



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELCC NO. 819 of 2017

(Formerly Nairobi 813 of 2001)

MARY WANJIRU NJENGA.....PLAINTIFF

VERSUS

WAWERU KOIMBURI.....1ST DEFENDANT

KAHURA KOIMBURI.....2ND DEFENDANT

KOIMBURI NDONYE.....3RD DEFENDANT

TOWN COUNCIL OF KIKUYU.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

JUDGMENT

1. The suit property in this matter is land title number Muguga/Muguga/T421 situated in Kikuyu in Kiambu County.
2. The plaintiff, Mary Wanjiru Njenga is represented by learned counsel Mr. Mwigigi Kinuthia. The defendants are represented by learned counsel Mr. Paul Gacheru instructed by Kangethe & Mola Advocates. The 2nd and 3rd defendants, Town council of Kikuyu and Chief Land Registrar respectively in the counter claim are not represented herein.
3. This suit was originated by way of an amended plaint dated 23rd January, 2001 wherein the plaintiff is seeking orders;
 - a. That the defendants, their agents or employees be evicted from the plaintiff's land reference number Muguga/Muguga/T421 forthwith.
 - b. That the defendants do pay to the plaintiff mesne profits of Ksh 24,000/= from 1996 up to the year 2000 and thereafter at Ksh 6,000/= per year till they vacate there from or such other sum as the court may deem fit to grant.
 - c. Costs.
4. Briefly the plaintiff claims that she is the registered owner of the suit property which was originally owned by the defunct Kiambu County council. That Jackson Mburu Gitu who is the subsequent owner sold the suit to her.
5. The plaintiff further claims that in or about 1996, the defendants trespassed into the suit property. As a result, a suit namely Kikuyu RMCC No 12 of 1998 was filed against the defendants but it was dismissed on 9th March, 2000 as the court lacked jurisdiction thereof, thus, it provoked the instant suit.
6. In their statement of defence and counter claim dated 25th August, 2000, amended on 28th June, 2001 and reamended on 24th July, 2005, the 1st and 2nd defendants denied the plaintiff's claim and sought its dismissal with costs. They averred that they had been in quiet and uninterrupted possession of the suit property which was acquired by their father from the then Kikuyu Area Council as compensation for a road surrendered to the council in 1965.

7. The 1st and 2nd defendants counter claimed that the plaintiff knowingly and fraudulently acquired the title to the suit property. They are seeking, inter alia, cancellation of the said title and rectification of the register to include them as the owners of the property.
8. I note a reply to defence and defence to counter claim filed on 4th September, 2000. There is also a reply to amended defence and defence to counter claim dated 9th July, 2001 herein.
9. On 5th November, 2018, the plaintiff (PW1) testified and closed her case as the defendants had been duly served for hearing. However, following the determination of notice of motion applications dated 26th November, 2018 and 30th November, 2018, the suit was heard afresh in the spirit of **Articles 50 (1) and 23 (c) of the Constitution of Kenya, 2010.**
10. PW1 testified a fresh and she relied on her statement dated 4th June, 2018 and her list of documents dated 19th November, 2001 (P Exhibits 1 to 6). She called no witnesses.
11. DW1, Peter Ndonge Koimburi stated that he was the administrator of the estate of his late father (3rd defendant in the suit). He relied on his statement dated 28th November, 2018 as well as the list of documents dated 2nd July, 2007 (D Exhibits 1 to 7) and supplementary list of documents dated 4th December, 2018 (D Exhibit s 1 and 9) in his evidence. No other witness adduced evidence for the defendants/counter claimers in this matter.
12. Learned counsel for the plaintiff (PW1) did not file and serve submissions or at all.
13. By submissions dated 31st January, 2019 learned counsel of the defendants/counter claimers framed four (4) issues for determination which include whether PW1 acquired the suit property through fraud hence the title to the property should be cancelled and whether she is entitled to the reliefs sought in the plaint. Counsel submitted, inter alia, that PW1 knowingly either misled and deceived the Land Registrar as to consideration paid to acquire the suit property or the value of it and that she did not produce an application to the land control board and consent thereof which are necessary and mandatory documents in transfer of any property.
14. To buttress his submissions, counsel relied on authorities including Jonathan **Namulala Nyongesa –vs- Multibusiness shooters investors Ltd and 3 others (2017) eKLR and Vincent Koskei –vs- Benard Koskei (2018) eKLR.** He cited section 107 of the evidence Act (Cap 80) that he who, alleges must prove.
15. I have carefully considered the entire pleadings, evidence of PW1 and DW1 as well as the defendants/counter claimers' submissions. I take into account the decision in **Great Lakes Company (U) Limited-vs- Kenya Revenue Authority (2009) KLR 720** regarding issues for determination in a suit generally and agreed issues dated 5th September, 2000 and 19th November, 2001 signed by counsel for the respective parties. Accordingly, I embrace the said issues which include whether PW1 acquired the suit property through fraud and whether the defendants and/or their father have been in quiet, uninterrupted possession of the suit property for more than twenty (20) years.
16. P Exhibits 1 to 4 show that the suit property was initially allocated to Jackson Mburu Gitu who obtained its title deed on 27th November, 1992. PW1 bought the suit property from the said Jackson Mburu Gitu on 30th August, 1996 and she was registered as the proprietor of the property on 2nd September, 1996 as shown on P Exhibits 5 to 8 respectively.
17. By P Exhibits 6 and D Exhibits 7, there is no dispute that PW1 is the registered proprietor of the suit land. I am conscious of the terms "proprietor" and "register" as defined under section 2 of the Land Registration Act, 2016 (2012) as well as the interest and rights of a proprietor as set out at sections 24, 25, and 26 of the same Act.
18. In the case of **Mwangi and another –vs- Mwangi (1986) KRL 328,** it was noted that the registration of a title to land is a creation of the law. The suit property was registered in the name of PW1 under the Repealed Registered Land Act (Cap 300) and her registered interest was subject to overriding interests as recognized under sections 27, 28 and 30 of the Repealed Act. In cross-examination, DW1 stated that the suit property belonged to his late father. However, DW1 failed to prove that particular allegation bearing in mind that even D Exhibit 7 confirms that PW1 is the registered proprietor of the suit property.
19. Having determined that PW1 is the absolute in and indefeasible owner of the suit property which is classified as private land under **Article 64(1) of the Constitution of Kenya 2010,** the issue of trespass then arises for determination. Whereas PW1 asserts that she is the registered owner of the suit property, the defendants contend that the 3rd defendant is the bonafide beneficiary of the property. DW1 has not availed to this court any material to show that the 3rd defendant was lawfully allocated and registered as the proprietor of the suit property.
20. It follows that the defendants are in unlawful occupation of the suit property as recognized under **section 152A of the Land Act, 2016 (2012).** The defendants are trespassers thereon; see **Clerk and Lindsell on torts (18th Edition) at paragraph 18-01.**
21. On the issue of mesne profits, the same are at prayer (b) of the plaint amended on 23rd May, 2001. I am aware of the definition of the term "mesne profits" in **Section 2 of the Civil Procedure Act (Cap 21)** and the decision in the **case of Rioki Estate company (1970) Limited –vs- Kinuthia Njoroge (1977) KLR 146.**
22. Mesne profits are a form of especial damages which must be specifically pleaded and proved; see **Nakuru Industries Limited –vs- S.S Mehta and sons (2016) eKLR.** In the instant suit, PW1 failed to plead and prove a specific sum as mesne profits thus she is not entitled to any mesne profits.
23. Regarding the issue of fraud by the defendants by original action and the plaintiffs by counter claim, I note the particulars of fraud at

paragraph 8 (i) to (ix) in the reamended defence and counter claim. PW1 strongly denied the said allegations. I also take into account the decision in **Namlala Nyongesa and Alice Chemutai Too cases** (supra) in respect of fraudulent acquisition of the title to land. The defendants and plaintiffs in the original action and counter claim respectively fell short of proving the allegations of fraud against PW1 to the required standard.

24. In the case of **Koinange and 3 others –vs- Koinange 1986) KLR 23**, it was held that in a case where a party alleges fraud, the standard of proof is not beyond any reasonable doubt, but on a higher standard than a balance of probabilities, **see also Raila Odinga and 2 others - vs- Independent Electoral and Boundaries Commission (2011) eKLR**.

25. In the counter claim, it is alleged that the plaintiff and or their father are the legal proprietors of the suit property having been in lawful and uninterrupted possession of the same for more than twenty (20) years. In his evidence in chief, DW1 stated that;

“I am in occupation of the suit land since my childhood. I was born and lived thereon. My late father got the land by way of a compensation of L.R No. Muguga/Muguga/208 from the 2nd defendant in the counter claim.”

26. It is trite law that rights and registration to land can be challenged on grounds of fraud, misrepresentation and adverse possession; **see the case of Taybali Adamji Alibhai –vs-Abdulhussein Adanji Alibhai (1938) 5 EACA** subsequently applied in **Kimani Ruchine and another –vs- Swift Rutherford Company Limited (1976-80) 1 KLR 1500**.

27. It is common ground from the pleadings of the respective parties that the suit property was a subject matter in Kikuyu RMCC No12 of 1998 between the parties in the instant suit. D Exhibit 5 shows that ownership of the suit property could not be determined by the court by virtue of the limited jurisdiction of that court under section 3(1) of the Land Disputes Tribunals Act, 1990 (repealed)

28. Moreover, the filing of Kikuyu. RMCC.12 of 1998 for recovery of the suit property by PW1 would stop time from running for purposes of section 38 of the Limitation of Actions Act (Cap 22) as held in the case of **Ndatho-vs-Itumo and 2 others (2002) 2 KLR 637**. The plaintiff’s claim based on adverse possession to the suit property is bound to fail in the circumstances.

29. In the final analysis, I find that the plaintiff is the proprietor of the suit property having lawfully obtained title to it without any encumbrances. She has proved her case against the 1st, 2nd and 3rd defendants on a balance of probabilities. The defendants’ defence and counter claim reamended on 24th June 2005 has not been proved to the required standard.

30. A fortiori; I make the following final orders;

(a) I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders; (a) to (c) sought in her amended plaint dated 23rd January, 2001.

(b) The 1st and 2nd defendants’ counterclaim reamended and dated on 24th July, 2005 be and is hereby dismissed with costs to the plaintiff

Signed, Dated, and delivered at Migori this 15th day of May, 2019

G.M.A ONG’ONDO

JUDGE

Signed, Dated, and delivered at Thika this 14th day of JUNE 2019

L.N GACHERU

JUDGE

In presence of:

1. Mr. Kinyanjui holding brief for Mr. Mwangi Kinuthia for plaintiff
2. Mr. Kece holding brief for Mr. Gacheru for the defendants
3. Lucy – Court Assistant