



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 746 OF 2017

(FORMERLY NAIROBI ELC NO.742 OF 2012)

PETER KIRURI KARANGA.....PLAINTIFF

VERSUS

DANIEL MBUTHI WANYOIKE.....DEFENDANT

JUDGMENT

By a **Plaint** dated **24th October 2012**, the Plaintiff herein brought this suit against the Defendant for orders that;

a) The Defendant Daniel Mbuthi Wanyoike do give vacant possession of Plot No.5 Wawage Investment Company Limited Ruiru Block 126 to the Plaintiff.

b) A permanent injunction restraining the Defendant Daniel Mbuthi Wanyoike whether by himself, his agents, employees, servants, Assigns, persons claiming under him or under his authority from interfering with the Plaintiff's ownership, quiet possession enjoyment and user of plot No.5 Wawage Investment Company Limited Ruiru Block 126.

c) Costs of the suit

d) Interest in (c) above

e) Such other and further relief that the Court may deem fit and just to grant.

In his statement of claim, the Plaintiff averred that he is the registered owner of the suit property. However in the month of **June 2012**, the Defendant unlawfully commenced building a structure. That when he registered a complaint with **Wawage Investment Company Limited**, being the company that sold to him the land, the Defendant was invited and investigations revealed that the Plaintiff and one **Stephen Waithaka** were the rightful owners. That despite demands, the Defendant has failed to give vacant possession.

The suit is contested and the Defendant filed a Defence dated **8th November 2012**, and denied all the allegations made in the Plaintiff and averred that he is the owner of the suit land and has been in possession for over **twenty years**, and therefore the Plaintiff's claim is baseless.

The suit proceeded via *viva voce* evidence wherein the Plaintiff gave evidence for himself and called one more witness. The Defendant also gave evidence and called one more witness and thereafter the parties closed their respective cases.

PLAINTIFF'S CASE

PW1 Peter Karuri Keranga adopted his witness statement dated **24th October 2012**, and produced his list of documents as exhibits. It was his testimony that via a sale agreement dated **9th November 2011**, he bought the suit property from one **Agnes Wambui Mbugua**, after conducting due diligence. He testified that he visited **Wawage Investment Company Limited** and the plot was transferred in the purchaser's respective name who was issued with a certificate. The said **Agnes** then showed the purchaser the plot and One **Francis**, the Director of the Company confirmed the location of the plot. That after five months, he noticed construction works ongoing on the suit land and when he was directed to the alleged owner, together with the said owner they visited the Company and that the Defendant did not produce any ownership documents. From then, the Company gave them a written feedback, and confirmed that the Plaintiff was the owner of the suit land. Further that according to the Company's records, he owns Plot No. 17 but not 5.

He further testified that the agreement was between **Francis Ng'ang'a** the Director who was acting on behalf of **Geoffrey Ngugi Mbugua** who had a Power of Attorney from **Agnes Wambui**. Further that the said Agnes did not complain that she had not received the purchase

price. That the Certificate issued to the said Agnes is **No.186** which was issued on **20th June 2001** and the one issued to him is 091 issued on the **9th of November 2001**.

PW2 Francis Njuro Ngugi adopted his witness statement dated **24th October 2012**, and a further statement dated **16th August 2013** and stated that he is a Director at **Wawage Investment Company Limited**, since inception. He told the Court that Plot No. 5 belongs to the Plaintiff and **No. 17** belongs to the Defendant and that the two plots are not close to each other. Further that the Plaintiff has not developed his plot while **plot No 17** is fully developed by the Defendant. It was his testimony that when a person purchases a property, he issues receipts for monies fully paid and Certificate of ownership. That he issued the Plaintiff with the Certificate which was earlier registered in the name of **Peninah Ngugi**, who had it transferred from **Susan Wangui**. Further that before that, it was in the name of **Agnes Wangui** who had given a Power of Attorney to **Geoffrey Ngugi** to sell the land on her behalf. That the purchase money was deposited to his account.

That the Certificate issued to the Defendant came from their offices without cancellation and that two other people were signing the certificates. Further that swooping of plots could happen after one had gone to their offices and had fresh certificates issued.

DEFENCE CASE

DW1 Stephen Wakinu George testified that the Defendant who was his younger brother died on the **8th of December 2016**, and he produced a letter of limited grant of representation dated **6th March 2017**, and adopted his witness statement dated **8th November 2011**. He further produced the list of documents dated **8th November 2012** as exhibit in Court.

It was his testimony that his brother was a member of **Wawage Investment Company Limited** and that he owned plots no.5. That **Plot No. 17** was owned by **Susan Wairimu Karanja** after an exchange. He informed the Court that there was cancellation from Plot 17 to 5 and a certificate **no. 084** was issued in the name of the Defendant in respect of plot no. 5. That though the Director of the Company had explained the process of exchange, he did not have another alternative to the one presented. He further testified that his brother never showed him any documents pertaining to the land and that he tried to learn about the Company after the passing on of his brother.

DW2 Serah Wairimu Kiarie adopted her witness statement dated **29th January 2012**, and confirmed that she was a Director of **Wawage Investment Company Limited**. It was her testimony that she sold **Plots No. 5, 16 and 17** to the Defendant. That the certificates were signed by one **Esther Wambugu** and the Secretary was **Francis Njuru**. That Certificate No. 5 was signed by the said **Francis Njuru** and that the suit plot belonged to the Defendant. She acknowledged that she did not participate in the transfer of documents as PW2 was the one in charge of the same. Further that Certificate **no.099** bearing the name **Daniel Mbuti** was for plot No. 17 and that she took him to the office and he bought the plots.

The parties filed written submissions to which the Court has now carefully read and considered and renders itself as follows

The issues for determination are;

- 1. Who is the rightful owner of the suit property**
- 2. Whether the Plaintiff is entitled to the orders sought**

1. Who is the rightful owner of the suit property

It is not in doubt that the purchase of this suit property was through a land buying company known as **Wawage Investment Company Limited**. In order for the Court to establish ownership of land bought through a land buying company, it usually seeks refuge in the fact that the records of the Company will present the best scenario and the Directors would be able to shade light through their records. In this instance, the records of the Company do exist and the records of the Company that have been presented by the Plaintiff and PW2 who was the Director and Secretary of the Company tasked with conducting transfers in the land, indicate that the Plaintiff is the owner of the suit land having bought it from one **Agnes** who had bought the suit land from one **Peninah**, and who had also bought the said land from one **Susan**, who was the original owner of the suit property. This Court has been presented with evidence showing the sequence of events that led to the Plaintiff acquiring the suit land.

However on the other hand, the Defendant through his personal representative also lay claim to the suit land. In this regard the Defendant called in DW2 who testified that she was also a Director of the Company and that she sold the land to the Defendant being the suit property. However there have been further allegation by the Defendant that though he originally owned suit No. 17, he swapped the land with the said **Susan** and that is how he acquired ownership of the suit land.

When a proprietor's title to land is challenged, the party must prove the legality of how he acquired the title to the land and thereby must give evidence of the root of his title. See the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

'We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register'

As already stated above, while the Company records gives the Plaintiff as the owner of the suit land, one of the Directors of the Company has laid claim that the suit land was sold to the Defendant. This Court then has an obligation to interrogate the evidence placed before it before it can come to a conclusion.

It was the testimony of PW2 that when a party required to exchange any plot, the Party would go to the Company and they would be given fresh certificates. In his submissions the Defendant submitted that he originally bought plot **No.17**. However in **2008**, he agreed to exchange his plot with one **Susan Karanja**, who had purchased three plots and in return they exchanged the plots No.17 and 5. It was DW2's evidence that the Defendant had three plots and that he owned plot No. 5. Then the question that begs answers is whether the Defendant bought the suit land originally or he exchanged the same.

During the hearing of the suit, DW1 who was the Administrator of the Estate of the defendant did not seem to be conversant with the case or the dealings in question which this Court can not fault him for, as he was only a brother to the deceased. This Court will therefore be guided by the sworn Affidavit and the evidence of the Defendant that were sworn before his unfortunate demise.

In his **Replying Affidavit**, sworn on the **8th of November 2012**, the Defendant had averred that he bought the suit property and was issued with **Certificate No. 99**. However he lost the said certificate and on the **30th of May 2008**, his certificate was renewed. This Court notes that the Certificate No. 99 that the Defendant produced as evidence relates to **Plot No. 17** and not **No. 5** and that the same was then cancelled and indicated **No. 5**. It is the Court's opinion that while the Defendant claims to have exchanged the suit property with the owner of the land one **Susan**, DW2 also claims to have sold the land to the Defendant originally. It is therefore the Court's finding that the Defendant's evidence as presented before this Court contradicts itself and the Defendant has therefore failed to prove the root of his claim to the ownership of the suit property as it is not clear whether the suit property was bought or exchanged.

On the other hand, the Plaintiff has produced evidence before this Court as to how he acquired ownership of the suit property. The Defendant has submitted that the sale agreement presented before this Court does not meet the required threshold of **Section 3 (3)** of the **Law of Contract Act**. However, the Defendant was not a party to the agreement and therefore he has no *locus standi* to challenge the said contract. Further the suit is not about enforcement of the said sale agreement and therefore it is this Court's finding and holding that at this stage the same is a non-issue.

The Plaintiff having produced a letter from the Company confirming that he is the owner of the suit land and further evidencing the sequence to which he acquired ownership, the Court further finds and holds that the Plaintiff has been able to explain to the satisfaction of this Court the root of his ownership of the suit property.

Consequently, the Court finds and holds that the Plaintiff is the rightful owner of the suit property.

2. Whether the Plaintiff is entitled to the orders sought

The Parties herein are holding share certificates and the suit plot is not registered yet and no certificate of registration has been produced as exhibit in court. However, the Court has already held that the Plaintiff is the rightful owner of the suit plot and therefore the Defendant has no business being in occupation of the said plot and should deliver vacant possession. Further the Plaintiff is also entitled to a permanent injunction as sought as he needs to enjoy the rights of an owner of the suit plot.

Having now carefully read and considered the pleadings by the parties, the witness statements, the evidence adduced and the written submissions, the Court finds that the Plaintiff has proven his case on the required standard of balance of probabilities. Consequently, the court enters Judgment for the Plaintiff against the Defendant **Stephen Wakinu George**, the legal representative of the estate of **Daniel Mbuti Wanyoike**

in terms of prayers No.(a), (b), (c) & (d) of the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of December 2019.

L. GACHERU

JUDGE

6/12/2019

In the presence of

No appearance for Plaintiff though Plaintiff present in person

Mr. Juma holding brief for M/S Wambui Ngugi for Defendant

Jackline - Court Assistant.

L. GACHERU

JUDGE

6/12/2019