



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. 56 OF 2008

GEORGE S. KENGA & 50 OTHERS

RESIDENTS OF RUBY ESTATE, SOUTH C.....PLAINTIFFS

VERSUS

AHMED SHEIKH ABDI RATHMAN.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE NAIROBI COUNTY COUNCIL.....3RD DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit on his own behalf and on behalf of the residents of Ruby Estate, South C in Nairobi. The Plaintiffs are the beneficial owners of all that parcel of land known as L.R No. 209/10722/89 located in Ruby Estate South C (hereinafter referred to as the suit property) having purchased their respective residential houses from Ruby Holdings Limited who owned the original title L.R/No. 209/10722.

2. It is the Plaintiffs' case that at the time they purchased the suit property between 1987 and 1990 there was an understanding between them and Ruby Holdings Limited that the purchase price for each residential premises was inclusive of social amenities including a children's playing ground and Nursery school. Pursuant to the said understanding, during the approval for amalgamation and sub-division of the original parcel of land known as L.R No 209/10722, the suit property L.R No 209/10722/89 was reserved for a children's playing ground while the adjacent plot L.R No. 209/10722/88 was reserved for a Nursery School.

3. In order to safeguard their interest in the two parcels of land reserved for their beneficial use, the Plaintiffs fenced it off and decided to incorporate themselves into a Welfare Association so that they could transfer the property to the name of the association to hold it in trust for their joint benefit. Before they could register the association, the 1st Defendant trespassed onto the land, pulled down the fence erected by the Plaintiffs and put up his own fence and started constructing structures on the suit property. Upon making inquiries, the plaintiffs discovered that the 2nd and 3rd Defendants had unlawfully transferred the suit property to the 1st Defendant. It is against the foregoing background that the Plaintiffs instituted this suit against the Defendant seeking the following reliefs:

a) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession, use and occupation of all that piece of land known as L.R No. 209/10722/89 ("the suit property")

b) A declaration that the 1st defendant whether by himself or his servants or agents or otherwise howsoever is wrongfully in occupation of the suit property and is a trespasser on the same.

c) An order cancelling the title over L.R No. 209/10722/89 issued to the 1st Defendant and registered as I. R number 54093/1 at the Land Titles registry.

d) A permanent injunction restraining the Defendants whether by themselves, or their servants or agents or otherwise from remaining on or continuing in occupation of the suit property

e) An order of vacant possession of the suit property

f) General damages

g) Costs of this suit.

4. In his Statement of Defence dated 1st December 2008, the 1st Defendant denies that the Plaintiffs have ever owned the suit property. He avers that the suit property was lawfully transferred to him by the 2nd Defendant. He denies any fraud in the said transfer.

5. The 2nd Defendant filed his Defence dated 18th August 2010 in which it denies that it allocated the suit property to the 1st Defendant and states that the suit property was earmarked for an open space. It states that the title purported to have been issued to the 1st Defendant is a forgery.

6. On its part, the 3rd Defendant filed a Defence dated 9th September 2008 in which it denies that Plaintiff's claim and denies that it allocated the suit property to the 1st Defendant. It further states that all it did was to grant planning permission to the 1st Defendant on the strength of the documents presented to it by the 1st Defendant.

7. The suit was set down for hearing on 7th December 2018 when the Plaintiff testified and closed his case. The 1st Defendant did not attend court despite having been served with a hearing notice. The 2nd and 3rd Defendants were represented by their respective counsel who cross-examined the Plaintiff and informed the court that they did not wish to call any witnesses.

Plaintiff's case

8. The Plaintiff testified that he is a resident of Ruby Estate, South C Nairobi and that he was representing the residents of the said estate who were currently 94 in number. He relied on his witness statement dated 3.11.2017 and filed in court on 7th November 2017. He produced his bundle of documents filed together with the witness statement on 7th November 2017 as Plaintiff's exhibit 1.

9. In his witness statement which is fairly comprehensive, the Plaintiff restates what is contained in the plaint, a summary of which is captured in the second and third paragraphs hereinabove. Upon cross-examination by counsel for the 2nd Defendant he stated that in the 2nd Defendant's Defence it is stated that L.R No. 209/10722/89 was earmarked as an open space and that there are no records of allocation of the said property and the title purported to have been issued to the 1st defendant is a forgery. He referred to a letter dated 25.2.94 from the Commissioner of Lands which confirmed that the suit property was set aside as an open space reserved for a Nursery School. He also referred to a letter from the Registrar of titles confirming that the certificate of title for L.R No. 209/10722/89 (I.R 54093) was a forgery. He stated that they had sued the Commissioner of Lands so that he could shed light on the issue of the title.

10. Upon cross-examination by counsel for the 3rd Defendant, the Plaintiff stated that he sued the 3rd Defendant because of the development approvals it had issued to the 1st Defendant. He confirmed that the City Council of Nairobi does not issue titles though it was supposed to hold the title for the suit property in trust for the public. He said he had no document to show that the 3rd defendant was party to the fraud. That marked the close of the Plaintiff's case after which counsel for the plaintiff as well as counsel for the 2nd and 3rd Defendants were given time to file their submissions but only counsel for the Plaintiff filed his submissions.

Issues for determination

11. From the pleadings, evidence and Plaintiffs' submissions, the following issues fall for determination:

- i. Whether the Defendant is a trespasser
- ii. Whether the Plaintiffs are entitled an order of vacant possession
- iii. Whether the court should issue a permanent injunction to restrain the 1st Defendant from interfering with the suit property.

Analysis and determination

12. In his submissions, counsel for the Plaintiff argued that the Plaintiff had adduced uncontroverted evidence that the suit property was set aside as an open space for communal use. The said land was entrusted to the 3rd Defendant. He submitted that most of the Plaintiffs bought plots in Ruby estate with the knowledge and belief that that a portion of the land would be available for public/communal use. The 2nd and 3rd Defendants in their pleadings unequivocally asserted that they did not authorize the acquisition of the suit land by the 1st defendant. In its correspondence to the Plaintiff's advocates, the 2nd defendant stated that the 1st Defendant's title was a forgery.

13. Section 26 of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, 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 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 grounds of fraud, or misrepresentation to which 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.”

14. The 1st Defendant's title was acquired illegally and has been declared by the 2nd defendant to be a forgery. The 1st Defendant did not adduce any evidence in respect of his claim to the suit property and his defence therefore remains unsubstantiated. In arriving at this conclusion I am guided by the words of Madan J as he then was in the case of **CMC Aviation Ltd V Crusair Ltd No. 1 (1978) KLR 103, 1976-80 11KLR 835** which was cited in **Shaneball Ltd V County Government of Machakos (2018) eKLR**:

“pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until the truth has been established or otherwise, they remain unproven. Averments in no way satisfy for example the definition of “evidence” as anything that makes clear or obvious; grounds for knowledge, indication or testimony, that which makes truth evident or renders evident to the mind its truth”

15. On the basis of the Plaintiffs' uncontroverted evidence, I am satisfied that the 1st Defendant's occupation of the suit property is a blatant act of trespass which is a breach of the Plaintiffs' rights and in contravention of the public interest.

16. The Plaintiffs having proved their case against the 1st Defendant are entitled to an order of vacant possession as well as a permanent injunction to restrain the 1st Defendant from remaining on or continuing in occupation of the suit property.

17. As regards, general damages, the court in **Nakuru Industries Limited v S.S Mehta 7 Sons (2016) eKLR** observed as follows:

“In tort damages are awarded as a way to compensate the plaintiff for the loss he has incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from the land are all factored in as well as the cost of restoration of the land to the position it was before the wrongful act was committed”.

18. Halsbury's Laws of England 4th Edition Vol 45 para 25 1503 provides as follows:

- a) *“If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss*
- b) *If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss*
- c) *Where the Defendant has made use of the plaintiff's land, the plaintiff is entitled to such sum as would reasonably be paid for that use.*
- d) *Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or the defendant cynically disregards the rights of the plaintiff with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.*
- e) *If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the damages may be increased”.*

19. In the instant case the 1st Defendant unlawfully entered the Plaintiffs land waving a fake title and commenced some construction thereon. The Plaintiffs did not lead any evidence with regard to the status of the said construction at the time of the hearing but what is clear is that they were deprived of the use to of the suit property which was intended for their common use. Even though it is difficult for the court to assess the measure of damages which ought to be awarded to the Plaintiffs in order to restore the land to what it was before the trespass, I will award the Plaintiffs the sum of Kshs. 200,000 as nominal damages.

20. The upshot is that the Plaintiffs have proved their case on a balance of probabilities and I enter judgment for them against the 1st defendant in the following terms:

- a) A declaration is hereby issued that the Plaintiffs are entitled to exclusive and unimpeded right of possession, use and occupation of all that piece of land known as L.R No. 209/10722/89 (“the suit property”)
- b) The 1st Defendant is hereby ordered to vacate and deliver vacant possession of the parcel of land known as L.R No. 209/10722/89 to the plaintiffs within 30 days of service upon him of the decree herein.
- c) In default of compliance the plaintiffs shall be entitled to an order of eviction for the forcible removal of the 1st Defendant, his agents and/or servants from the suit property upon application.
- d) A permanent injunction be and is hereby issued restraining the 1st defendant whether by himself or his agents and/or servants or otherwise howsoever from remaining or continuing in occupation of the suit property.
- e) The title over L.R No. 209/10722/89 issued to the 1st Defendant and registered as I. R number 54093/1 at the Land Titles registry is declared as unlawful and is hereby cancelled forthwith.
- f) The Plaintiffs are awarded Kshs. 200,000 as general damages for trespass.

g) The costs of this suit shall be borne by the 1st Defendant.

Dated and signed at Kericho this 27th day of June, 2019.

.....

J.M ONYANGO

JUDGE

Dated, signed and delivered at Nairobi this 17th day of July, 2019.

.....

S. OKONG'O

JUDGE