



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CIVIL CASE NO. 215 OF 2014

BENARD KEIROH KAMAU.....PLAINTIFF

VERSUS

JAMES MUGO WAWERU.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 26/2/2014 seeking a permanent injunction to restrain the Defendant from trespassing into, developing, disposing off, selling, leasing, erecting unlawful structures or in any manner interfering with the Plaintiff's right of ownership, occupation, use and enjoyment of the property known Nairobi/Block 141/590 ("the Suit Property"). He also seeks vacant possession of the Suit Property, costs of the suit plus interest.
2. The Plaintiff claims that he is the registered owner of the Suit Property and that the Defendant without his permission or authority, trespassed onto his land interrupting his peaceful occupation and possession of the Suit Property. This was in spite of the Plaintiffs advocate's demand letter dated 14/2/2014 asking him to stop the trespass. Instead, the Defendant threatened to continue to trespass on the Plaintiff's Suit Property.
3. In the Amended Defence and Counterclaim filed in court on 3/10/2016, the Defendant denies that the Plaintiff is the lawful owner of the Suit Property. The Defendant claims he is the rightful owner of the Suit Property following the allocation of plot number 114 by Karura Farmers Company Limited in 1982 when he was issued with membership number 729. The Defendant challenges the fact that the Plaintiff purchased the Suit Property on 4/1/1992.
4. The Defendant contends that he has been in open, continuous, quiet and exclusive uninterrupted possession of the Suit Property with the knowledge of the Plaintiff for over 12 years since the Plaintiff purports to have acquired the Suit Property.
5. The parties each called two witnesses to give evidence. The witnesses adopted their witness statements filed in court as their evidence in chief.
6. The Plaintiff's testimony is that he acquired the Suit Property for valuable consideration in 1992. He purchased it from Charles Ndung'u Karanja at the agreed price of 68,000/= out of which Kshs. 35,000/= was paid at the time of execution on 4/1/1992. Plot number 114 phase A was transferred to him on 17/2/1995 by Karura Farmers Company Limited. He produced copies of receipts issued by Kibatia & Company Advocates on account of processing the title on 29/10/2002.
7. The photographs produced by the Plaintiff show a fence made of iron sheets on the Suit Property. The Plaintiff also produced a copy of the certificate of lease dated 29/7/2013 confirming that he was registered as lessee of the Government of Kenya for 99 years with effect from 1/5/2000. The certificate of lease was re-issued on 29/7/2013. The original certificate had been issued on 29/8/2003.
8. It was the Plaintiff's evidence that at the time he bought the Suit Property, Mr. Karanja took him to view the land which was not occupied. That was in 1992. Mr. Karanja later took him to the offices of Karura Farmers Company to formalise the transaction. After paying for the land he tried to fence it but found people had trespassed on it. They attacked him and chased him away. He stated that he was not aware of the existence of the court order issued in **HCCC No. 3017 of 1990**. He was not a party to that suit.
9. An official of Karura Farmers Company Limited also gave evidence for the Plaintiff. He was appointed director in 2000 following his election. He confirmed to the court that the company had a way of registering the plots. He stated that Nairobi Block 141/590 is part of what was previously number 114. The plot sizes were reduced to create public utility plots. It was his evidence that the Defendant was a member of Karura Farmers until 1989 and had a plot adjacent to 114. His plot was number A 99 which is currently owned by Samuel Kengu. He stated that plots number 99 and 114 were initially owned by Mr. Waweru until 1989 when they were repossessed. This followed a meeting

held in March 1989 where it was resolved to repossess and sell the plots to raise money to save the other plots.

10. It was the director's position that even though the Defendant had a share certificate issued by Karura Farmers Company Limited, he lost possession of his plot in 1989 when he failed to pay the sum of Kshs. 2454 resolved by the Company. According to him, the Defendant should have surrendered his share certificate to the company as all members who lost plots surrendered their documents to the company.

11. On cross examination he conceded that at the time the plot was transferred to the Plaintiff a valid order had been issued in Nairobi **HCCC No. 3017 of 1990**. The witness produced a photocopy of the register of Karura Farmers Company Limited.

12. It was his evidence that where there was a correction on the register, it showed that there had been a sale pursuant to which the old name would be cancelled and the name of the new owner entered on the register. He confirmed that the register was prepared by Karura Farmers. He stated that 192 other members lost their plots after the 1989 resolution and collected their refunds at District Officer's Office at Kasarani.

13. It was his evidence that Mukinya Enterprises Limited who sold the land to Karura Farmers Limited tried to repossess the land when Karura Farmers failed to pay it for the land. A decision was taken that each member would pay Kshs. 2454 to save the plots from being repossessed. The Defendant failed to pay this amount and thereby lost his plot and ought to have collected his refund at District Officer's Office at Kasarani.

14. The Defendant also testified with his wife. It was his evidence that he was allocated the Suit Property and made all the payments. He was issued a share certificate as the owner of the suit land on 31/12/1982. The original suit land was number 114. He claims that Karura Farmers Company Limited illegally allocated the suit land to non- members in 1989 prompting him and other shareholders to file **HCCC No. 3017 of 1990** against Karura Farmers Company Limited. The court issued an order on 4/2/1992 restraining Karura Farmers Company from interfering with the member's ownership of plots allocated to them. The orders were extended and an order made for *status quo* to be maintained on 12/8/1992. The Defendant claims he has been in occupation of the Suit Property for over 32 years and has extensively developed it. He claims there was no dispute between him and the Plaintiff until when the Plaintiff filed suit in 2014.

15. The Defendant produced a copy of his share certificate issued on 31/12/1992 showing he had been allocated plot number 114, copies of receipts showing that he made payment to Karura Farmers Limited on 4/6/1982 and 11/2/1981. He also produced the court orders as well as the rates payment demand which shows the Plaintiff's name as the registered owner.

16. The Defendant claims that he was told by Karura Farmers secretary that he could not pay the sum of Kshs. 2454 in 1992 because the company had already received enough money.

17. The Defendant claims to have developed the Suit Property although he did not produce any photographs in court to show the nature of developments he had made on the Suit Property.

18. He confirmed that **Nairobi HCCC No. 3017 of 1990** has not been concluded. The Defendant stated that when he discovered the rates demand notes were issued in the Plaintiff's name, he inquired and was told to continue paying the rates and that the Nairobi City Council has always accepted his payment.

19. He stated that the court order directed that they were not to be disturbed and they were to continue building on the Suit Property. He had fenced the land with iron sheets. He stated that he built on the Suit Property in 1992 and that prior to constructing on the land, he had been cultivating the land. He claimed to have built a stone house and a *mabati* house on the Suit Property but did not produce evidence to support this assertion.

20. The Defendant called his wife as a witness. She testified that they built in 1992 and they have lived there since 1992. She stated that the court granted an order which allowed them to build. She stated that she got to know the Plaintiff when they were served with court orders. Nobody had ever gone to tell them to leave the Suit Property.

21. The issues for determination are: -

- i. Who between the Plaintiffs is the legal and rightful owner of the Suit Property?
- ii. Did the registration of the Plaintiff as the owner of the Suit Property confer on him the absolute, indefeasible rights that cannot be challenged?
- iii. Is the Plaintiff entitled to the prayers sought in the plaint?
- iv. Has the Defendant acquired ownership of the Suit Property?

22. It is not in dispute that Plot number 114 is the same as Nairobi Block 141/590. The Defendant maintains that his share certificate was issued on 31/12/1982 while the Plaintiff's certificate was issued on 27/3/1995. The Defendant maintains that when Karura Farmers Company Limited attempted to repossess the Suit Property from him, he went to court and obtained orders restraining the company from depriving him of his membership and interfering with his ownership of the suit properties.

23. It is not clear why the Defendant did not join the Karura Company Limited as a party to these proceedings. The Defendant did not produce the pleadings in **Nairobi HCCC No. 3017 of 1990**. It is not clear what relief was sought in this suit. It would also seem that after getting the interlocutory orders in 1992, the Defendant did not progress the suit and no appeal was filed as the court directed. In essence this means that that suit is still pending in court and has not been prosecuted for over 26 years.

24. The court has looked at the order issued on 28/8/1992. The court extended the injunction order restraining the Defendant from depriving the Plaintiffs of their allocated plots. The 2nd order directed that the *status quo* was to be maintained. A further order was made for the present occupants to remain in plot numbers 99A, 84A, 83A, 356B and 528B. Order number 4 stated that third parties were not to be disturbed from their occupation of plot numbers 114A, 96A, 97A, 98A and 85 until they harvested their crops. The court directed that the orders were to remain in force pending the appeal and each party was at liberty to apply.
25. The order issued on 19/2/1992 was to the effect that Karura Farmers Company Limited was restrained from depriving the Plaintiffs in that suit of the membership of the company and interference with the plots allocated to them.
26. The Defendant argues that the High Court has previously cast out on the minutes which authorised Karura Farmers to repossess the Defendant's land and other members. The Defendant argues that Karura Farmers had no capacity to allocate the plot to Mr. Karanja or transfer it to the Plaintiff since the land had already been alienated to him.
27. The Defendant challenges the Plaintiff's share certificate and terms it a nullity. He relies on the case of **Gitwany Investments Limited v. Tajmal Limited and 3 others** [2006] eKLR in urging that the Defendant's certificate having been acquired first in time, it should prevail. The court notes that in the **Gitwany Investments case**, the Commissioner of Lands had admitted issuing two titles in respect of the same parcel of land while in this case the Defendant does not have a title.
28. The Defendant concedes that a title is *prima facie* proof of ownership under Section 26 of the Land Registration Act but can be challenged on grounds of fraud or misrepresentation to which the person is proved to be a party. It can also be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Defendant submits that the Plaintiff's title was acquired fraudulently since the Plaintiff was or ought to have been aware of the existence of the court order.
29. The Defendant also argues that the Plaintiff's title was acquired unprocedurally and through a corrupt scheme. In support of this argument, the Defendant argues that the name of Mr. Karanja who sold the Plaintiff property does not appear in the register and that Mr. Karanja's name was not crossed out in the register yet the practice was that the name of the vendor would be crossed out and that of the purchaser inserted in the register. The Defendant relies on the case of **Elijah Makeri Nyangwera v. Stephen Mungai Njuguna & Another** [2013] eKLR where the court stated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party of the vitiating factors which include illegally or unprocedurally or through a corrupt scheme.
30. The Defendant did not establish that the Plaintiff's title was acquired through fraud or unprocedurally.
31. The Defendant submits that the Plaintiff's claim to the Suit Property was extinguished since under Section 7 of the Limitations of Actions Act, a cause of action must be brought within 12 years from the date the cause of action arose. The Defendant claims to have acquired the Suit Property under the doctrine of adverse possession.
32. To be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land as of right and without interruption for a period of at least 12 years. The claimant must prove that he was on the land without the permission or consent of the owner and that the possession was actual, open, notorious, exclusive and adverse by the claimant for the statutory period without interruption.
33. This argument is contradictory; on the one hand the Defendant denies that the Plaintiff is the lawful owner of the Suit Property while on the other he seems to concede this fact when he argues that he acquired the Suit Property through adverse possession.
34. The Defendant has not shown that his claim to the Suit Property is adverse to the Plaintiff's claim to it. The Plaintiff testified that when he attempted to take possession, he was chased away by the Defendant's agents. The Defendant's wife also testified that she only got to know the Plaintiff when they were served with these suit papers. This suit was filed in 2014.
35. The Plaintiff's evidence that when he purchased the suit land there was no development on the Suit Property was not challenged by the Defendant. The Defendant did not adduce any evidence to show that he was in possession of the Suit Property since 1982.
36. It is not also clear why the Defendant did not progress the suit it filed with the other members against Karura Farmers Company Limited until a final determination was made. He went ahead to construct on the Suit Property without first acquiring a title.
37. The court has looked at the order given on 28/8/1992. It did not authorise the Defendant to build on the Suit Property as he stated in his evidence. The court stated that the *status quo* was to be maintained. The 3rd order was to the effect that occupants of plot numbers 99A, 84A, 83A, 356B and 528B were to remain in their plots. Plot number 114 is not included in this order. Order number 4 stated that third parties were not to be disturbed from their occupation until they harvested their crops, plot number 114 A is listed among those for which 3rd parties were not to be disturbed. These orders were to remain in force pending the appeal and each party was at liberty to apply. The last order was to the effect that "the Defendants do show that the plot to be declared after leaving by the 3rd parties currently occupying then be handed over". The import of this last order is unclear.
38. The Defendant stated in his evidence that he did not pursue an appeal. The court is unable to find that the two orders issued in 1992 authorised the Defendant to develop the Suit Property. The Defendant ought to have maintained the status quo. The Defendant did not produce any evidence in court of the developments he had erected on the Suit Property.
39. The Defendant faults the Plaintiff's title for having been obtained during the pendency of Nairobi **HCCC No. 3017 of 1990** when an order of injunction was in force. The Plaintiff was not a party to the proceedings. The Defendant did not adduce evidence that he later paid the sum demanded by Karura Farmers for him to be reinstated as the allottee of the disputed plot. The Defendant took no further action to

prosecute the case after obtaining temporary injunctive relief. The orders made in that case were not final.

40. The court has considered the facts of the case together with the Defendant's Written Submissions. The Plaintiff did not file submissions. The court finds that the Defendant failed to prove on a balance of probabilities that he has a claim adverse to the Plaintiff's claim to the Suit Property to entitle him to the orders he seeks in the counterclaim. The counterclaim is dismissed with costs to the Plaintiff.

41. The Plaintiff who holds a title to the Suit Property has proved his claim to the Suit Property and the court grants prayers a, b and c of the Plaintiff.

Dated and delivered at Nairobi on 17th day of April 2018.

K. BOR

JUDGE

Delivered in open court in the presence of: -

Mr. Wachira holding brief for Mr. Gachie for the Plaintiff

Ms Chege holding brief for Mr. Litoro for the Defendant

Mr. V. Owuor- Court Assistant