



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 198 OF 2017

PATRICK NG'ANG'A MUCHIRI.....PLAINTIFF

VS

GERISHOM NGURE MANGARADEFENDANT

JOHN MUCHIRI GACHUHI3RD PARTY

JUDGMENT

1. Vide a plaint filed on the 9/2/17 the Plaintiff sued the Defendant and sought the following orders;

- a) That the Defendant be evicted from the suit property.
- b) That a declaration be made by this Court that the Defendant is a trespasser and ought to vacate the suit property immediately.
- c) That the Defendant demolishes and removes the illegal structures on the suit property at the expense of the Defendant.
- d) That a permanent injunction restraining the Defendant their agents, workers and all other persons from entering or occupying or trespassing on or claiming the title.
- e) That general damages and/or exemplary damages and/or aggravated damages and/or aggravated damages and/or punitive damages against the Defendant for loss of business to be assessed and quantified and proved at the hearing hereof.
- f) Mesne profits against the Defendant at a rate to be determined based on the comparable rates in the area also to be quantified and proved.
- g) Costs of the suit and interest.
- h) Any other relief that the Court may deem fit to grant.

2. It is the Plaintiff's case that at all material times he and his brothers are co-owners of the suit land having purchased the same from one Grace Wanjiru. He avers that he discovered in 2016 that the Defendant had trespassed onto the suit land without his consent and carried out unauthorized construction of structures. He has pleaded particulars of trespass in para 9 of the plaint.

3. The Defendant denied the Plaintiffs' claims and averred that he bought the suit land for valuable consideration from one David Gachuhi Muchiri, the Plaintiffs co-registered owner in the presence and with the approval of their father John Muchiri Gachuhi in 1999, a fact that was well known to the Plaintiff. That upon purchase he commenced construction of the permanent building that has been there for the past 13 years prior to the filing of the suit. He denied any acts of trespass and avers that he is in occupation as of right.

4. The Defendant took out a 3rd party notice under Order 1 Rule 15 of the Civil Procedure Rules against the 3rd party on the grounds that the 3rd party purported to sell the suit land to the Defendant based on a representation and or misrepresentation that he had authority and capacity to sell the suit land from the Plaintiff. As a result of the said representation and or misrepresentation, the Defendant developed the plot which developments are now valued at Kshs 2.8 million as at 2017. He sought indemnity from the 3rd party in respect to the refunds of the purchase price, costs of development in the sum of Kshs 2.8 million and compensation for loss of business.

5. The 3rd Party in his defense stated that he bought the suit land from one Grace Wanjiru in 1995 and caused it to be registered in the names of his 3 sons namely David Gichuhi Muchiri (dcd), Ernest Ndungu Muchiri (dcd) and the Plaintiff. That he learnt from his son David that the other two sons had agreed to sell the suit land to the Defendant in 2000. That he did not participate in the transaction nor receive any of the

purchase price. He asserted that the plot belongs to the Defendant who upon purchasing it developed and has occupied it since.

6. At the trial the Plaintiff led evidence that he and his 2 deceased brothers own the suit land having purchased it from one Grace Wanjiru. That in 2011 he noticed the developments on the suit land but on inquiry from his father he was informed that it was his father and his deceased brother David that was developing the suit land. However in March 2016 he discovered that it was not his father but the Defendant who had trespassed onto the suit land. Sensing danger he sought to find out the state of the ownership of the land from the County Government of Murang'a vide letter dated the 1/3/16 which result was that he and his deceased brothers were still the registered owners of the land. He informed the Court that he resides in America and did not visit Kenya in the period between 1996-2003 but thereafter he has been coming annually. That at no time did he give any power of attorney to his father nor his deceased brother to dispose of the suit land to the Defendant.

7. Whilst being cross examined by the 3rd party, he denied that the suit land was sold to develop another plot at Kangemi. He denied that the plot was purchased by the 3rd party and registered in his and his deceased brothers' names. That it is he and his two deceased brothers who purchased the suit land from one Grace Wanjiru. The vendor transferred the suit land to their names on the 10/1/95. The transfer was confirmed by the Muranga County Council on the 13/4/1995. The said council confirmed to the Defendant vide letter dated 20/9/04 that the suit land is registered in the name of the Plaintiff and his two brothers. Further that on the 26/4/16 the County Government of Murang'a through its sub county administrator confirmed that the suit land belongs to the Plaintiff and his two brothers. He informed the Court that he pays rent and rates for the suit land.

8. PW2 – Julius Kibe Muchiri testified and stated that he is the brother of the registered owners of the suit land. The 3rd party is his father. He confirmed to the Court that the suit land belongs to the Plaintiff and his deceased brothers. He stated that David and Ernest died in 2003 and 1996 respectively. That no letters of representation have been filed in respect to the two deceased brothers. He stated that the Defendant is a trespasser. That he learnt from the Plaintiff that he and his brothers did not sell the land to the Defendant.

9. The Defendant testified and relied on the Replying affidavit filed on the 21/4/17 as his evidence in chief. He also produced exhibits marked as DEX1-9 in support of his defence. That he knows the Plaintiff and the 3rd party as son and father. He informed the Court that he bought the suit land from the 3rd party in 1999 at the cost of Kshs 160,000/- , which amount he paid in installments until payment in full. That a second agreement was entered into by the Defendant and David Gachuhi Muchiri, one of the co-owners in 2000 to provide for access road to the suit land. This agreement was not executed by the Plaintiff. By then Ernest Ndungu Muchiri one of the co-owners had died in 1996. That he applied for a building permit in 2000 and commenced the construction which he completed in 2005. That the Plaintiff was aware that he was constructing the building as he visited his father often who lived in the next plot. That he seeks compensation and indemnity from the 3rd party in the sum of Kshs 2.8 million as shown in the valuation report produced in Court and marked DEX No 9.

10. In cross examination he explained that the suit land belonged to the 3rd party as per the agreement dated the 2/1/95. That the 3rd party bought the suit land from one Grace Wanjiru and registered it in the names of his 3 sons. Later he carried out a search which indicated that the suit land was registered in the names of the Plaintiff and his two brothers. That he was informed that the 3 brothers were represented by their father in the agreement dated the 13/2/1999. That the 3rd party did not have a power of attorney from his 3 sons authorizing him to sell the suit land to him. He stated that he believed that the 3rd Defendant represented his sons in the transaction. That the agreement dated 9/5/2000 was entered into by David Gachuhi Muchiri and the Defendant in the absence of the Plaintiff and Ernest Ndungu Muchiri who was deceased by then. That this agreement was purposefully to provide a 5 feet passage between plot No 4 (which belonged to the 3rd party) and the suit land. That the Murang'a County Council confirmed to him that the land belonged to the 3 brothers as at 2004. That the construction was stopped in 2004 but later was allowed to complete it. He stated that he was unaware if the family had petitioned letters of grant for the estates of the deceased brothers. He informed the Court that in the event that he loses the case he shall seek for compensation and indemnity from the 3rd party and hence the valuation report he produced in Court which indicates the value of the property and developments in the sum of Kshs. 2.8 million.

11. The 3rd party informed the Court that he bought the suit land from Grace Wanjiru at the consideration of Kshs 100,000/- and caused it to be registered in the names of his 3 sons. That later he sold the suit land and applied the proceeds to develop another family plot in Kangemi, Nairobi. That he sought the approval of his sons orally as he did not foresee any misunderstanding. That the Plaintiff was aware about the transaction. On cross examination by My Kakai for the Plaintiff, he stated that he gave the purchase price to his sons. That he has no document authorizing him to sell the suit land on behalf of his sons.

12. As to who the registered owners of the suit land are, the Plaintiff submitted that at all material times relevant to the suit, the registered owners of the suit land are David Gachuhi Muchiri , Ernest Ndungu Muchiri and the Plaintiff. That this evidence is supported by the documents on record from interalia Muranga County Government as well as PW2. Except for the Plaintiff the other two are deceased.

13. As to whether the Defendant is a trespasser, the Plaintiff submitted that the suit land belongs to the Plaintiff and his two brothers and the Defendant has no authority to be on the land. That the Defendant unlawfully entered into the Plaintiffs suit land without any express permission of the Plaintiff and so is a trespasser. In respect to damages for trespass, the Plaintiff submitted that the general principle as regards to the measure of damages to be awarded in the case of trespass to land where damage has been occasioned to the land in the amount of diminution in value or the cost of reinstatement. That the overriding principle is to put the claimant in the position he was prior to the infliction of harm (**see Duncan Ndegwa Vs Kenya Pipeline HCCC NO 2577 OF 1990**). He sought damages in the sum of Kshs 500,000/- as reasonable in the circumstances.

14. In his further submissions the Plaintiff submitted that the suit is not a representative suit as alleged by the Defendant. He submitted that the nature of ownership of the suit land was a joint tenancy and quoting Halsbury's law of England Vol 39(2) at page 141 para 193 he submitted that each joint tenant has an identical interest in the whole land and every part of it and that in essence the act of one personal representative is at common law the act of all. That the suit is brought purely on his rights of ownership in the suit land. In response to the claim of the Defendant that he has attained prescriptive rights in the suit land on grounds of long possession in excess of 12 years, the Plaintiff submitted that the claim is unfounded because the Defendant has not filed any counterclaim nor prayed for a right under Adverse

Possession.

15. The Defendant opposed the Plaintiffs claim in his submissions and stated that the Plaintiff has no locus to prosecute the suit as filed as he has no legal standing to represent his deceased brothers. The suit is untenable on grounds that the Plaintiff did not obtain letters of grant of administration to represent the interests of the deceased brothers. That since the suit seems to have been filed in a representative capacity, it offends the provisions of Order 1 Rule 8 of the Civil Procedure Rules as the legal estates of the two deceased brothers should have been notified under sub rule 2 before the suit was filed.

16. Further the Defendant submitted that the agreement dated the 2/1/95 between the 3rd party and the vendor Grace Wanjiru was executed by the 3rd party and the Defendant before the two deceased sons. That it is not true that the suit land was purchased by the Plaintiff and his brothers but by the 3rd party. That the 3rd party sold the suit land to the Defendant in 1995 and a further agreement in 2000 to provide access was witnessed by David Gichuhi whose estate is not a party to the suit. That the Plaintiff was aware of the construction and occupation of the suit land by the Defendant since 2005 and faulted him for filing suit after 12 years. That the Court being a Court of equity should not aid the indolent, the Plaintiff in this case who slept on his rights and failed to move the Court in 2005 when the construction started. That the Defendant as a result acquired proprietary rights arising from occupation of the land for a period in excess of 12 years. Finally he sought indemnity against the 3rd party for interalia, the purchase price in the sum of Kshs 160,000/-, cost of development in the sum of Kshs 2.8 million together with compensation for loss of business to be computed by the Court.

17. The 3rd party submitted that the Plaintiff is his 3rd born son who resides in America since 1995 but visits Kenya once every year. That he lives on plot No 4 adjacent to the suit land. That he bought the suit land from Grace Wanjiru and caused it to be registered in the names of his sons to hold in trust for him. He admitted selling the plot to the Defendant at the consideration of Kshs 160,000/- after which he developed the land and has occupied it for a period in excess of 12 years and with the knowledge of the Plaintiff who raised no objection. That his two sons David and Ernest are deceased and no letters of administration have been sought. That the Plaintiff has no capacity to file the suit on behalf of his two brothers in the absence of letters of grant of administration.

18. Having considered the pleadings, the evidence adduced in Court, the written submissions and the legal authorities where supplied by the parties, the issues for determination are as follows;

- a. Does the Plaintiff have locus to file suit
- b. Who owns the suit land
- c. Has the Defendant trespassed onto the suit land
- d. Is the Plaintiff entitled to damages for trespass
- e. What orders should be given in respect to the 3rd party suit
- f. Who meets the costs of the suit.

19. As to whether the Plaintiff has locus to file this case, it is the Defendant's admission that the suit land is registered in the name of the Plaintiff and his deceased brothers. He averred that to the extent that the Plaintiff seems to have filed a representative suit, he failed to comply with the provisions of order 1 rule 8 which require that in suits with multiple parties with similar interests, the same ought to be brought as a representative suit. The Plaintiff is categorical that he has filed the suit seeking orders for trespass based on his right as a co-owner of the suit land and not on a representative capacity. The Defendant, in concurrence with the 3rd party have claimed that the suit is unfounded because the Plaintiff has not filed letters of grant of administration in the estates of his two brothers who are co-owners of the land on record. Locus is the right of an individual to be heard in Court proceedings. To have locus to sue, a party must have a sufficient interest in the matter in issue. See the case of **Law society of Kenya Vs Commissioner of Lands & others HCCC No 464 of 2000 KLR 706**. Where the Court finds that a party has no locus, it may proceed to strike out the suit for being an abuse of the Court process.

20. In the case at hand, it is not in dispute that the suit land is registered in the names of the Plaintiff and his two deceased brothers. It is not in dispute that the two brothers are deceased. It is on record that the suit land was allocated to Grace Wanjiru vide a letter dated the 15/10/92 by the Muranga County Council. On the 10/1/95 the said Grace Wanjiru applied for a change of ownership of the suit land to David Gachuhi Muchiri Ernest Ndungu Muchiri and the Plaintiff. Vide a meeting of the Muranga Council Town Planning committee held on the 14/3/1995 the application was approved and communicated to the previous owner on the 14/3/1995. On the 3/9/2004, the Defendant sought the ownership position of the suit land from the Clerk of the Murang'a County Council. The said council replied vide letter dated the 20/9/2004 and confirmed that the Plaintiff and his two brothers are the registered owners of the suit land. On inquiry by the Plaintiff vide a letter dated the 1/3/2016, the Muranga County Government through its Sub County Administrator namely G G Murimi confirmed that the ownership of the land according to its records are the Plaintiff and his two brothers.

21. It is not in dispute that the two brothers David and Ernest are deceased. There is a death certificate dated 7/11/2003 produced by the Defendant, David Gachuhi Muchiri died on the 5/8/2003. There was no evidence adduced to support the death of Ernest however that fact is admitted by all the parties in the suit that he died in 1996.

22. I have perused the searches and the confirmation of ownership of the suit land by the County Government and it does not state the nature of the ownership so much so that the Court is unable to tell if the ownership is joint tenancy or tenancy in common. Section 91 of the Land Registration Act defines co-tenancy as the ownership of land by one or more persons and includes joint tenancy or tenancy in common. The relevant section of the Act section 91(2) states as follows;

“(2) Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content of the rights of the persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common”.

23. The import of the above provisions of the law is that where the instrument of transfer is silent on the nature of their rights as to co-ownership, there shall be a presumption that they hold the interest as tenants in common in equal shares. In the instant case it is clear that the Plaintiff is right to have brought a suit for trespass based on his right of co-ownership which entitles him to protect the suit land from trespassers and any other aggression. Being a tenancy in common, the Plaintiff has a right to the undivided share of the whole land. It is on record that the estates of his brothers have not been succeeded. That notwithstanding the Court finds that the claim of the Plaintiff as against the whole suit land is valid as against trespass by the Defendant. It is the view of the Court that the claim does not affect the ownership of the suit land. It does not amount to dispossession of the suit land from the estates of the two brothers. It is the Courts finding that he has locus.

24. In answer to the 2nd issue as to who owns the land, the issue has been partly answered elaborately in the proceeding paras. The Defendant averred that he bought the suit land from the 3rd party who in turn acquired it from one Grace Wanjiru. It is clear from the evidence that by the time the suit land was sold by the 3rd party to the Defendant, the same was registered in the names of the Plaintiff and his two brothers. Therefore, during the period of 1999 when the alleged transaction took place the Plaintiff and his two siblings had become owners of the suit land in 1995 as shown by the minutes and approval of the County Council of Muranga. The 3rd Defendant had no interest, legal capacity or right in the land at this time or at all. The 3rd party admitted that he did not have any power of attorney nor any authorization from the Plaintiff and his siblings to sell the land to the Defendant. He failed to give any evidence in support of any authorization. In respect to the agreement of 2000, the Defendant has submitted that this agreement was entered into by the 3rd party and David Muchiri with the approval of the other co-owners. No evidence of a power of attorney or authorization was tabled before the Court to support the claim that David and his father sold the land with the approval of the Plaintiff. If indeed David did so, it was purely without any authority and the Court finds the agreement null and void. In any event the agreement of 2000 specifically states that it was for provision of access to the suit land which was also unauthorized and without any validity at all.

25. It is the Courts finding that the suit land is owned in common by the Plaintiff and the estates of his deceased brothers.

26. Trespass to land has been defined as consisting of “any unjustifiable intrusion by one person upon land in the possession of another”, (see, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**). Section 3(1) of the Trespass Act states as follows;

“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

27. The Defendant has alluded that he is a purchaser for value and that he has a right to the land as a purchaser. From the forgoing paras, it is clear that the land belonged to the Plaintiff and his siblings for which none of them sold to the Defendant. The Defendant admitted buying the land from the 3rd party who had no title on the false belief that he was the registered owner. It would appear that the Defendant did not carry out any due diligence. It is on record that he did so in 2004 after purporting to have bought the land in 1999. In the case of **Samuel Kamere Vs Land Registrar (2015) ECLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person 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 legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.”

28. It is the finding of the Court that the Defendant did not acquire any valid title from the 3rd party who had no title and /or interest to pass to him. He was a stranger to the title of the Plaintiff and his two siblings. He therefore entered the suit land without any authority whatsoever from the registered owners of the suit land, the Plaintiff included. Trespass being a tort must be filed within a period of 3 years however a continuing trespass is one that is occurring from day to day and is permanent in nature as is the case here. The Plaintiff stated that he noticed the construction of the building (shop) way back in 2003 but his father misled him to believe that he (father) was doing the construction. It is only in 2016 that he discovered that the Defendant had trespassed on to the land and constructed a building. He filed the suit in 2017 within the period of 3 years. The Court finds the explanation plausible.

29. It is the finding of the Court that the Defendant is in trespass of the suit land. It is trite that trespass is actionable perse so much so that damages are payable even if the owner of the land has not suffered any harm. In the instant case the Court has arrived at a finding that there is trespass by the Defendant. The Plaintiff has claimed Kshs 500,000/0 being general damages on trespass. The Defendant has not controverted the sum and the Court taking into consideration the period of trespass, the damage on the land as result of construction and the conduct of the Defendant finds the sum of Kshs 500,000/0 to be reasonable damages in the circumstance. The said amount shall be payable to the Plaintiff by the Defendant. It is clear that the 3rd party misrepresented to the Defendant that he owned the suit land. The Court orders the 3rd Defendant to indemnify the Defendant to the extent of Kshs 100,000/- in respect to the general damages payable to the Plaintiff.

30. The Defendant has submitted that he is entitled to rights of prescription on account of occupation of the suit land for a period in excess of 12 years. This claim is not pleaded. Submissions are not pleadings and failure to plead and or file a counterclaim does not entitle the Defendant to a cause of action capable of being determined by the Court.

31. I have perused the 3rd party claim filed by the Defendant against the 3rd party and it is clear that the claim constitutes an independent cause of action which stands at variance to the current suit. It is unrelated and the Court strikes it out completely save for the indemnity in respect to the general damages which the Court has made a finding in the preceding paras. The claim of the Defendant against the 3rd party in respect to refunds of the purchase price, compensation for development and loss of business is hereby struck out for the aforementioned reasons.

32. The Plaintiffs claim for mesne profits fails as it is unsupported.

33. Final orders;

- a. A declaration is hereby made that the Defendant is a trespasser on the suit land. He is ordered to vacate the suit land within 60 days in default eviction to ensue.
- b. The Defendant is ordered to demolish and remove the structures on the suit land at his expense, in default the Plaintiff shall do so at the expense of the Defendant which can be recovered as a civil debt.
- c. A permanent injunction be and is hereby issued restraining the Defendant his agents and workers from entering or occupying the suit land or interfering with the title of the registered owners of the suit land.
- d. General damages for trespass are ordered in the sum of Kshs 500,000/- payable by the Defendant to the Plaintiff.
- e. The Defendant shall be indemnified by the 3rd party to the extent of Kshs 100,000/- in respect to the general damages for trespass.
- f. The claim of the Defendant against the 3rd party in respect to refunds of the purchase price, compensation and loss of business is struck out.
- g. The cost of the suit is payable by the Defendant to the Plaintiff.
- h. The cost of the 3rd party claim (if any) shall be met by the 3rd party and the Defendant jointly.

34. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD OCTOBER, 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kaka for the Plaintiff

Mr Mbutia HB for Kirubi for the Defendant

3rd Party – Present in person

Irene and Njeri, Court Assistants