suit from remaining on or continuing in occupation of the suit property. The plaintiffs also sought a mandatory injunction to compel the defendant in the main suit to remove the fence and/or structures that she had put up on the suit property and to restore the same into the same condition in which it was prior to the defendant in the main suit's acts of trespass. Finally, the plaintiffs sought general damages for trespass and costs of the suit.

In their plaint dated 9th August, 2010, the plaintiffs averred that they were the beneficial owners of the suit property and that they were at all material times lawfully entitled to possession of the suit property. The plaintiffs averred that on or about the month of August, 2010, the defendant in the main suit without any justifiable cause wrongfully entered the suit property, took possession thereof and erected a fence around the same. The plaintiffs averred that the defendant in the main suit remained in possession of the suit property and had denied them possession thereof despite demand and notice of intention to sue. The plaintiffs averred that the defendant in the main suit was a trespasser on the suit property.

The defendant in the main suit filed a defence and counter-claim against the plaintiffs and two (2) additional parties, Stanley Wainaina Njoroge and City Council of Nairobi who were sued as the 3rd and 4th defendants in the counter-claim respectively. The defendant in the main suit denied the plaintiffs' claim in its entirety. The defendant in the main suit averred that she purchased the suit property from the 3rd defendant in the counter-claim on 6th September, 2002 at a consideration of Kshs.360,000/= which she paid in full. The defendant in the main suit averred that the said sum of Kshs.360,000/= was all inclusive of stand premium, ground rent, rates, survey fees, infrastructure charges, clearance fees and transfer fees. The defendant in the main suit averred that after paying all the requisite charges, 3rd defendant in the counter-claim transferred the suit property to her and agreed to assist her with the changing of records at the offices of the 4th defendant in the counter-claim so that they could reflect the name of the defendant in the main suit as the owner of the suit property.

The defendant in the main suit averred that the records at the offices of the 4th defendant in the counter-claim were later changed to reflect her name as the owner of the suit property. The defendant in the main suit averred that on 29th July, 2010 the 3rd defendant in the counter-claim and the plaintiffs pulled down a fence that she had erected around the suit property and stopped her from accessing the suit property after she had earlier turned down their request that she agrees to be refunded the money that she had paid to the 3rd defendant in the counter-claim as the purchase price for the suit property. The defendant in the main suit averred that she reported the incident to the police and later learnt that the suit property was in the process of being transferred to the plaintiffs. In her counter-claim, the defendant in the main suit reiterated the contents of her defence and averred that the 3rd defendant in the counter-claim having sold the suit property to her, he had no legal right or title in the suit property which he could transfer to the plaintiffs. The defendant in the main suit averred that any document of title held by the plaintiffs purporting to confer any interest in the suit property upon them were obtained through fraud and misrepresentation by the plaintiffs and other defendants in the counter-claim. By way of a counter-claim, the defendant in the main suit sought judgment against the plaintiffs and the 3rd and 4th defendants in the counter-claim, a declaration that the defendant in the main suit was the lawful and bona fide owner of the suit property and that the 3rd and 4th defendants in the counter-claim be compelled to effect all actions and any other process necessary to give effect to the order, an injunction restraining the 4th defendant in the counter-claim from proceeding with or continuing with the process of registering the plaintiffs as the proprietors of the suit property and an injunction to restrain the plaintiffs and the 3rd and 4th defendants in the counter-claim from trespassing on the suit property or dealing with the property in any other manner.

The plaintiffs filed a reply to defence and defence to counter-claim on 20th July, 2011 in which they joined issue with the defendant in the main suit in her defence and reiterated the contents of their plaint. The plaintiffs denied that the defendant in the main suit was the lawful owner of the suit property and that she had a right to enter therein. The plaintiffs denied the defendant in the main suit's counter-claim in its entirety and reiterated that they were and had at all material times been the beneficial owners of the suit property. The plaintiffs averred that the defendant in the main suit was not entitled to the reliefs sought in the counter-claim. The 3rd and 4th defendants in the counter-claim did not defend the counter-claim.

At the trial, the plaintiffs gave evidence through their attorney, Njuguna Gathacha (PW1). He told the court that the 2nd plaintiff was his daughter while the 1st plaintiff was his son in law. He stated that the plaintiffs were resident in the United States of America and that they had given him a power of attorney to prosecute the suit on their behalf. He produced the power of attorney as an exhibit. PW1 told the court that he was familiar with the suit property and that the property belonged to the plaintiffs. He stated that the suit property initially belonged to the 3rd defendant in the counter-claim to whom he was introduced by one, John Wainaina Kariuki when he was looking for a plot for the plaintiffs. He stated that the 3rd defendant in the counter-claim told him that he was selling the suit property. He stated that on 8th January, 2010 he went to view the suit property with the said John Wainaina Kariuki and they found the property vacant and not fenced. He stated that the 3rd defendant in the counter-claim thereafter gave him copies of documents showing that he was the owner of the suit property which included a letter of allotment dated 10th February, 2001 and a letter from the 4th defendant in the counter-claim dated 27th February, 2008 to the effect that the 3rd defendant in the counter-claim was the owner of the suit property. The 3rd defendant in the counter-claim also gave him copies of the receipts for the payments that he had made to the 4th defendant in the counter-claim in respect of the suit property. He produced the documents in evidence as exhibits. PW1 stated that after he was given copies of the said documents, he went to 4th defendant in the counter-claim's Housing Department at Dandora where he carried out a search on the suit property which confirmed that the suit property belonged to the 3rd defendant in the counter-claim. He produced a copy of the search as an exhibit. He stated that the search disclosed that the suit property had a debt of Kshs.9,600/= which he paid and was issued with a clearance certificate. He produced a copy of

the receipt for Kshs.9,600/= and a copy of the clearance certificate as exhibits. PW1 stated further that after carrying out due diligence, an agreement for sale was prepared between the plaintiffs and the 3rd defendant in the counter-claim on 9th February, 2010 and signed by the parties thereto. He stated that the purchase price was agreed at Kshs.2,200,000/- of which a sum of Kshs.900,000/= was paid in cash on the signing of the agreement. A further sum of Kshs.1.3 million was also paid to the 3rd defendant in the counter-claim in cash after which the 3rd defendant in the counter-claim gave the plaintiffs a power of attorney dated 9th February, 2010 which was duly registered. He produced as exhibits copies of the said agreement for sale and power of attorney. He stated that the 3rd defendant in the counter-claim also gave him a lease dated 20th August, 2007 and a beacon certificate dated 10th February, 2001 that had been issued to him by the 4th defendant in the counter-claim. Both were produced in evidence as exhibits. PW1 stated that they thereafter wrote to the 4th defendant in the counter-claim to transfer the suit property to the plaintiffs. PW1 stated that after clearing all the formalities, their application for transfer was placed before the 4th defendant in the counter-claim's Housing Development Committee which approved the same after which the suit property was transferred to the plaintiffs. The minutes of the meeting of the 4th defendant in the counter-claim's Housing Development Committee at which the said approval was given was produced in evidence as exhibit. PW1 stated that 6 months after the suit property had been transferred to the plaintiffs, he was informed by John Wainaina Kariuki that there was a tractor on the suit property excavating the same. He stated that he learnt later that it was the defendant in the main suit who was excavating the property. PW1 denied that the plaintiffs acquired the suit property fraudulently. He stated that the plaintiffs purchased the suit property lawfully after carrying out due diligence. He stated that there was nothing on record or on the suit property which showed that the property belonged to the defendant in the main suit. He stated that there was no way the plaintiffs who had never met the 3rd defendant in the counter-claim could have colluded with him to defraud the defendant of the suit property.

In her defence, the defendant in the main suit (hereinafter referred to only as "the defendant") gave evidence and called one (1) witness. The defendant adopted her witness statement dated 31st July, 2017 as part of her evidence in chief. The defendant told the court that; in August, 2002, she was looking for a property to purchase when she was introduced to the 3rd defendant in the counter-claim who had two parcels of land he wanted to sell one of which was the suit property. She visited the two parcels of land and showed interest in the suit property. At the time, she had already been shown a letter of allotment in respect of the suit property. After visiting the suit property, she confirmed with the 4th defendant in the counter-claim that the suit property belonged to the 3rd defendant in the counter-claim. She thereafter agreed with the 3rd defendant in the counter-claim on a purchase price of Kshs.360,000/= and an agreement for sale was prepared between them. She stated that the agreement for sale provided for a deposit of Kshs.45,600/= which the 3rd defendant in the counter-claim was to use to meet certain obligations set out in special condition 9 of the agreement for sale. She stated that the balance of the purchase price was to be paid to the 3rd defendant in the counter-claim after he had produced the original receipts showing that he had made the payments referred to in the said special condition 9 of the agreement for sale. She stated that the 3rd defendant in the counter-claim gave her all the receipts which were required under the agreement after which she paid him the balance of the purchase price. The 3rd defendant in the counter-claim thereafter executed a power of attorney in her favour in respect of the suit property.

The defendant produced as exhibits; the original letter of allotment dated 16th January, 2002, original agreement for sale dated 6th September, 2002, five (5) original receipts for the payments which the 3rd defendant in the counter-claim had made to the 4th defendant in the counter-claim for various items, original copies of the letter signed by the 3rd defendant in the counter-claim acknowledging payment of the purchase price, original copy of a covering letter dated 26th September, 2002 addressed to her by Seth & Wathigo Advocates which represented both parties in the transaction, original copy of the power of attorney dated 6th September, 2002 and a receipt dated 6th July, 2010 for Kshs.9,600/= issued by the 4th defendant in the counter-claim.

The defendant stated that after she had been given all the documents relating to the suit property, she went to the property and marked its boundaries. She stated that she purchased the property for investment. She stated that she engaged one, Donald Mulongo to be checking on the suit property from time to time and that she had asked him to excavate the boundaries of the suit property with a view to reinforcing the fence that was in place. She stated that Donald Mulongo looked for excavators and after the cost was agreed upon, the project commenced. She stated that midway, the excavators were stopped by a group of people who claimed that the suit property belonged to them. She stated that she had received confirmation from the 4th defendant that the suit property belonged to her. She stated that she reported the incident to the police and all went quiet only for her to be served with summons in this case. She urged the court to grant her the reliefs she had sought in the counter-claim.

The defendant's witness was Mercy Wakibui Kamau(DW2). DW2 was the advocate who acted for the defendant and the 3rd defendant in the counter-claim when the defendant was purchasing the suit property. She adopted her witness statement as her evidence in chief. DW2 told the court that she was the advocate who acted in the transaction between the defendant and the 3rd defendant in the Counter-claim. She stated that her firm acted for both parties. She stated that she is the one who drafted and attested the agreement for sale between the parties. She identified the agreement for sale that had been produced in evidence as DExh. 2 and confirmed that she witnessed the execution thereof. DW2 stated that the 3rd defendant in the counter-claim also executed a power of attorney in favour of the defendant which her firm registered. She stated that she was the one who attested the said power of attorney. She stated that powers of attorney were being used for the transactions involving land in the area where the suit property is situated because land in the area had no titles. DW2 stated that after the sale transaction was completed, her firm handed over to the defendant all the documents relating to the sale under a covering letter dated 26th September, 2002.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 26th November, 2018 while the defendant filed her submissions in reply on 29th November, 2018. I have considered the pleadings, the evidence tendered by the parties and the parties' respective submissions. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in the suit and counter-claim:

1. Whether the plaintiffs acquired the suit property lawfully from the 3rd defendant in the counter-claim.
2. Whether the defendant also acquired the suit property lawfully from the 3rd defendant in the counter-claim

3. Whether the defendant trespassed on the suit property.
4. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
5. Whether the defendant is entitled to the reliefs sought in the counter-claim

Whether the plaintiffs acquired the suit property lawfully:

I am in agreement with the contention by the defendant that the 3rd defendant in the counter-claim having sold the suit property to the defendant, he had no interest left in the property which he could convey to the plaintiffs. However, I am satisfied from the evidence placed before the court that the plaintiffs acquired the suit property in good faith for valuable consideration from the 3rd defendant in the counter-claim without notice that the 3rd defendant in the counter-claim had sold the suit property to the defendant earlier. I am of the view that the plaintiffs having purchased the suit property from the 3rd defendant in the counter-claim in good faith for valuable consideration without notice of the defendant's interest in the property, they acquired a valid beneficial interest in the property.

Whether the defendant acquired the suit property lawfully:

The defendant placed uncontroverted evidence before the court showing that she was the first purchaser of the suit property from the 3rd defendant in the counter-claim. I am satisfied from the evidence on record that the defendant entered into an agreement for sale with the 3rd defendant in the counter-claim in respect of the suit property and that the defendant paid the full purchase price of Kshs.360,000/= and was handed vacant possession of the suit property in 2002. The 3rd defendant in the counter-claim also gave the defendant all the documents of title that he held in respect of the suit property. The 3rd defendant in the counter-claim also gave the defendant an irrevocable power of attorney to enable her deal with the suit property. According to the agreement for sale between the defendant and the 3rd defendant in the counter-claim, the 3rd defendant in the counter-claim had an obligation to obtain all consents that were necessary to convey the suit property to the defendant. It is my finding that the defendant acquired the suit property lawfully from the 3rd defendant in the counter-claim.

The plaintiffs had contended and rightly so in their submissions that the title of the suit property had not passed to the defendant. The suit property was not registered. What the 3rd defendant in the counter-claim held was a beneficial interest which he conveyed to the defendant. The plaintiffs also acquired the property in the same state. The plaintiffs did not therefore acquire a better title compared to that of the defendant.

In their submissions, the plaintiffs had referred to sections 24 and 25 of the Land Registration Act, 2012 in support of their contention that they had a better title over the suit property. I am of the view that these provisions of the law are not relevant. Neither the 3rd defendant in the counter-claim nor the plaintiffs were registered as proprietors of the suit property. A copy of the lease that was produced by the plaintiffs in evidence which was between the 3rd defendant in the counter-claim and the 4th defendant in the counter-claim was not registered. The 3rd defendant in the counter-claim was therefore not registered as the owner of the suit property. Similarly, the plaintiffs were never registered as proprietors of the suit property. The plaintiffs did not therefore acquire a registered title which is protected under sections 24, 25 and 26 of the Land Registration Act, 2012. In my view and contrary to the plaintiffs' submission, the registration of a person by the City Council of Nairobi, the 4th defendant in the counter-claim as a proprietor of land allocated by the said council does not qualify such person to enjoy protection under sections 24 and 25 of the Land Registration Act, 2012. What was acquired by the plaintiffs was an equitable interest in the suit property which is protected by law in accordance with the equitable principles. As I will explain later in this judgment, the plaintiffs' equitable interest in the suit property could not override that of the defendant that was acquired earlier.

Whether the defendant trespassed on the suit property:

It is clear from my findings above that both the defendant and the plaintiffs acquired equitable interest in the suit property at different times. Both acquired their interests in the suit property in good faith from the 3rd defendant in the counter-claim to whom they paid full consideration. What I have before me in my view are competing equal equities. It is a maxim of equity that where there are equal equities, the first in time prevails. In the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal cited with approval the High Court case, Gitwany Investment Limited v Tajmal Limited & 2 others (2006)eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported)” – is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

As I have stated earlier, the defendant is the one who purchased the suit property first from the 3rd defendant in the counter-claim and was waiting to be issued with a title when the 3rd defendant in the counter-claim whose name was still reflected in the records of the 4th defendant in the counter claim as the owner of the suit property sold the property for the second time to the plaintiffs. As I have held above, what the plaintiffs acquired from the 3rd defendant in the counter-claim was an equitable interest just like the interest which was acquired by the defendant. The plaintiffs' interest having been acquired subsequent to that of the defendant must give way to that of the defendant. The

plaintiffs who were victims of the 3rd defendant in the counter-claim's acts of fraud and misrepresentation will have to look to him for a remedy. It is surprising that the plaintiffs did not deem it fit to join the 3rd defendant in the counter-claim in the main suit as a defendant. Having held that the defendant's interest must prevail against that of the plaintiffs, it is my finding that the defendant had a right to enter the suit property and to undertake any development that she wished to undertake. The defendant did not therefore trespass on the suit property as alleged by the plaintiffs.

Whether the plaintiffs are entitled to the reliefs sought in the plaint:

The plaintiffs having failed to establish that the defendant trespassed on the suit property, it is my finding that their case was not proved. The plaintiffs are therefore not entitled to any of the relief sought in the plaint.

Whether the defendant is entitled to the reliefs sought in the counter-claim:

The defendant sought several reliefs in her counter-claim. From my findings above, I am satisfied that the defendant has proved her counter-claim against the plaintiffs and the 3rd and 4th defendants in the counter-claim who did not defend the counter-claim. The defendant is therefore entitled to the reliefs sought in the counter-claim.

Conclusion:

In conclusion, I hereby enter judgment for the defendant (plaintiff in the counter-claim) as follows:

1. The plaintiffs' suit (main suit) is dismissed.
2. A declaration is made that the defendant (plaintiff in the counter-claim) is the lawful and bona fide owner of all that parcel of land known as Plot No. 239 Umoja Innercore Sector V infill.
3. Subject to the payment by the defendant (plaintiff in the counter-claim) of the charges and other levies that are lawfully required to be made to the 4th defendant in the counter-claim in respect of Plot No. 239 Umoja Innercore Sector V infill and the general progress of issuing of titles for plots in Umoja Innercore Sector V, the 3rd and 4th defendants in the counter-claim shall take necessary steps to facilitate the registration of the defendant(plaintiff in the counter-claim) as the owner of Plot No. 239 Umoja Innercore Sector V infill.
4. An order of injunction is issued restraining the 4th defendant in the counter-claim whether by itself, its servants and/or agents from proceeding or continuing with the process of registering the plaintiffs (1st and 2nd defendants in the Counter-claim) as the owners of the parcel of land known as Plot No. 239 Umoja Innercore Sector V Infill.
5. A permanent injunction is issued restraining the plaintiffs (1st and 2nd defendants in the counter-claim) and the 3rd and 4th defendants in the counter-claim from trespassing, entering into, dealing or in any manner interfering with the defendant's (plaintiff in the counter-claim) quiet enjoyment of the parcel of land known as Plot No. 239, Umoja Inner Core Sector V Infill save as the 4th defendant in the counter-claim may be permitted by law in exercise of its physical planning/development regulatory powers.
6. The defendant (plaintiff in the Counter-claim) shall have the costs of the suit and the counter-claim to be paid by the 3rd defendant in the counter-claim.

Delivered and Dated at Nairobi this 20th day of June 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Nyagah h/b for Mr. Osoro for the Plaintiffs

N/A for the Defendant

N/A for the 3rd and 4th Defendants in the counter-claim

C. Nyokabi-Court Assistant