



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

E.L.C CASE NO. 96 OF 2017

PAUL MWORIA BAGINE..... 1ST PLAINTIFF

SIMION JAMES KIOGORA ZAKAYO.....2ND PLAINTIFF

M'KIAMBATI M'NGARUTHI 3RD PLAINTIFF

VERSUS

PAULINE KAGENDO MWARIDEFENDANT

JUDGMENT

The pleadings

1. The plaintiffs filed the instant suit vide a plaint dated 10th March 2017 seeking the following orders;

- 1) An order that the defendant vacate Plot No. 30, 31 and 32 within Kisima Market respectively in favor of the 1st, 2nd and 3rd Plaintiffs respectively.**
- 2) An order directing the defendant to allow the plaintiffs access to their respective plots.**
- 3) General damages**
- 4) Interests on (iii) above**
- 5) Costs of the suit**

2. The plaintiffs claim that the 1st Plaintiff is the registered owner of Plot No. 30, the 2nd plaintiff is the owner of Plot No. 31 while the 3rd plaintiff is owner of Plot No. 32 within Kisima Market. The plaintiffs have pleaded that defendant is claiming ownership of plot 29, yet there are no records to that effect. Around January 2017, the defendant deposited building materials on the plaintiffs' plots and fenced all around with barbed wire fence claiming that all the plots belong to her. She prevented the plaintiffs from accessing their plots and therefore they cannot develop them. The defendant further built temporary structures on the plaintiffs' respective plots. In spite of repeated demands defendant has refused to vacate from the plaintiffs' plots.

3. On the other hand the defendant filed her statement of defence and a counter claim on 22.6.2017 where she maintained that she is the lawful and registered owner of Parcels No. KIIRUA/KIIRUA/NKANDO/3181, 4139, and 4140, which plots, the plaintiffs are referring to as plot no. 30, 31 and 32. Her mother one Teresa Mwari was the initial allottee of the suit parcels back in 1972 and after her death she remained and utilized the suit land. Consequently she claims for;

“A declaration that “she is the lawful proprietor of all those parcel of land known as KIIRUA/KIIRUA/NKANDO/3181, 4139, and 4140” and an order of permanent injunction “against the defendants in the counter claim their servants’ agents and anybody acting on their behalf from interfering with the plaintiff’s (in the counter claim) quiet use and occupation thereof, registration and or possession of all those parcels known as KIIRUA/KIIRUA/NKANDO/3181, 4139, and 4140”, plus costs of the suit”

The Evidence

4. All the three plaintiffs gave their testimony in support of their case. **PW1** is **SIMON JAMES KIOGORA** (2nd plaintiff). He adopted his

statement dated 17th March 2017 as his evidence, where he maintained that he owns Plot 31 Kisima Market, while the 1st plaintiff owns plot no.30 and 3rd Plaintiff Plot No. 32 (though he has erroneously referred to plaintiffs as defendants in that statement). PW1 stated that there is an adjacent plot no 29 at kisima market. The defendant herein fenced all the four plots, brought building stones and is constructing commercial plots. In his testimony he told the court that in the year 2008 he went to the councilor (M.C.A) and asked him for plots which were being given out at Maili Saba and he got Plot No. 31. He got a receipt (P Exh.3) from the county council after paying Ksh. 10,000. He was told that the money was for survey and other charges.

5. PW1 additionally stated that the plots at Kisima have no titles, just allotment numbers.

6. **PW2 PAUL MWORIA BAGINE** is the 1st plaintiff. He testified that he owns Plot No. 30 in Kisima Market. He got the plot after balloting through the defunct county council of Meru and he has been paying rent regularly since then. He is currently an MCA representing North Imenti Ward. He told the court that the suit land is in Kisima, an area called Kiirua/Nkando adjudication area. In that area adjudication ended from 2010 and titles were issued. He is aware that there are objection proceedings before final findings are made regarding registration.

7. **PW3 M'KIAMBATI M'NGARUTHI** is the 3rd plaintiff. He told the court that his plot at Kisima Market is No. 32 which he got from the council and he has always paid rent. He averred that the council plots do not have titles in that area so the defendant should be removed from that area.

8. In support of their case, the plaintiffs produced as exhibits their documents in the list dated 13.3.2017.

9. For the defence case, it is **PAULINE KAGENDO** who testified, as **DW1**. She is the defendant. She adopted her statement made on 22nd June 2017 as her evidence. She averred that the suit parcels emanated from land no. 693. Vide objection No. 816 where the council of Meru was the respondent and her mother now deceased was the objector. In the said objection proceedings, the land adjudication officer vide his decision dated 7/7/1995 ruled that the objector Teresia Mwari Murithi do occupy ¼ acre thereof which was given no. 3181. The objector was to occupy ¼ acres being the land given to her by the council of Meru vide minute 3/72 which had authorized her to build on the parcel in 1972. Her mother was in occupation of the land until her demise in 1998 and when she passed on, defendant took over the issue with the adjudication office. She succeeded and she became the proprietor of the 1/4 acre. The adjudication process ended and the title deeds were issued as parcels no. KIIRUA/KIIRUA/NKANDO/3181, 4139, 4140.

10. In support of her case, defendant produced as exhibits, the documents in her list dated 21.6.2017 (running from page 1 to 17).

Analysis and Determination

11. I have considered the record, the evidence adduced by the parties as well as the rival submissions. The issue to determine is “**who is entitled to the suit parcels?**”

12. The defendant herein has availed titles for KIIRUA/KIIRUA/NKANDO/3181, and 4140 which shows that she is the registered proprietor of the said plots. She avers that the title for plot 4139 is yet to be issued. She claimed that those are the plots which the plaintiffs are claiming to be plot numbers 30, 31 and 32 within Kisima Market. The plaintiffs on the other hand produced rate receipts as proof that they own the respective plots. Additionally they all claimed that they acquired the land through the county council but were not clear on the procedure of such acquisition.

13. **Section 24 (a) of the Land Registration Act** provides that;

“*Subject to this Act—*

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”

14. Further **Section 26 of the aforementioned Act** provides that;

“(1) The certificate of title issued by the Registrar upon registration, or 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 and 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 the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

15. Considering, the above provisions the titles availed by defendant are sufficient evidence of proof of ownership of the suit properties by the defendant. The plaintiffs have not pleaded, nor have they proved fraud, misrepresentation or illegally. Further, the plaintiffs have not adduced any evidence to indicate that the titles held by defendant were acquired un procedurally or through a corrupt scheme.

16. As rightly submitted by the defence, the defendant as the registered proprietor of the land is the one who has rights and privileges appurtenant thereto.

17. Apart from the fact of registration, the court has taken into account the root of the claims of the parties. How does each party claim to have acquired the suit parcels?

18. For the plaintiff, she has given a firm and consistent account of how the suit land was acquired. Her mother, Teresia Mwari was allocated the land by the county council for Meru way back on 15.1.1985 – See defence exhibit 2, but the council wanted to take the land at some point. Objection proceedings were lodged in case no. 816 on 7.7.1995. By then the plot was known as no. 693. In the decision dated 7.7.1995, judgment was delivered in favour of Teresia Mwari where the suit parcel had been subdivided and given a number 3181.

19. It is common ground that such objection proceedings are lodged in respect of areas undergoing adjudication process. For the suit parcels, the area was known as Kiirua/Nkando adjudication section. The process of adjudication is anchored under the Land Adjudication Act and Land Consolidation Act. After the dispute resolution mechanisms are exhausted under the aforementioned statutes, the adjudication registries are closed and the data is transmitted to the Director of land adjudication who in turn forwards the said data to the chief land registrar for the issuance of the titles. It appears that this is the route upon which defendant's claim had followed.

20. For the plaintiffs, their process of acquisition of the land is vague and doesn't seem to have been anchored under any particular law. In the pre-2010 legal regime, county council land could be acquired by individuals through allotment. However, minutes of the relevant council had to sanction the process. In addition, the allotment process had terms of engagement like offer and acceptance which had to be followed.

21. For PW 1, he avers that he went to a councilor called Mureti who told him he had plots to give out. He confirmed that there were no minutes sanctioning the alleged acquisition.

22. As for Pw 2, he relied on the alleged letter of allotment (pexh 1). That letter is written "**To await balloting**" and it doesn't mention the specific plot which was to be allotted. PW 2 also admitted that there were no minutes sanctioning the alleged allotment.

23. Likewise, PW3 apparently got the land from council but he has no minutes to that effect.

24. In the case of **Joseph Arap Ng'ok versus Justice Moiwo Ole Keiwua Nairobi Civil appeal no. 60 of 1997 (COA)**, it was stated that:

"It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter of the title document pursuant to the provisions of the act under which the property is held".

25. In the case of **John Mukaru Wachichi & others vs Minister of lands & others, H.C.C.C petition 82/2010 NBI**, the court stated that:

".....The court observed that the distinction is based on the fact that the right to property under the law and constitution is afforded to the registered owners of the land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land"

26. I find that plaintiffs did not acquire any transferable interests in the suit property as the purported acquisition of the land is not anchored under any known law.

27. The other issue the court has considered is on occupation. It is clear that defendant is the one on the suit land. That is why the plaintiffs have sought for her eviction in the plaint. PW 1 also stated that Pauline Kagendo whom he has sued is the one on the plot. He has also seen the grave of defendant's mother on that land. As for PW 2, he stated that "**none of us, plaintiff's resides on the suit land**".

28. As for PW 3, he stated as follows; "**I know Pauline Kagendo and she is my neighbor for a long time even before she was born. I have seen her growing up there. I knew her mother well. She was Teresia Mwari Muriithi. She died and was buried there.....To date, Pauline is still on that land even now**".

29. Defendant has also has availed some documents (D exhibit 5 & 6) which are notices issued by 2nd plaintiff in 2009 where he was requesting defendant to leave the land.

30. From the foregoing, it is clear that defendant is the one who is and has always been in occupation and control of the suit land. The plaintiff's cannot therefore purport to claim that the land of defendant could be elsewhere other than the suit premises.

Conclusion

31. In conclusion, I find that plaintiff's case has not been proved to the required standard. On the other hand, defendant's counter claim has been proved on a balance of probability. I hence grant final orders as follows:

(1) Plaintiff's claim is hereby dismissed.

(2) Defendant's counterclaim is allowed to the effect that:

(a) It is hereby declared that Pauline Kagendo Mwari is the lawful proprietor of all those parcels of land known as Kiirua/Kiirua/Nkando/3181, 4139 and 4140.

(b) An order of permanent injunction is hereby issued against the plaintiffs their servants, agents and anybody acting on their behalf from interfering with Pauline Kagendo's quiet use and occupation thereof, registration and or possession of all those parcels known as Kiirua/Kiirua/Nkando/3181, 4139 and 4140.

(3) Defendant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

B.G Kariuki for plaintiffs

2nd plaintiff

3rd plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE