



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 484 OF 2016

JOHN NGORE NJUGUNA.....PLAINTIFF

VERSUS

GLADYS SILANTOI PULEL.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....2ND DEFENDANT

JUDGMENT

1. By plaint dated 10th November 2016, the plaintiff averred that he is the legal owner of the parcel of land known as Gilgil Site & Service Plot 541 Residential situated in Gilgil Town (hereinafter “the suit property”) having purchased it on 22nd March 1989 from Joseph Ndungu Kimani who had been allocated the plot by the County Council of Nakuru. He further averred that the 1st defendant used forged documents to have the suit property transferred by the 2nd defendant to herself. He therefore sought judgment against the defendants jointly and severally for:

- a) *A declaration that the plaintiff is the right legal owner of the suit property Gilgil Site & Services/541 Residential Gilgil town.*
- b) *A permanent injunction restraining he (sic) defendants and particularly the 1st defendant from carrying on further construction, wasting, alienating, selling, leasing, charging or in anyway (sic) interfering with the possession and quiet possession of the suit property by the plaintiff.*
- c) *An order for demolition of the illegal structures erected on the suit property Gilgil Site and Services/541 Residential Gilgil town and eviction of the 1st defendant.*
- d) *Damages and mesne profits.*
- e) *Costs of this suit.*

2. In her statement of defence, the 1st defendant generally denied the allegations in the plaint. She averred that she is the registered owner of the suit property having purchased it from the plaintiff on 28th July 2008. The 2nd defendant also filed a statement of defence in which it generally denied the plaintiff’s allegations. The plaintiff’s claim against the 2nd defendant was however withdrawn by consent before the hearing of the suit was concluded.

3. At the hearing only the plaintiff and the 1st defendant testified in respect of their respective cases.

4. The plaintiff stated that he retired from the military in the year 2015 at the rank of colonel. He met the 1st defendant in the year 2012. On 22nd March 1989 he bought two plots being No. 541 and 543 Gilgil Site and Service from Joseph Ndungu Kimani who had been allocated the plots by the County Council of Nakuru. Mr Kimani gave him the original of the letter of allocation dated 25th November 1987 in respect of plot No. 541 which he produced as an exhibit. He further stated that Mr Kimani accompanied him to the offices of County Council of Nakuru where he paid rent arrears of KShs 320 and he was issued a receipt dated 22nd March 1989 in the name Mr Kimani. He also paid survey fees of KShs 2, 000, KShs 100 being clearance fees, showing fees of KShs 250 and KShs 360 being transfer fees. He produced receipts in respect of these payments. He added that the plot was transferred by the County Council from Joseph Ndungu Kimani to his name through a transfer of plot form dated 22nd March 1989 which was signed by himself, Joseph Ndungu Kimani and the Clerk/Administrative Officer of the County Council. He produced the transfer form as an exhibit.

5. The plaintiff further testified that Mr Kimani was asked by the County Council to surrender the original allocation letter and he complied and it was endorsed with the words ‘transferred on 22nd March 1989’ and signed by the clerk/Administrative Officer. The plaintiff took

possession of the plot and started paying rates to the County Council of Nakuru. He received demands for rent and rates from the county council which he duly paid. He produced Notice to pay Rent Arrears of KShs 1,210 dated 8th October 1992, receipt dated 6th December 1990 for KShs 400/= being rent arrears, a demand notice for KShs 7, 410 being rent arrears, a receipt for KShs 7, 410 in respect of the rent arrears, another receipt for KShs 6, 010 dated 28th June 2007 being rent, receipt for KShs 400 being administration fees dated 28th June 2007, receipt for KShs 500 being application fees dated 28th June 2007, receipt for KShs 500 being miscellaneous fees dated 28th June 2007 and receipt for KShs 2, 940 being rent and arrears of rent.

6. He added that in the year 2013, his late wife went to County Council of Nakuru offices at Gilgil to pay rates but was told that the suit property did not belong to him. The plaintiff made a follow up at County Council offices and was informed that the 1st defendant was the owner of the plot. He wrote a complaint to the county offices at Gilgil. As a result both he and the 1st defendant were summoned to appear before the sub-county administrator at Gilgil to show who owned the plot. Although the plaintiff attended and availed his original documents, the 1st defendant did not attend. The plaintiff further testified that the County Council later constituted a land board in Gilgil which he attended and produced all his original documents. The 1st defendant attended but without any documents. Later in the year 2016, the county administration constituted a dispute resolution committee. The plaintiff attended and produced originals of his documents but the 1st defendant did not appear. The committee made a verdict that the plot was illegally encroached by the 1st defendant and that the 1st defendant relied on forged documents. They gave the plaintiff a letter dated 25th February 2016 to that effect. A copy of the letter was produced as an exhibit.

7. The plaintiff also testified that he reported the matter to CID Nakuru in the year 2015. The County government wrote a letter dated 28th April 2015 to CID Nakuru in which it stated that the county had ascertained that the plot belonged to the plaintiff but was fraudulently transferred to the 1st defendant. A copy of the letter was produced as an exhibit. The plaintiff added that it is not true as alleged by the 1st defendant that she bought the land from him since he had never met her before this case and had never transacted with her. She never paid to the plaintiff any amount for the plot. He referred the court to the sale agreement dated 28th July 2008 which was later produced as defence exhibit and stated that the seller named therein as John Ngure Njuguna is not him, the seller's national ID number, postal address stated therein and the seller's signature are not his. He added that his correct national ID Number is 4258006. The agreement was drawn by Seth and Wathigo advocates, a law firm he had never gone to until he went to enquire on who had prepared the said agreement. The signature on the agreement is not mine.

8. Under cross examination, he stated that his national ID Number 4258006 was issued to him on 7th September 2012 when he was retiring from the military. He stated that he first learnt of the existence of the sale agreement dated 28th July 2008 around the year 2013 and obtained a copy from the county offices in Gilgil. He then realized that his signature and other details had been forged. It was also in the year 2013 that he learnt that someone was occupying and constructing on the land. He added that he attended the land board in Gilgil around the year 2015 but did not have the minutes of the meeting and that he paid rates for the plot until the year 2011 when he received the last demand notice. He further stated that he intended to develop the plot after retirement. He used to work outside the country from time to time and did not visit the plot between the years 2003 and 2013.

9. In her testimony, the 1st defendant stated that she is a business woman and that she bought the suit property from John Ngure Njuguna on 28th July 2008 and paid KShs 130, 000 as purchase price. She obtained approval of building plans for construction of a single room building and erected a fence. She produced a sale agreement dated 28th July 2008 as well as a copy of the approved plans. She added that the county council issued to her an allotment letter in the year 2008 which was later burnt in a fire and that she requested the county council and was issued with a new allotment letter dated 2nd August 2012. She produced a copy of it as an exhibit. She further stated that she started paying for the plot in the year 2009 and that from late 2012 disagreements started between her and the plaintiff. She had started construction in the year 2012 and completed in the year 2015. Owing to the dispute raised by the plaintiff, she went to the county government to check who the rate payer was and she was told that only her name was in the system. The plaintiff later reported her to CID. The CID demanded her documents but she did not give them since they were using force and were armed. She added that she bought the plot from John Ngure Njuguna, not the plaintiff herein. She could not trace the said John Ngure Njuguna as at the time of hearing since he went his own way after the transaction. She also stated that at the time of her testimony, the records at the county government show her name and that during the construction from 2008 nobody stopped her.

10. Under cross examination, the 1st defendant stated that she was aware that this court issued an order on 17th February 2017 that the rent from the property be deposited in a joint account at Jamii Bora bank and that the account was opened. She added that she had been depositing same for 3 months when Kenya power disconnected power, that as at the date of her testimony she had deposited KShs 14, 000 and that the monthly rent for the property is about KShs 10, 000. She further stated that she did not know John Ngure Njuguna, that he was introduced to her by her neighbour who relocated to Nairobi about the year 2015. She added that she did not know her said former neighbour's real name, that John Ngure Njuguna was a stranger to her but her neighbour knew him, that she met him about 3 times before signing the sale agreement and that in the sale agreement it is not stated that John Ngure Njuguna had a letter of allotment or that he had any document for the plot. She also stated that she went with John Ngure Njuguna to county office and effected transfer of the property to herself in the year 2008. She conceded that the plaintiff and she were summoned to county government offices. She stated that she attended and presented her documents, that she was not aware that a verdict was reached by a committee and that she was aware that there was a dispute resolution committee but did not know if it reached a verdict.

11. Upon being shown the letter from the County government dated 25th February 2016 (PEXh 16) to the plaintiff and letter dated 28th April 2015 to CID Nakuru (PEXh 17), she stated that she did not agree that she had never produced documents to the committee or that her documents were forged. She added that she called her former neighbour on phone to go and record a statement with CID but he was unreachable.

12. Parties filed and exchanged written submissions. The plaintiff submitted that the allocating authority for the plot was County Council of Nakuru whose successor the County Government of Nakuru's investigations concluded that the plot belongs to the plaintiff and that the 1st defendant's documents were forgeries. The plaintiff further cited the case of **Sukhdev Singh Laly v Philip Ojwang Kamau & 3 others**

[2018] eKLR and submitted that John Ngure Njuguna could not confer any proprietary rights in respect of the suit property to the 1st defendant.

13. For the 1st defendant it was argued in submissions that she is a bona fide purchaser for value without notice of any defect in title, that the allegations of fraud against her were not proven and that she acquired a valid title to the suit property. She relied on the Uganda Court of Appeal decision in **Katende vs. Haridas and Company Limited** as cited in **Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR** and **Eunice Grace Njambi Kamau & Another vs. Attorney General & Five Others [2013] eKLR**.

14. I have carefully considered the parties' pleadings, evidence and submissions.

15. Although both parties are laying claim to the suit property, each has given his own account of the history of the property and how they acquired their alleged respective interest in it. What stands out from the two accounts is that the plaintiff has traced the suit property to 25th November 1987 when it was allocated by the County Council of Nakuru to Joseph Ndungu Kimani pursuant to a letter of allotment of that date. He produced the said letter as an exhibit. He purchased the plot from the said Joseph Ndungu Kimani and paid KShs 320 to the County Council being arrears of rent which Joseph Ndungu Kimani owed, KShs 2,000 being survey fees, KShs 100 being clearance fees, KShs 250 being showing fees and KShs 360 being transfer fees. All these payments were made on 22nd March 1989. Thereafter the plot was transferred to him through transfer dated 22nd March 1989. He produced original receipts in respect of the payments as well as the transfer form duly signed by himself, Joseph Ndungu Kimani and the clerk/administrative officer of the County Council of Nakuru. He was later shown the plot by the council and he took possession. Between October 1992 and the year 2013 he received demands for rent and rates from the County Council of Nakuru which he paid. However when he sent his wife to pay rates in the year 2013 she was told at the council that the plot belonged to the 1st defendant and not the plaintiff. The foregoing account which was given by the plaintiff in his testimony is largely supported by the documents produced and was not challenged by the 1st defendant save for her claim that she purchased the property on 28th July 2008. I therefore accept it as the correct status of the plot between 25th November 1987 and the year 2008.

16. The issues that emerge for determination are firstly whether the 1st defendant purchased the suit property from the plaintiff; secondly, whether the 1st defendant acquired a valid title in respect of the suit property and lastly, whether the plaintiff is entitled to the reliefs sought.

17. The 1st defendant stated at paragraph 3 of her statement of defence that she purchased the property from the plaintiff on 28th July 2008 at a purchase price of KShs 130,000. She however changed her stand during her testimony and stated that she purchased it from John **Ngure** Njuguna and not the plaintiff herein whose name is John **Ngore** Njuguna. Thus, the answer to the first issue for determination is in the negative.

18. Now on to the second issue for determination. As a starting point, it is important to recall what the Court of Appeal stated in **Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR**:

It is evident that there are two competing claims over the suit property, and we have said that the plaintiff's proprietary interest is already established. Since the appellant's title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.

19. There is no dispute that the dispute herein between the plaintiff and the 1st defendant is over one and the same property: the parcel of land known as Gilgil Site & Service Plot 541 Residential situated in Gilgil Town. As recounted above, the plaintiff has established his claim over the suit property as far back as 25th November 1987 when it was allocated by the County Council of Nakuru to Joseph Ndungu Kimani who later sold it to him and transferred it to him on 22nd March 1989. On the other hand, the 1st defendant's case is that she purchased the suit property on 28th July 2008 from John **Ngure** Njuguna, a person who she categorically stated in her testimony is not the plaintiff herein. She has not demonstrated how, when and from who the said John **Ngure** Njuguna acquired the property. It is certainly not her case that John **Ngure** Njuguna acquired the property from the plaintiff herein. She stated that she was introduced to John **Ngure** Njuguna by a neighbour whose name she claimed not to know. She did not call the neighbour or John **Ngure** Njuguna to testify in support of her case. She could not tell their whereabouts. All this does not paint a picture of a person who is able to support her transaction. Although she claimed to be a bona fide purchaser for value without notice, such a claim cannot be sustained in the absence of proof that the person she purchased from had valid title.

20. The 1st defendant produced a letter of allotment in respect of the suit property purportedly issued to her on 2nd August 2012 by the County Council of Nakuru. Suffice it to state that the suit property having been allocated by the same County Council of Nakuru to Joseph Ndungu Kimani pursuant to its earlier letter of allotment dated 25th November 1987, it was no longer available for alienation. In any case, the 1st defendant's case is that she bought the property way back on 28th July 2008 from John **Ngure** Njuguna. How then does the County Council of Nakuru allocate to her that which she already claims to own? The latter letter of allotment is thus of no value and could not confer any right in respect of the suit property to the 1st defendant.

21. Another detail worth noting is that the 1st defendant admitted that Criminal Investigations Department (CID) detectives summoned her to produce her documents in support of her claim to the suit property but she declined to cooperate with them despite knowing fully well that a dispute existed. That is hardly the conduct expected of a person keen to defend title to a property legitimately acquired. The 1st defendant has thus failed to demonstrate that she acquired a valid title or that she carried out the necessary due diligence to determine if she was dealing with a lawful owner with a legitimate title.

22. The final issue for determination is whether the plaintiff is entitled to the reliefs which are quoted at paragraph 1 of this judgment. In view of the answers to issues 1 and 2, the plaintiff has established his title to the suit property and is therefore entitled to prayers (a) and (b)

of the plaintiff. Regarding the prayer for demolition of the structures erected on the suit property, I note that the 1st defendant admitted in her testimony that she constructed on the suit property. According to her, the construction started in the year 2012 and was completed in 2015. Indeed, she produced approved building plans in that regard. According to the plaintiff, he discovered the 1st defendant's claim to the suit property in the year 2013. The 1st defendant stated in her evidence in chief that disagreements started between her and the plaintiff from late 2012. Clearly, she continued with construction even as the dispute between the parties was raging, even if in its early stages. In other words, the 1st defendant knowingly proceeded with and completed construction on a disputed property. The plaintiff is in the circumstances entitled to an order of demolition of the buildings unlawfully constructed on his land.

23. Regarding the head of mesne profits, I note that plaintiff did not lead any evidence that would guide the court as regards quantum of mesne profits. Nevertheless, the 1st defendant stated under cross examination that she collects monthly rent of about KShs 10,000. I consider this a useful guide in calculating mesne profits and I will thus award mesne profits at KShs 10,000 per month. Since the 1st defendant claims that she purchased the suit property on 28th July 2008, the mesne profits will be calculated from August 2008 until she hands vacant possession to the plaintiff or until she's removed from the property. The plaintiff also claimed damages. However, no basis has been laid or submissions made to warrant awarding anything under that head. I will therefore not award it.

24. In the end, I enter judgment in favour of the plaintiff and against the 1st defendant as follows:

- a) A declaration is hereby issued that as between himself and the 1st defendant herein, the plaintiff is the legal owner of the suit property Gilgil Site & Services/541 Residential Gilgil town.
- b) I grant a permanent injunction restraining the 1st defendant from carrying on further construction, wasting, alienating, selling, leasing, charging or in any way interfering with the plaintiff's quiet possession of the suit property.
- c) The 1st defendant to demolish all the structures she has erected on the suit property Gilgil Site and Services/541 Residential Gilgil town and to vacate from the property within 30 (thirty) days of the delivery of this judgment. In default, the plaintiff to demolish the structures and to evict the 1st defendant.
- d) I award the plaintiff mesne profits at KShs 10,000 per month from August 2008 until the 1st defendant hands vacant possession to the plaintiff or until she's removed from the suit property.
- e) Costs of the suit.
- f) Interest on both costs and mesne profits.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26th day of September 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Opar holding brief for Mr Ndubi for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: Beatrice & Lotkomoi