



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 462 OF 2016

LAWRENCE MUKORA MUNIU T/A

DYNAMITE HARDWARE.....PLAINTIFF

VERSUS

PHILIP NGIGI KANGETHE1ST DEFENDANT

NAIROBI COUNTY GOVERNMENT.....2ND DEFENDANT

COMMISSONER OF LANDS.....3RD DEFENDANT

REGISTRAR OF LANDS, NAIROBI COUNTY.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiff filed the Originating Summons on 5/5/2016 seeking specific performance as against the 2nd and 3rd Defendants for breach of contract and adverse possession against the 1st Defendant. He claimed that he had been in uninterrupted possession of Dagoretti/Riruta/4624 for over twelve years and framed twelve questions for the court's determination, touching on his claim for breach of contract and adverse possession of the suit land. In the alternative, he sought an order for adverse possession as against the 1st Defendant and transfer of the suit land to his name.

2. The Plaintiff deponed in the supporting affidavit that he applied for a temporary occupational license for a plot in Kawangware in 1994 from the City Council of Nairobi (the City Council) to use for his hardware business. The City Council granted him the license on 1/1/1994 upon terms and conditions set out in the temporary occupation license dated 20/12/1995. He applied for and was issued a license from the City Council on 8/2/1994 to operate the hardware business.

3. He applied for allotment of the plot from the City Council and the Commissioner of Lands in 1997. He produced a copy of the letter of allotment dated 1/9/1998 issued to Dynamite Hardware on behalf of the Commissioner of Lands. The letter required the Plaintiff to accept the offer and pay Kshs. 48,820/= within 30 days. The copy of the cheque that he produced does not show the year it only shows 25/9/200. He stated that he has been carrying on business on the suit land since 1995. He claimed that the 2nd and 3rd Defendants fraudulently sold the same piece of land to the 1st Defendant in disregard of his equitable interest over the land. He added that transfer of the land by the 2nd and 3rd Defendants' to the 1st Defendant was illegal since it was public land. At some point he lodged a caution against the suit land in the lands office.

4. Philip Ngigi Kangethe swore the affidavit in reply to the Plaintiff's claim. The 1st Defendant averred that he is the registered owner of the suit land. He denied that the 2nd and 3rd Defendants could have allocated the Plaintiff the suit land because they did not own it. He purchased the land from Dr. Magana Njoroge Mungai in July 2003 for 200,000/= and transferred it to his own name. He maintained that the City Council had illegally issued the temporary occupation license to the Plaintiff because the land did not belong to it. Despite requests to move out of the land, the Plaintiff had refused to vacate the land. He produced a copy of his title deed issued on 4/8/2003 and the previous title held by Dr. Njoroge Mungai which had been issued on 6/1/1997.

5. Erick Odhiambo Abwao who swore the affidavit on behalf of the 2nd Defendant confirmed that the Plaintiff applied for a temporary occupation license in 1994 and for allotment of the land in 1997. The letter of allotment issued to him set out conditions regarding the payments to be made. He averred that the Plaintiff initially complied with the conditions but later defaulted which forced the 2nd Defendant to repossess the land and to reallocate it to another person. He averred that the 1st Defendant had followed the law in getting the land

registered in his name. The Plaintiff swore a further affidavit which was filed in court May 2019 responding to the averments in the replying affidavits.

6. Parties filed submissions which the court has considered. The Plaintiff submitted that the Suit Property measuring 0.994 ha was adjacent to Dr. Mungai's land known as Dagoretti/Riruta/889 which measured 1.581 ha. He further submitted on how the latter plot was subdivided into three portions in his bid to explain how the land came to measure 1.581 ha. He submitted that he had established a case for the grant of the orders he sought in the plaint.

7. The 1st Defendant submitted that the Plaintiff should have filed an ordinary suit by way of plaint for the court to make a determination of the complex issues he raised in the Originating Summons while urging that an originating summons is not suitable for resolving complex and contentious questions of fact as the Plaintiff attempted to do in this suit. The 1st Defendant averred that oral evidence would need to be tendered including that of the land officer on the alienation of the suit land. The 1st Defendant added that the Plaintiff had not proved that the 2nd or the 3rd Defendants owned the suit land. The 1st Defendant submitted that the Plaintiff failed to comply with the conditions under which the land was offered to him in 1998. The 1st Defendant urged that the allegations of fraud made by the Plaintiff were against Dr. Mungai who is now deceased and cannot give evidence and that the Plaintiff should have joined the administrator of the estate of Dr. Mungai to these proceedings.

8. The 2nd Defendant submitted that Section 26 of the Land Registration Act protected the 1st Defendant's interest in the land. It submitted that the Plaintiff had failed to prove the allegations of fraud he made and denied that the Plaintiff was entitled to claim adverse possession of the land based on the fact that he was given permission to occupy the land by the 2nd Defendant. The 2nd Defendant submitted that the Plaintiff had failed to demonstrate that he had been in continuous and uninterrupted possession of the suit land.

9. The 2nd Defendant also submitted that the proper manner for moving the court should have been for Plaintiff to file a plaint so that proper evidence can be given in court by witnesses. The 4th and 5th Defendants submitted that an originating summons under Order 37 of the Civil Procedure Rules is intended for settling simple and straight forward matters without the expense of a full trial but it is not suitable for serious complicated issues.

10. The Council submitted that a licensee cannot claim adverse possession over government land and that if occupation is granted by the proprietor of the land through permission or agreement, then it is not adverse to the proprietor's interest. Since the Plaintiff was granted a license to occupy the land he cannot claim adverse possession. The 2nd Defendant further submitted that the land belonged to the 2nd Defendant and not the national government.

11. The court has considered the Originating Summons, the affidavits and the supporting documents attached to the affidavits. The Plaintiff claims specific performance for breach of contract and makes an alternative claim for adverse possession to the suit land. Having looked at the instances when a party ought to bring an origination summons set out in Order 37 of the Civil Procedure Rules, and having considered the Plaintiff's claim, the court agrees with the Defendants that the proper forum to ventilate the Plaintiff's claim to the suit plot is through an ordinary suit in which parties can call evidence to assist the court arrive at a fair determination of the claim.

12. The court declines to grant the orders sought in the Originating Summons, it is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 13th day of December 2019

K.BOR

JUDGE

In the presence of:-

Mr. J. Chigiti holding brief for F. Musungu for the Plaintiff

T. Balala holding brief for P. Gacheru for the 1st Defendant

P. Malanga holding brief for G. Gituma for the 2nd Defendant

A.Kamau for the 4th and 5th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 3rd Defendant