



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 328 OF 2012

IRENE WAFULA NJERU (suit on her

own behalf and on behalf of the

benefit of the estate of Nahashon Njeru (deceased).....PLANTIFF

=VERSUS=

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The plaintiff has filed this suit against the defendant seeking:-

2. It seeks orders:-

(a) A declaration that the parcel of land known as LR No. 209/12028 (Grant No. IR 69998) situate in Nairobi Area, belongs to the plaintiff.

(b) A permanent injunction restraining the Defendant, their officers, agents and/or servants or any other person acting for the defendant with the defendant's authority, from damaging, wasting, encroaching or trespassing onto, constructing thereon, further alienating or disposing of or in any other way whatsoever interfering with the plaintiff's parcel of land known as LR NO. 209/13029 (Grant No. IR 69998) situate in Nairobi Area.

(c) A mandatory injunction compelling the defendant to remove all the illegal structures erected on the said parcel of land known as LR No. 209/13028 (Grant No. IR 6998) by the Defendant, and to restore of the same to the original position.

(d) Order for the defendant eviction from the parcel of land known as LR NO. 209/1308 (Grant No. IR 69998) and the plaintiff be granted vacant possession of the said parcel of land.

(e) General damages for trespass.

(f) Interest at Court rates.

(g) Costs of the suit plus interest thereon at court rates.

(h) Any other relief this honourable court deem fit and just to grant.

In the alternative the plaintiff prays for:-

(a) Kshs. 30,000,000 being the assessed market value of the plaintiff's said parcel of land known as LR No. 209/13028 (Grant NO. IR 69998) situate in Nairobi Area.

(b) General damages for trespass.

(c) Interest at commercial rates.

(d) Costs of the suit plus interest thereon at court rates.

(e) Any other relief this honourable court deems fit and just to grant.

3. Upon being served with copies of plaint and summons to enter appearance, the defendant, entered appearance and filed a statement of defence dated 7th November 2012.

4. PW1 Irene Wanja Njeru told the court that she has brought this suit as the administrator of the estate of her late husband Nahashon Njeru. She told the court that her late husband owned LR No. 209/13028 situated in Kileleshwa. When her husband passed on in 2007, she went to Kileleshwa to look for the said plot because she wanted to sell it in order to cater for the children. She could not trace the plot since the same had been developed. There was a block of flats on the said land. She was informed that the flats were constructed for the Ministry of Housing. She engaged a surveyor who prepared a report. A valuation report was also prepared. The suit property is worth Kshs.30 million. She prays that the suit property revert back to her or that she be compensated for the loss of the land. She also seeks costs of the suit and interest.

5. The defence called one witness DW1 Julius Wairagu told the court that he is an architect working with the Ministry of Housing. He adopted his witness statement dated 7th November 2012. He told the court the police houses are constructed on LR No. 209/3545 which parcel belongs to the government of Kenya. He said the parcel of land was alienated for public use. On it are police houses and a shopping center. He told the court there is a police station adjacent to the suit plot.

6. He also told the court that before the houses were constructed there was a maintenance depot belonging to the Ministry of Public Works. The said depot was brought down to pave way for the construction of the houses in 2006. During construction no one claimed ownership of the said plot. DW1 told the court, during construction he visited the site often as he was in charge of the project together with other Consultants. The project was completed in 2008 and is occupied by civil servants. He told the that court that the plaintiff is not entitled to any compensation by the government of Kenya.

7. At the end of the trial parties tendered written submissions.

The Plaintiff's submissions

8. The plaintiff produced a copy of lease which shows that the owner of the parcel of land known as LR No. 209/13028 (grant No. IR 69998) is the late Nahashon Njeru. A certificate of search also shows the suit property was registered in the name of Nahashon Njeru. The plaintiff did not sell or transfer ownership to the defendant. The plaintiff continued paying land rates and rent for the suit property as required. She produced several receipts to confirm this.

9. She has put forward the cases of **Aster Holdings Limited vs City Council of Nairobi & 4 Others [2017] eKLR; Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another [2017] eKLR**. The defendant in this case adduced evidence in support of its ownership of LR No. 209/3545 and not the suit property.

10. The plaintiff in her visit to the suit property found the defendant had put up permanent structures. She was denied access to her property by the defendant's agents. Neither the plaintiff nor her late husband had sold or given authority to the defendant to construct on their land. The survey reports by M/s Moha Survey Consultants (Exhibit P5) and M/s Green Gain Consultants Ltd (Exhibit P6) confirm that the defendant has encroached on the suit property. Any acquisition by the government as stated by DW1 was illegal and fraudulent. She has put forward the case of **Mike Maina Kamau vs Attorney General [2017] eKLR**.

11. Since it has been proved that the plaintiff owns LR No. 209/13028 (Grant NO IR 69998) and the defendant illegally and fraudulently acquired the suit property, it is only right and just that the plaintiff be granted the prayers sought. She has relied on the case of **Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another [2017] eKLR**.

12. From the valuation reports, the valuers, considered the value of apartments within the block that lie wholly on the suit property including the value of the vacant plot and estimate the improvements thereon. The estimated current market value is Kshs.30 million. It is in the interest of justice that in the event that the plaintiff's ownership of parcel of land LR NO. 209/13028 (grant IR 69998) cannot be restored, then the plaintiffs have to be compensated. The plaintiff has proved her case on a balance of probabilities and judgment should be entered in her favour as against the defendant.

The Defendant's submissions

13. The suit land is public land which was not available for alienation at the time it was allocated. The survey plan for LR No. 209/3545 F/R 298/49 dated 9/11/950 shows the excision of LR 209/3545.

14. The records at the Ministry of Lands show that in 1950, vide a letter dated 20th January 1950 the director of works applied for a plot to put up an office and a yard for the maintenance staff. That the land was surveyed and the plot was reserved as LR 209/3545. This is the land contained in the survey plan which evidence was not controverted by the plaintiff. This is a public land and there is no encroachment at all. The deceased must have seen the wall and the existing government depot and police station on the land. The defendant has not encroached on any land. The plaintiff's husband acquired alienated government land without reference to the government department that was for the time being vested with the land. The Ministry of Housing then proceeded to develop the land in the usual discharge of its mandate and without notice that the plaintiff had acquired the land.

15. The plaintiff cannot plausibly sustain a claim for compensation against the defendant or Ministry of Public Housing. The suit land has

always been a public works maintenance depot. The plaintiff has never been in possession or occupation of the land. If the plaintiff realizes her husband bought a phantom plot her only recourse it has is against the vendor. The deed plan subject to which the grant was issued was prepared at the plaintiff's behest by a private surveyor. The government or the Ministry of Housing cannot be liable for actions in which the registration relied on the representation of a private surveyor unless section 21(2) of The Survey Act. No rights and liabilities accrue to the parties as a result of an illegality. In this case the plaintiff illegally acquired public land. It relies on the case of **Macffoy vs United Africa Company**.

16. The land was reserved for public works maintenance depot. It ceased being unalienated government land hence the grant made thereon was illegal as it was designed to defeat the public purpose for which the land was reserved and was being used. Consequently, the plaintiff cannot be compensated. It has put forward the case of **Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR**. The plaintiff is not entitled to compensation. She is free to pursue the vendor or the Licensed Surveyor not the Ministry of Housing. The plaintiff's suit ought to be dismissed with costs.

17. I have considered the pleadings, the evidence on record, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether the suit land is private or public land.

(ii) Whether the defendant has encroached on the plaintiff's land and erected permanent structures (residential flats) on it.

(iii) Whether the plaintiff is entitled to the prayers sought or in the alternative compensation.

(iv) Who should bear costs?

18. It is the plaintiff's case that the suit property LR No. 209/13028 is registered in the name of Nahashon Njeru her late husband. She produced the certificate of title issued to Esther Rotich on 29th July 1996. The same was transferred to Nahashon Njeru on 2nd August 1999 for KShs.2.3 Million.

19. The certificate of title was issued to Esther Rotich vide Deed Plan Number 204307 dated 2nd April 1996. The same deed plan shows that the suit property is adjacent to LR No. 209/3545. It is not clear how Esther Rotich acquired the suit property. There is no letter of allotment produced by the plaintiff in the name of the alleged initial owner Esther Rotich. It was incumbent on the plaintiff to show the history of the said title before the land was transferred to her late husband. Entry No. 4 in the certificate of title shows that the suit property was transferred to Nahashon Njeru for KShs.2,300,000 on 2nd August 1999. There is no evidence of any transaction between the initial grantee Esther Rotich and the late Nahashon Njeru. It is the plaintiff's case that the property was purchased from Esther Rotich. It is not enough to state that the suit land is registered in the name of Nahashon Njeru.

20. The defendant on the other hand maintains this was public land which had been alienated for public use. That the houses are constructed on LR 209/3545 which was previously part of the public works maintenance depot extension and that the developments undertaken by the defendant were within the said parcel of land. That the said land was allocated and reserved as such to the Ministry of Public Works who put up an office and a maintenance yard.

21. DW1 J G Waragu also told the court that he was in charge of the project in 2006 and that no one at the time objected to the construction. He also told the court that nobody claimed to have title to the said land. In support of it's case, the defendant relied on a letter of allotment dated 17th January 2006. It refers to Nairobi City LR No. 209/3545 Kileleshwa (maintenance depot). There is also a deed plan No. 46526.

22. It is clear from the evidence on record that this is public land. That where the houses are constructed on is LR NO. 209/3545. There is no explanation by the plaintiff as to why the plaintiff or her late husband Nahashon Njeru never took possession of the suit property despite purchasing it in 1999. DW1 stated that the block of flats were constructed in 2006. By 2006 the said Nahashon Njeru was still alive. He did not object to the construction of the said houses. The only logical conclusion was that he knew this was public land.

23. If indeed the late Nahashon Njeru bought the suit property from the alleged initial grantee, Esther Rotich then I find that he did not do due diligence as he would have noticed the same was next to a police station and was being used as a maintenance depot by the Ministry of Public Works. In the case of **Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR**. The Court of Appeal stated thus:-

“We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellant purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to a provincial headquarters and the law courts, without any form of inquiry? As this court stated in Athi Highway Developers Limited vs West End Butchery Limited & 6 Others (supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property with the alacrity of a potato dealer in Wakulima market”. And further in Flemish Investments Ltd vs Town Council of Mariakani, CA No. 30 of 2015, in an appeal where the appellant, who had fraudulently obtained registration of public property in his name, but claimed to be an innocent purchaser for value without notice, this court stated:-

“A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings, and fixtures thereon, among others. If indeed the appellant honestly believed that Plot NO. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial

property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells”.

I rely on the above decisions in finding that LR 209/13028 must have been part of LR No. 209/3545 which is public land. The survey reports relied on by the plaintiff's are by private surveyors. She should have engaged the services of a government surveyor to establish whether indeed LR No. 209/13028 exists.

24. I note that the authorities relied on by the plaintiff relate to instances where the certificate of leases were issued regularly. The facts of this case are distinguishable in that the plaintiff was unable to demonstrate to the court that the initial grantee Esther Rotich followed due process in acquiring the said title. There was no letter of allotment issued to Esther Rotich. She therefore did not have any title upon to pass to the late Nahashon Njeru.

25. The plaintiff is not entitled to any compensation as no rights and liabilities can accrue to the parties as a result of an illegality. The plaintiff has failed to prove that the defendant has encroached on LR 209/13028, hence she is not entitled to any compensation.

26. In conclusion, I find that the plaintiff has failed to prove her case on a balance of probabilities as against the defendant and the suit is dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant