



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. CASE NO. 23 OF 2018

MICHAEL KIMANI THAIRU.....PLAINTIFF

VERSUS

PETER KINYANJUI GEDRAPH.....1ST DEFENDANT

MONTEZUMA MONALISA FUNERAL HOME LTD.....2ND DEFENDANT

VICTOR VINCENT KANG'ETHE KINYANJUI.....3RD DEFENDANT

JUDGMENT

Introduction:

1. In the Amended Complaint dated 3rd November, 2015, the Plaintiff averred that he was allocated Land Reference Number 4953/1977 by the Commissioner of Lands on 28th May, 1991; that he was issued with the Title Grant No. I.R. 67233/1 after paying the requisite rent and rates to the Commissioner of Lands and that he filed in the Chief Magistrate's Court Civil Suit No. 261 of 2010 against the 2nd Defendant while the 2nd Defendant filed Thika Chief Magistrate Case No. 353 of 2010 against the 1st Defendant in which each party is claiming the suit land.
2. The Plaintiff is seeking for a declaration that the suit land L.R. No. 4953/1977 belongs to him; a declaration that the 1st Defendant is a trespasser and for an order of eviction to issue as against the Defendants.
3. In his Defence, the 1st Defendant denied that the Plaintiff is the registered proprietor of the suit land. The 1st Defendant further denied having filed Thika CMCC No.353 of 2010 as alleged in the Complaint.
4. The 3rd Defendant averred in his Defence and Counter-claim that it was with his blessings that the 1st Defendant filed Thika CMCC No. 261 of 2010 and that it is not true that the suit land belongs to the Plaintiff.
5. According to the 3rd Defendant, he is the bona fide and legal owner of L.R. No. 4953/1977; that he was issued with the Grant for the said land on 1st June, 1991 and that the court should make a declaration to that effect.

The Plaintiff's case:

6. The Plaintiff, PW1, informed the court that he was allocated the suit land by the then Commissioner of Lands and that upon allocation of the said land vide a Letter of Allotment, he paid to the Government all the requisite premiums. PW1 informed the court that the Commissioner of Lands later on issued him with Grant No. I.R 67233 whose Land Reference number is 4953/1977 (*the suit property*).
7. PW1 informed the court that he later on found someone had fenced the suit land without his permission and that he reported the issue to the police. According to PW1, it later emerged that there were other cases in the Magistrate's Court in respect of the same suit land. It was the evidence of PW1 that his intention was to develop the suit land and that he is in possession of the approved development plan.
8. The Plaintiff produced in evidence the Letter of Allotment dated 28th May, 1991, the Grant; the Land Rent Demand dated 15th December, 2003 and 24th November, 2011 and the receipts evidencing payment of the rent.
9. The 1st Defendant, DW1, informed the court that the 3rd Defendant is his son. According to DW1, the suit land belongs to the 3rd Defendant. DW1 stated that the 3rd Defendant lives out of the country; that he is the one who used to take care of the suit land and that his son was issued with the Grant in respect of the suit land on 1st June, 1991.

10. The 1st Defendant stated that the Plaintiff has never been in occupation of the suit property; that he surrendered most of the ownership documents to the Ministry of Lands in the year 2007 so as to have the land registered under the Registered Land Act; that indeed, the said land was registered as Thika Municipality Block 5/147 and that the process of conversion of the land from the Registration of Titles Act to Registered Land Act has never been completed to date.
11. DW1 informed the court that he surrendered the original Grant to the Commissioner of Lands. DW1 produced in evidence the copy of the Grant in respect of the suit land; the letter dated 16th September, 2005; the land rent invoice; the land rent payment vouchers and the letter of allotment. DW1 also produced in evidence the Power of Attorney that was donated in his favour by the 3rd Defendant.
12. DW1 testified that he has been in possession of the land since the land was allocated to the 3rd Defendant. According to DW1, he built a perimeter wall around the land and that they obtained approvals to build godowns on the land.
13. In cross-examination, DW1 stated that he was given a 'new' Letter of Allotment after surrendering the Grant and the old Letter of Allotment for the purpose of converting it from the Registration of Titles Act to Registered Land Act.
14. DW1 stated that he initially sued the 2nd Defendant who had fake documents for the suit land and that he has never been evicted from the suit by the Plaintiff or the 2nd Defendant.
15. The Plaintiff's advocate submitted that a person's claim is only as good as his proof; that the Plaintiff has proved ownership of the suit property and that the 1st Defendant failed to prove his claim. Counsel submitted that the Plaintiff produced in evidence the Letter of Allotment of 1991; the receipt of Kshs. 89,380 that was issued to him in 1992; the original Grant in respect of the suit property and the official search.
16. The Defendants' advocate submitted that one of the ways of showing ownership of land is through payment of rates and rent; that the Plaintiff did not produce evidence to show that he had been paying rent and rates and that the Defendants produced evidence showing the payment of rent and rates.
17. Both the Plaintiff and the 3rd Defendant claim to be owners of land known as L.R. No. 4953/1977. To prove his claim, the Plaintiff produced in evidence the Letter of Allotment dated 28th May, 1991. The said Letter of Allotment shows that the Government offered to the Plaintiff an unsurveyed plot within Thika Municipality on condition that he pays the stand premium of Kshs. 89,380. The Plaintiff paid the said sum by way of a cheque and was issued with a receipt on 8th April, 1992.
18. Annexed on the Plaintiff's Letter of Allotment is a copy of the Part Development Plan showing the location of the unsurveyed plot. The Plaintiff also produced the Grant for L.R. No. 4953/1977 together with Deed Plan number 165431. The said Grant was registered in favour of the Plaintiff as I.R. 67233/1 on 18th October, 1995. In addition to the Grant and the Letter of Allotment, PW1 produced in evidence the pay-in-slip of Kshs. 163,483 for the accrued land rent. The said payment was made on 23rd December, 2011 and a receipt for the said amount was issued by the National Bank.
19. On the other hand, PW1 informed the court that the suit property was allocated to his son, the 3rd Defendant, and that he surrendered the original Grant for L.R. No. 4953/1977 for the purpose of converting the title from the Registration of Titles Act to the Registered Land Act.
20. The copy of the Grant that purportedly remained in the custody of DW1 after the original was surrendered to the Commissioner of Lands shows that the 3rd Defendant was registered as the owner of L.R. No. 4953/1977 on 18th October, 1995. In fact, save for the names of the allottees, the Grant that the Plaintiff is holding is similar in all respects like the copy of the Grant that the 1st Defendant produced in evidence.
21. Although the Plaintiff produced in evidence the Letter of Allotment dated 28th May, 1991 together with the Part Development Plan and a receipt showing the payment for the stamp duty, the Defendants did not produce the Letter of Allotment that gave rise to the Grant of L.R. No. 4953/1977 in favour of the 3rd Defendant.
22. It is trite before the year 2010, unalienated Government land was allocated by way of a Letter of Allotment, with a condition that the requisite stand premium be paid. It is only after the offer is accepted by the allottee by paying the stand premium that the allocated land was surveyed and a Grant issued by the Commissioner of Lands, on behalf of the President.
23. Although the 1st Defendant informed the court that he surrendered the original Letter of Allotment and the Grant for L. R. No. 4953/1977 that was issued to the 3rd Defendant for the purpose of having the suit land converted from the Registration of Titles Act to the Registered Land Act, he did not explain to the court why he never retained a copy of the Letter of Allotment, or a receipt evidencing the payment of the stand premium.
24. If indeed, the 1st Defendant surrendered the two crucial documents to the Ministry of Lands, then he should either have produced the copies of the same, or a letter from the Ministry of Lands acknowledging the receipt of the said documents or better still, he should have called a witness from the Ministry of Lands to confirm that the Letter of Allotment and the Grant for L.R. No. 4953/1977 was surrendered to the Ministry.
25. It is trite that a title can only be surrendered to the Government, for whatever purpose, by way of a Surrender instrument. The Defendants in this matter never produced in evidence a duly registered Surrender instrument. Consequently, the contention by DW1 that he surrendered the original Grant for L.R. No. 4953/1977 which was registered in the name of the 3rd Defendant before being issued with a

Letter of Allotment dated 15th March, 1998 for land known as Thika Municipality Block 5/147 is unsubstantiated.

26. The totality of the evidence before me shows that it is the Plaintiff who has proved on a balance of probabilities that he was allocated the suit land by the Government, and he accepted the said allocation by paying the requisite premium. On the other hand, the Defendants have not proved that they were allocated the same land and that the requisite stand premium was ever paid by them.

27. For those reasons, I allow the Plaintiff's Amended Plaint dated 3rd November, 2015 as follows:

- a. Declaration be and is hereby issued that the suit land No. 4953/1977 Grant No. I.R 67233/1 lawfully belongs to the Plaintiff.*
- b. Any document held by the 1st, 2nd and 3rd Defendants purporting to be valid in respect of L.R. No. 4953/1977, I.R. 67233 is declared a nullity.*
- c. Eviction order against the 1st and 2nd Defendants is hereby issued.*
- d. A permanent injunction is hereby issued restraining the Defendants from entering or remaining on the suit land.*
- e. The 1st and 3rd Defendants to pay the costs of the suit.*

DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT THIKA THIS 18TH DAY OF OCTOBER, 2019.

L. GACHERU

JUDGE