



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCC NO. 205 OF 2018

(Formerly Nairobi ELCC NO.1270 of 2007 and Nairobi HCCC No. 1291 of 2003)

HUMPHREY WAINAINA MBOGO.....PLAINTIFF

-VERSUS-

THIKA MUNICIPAL COUNCIL.....1ST DEFENDANT

GEORGE MWANGI.....2ND DEFENDANT

COUNCILLOR ROSEMARY KAHUKI.....3RD DEFENDANT

FRANCIS KAMAU KARENGE.....4TH DEFENDANT

BENSON MAINA MUGI.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

JUDGMENT

1. The suit property in this matter is the parcel of land known as Thika Municipality Block II/870 situate within the area known as Kang'oki Commercial Plots along Kenyatta Road in Thika Municipality. It is approximately 0.0329 hectares in area.

2. The plaintiff is represented by learned counsel, Mr. Timothy Owade instructed by Mutembei Chabari and Company advocates. Learned counsel, Mr. Macharia Kahonge is on record for the first and third defendants. The 2nd defendant is not represented. The 4th and 5th defendants are represented by learned counsel, Ms. B. Mwangi of Makumi, Mwangi and company advocates while the 6th defendant is represented by learned litigation counsel, Mr. Terer and Ms Ndudu.

3. The plaintiff's case according to his plaint dated 9th December 2003 is that he has a valid certificate of lease duly issued to him by the relevant authorities in respect of the suit property. That sometimes in December 2003, the plaintiff was surprised to find the suit property having been subdivided into four (4) portions. That the 1st defendant's officers had illegally purported to transfer the said resultant sub-plots to the 2nd, 3rd, 4th and 5th defendants who were carrying out construction works thereon without the plaintiff's consent and or knowledge.

4. It is the plaintiff's claim that the conduct of the defendants was in total disregard of his proprietary right and interest in the suit property. That the acts of the defendants amounted to trespass on the suit property. Thus, he has sought the following orders:

a) A permanent injunction restraining the defendants their agents, servants, allottees, and anybody else whomsoever acting on their behalf or claiming through or for them from trespassing, grabbing, repossessing, building or erecting any structures on and/or in any other manner whatsoever interfering with the Plaintiff's quiet and peaceful user and occupation of the parcel of land known as THIKA MUNICIPALITY BLOCK II/870.

b) An order that the Defendants do deliver vacant possession of THIKA MUNICIPAL BLOCK II/870 and in default the defendants be evicted from the same.

c) Costs of this suit and interest thereof.

d) Interest on (c) above at court rates.

e) Any other alternative relief that this Honourable court may deem fit to grant.

5. In their amended statement of defence and counterclaim dated 5th November 2004, the 1st and 3rd defendants denied the plaintiff's claim. They jointly stated that the 1st defendant is the owner of the suit property which was part of an unsurveyed municipal council land. It was previously used as a dumping site within Thika municipality before it was rehabilitated into a public garden/ park, to wit, Moi Gardens, and thereafter portions of it alienated for public utility purposes to be used by hawkers for hawking/market purposes and for the general public. That the 1st defendant has always been in possession of the suit property which was allocated to licenced hawkers who individually and separately possess, constructed temporary stalls thereon and enjoy user of the property. The 3rd defendant denied that she is an allottee of the suit property and or she has constructed any structure on the suit property.

6. The 1st and 3rd defendants claim that the plaintiff in collusion with the agents and or servants of the 6th defendant obtained allocation of the unsurveyed public utility belonging to the 1st defendant through fraud and misrepresentation. They sought dismissal of the plaintiff's suit with costs and that judgment be entered in the counterclaim in their favour against the plaintiff and the 6th defendant for:

a) A declaration that the allocation sub division and grant of the lease to the plaintiff of the subdivided plots numbers THIKA MUNICIPALITY/ BLOCK II / 870 was obtained by and/or through fraud and/ or misrepresentation as the said premises herein were public utility plots/ land and should continue so to be.

b) An order that the registration of the plaintiff as a proprietor of the leasehold title No. THIKA MUNICIPALITY/ BLOCK II/ 870 be cancelled and that the Land Register at the Thika Land Registry be so rectified.

c) Such further order/ as this court may deem just to grant.

d) Costs of this suit and of the counter-claim.

7. By their amended statement of defence dated 4th April 2017, filed on 18th April 2017 and further amended on 7th November 2018 and filed on 9th November 2018 pursuant to court order granted on 7th November 2018, the 4th and 5th defendants deny the plaintiff's claim. They averred that they are the rightful owners of stalls numbers C-6 and C-12 respectively on the suit property located at Moi Market within Thika Town. That the plaintiff's certificate of lease in respect of the suit property is easily defeasible having been procured through blatant and outright fraud by the plaintiff in collusion with the 6th defendant and or his employees. They sought dismissal of the plaintiff's suit with costs and that judgment be entered in their favour against the plaintiff for:

a) A declaration that the allocation, subdivision and issuance of a certificate of lease to the plaintiff in respect of land title No. Thika Municipality Block 11/870 was fraudulent.

b) An order that the registration of plaintiff as lessee of Thika Municipality Block 11/870 be cancelled forthwith and the Land Register at Thika Land Registry be rectified accordingly.

c) In the alternative, judgment be entered in favour of the 4th defendant as against the 1st and 6th defendants jointly and severally in the sum of Kenya Shillings Twenty Seven Million Six Hundred Eighty Nine Thousand (KShs. 27, 689,000/) and interest thereon;

d) In the alternative, judgment be entered in favour of the 5th defendant as against the 1st and 6th Defendants jointly and severally in the sum of Kenya Shillings Twenty Million One Hundred Ninety Two Thousand Three Hundred (KShs. 20,192,300/) and interest thereon;

e) Such other and/or further order as this Honourable Court may deem fit and just.

f) Costs of this suit.

8. Together with the further amended statement of defence, the 4th and 5th defendants filed co-defendants' amended notice of indemnity under Order 1 Rule 24 (1) of the Civil Procedure Rules, 2010. The 4th and 5th claim that the 6th defendant acted in a fraudulent manner in the issuance of the alleged title document to the suit property in favour of the plaintiff. They set out particulars of fraud against the 6th defendant and particulars of negligence of the said 6th in the plaint. They claim indemnity against the plaintiff and the costs of the suit.

9. By a defence dated 4th July 2006, the 6th defendant denied the 1st defendant's amended defence and counterclaim. The 6th defendant averred that the allocation and issuance of the title in respect of the suit property on 11th June 1999, was lawful, procedural and within its powers and discretion. That the suit property had never been set aside as a public utility plot and that the 6th defendant did not require the consent of the 1st defendant to allocate the suit property. That the 1st defendant's suit (claim) is time barred under the Public Authorities Act (Cap 39), section 13A of the Government Proceedings Act (Cap 40) and section 136 of the Government Lands Act (cap 280).

10. The plaintiff's counsel indicated to the court that he did not intend to reply to the 4th and 5th defendants' amended statement of defence. Accordingly, he did not file any response thereto. However, by a reply to the 1st defendant's amended defence and defence to counterclaim dated 4th September 2006, the plaintiffs denied the amended defence and sought its dismissal with costs and that judgment be entered against the defendants as prayed for in the amended plaint.

11. On 3rd December 2018, Mr. Kahonge, learned counsel for the 1st and 3rd defendants informed the court that he had no further instructions from his clients. The 1st, 3rd and 6th defendants failed to either adduce evidence or file submissions thus their respective cases were deemed closed.
12. The 1st, 3rd and 6th Defendants did not make any submissions in this matter.
13. This suit was transferred from Nairobi (Milimani) Environment and Land Court to Thika Land and Environment Court on 28th June 2018 for hearing and determination. The court had a total of six witnesses.
14. The plaintiff (PW1) relied on his statement dated 15th July, 2016 and list of documents dated 27th April, 2014 (P Exhibits 1 to 6) as well as letter of allotment dated 11th June, 1999 (P Exhibit 7) in his evidence. During cross examination, PW1 stated, inter alia, that the suit property was a vacant dumpsite and made reference to P Exhibits 3 and 6. On further cross examination, he stated that he had no claim against the chief land registrar (6th Defendant)
15. DW1, Benard Kamau Gachoka, a registered Valuer relied on D Exhibits 1(a) to (d), stated that the 5th Defendant's counsel instructed him to value the suit property housing No C.12. He prepared valuation reports (D Exhibits 2 and 3) for the 4th and 5th Defendants.
16. DW2, Edwin Munoko Wafula, a Land Registrar based in Nairobi relied on his statement dated 6th November, 2018 as his evidence in chief. During cross examination, he stated that the suit property was allocated to PW1 which position has not changed at all.
17. DW3 (the 4th Defendant) premised his evidence on his list of documents especially D Exhibits 4 to 9 for the 4th and 5th Defendants. He stated that he has no agreement for the sale of the suit property between Mucheru and himself. That he had no title to the suit property. He also stated that there was no survey plan, stamp duty payment and transfer thereof.
18. DW4 (the 5th Defendant) anchored his testimony on his statement dated 21st June, 2018 and he did refer to D Exhibits 1, 11 and 12. He stated that he was holding his title deed and not paid stamp duty for the suit property. He further stated that PW1 holds a fraudulent title to the suit property. In cross examination, he stated that his stall stands on the land of PW1 and that official search shows that PW1 owns the suit property.
19. In submissions, learned counsel for the plaintiff relied on statements dated 7th December, 2018 and filed on 10th December, 2018 wherein he urged the court to enter judgment in terms of the orders sought in the plaint as the plaintiff has proved his case in a balance of probabilities. He framed four (4) issues for determination including whether the allocation of the suit property to the plaintiff was lawful and whether the plaintiff is entitled to the orders sought herein.
20. Counsel submitted, inter alia, that the plaintiff was allocated the suit property long before there was a Government ban on allocation of land. To buttress his submissions, counsel made reference to sections 9 and 35 of the Government Lands Act (Cap 280) as well as Section 107 of the Evidence Act (Cap 80).
21. By submissions dated 17th December, 2018 filed on even date, learned counsel for the 4th and 5th Defendants urged the court to find in favour of the 4th and the 5th Defendants. He submitted in respect of an unalienated Government Land, the process of allotment of an unalienated Government Land, the plaintiff's supporting documents and Government ban on allotment of public land, among other things.
22. Counsel also submitted that the 1st Defendant allocated the suit property to the 4th and 5th Defendants as part of the 1st Defendant's effort to provide hawkers in Moi market within Thika Town with an area within which to carry out their trade. Counsel placed reliance on authorities including **Kenya Industrial Estates Ltd-vs- Anne Chepsiror & others (2015) eKLR and John Peter Mureithi & 2 others – vs- Attorney General & others (2006) eKLR.**
23. I have carefully considered the entire pleadings, evidence and submissions herein. I am guided by the Court of Appeal decision in **Galaxy paints Company Ltd-vs- Falcon Grounds Ltd (2000)2 EA 385** as well as agreed issues dated 5th July, 2006 by the plaintiff and issues (a) to (c) in the plaintiff's submissions. To that extent, I embrace the said issues and compress them to whether;
 - (a) The plaintiff (PW1) was lawfully allocated the suit property and whether;
 - (b) The plaintiff is entitled to the orders sought in his plaint.
24. It is common ground that the suit property was an unalienated government land. It was utilized as a garbage dumpsite. Presently, **Article 62 of the Constitution of Kenya 2010** governs public land.
25. The plaintiff (PW1) has demonstrated by way of P Exhibits 1 to 6 and 7 that he was allocated the suit property by the Government of Kenya. Moreover, DW2, DW3 and DW4 confirmed that the suit property belongs to PW1 who was very emphatic that he has no claim against the 6th defendant. DW1 stated that he inspected and valued the suit property belonging to 4th defendant.
26. DW3 testified that he saw the suit property, purchased and developed the same. However, he confirmed that he did not get survey plan for the land hence he purchased non surveyed public land.
27. The doctrine of caveat emptor cautions buyers to beware at all times. DW3 and DW4 should have exercised great caution before entering

into the process of buying non surveyed property as held in **Margaret Wanjiku Kamau –vs- John NJoroge Gachuru (2005) eKLR.**

28. Additionally, DW3 and DW4 clearly stated that they did not pay stamp duty for the suit property. DW3 plainly stated that he had no title, written agreement and transfer in respect of the suit property.

29. It is trite law that deliberate failure to enter into a written sale or agreement, failure to pay stamp duty for the transfer (if any) and failing to keep a copy of the transfer portrays a party in the land transfer transaction quite negligent in his or her business transaction hence, it cannot be concluded that the party is a bonafide purchaser for value; **see the Court of Appeal decision in case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura-vs-Attorney General and 4 others (2017) eKLR.**

30. Since the plaintiff (PW1) has shown that he was lawfully allocated the suit property, he is entitled to the property under **Article 40 (1) of the Constitution of Kenya, 2010** which provides:

“Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property” (Emphasis added).

31. Moreover, **Article 61 of the said Constitution** stipulates, that all land in Kenya belongs to the people of Kenya, collectively as a nation, as communities and as individuals. There under, land is classified as public, community or private.

32. I am aware of sections 7 and 9 of the Land Registration Act, 2016 (2012) regarding land registers and maintenance of documents respectively. The 4th and 5th defendants claim indemnity and or contribution from the 6th defendant. Nonetheless, PW1 has exonerated the 6th defendant from blame herein.

33. Sections 81 to 84 of the Land Registration Act, 2016 (2012) provide for indemnity claim. In the instant case, the 4th and 5th defendants have failed to prove that they have suffered loss in respect of the suit property.

34. The plaintiff has sought a permanent injunction against the defendant jointly and severally. The remedy is equitable and discretionary in nature. This court is empowered to grant permanent preservation orders including injunctions under section 13 (7) (a) of the Environment and Land court Act 2015 (2012). In the present scenario, the permanent injunctive remedy is merited.

35. In the premises, the plaintiff has proved that the defendants are trespassers on the suit property. **Section 152 A of the Land Act, 2016 (2012)** prohibits unlawful occupation of private land. I find that this suit has been proved against the defendants except the 6th defendant jointly and severally on a balance of probabilities. The 1st and 3rd defendants’ counter claim and the 4th and 5th defendants indemnity claim fail for want of proof to the required standard.

36. Wherefore, I make the following final orders;

a) That the judgment be and is hereby entered for the plaintiff against the defendants save the 6th defendant in terms of a permanent injunction, delivery of vacant possession of the suit property in default eviction of the 2nd to the 5th defendants from the said property together with costs of the suit as sought in his plaint dated 9th December, 2003.

b) The plaintiff’s suit against the sixth defendant is dismissed accordingly.

c) That the 1st and 3rd defendants’ amended counter claim dated 5th November, 2004 be and is hereby dismissed with costs to the plaintiff.

DATED AND SIGNED AT MIGORI THIS 30TH DAY OF APRIL, 2019:

G.M.A. ONGONDO

JUDGE

DATED, SIGNED AND DELIVERED AT THIKA THIS 14TH DAY OF JUNE, 2019.

L. N. GACHERU

JUDGE

In the presence of:

1. Mr. Owade for the plaintiff

2. M/s Mwangi for the 4th and 5th defendants

3. No appearance for other defendant

