



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 366 OF 2017

PETER OLOISHORUA NKURAIYIA.....PLAINTIFF

VERSUS

PETER KAMAU NG'ANG'ADEFENDANT

CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE No. 382 OF 2017

PETER NG'ANG'A GATHI.....1ST PLAINTIFF

DANIEL KARIUKI NDUNG'U.....2ND PLAINTIFF

SIMON KANGETHE.....3RD PLAINTIFF

VERSUS

PETER OLOISHORUA NKURAIYIA.....1ST DEFENDANT

TUSIANE MANAGOI.....2ND DEFENDANT

JUDGMENT

1. This judgment is in respect of two consolidated matters: Case No. 366 of 2017 and Case No. 382 of 2017. Case No. 366 of 2017 was chosen to be the lead file. Both cases concern a parcel of land known as Residential Plot No. 581 Gilgil Township measuring 0.0450 hectares (hereinafter “the suit property”).

2. By plaint filed on 2nd October 2017, Peter Oloishorua Nkuraiyia (hereinafter “Nkuraiyia”) commenced proceedings in Case No. 366 of 2017 against Peter Kamau Ng’ang’a (hereinafter “Ng’ang’a”). He averred that he is the owner of the suit property having been allotted the said plot on 6th September 1994. That he has been in continuous occupation of the plot since the date of allotment and has developed it. He added that on or about 25th September 2017 Ng’ang’a accompanied by a group of people forcefully entered the suit property and erected structures thereon. He therefore sought judgement against Ng’ang’a for a declaration that he is the legal owner of the suit property; a permanent injunction to restrain Ng’ang’a, his servants or agents from entering upon, interfering with or in any manner dealing with the suit property; and costs.

3. In his statement of defence Ng’ang’a denied Nkuraiyia’s allegations and stated that he was allocated the plot in a vacant state by the County Council of Nakuru on 12th March 2010 after it had been repossessed. He added that upon acquiring the plot he sold it to the plaintiffs in Case No. 382 of 2017 on 1st June 2015. He therefore urged the court to dismiss Nkuraiyia’s case with costs.

4. On their part, the plaintiffs in Case No. 382 of 2017 commenced the said case on 5th October 2017 against Nkuraiyia and Tusiane Managoi (hereinafter “Managoi”). They averred in the plaint that they purchased the suit property from Ng’ang’a on 18th June 2015 and took immediate possession until August 2017 when Nkuraiyia and Managoi trespassed onto the plot, erected a permanent perimeter wall around it and started laying claim over it. That Ng’ang’a was allocated the plot by the County Council of Nakuru after it had been repossessed. They therefore sought judgment against Nkuraiyia and Managoi for a declaration that they (the plaintiffs) are the legal/bona fide/registered owners of the suit property; a permanent injunction restraining Nkuraiyia, Managoi, their agents or servants from trespassing, interfering, alienating, disposing, constructing, developing and or dealing in any way with the suit property; a mandatory injunction compelling Nkuraiyia and Managoi to bring down the permanent structures and or any other development on the suit property; general and special damages and costs.

5. Nkuraiyia and Managoi responded to Case No. 382 of 2017 by filing a defence and counterclaim. They denied the plaintiffs' allegation and added that Ng'ang'a's alleged acquisition of the suit property was tainted by fraud. In the counterclaim they generally reiterated Nkuraiyia's case as pleaded in Case No. 366 of 2017 and sought judgment against the plaintiffs in Case No. 382 of 2017 on similar terms as sought in Case No. 366 of 2017.
6. At the hearing Nkuraiyia testified as PW1 and stated that he is a civil servant and that he was allotted the suit property by the Commissioner of Lands through letter of allotment dated 6th September 1994. He has been in continuous occupation of the plot since the date of allotment and has developed it. He also paid rent and other applicable charges to the County Council of Nakuru. In August 2017, unknown persons destroyed his temporary structures on the property. He reacted by erecting a permanent perimeter fence, digging a pit latrine and erecting a two roomed temporary house. Around 25th September 2017 Ng'ang'a accompanied by a group of people broke the padlock on the gate, forcefully entered the suit property and erected structures thereon despite protests from Nkuraiyia's agents on site. He added that once the land was allocated to him, the County Council could not re-allocate it to someone else. Regarding a sale agreement which Ng'ang'a claimed he had entered into with the plaintiffs in Case No. 382 of 2017, he dismissed it as fraudulent and stated that Ng'ang'a had no capacity to sell the suit property. He further stated that Managoi is his assistant whom he had given the responsibility to look after the suit property.
7. He further stated that he had structures on the plot such as an iron sheet room and toilet which were destroyed. The plaintiffs in Case No. 382 of 2017 went to interfere with the property in August 2017. Since 6th September 1994 to August 2017, only himself (Nkuraiyia) had been in occupation of the land. He did not receive any notice of repossession of the plot from County Council of Nakuru. He had paid all the rates. The council had all his contacts and could have reached him. He added that though the plaintiffs in Case No. 382 of 2017 claim that they have property rates payment receipts, he also had paid rates and was issued with receipts. According to him, there must have been fraud and the rates receipts of the plaintiffs in Case No. 382 of 2017 are fake.
8. He further stated that Ng'ang'a is a stranger to him and that he had never seen him. That he has always occupied the suit property since 6th September 1994 when it was allocated to him through allotment letter dated 6th September 1994. He produced a copy of the allotment letter, copy of receipt dated 23rd July 1994, receipt dated 28th July 1994, receipt dated 16th August 1994, receipt dated 18th December 1994, property rates payment request dated 28th January 2011, property rates payment request serial No. 228755, letter from County Government of Nakuru dated 22nd May 2015, letter from himself dated 18th August 2017, letter from National Land Commission dated 23rd January 2017, letter from National Land Commission dated 12th September 2017, letter from County Government of Nakuru dated 4th October 2017 and letter from National Land Commission dated 10th October 2017 as exhibits.
9. Under cross examination by Ng'ang'a's advocate, Nkuraiyia stated as he has been in Foreign Service throughout his civil service career. As at the time of getting the allotment, he was not living in Kenya. That he applied for the plot and it was allocated to him. The allotment letter stated a stand premium of KShs 2,700 and annual rent of KShs 540 which he paid. He complied with special condition number 2 in the letter of allotment. At the time of allocation, he was on leave and came back to the country. He put Managoi to take care of the suit property and he has been in possession of the plot throughout.
10. Under cross examination by counsel for the plaintiffs in Case No. 382 of 2017, Nkuraiyia stated that according to the receipts which he had produced, his ground rent arrears as at January 2011 was KShs 7, 620. The annual ground rent was KShs 600 as at 2011 and that as at 2011 he had penalties in respect of land rates which he paid.
11. The plaintiff's case was closed at that point.
12. Thereafter, Ng'ang'a testified as DW1. He stated that there was an advertisement in Daily Nation of Tuesday 1st September 2009 indicating that plots were to be repossessed. The suit property was among them. He applied at the county council government and he was allocated the suit property through a letter of re-allocation dated 12th March 2010. He produced a copy as an exhibit. He was taken to the site and shown the beacons by the county government. It was in an open field and was not occupied at that time. He fenced it. Nobody came to complain when he did so. He had the plot from 2010 until the year 2015 when he sold it to the plaintiffs in Case No. 382 of 2017 through sale agreement dated 18th June 2015. He produced a copy of the agreement as an exhibit. He took the buyers to the plot and showed it to them. There was no other person claiming the plot or in occupation at that time. The buyers perused his documents and even cross-checked with the county council. He then signed the transfer to them.
13. Under cross examination by Nkuraiyia's counsel, he stated that the newspaper advertisement did not mention the suit property and that although he had documents showing that he paid rates to the council for the period 2010 – 2015, he did not produce the rates payment receipts in court. He added that he was not aware that Nkuraiyia was issued with a letter of allotment by the Commissioner of Lands.
14. Under cross examination by counsel for the plaintiffs in Case No. 382 of 2017, he stated that the plot is currently registered in the names of the plaintiffs in Case No. 382 of 2017 and that there was no caveat or any restriction against his title at the time of sale.
15. Under re-examination, he stated that the suit property was repossessed by the county council and re-allocated to him. He was not involved in the repossession and was not involved to know who signed the re-allocation letter. The plot was re-allocated to him when he presented himself at County Council offices. There were many other plots that were repossessed and re-allocated besides the suit property.
16. Ng'ang'a closed his case at that point.
17. Next it was the turn of the plaintiffs in Case No. 382 of 2017. They called Simon Kangethe who testified as DW2. He stated that he and the rest of the plaintiffs in Case No. 382 of 2017 are members of Kenya Defence Forces and that they bought the suit property together from Ng'ang'a. They signed the agreement Ng'ang'a had produced as an exhibit. The plot was sold free from any encumbrances and they did a search which showed that the plot was clean. Ng'ang'a told them that he acquired the plot from the County Council following repossession

and re-allocation. Ng'ang'a told him that the plot was repossessed pursuant to a newspaper advertisement in Daily Nation of Tuesday 1st September 2009. He produced a copy of it as an exhibit. Besides the said advertisement, there were other repossession notices. He also produced copies of these as exhibits. Upon purchasing the land he and the rest of the plaintiffs in Case No. 382 of 2017 followed up transfer at Gilgil sub-county offices. He produced a transfer dated 19th June 2015 signed by the vendor and the County Council as well as a clearance certificate. They were required to pay KShs 5,000 as transfer fees which they paid. Upon the transfer being registered, rates demands started coming in their names and they would pay the rates. He produced payment receipt for KShs 600 as ground rent dated 28th August 2018. Since he and the rest of the plaintiffs in Case No. 382 of 2017 were members of KDF they were redeployed away from Gilgil on duty and did not therefore build anything on the plot in 2015 or 2016. They however erected a structure in August 2017. When the dispute arose DW2 sent his wife to Gilgil sub-county office to check on the status. The office gave him and the rest of the plaintiffs in Case No. 382 of 2017 a letter dated 24th August 2017 stating that the plot belongs to them and that Ng'ang'a was allocated the plot after repossession.

18. Under cross examination by Nkuraiya's counsel, he stated that the county government does not issue title deeds. It issues allotment letters. Title deeds are normally issued by Ministry of Lands.

19. The case of the plaintiffs in Case No. 382 of 2017 was thus closed. Parties then filed and exchanged written submissions. I have considered the pleadings, the evidence and the respective submissions.

20. The issues that arise for determination are firstly whether the suit property was allocated to Nkuraiya; secondly, whether it was repossessed; thirdly, if so, whether Ng'ang'a passed any valid title to the plaintiffs in Case No. 382 of 2017 and finally, whether the parties are entitled to the orders that they have sought.

21. Chronologically, there is no dispute that Nkuraiya's interest in the suit property predates that of Ng'ang'a and even that of the plaintiffs in Case No. 382 of 2017. Nkuraiya's case is that he was allocated the suit property by the Commissioner of Lands through letter of allotment dated 6th September 1994. The legal successor of the Commissioner of Lands is the National Land Commission. Nkuraiya produced letters dated 23rd January 2017, 12th September 2017 and 10th October 2017 from National Land Commission, all of which confirm the allocation. Ng'ang'a and the plaintiffs in Case No. 382 of 2017 seem to concede that Nkuraiya was allocated the property. In fact, their case is that the suit property was repossessed by the County Council of Nakuru at the beginning of 2010 owing to non-payment of rent and that the plot was re-allocated by the said council to Ng'ang'a on 12th March 2010 who in turn sold it to the plaintiffs in Case No. 382 of 2017 on 18th June 2015. Repossession can only arise if in the first place there was an allocation. I therefore find and hold that the suit property was allocated to Nkuraiya by the Commissioner of Lands through letter of allotment dated 6th September 1994. That resolves issue number one.

22. The next question is whether the suit property was repossessed. Ng'ang'a and the plaintiffs in Case No. 382 of 2017 insist that it was, while Nkuraiya's stand is that there was no repossession. It is important to note that the allocation to Nkuraiya was done by the Commissioner of Lands. According to Ng'ang'a and the plaintiffs in Case No. 382 of 2017, repossession was done by the County Council of Nakuru owing to non-payment of rent and following notices issued by the council. They produced copies of some of those notices which appear to have been issued between the years 2009 and 2010. None of those notices was addressed to Nkuraiya whose address was readily available in the letter of allotment. Further, there is no allegation in any of those notices that there were arrears or rent in respect of the suit property. Equally, there is no letter or notice specifically addressed to Nkuraiya informing him that the suit property was repossessed.

24. As observed above, Nkuraiya produced letters dated 23rd January 2017, 12th September 2017 and 10th October 2017 from National Land Commission stating that the suit property was allocated to Nkuraiya. The letters dated 23rd January 2017 and 10th October 2017 specifically recommend that title documents be issued to Nkuraiya. It is highly unlikely that this would have been the case if there had been repossession. The letter of allotment having been issued by the Commissioner of Lands repossession would have been by the very same Commissioner of Lands. There is no evidence that the County Council informed or involved the Commissioner of Lands or the National Land Commission in any repossession.

25. I am aware that Ng'ang'a and the plaintiffs in Case No. 382 of 2017 have produced receipts suggesting that they paid rent and rates to the County council following the alleged repossession. Payment of rent or rates *per se* is not proof of ownership and such payments in the absence of proof of repossession or a valid allocation would be of no consequence. In view of the foregoing discussion, I find and hold that the suit property was not repossessed from Nkuraiya.

26. The third issue for determination is whether Ng'ang'a passed any valid title to the plaintiffs in Case No. 382 of 2017. According to Ng'ang'a and the plaintiffs in Case No. 382 of 2017, Ng'ang'a was allocated the suit property by the County Council on 12th March 2010 after which he sold it to the plaintiffs in Case No. 382 of 2017 on 18th June 2015. I have already found that there was no repossession by the county council. Ng'ang'a therefore had no valid title and could not pass any valid title to the plaintiffs in Case No. 382 of 2017.

27. The last issue for determination is whether the parties are entitled to the orders that they have sought. The plaintiffs in Case No. 382 of 2017 seek judgment against Nkuraiya and Managoi for a declaration that they (the plaintiffs) are the legal/bona fide/registered owners of the suit property; a permanent injunction restraining Nkuraiya, Managoi, their agents or servants from trespassing, interfering, alienating, disposing, constructing, developing and or dealing in any way with the suit property; a mandatory injunction compelling Nkuraiya and Managoi to bring down the permanent structures and or any other development on the suit property; general and special damages and costs. In view of my finding that Ng'ang'a had no valid title and could not pass any valid title to the plaintiffs in Case No. 382 of 2017, it follows therefore that they have no valid title and the reliefs they have sought cannot issue.

28. While it appears that the plaintiffs in Case No. 382 of 2017 paid money to Ng'ang'a as purchase price for the suit property, that alone would not be a valid ground for divesting Nkuraiya of his superior right to the property. As purchasers, they would be entitled to pursue Ng'ang'a for relief owing to his failure to pass good title to them. Perhaps they ought to have asked Ng'ang'a more questions about the repossession before they committed to the transaction. Still, they can pursue justice as between themselves and Ng'ang'a. As Waki JA stated in **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR:**

40. *It seems to me, as I move to answer the last issue, that this case is not far removed from the notorious cases where unsuspecting Kenyans fell victims to the land grabbers I alluded to at the opening paragraph of this judgment. As this Court opined in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR:*

"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future."

44. *Mughal is not without a remedy. Black's law Dictionary 8th Edition defines 'bona fide purchaser' as:*

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims." ...

45. *I have expressed my doubts that Mughal was such a purchaser. Nevertheless, he is entitled to press his case ...*

It is my finding that the pursuit of damages is one of the remedies open to an offended party and I would leave it at that.

28. I too leave it at that. It is up to the plaintiffs in Case No. 382 of 2017 to fashion a case as they deem fit.

29. On his part, Nkuraiya seeks judgement against Ng'ang'a and the plaintiffs in Case No. 382 of 2017 for a declaration that he is the legal owner of the suit property; a permanent injunction to restrain Ng'ang'a and the plaintiffs in Case No. 382 of 2017, their servants or agents from entering upon, interfering with or in any manner dealing with the suit property; and costs.

30. I have held above that the suit property was allocated to Nkuraiya by the Commissioner of Lands through letter of allotment dated 6th September 1994 and that the suit property was not repossessed from him. That means that as between him, Ng'ang'a and the plaintiffs in Case No. 382 of 2017, he has a superior right to the suit property. Nevertheless, a letter of allotment is not title to land. Nkuraiya would have to follow it up, comply with all the conditions of the offer before he gets issued with a title document. In Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR, the Court of Appeal stated:

In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.

31. I would therefore not issue a declaration that he is the legal owner of the suit property. Such a declaration would be inaccurate and even misleading to Nkuraiya himself and to third parties. Instead, I hereby declare that Nkuraiya has a superior right to the suit property than Ng'ang'a and the plaintiffs in Case No. 382 of 2017.

32. Regarding the prayer for a permanent injunction to restrain Ng'ang'a and the plaintiffs in Case No. 382 of 2017, their servants or agents from entering upon, interfering with or in any manner dealing with the suit property, Nkuraiya has proven his case on a balance of probabilities. He is thus entitled to that order.

33. In the end, I enter judgment for Nkuraiya jointly and severally against Ng'ang'a and the plaintiffs in Case No. 382 of 2017 as follows:

a) The case of the plaintiffs in Case No. 382 of 2017 is dismissed.

b) I hereby declare that Nkuraiya has a superior right to the parcel of land known as Residential Plot No. 581 Gilgil Township than Ng'ang'a and the plaintiffs in Case No. 382 of 2017.

c) I grant a permanent injunction to restrain Ng'ang'a and the plaintiffs in Case No. 382 of 2017, their servants or agents from entering upon, interfering with or in any manner dealing with the parcel of land known as Residential Plot No. 581 Gilgil Township.

d) Costs of the consolidated suit are awarded to Nkuraiya.

34. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for plaintiff in ELC 366 of 2017 and defendants in ELC 382 of 2017

No appearance for defendant in ELC 366 of 2017

No appearance for plaintiffs in ELC 382 of 2017

Court Assistants: Beatrice & Lotkomoi