



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 713 OF 2012

TOMAJOK LIMITED.....PLAINTIFF

VERSUS

NICHOLAS GEORGE MWAI MWANGI.....DEFENDANT

JUDGEMENT

1. This suit was commenced vide the plaint dated 16/10/2012 by the Plaintiff contending that it was the owner of land reference number (L.R No.) 209/4401/709 situated at Hamza, Makadara, Nairobi (“the Suit Property”). It averred that in September 2012, the Defendant wrongfully entered upon the Suit Property and placed a notice on the land indicating that he was undertaking a project on L.R Nos. 4401/805, 806 and 807 for construction of flats and proceeded to commence construction, which he was still carrying out. The Plaintiff further averred that it had verified from the Government records held at the Ministry of Lands and Survey of Kenya that L.R Nos. 4401/805, 806 and 807 do not exist.

2. The Plaintiff further contended that by virtue of not having title to the suit land, the Defendant cannot be in possession of valid building approvals and that his structures are therefore illegal. The Plaintiff averred that it had been deprived of the use and enjoyment of the suit land and had suffered loss and damage. It prayed for a permanent injunction to restrain the Defendant from trespassing, constructing, occupying, selling, alienating, disposing, charging, mortgaging, or creating a lien, charge, caveat or any other illegal encumbrance against the suit land. It also sought an order to evict the Defendant from the suit land as well as costs of the suit.

3. The Defendant filed his Amended Defence and Counterclaim dated 06/03/2015 in which he contended that he was the bona fide owner of the property known as L.R. No.209/4401/709 situated at Hamza, Makadara, Nairobi. He averred that he bought the land from Thomas Omondi Oloo, who bought it from Alex Mwaura. He averred that Alex Mwaura was allocated the land by the City Council of Nairobi vide the letter of allotment dated 22/09/1992. The Defendant admitted that he placed a notice on L.R No. 209/4401/709 (Plot No.805), L.R No. 209/4401/7089 (Plot No.806) and L.R No. 209/4401/707 (Plot No.807) for construction of flats. He stated that he commenced construction on the land after obtaining valid building approvals from the City Council of Nairobi.

4. The Defendant contended that it was the Plaintiff who had fraudulently obtained a lease in respect of the property known as L.R No. 209/4401/709. He gave particulars of fraud on the part of the Plaintiff which included obtaining the lease without an allotment letter from the City Council of Nairobi and without consulting the City Council of Nairobi; failing to follow due procedure and using a lease document obtained illegally or unprocedurally to register its interests over the suit land at the Ministry of Lands.

5. The Defendant further contended that he was the bona fide owner of two adjacent plots being Plot No. 805 (L.R No. 209/4401/709), and Plot No. 807 (L.R No. 209/4401/707) and that these two plots were amalgamated with Plot No. 806 (L.R No.209/4401/708) with the consent and approval of the City Council of Nairobi. He averred that he had been paying the land rates. In 2012, upon paying the necessary charges, he obtained change of use and development permission from the City Planning Department of the City Council of Nairobi to develop the suit property as well as two adjacent plots. He averred that he then put up permanent structures on the suit property which were partly financed through a loan facility amounting to Kshs. 35,000,000/= that he took from Housing Finance Kenya.

6. The Defendant sought to have the Plaintiff’s suit dismissed with costs and counterclaimed for a declaration that the property known as L.R No.209/4401/709 (Plot No.805) belonged to him. He sought a declaration that the registration of a lease over L.R No. 209/4401/709 (Plot No.805) in favour of the Plaintiff was unlawful, unprocedural and was procured fraudulently. He also sought a permanent injunction to restrain the Plaintiff from interfering with his property known as L.R No.209/4401/709 (Plot No.805) and an order directing the Land Registrar to cancel the lease issued to the Plaintiff over the suit property and register the lease in his favour. He also sought compensation for violation of his rights as well as the costs of the suit.

7. The Plaintiff filed a Defence to the Defendant’s counterclaim in which it contended that the Defendant could not have acquired a proper title from one Thomas Omondi Oloo since Mr. Thomas Oloo did not have a good title which he could to pass to him. The Plaintiff also contended that any purported amalgamation of the Defendant’s properties with those of the Plaintiff was illegal and baseless and was done without the Plaintiff being informed of it.

8. Each party called one witness to testify on its behalf. To prove that it owned the suit property, the Plaintiff produced the lease dated 05/04/2011 between it and the City Council of Nairobi over L.R No. 209/4401/709 I.R No. 12431/809, being a portion of the grant registered as No.137568/709 on 09/05/2012. During cross examination, the Plaintiff's director told the court that the Plaintiff applied to the City Council of Nairobi to be allocated the suit property. However, he neither produced a copy of the application nor the letter of allotment and could not explain how the approval for allocation was given. He also did not have any receipts to confirm payment of rates. He further told the court that the lease was preceded by due process, specifically that the full Nairobi City Council minutes confirmed that the undeveloped plot was allocated to the Plaintiff. When he sought to produce the said minutes as evidence, counsel for the Defendant objected to the production of those minutes in evidence. The court expunged those minutes said to have made a resolution allocating the suit property to the Plaintiff because they were not certified.

9. The Defendant produced a copy of the sale agreement dated 02/07/2011 over the suit land, which he entered into with Thomas Omondi Oloo, who bought the land from Alex Mwaura, the original allottee vide the letter of allotment dated 30/09/1992. The City Council of Nairobi confirmed through the letter dated 05/11/2012, that Plot No.805 (L.R No.209/4401/709) was initially allocated to Alex Mwaura. The Chief land surveyor wrote an internal memo dated 31/7/2009 to the Chief Counsel, City Council of Nairobi stating that the deed plans for the suit property were submitted for approval unprocedurally.

10. Parties filed written submissions which the court has considered. The Plaintiff's position is that it has a lease which is indefeasible and contends that the Defendant has an allotment letter which cannot override a title deed. Further, that a letter of allotment does not confer any proprietary rights to anyone, and only serves as an offer until the conditions therein are met and a grant issued upon which proprietary rights are transferred to the grantee of the letter of allotment. The Defendant relied on the decision in **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR** for its proposition that mere possession of a title does not imply that it cannot be challenged.

11. The court has considered the pleadings, evidence, rival submissions by the parties as well as the law. The Plaintiff holds a lease to the suit property while the Defendant possesses an allotment letter. Both parties lay claim to the same land. The issue for determination is who between the Plaintiff and the Defendant is the legal owner of the suit property.

12. Based on the evidence adduced, the court can only draw the conclusion that the certificate of lease produced by the Plaintiff was not properly legally acquired because the Plaintiff did not adduce any evidence on the process of how it acquired the lease over the suit land. The City Council of Nairobi acknowledged that Alex Mwaura was allocated the suit land in 1992. While the court is able to trace the process through which the Defendant acquired the land, the Plaintiff's acquisition of a lease over the suit land is replete with anomalies.

13. The concept of indefeasibility of title relied on by the Plaintiff which is stipulated by Section 26 of the Land Registration Act provides that upon registration, the certificate of title issued by the Registrar shall be taken by the court 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 and endorsed in the certificate. The title is subject to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

14. Having failed to prove the root of its title, the court finds that the Plaintiff's lease was not acquired procedurally and dismisses the suit with costs to the Defendant.

15. The Defendant's counterclaim is allowed in terms of prayers 2, 3, 4 and 5 of the Amended Defence and Counterclaim dated 6/3/2015. The Defendant is awarded the costs of the counterclaim.

Dated and delivered at Nairobi this 22nd day of October 2019

K.BOR

JUDGE

In the presence of:-

Mr. Okemwa holding brief for Mr. Makori for the Plaintiff

Mr. R. Kamotho for the Defendant

Mr. V. Owuor- Court Assistant