



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 10 OF 2015

EUNICE NJOKI KIRURI (Suing as the legal administrator

of the estate of the late Nahashon Gichu Muchembe).....PLAINTIFF

VERSUS

RICHARD KIPRUTO KOECH.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The suit herein was commenced by way of Plaint dated 8th October 2014. In the said Plaint the Plaintiff alleged that at all material times from 1967 her father Nahashon Gichu Muchembe (deceased) was allocated Plot No. 20 Section III at Londiani Township. It was her contention that her late father had constructed a house which was burnt down during the tribal clashes of 2007.

2. It is her further contention that she had obtained the relevant approval to convert the Temporary Occupation License to a term lease of 99 years from the District Surveyor Kipkelion.

3. The Plaintiff alleges that sometimes in May 2014 the Defendant trespassed on her late father's parcel of land and began to survey it and take measurements of the same. She alleges to have reported the incident at Londiani Police Station. It is her further contention that the Defendant began to put up iron sheets to fence the plot despite a demand letter from her advocates that he stops trespassing on the same. The Plaintiff avers that the Defendant began to construct a permanent building on the suit premises. In her Plaint the plaintiff seeks the following prayers:

(1) A Permanent injunction restraining the defendant by himself, his agents, servants from entering, constructing, alienating or in any other way dealing with plot No. 20 Londiani Township.

(2) A declaration that the Plaintiff is the legal owner of plot No. 20 Londiani Township to the exclusion of all others.

(3) Costs of the suit plus interest.

4. Contemporaneously with the Plaint, the plaintiff filed a Notice of Motion under Certificate of urgency. In the said application, the Applicant/Plaintiff sought inter alia that pending the hearing and determination of the main suit there be an order of temporary injunction restraining the defendant/respondent by himself, his agents and or servants from entering, depositing materials, constructing or developing plot No. 584/III/20 Londiani Township.

5. The learned Justice L. Waithaka upon considering the application granted an order of temporary injunction restraining the defendant/respondent by himself, his agents and or servants from entering, depositing materials, constructing or developing plot No. 584/III/20 Londiani Township.

6. The Defendant on his part filed a Defence as well as a Replying Affidavit in response to the Plaintiffs application. In his Defence dated 15th October 2014, the Defendant dismisses the Plaintiff's suit as incompetent, untenable and not disclosing any cause of action. He alleges that he is the registered proprietor of the property known as L.R No. 584/711 registered in the land titles registry in Nairobi having obtained his title on 13th April 1999. He further contends that the Plaintiff's property being L.R No. 584/III/20 Londiani Township is a different parcel of land from his.

7. The case was set down for hearing on 29.10.2015 before Justice Sila Munyao who was the visiting ELC judge until February 2017 when I took over the case from where it had reached. The Plaintiff testified and called two witnesses. The Defendant also testified and called two witnesses.

PLAINTIFF'S CASE

8. The plaintiff testified that her late father Nahashon Gichu Muchembe was allocated a Temporary Occupational Licence (TOL) on 9th day of November, 1967. She produced a copy of the said TOL as an exhibit. He then put up some temporary houses in which were occupied until 2007 when they were burnt during the post election skirmishes.

9. The plaintiff testified that in 2014 she was informed that the defendant had moved into the suit property claiming that it was his and was digging trenches and within no time he had dug a foundation. The plaintiff moved to court and obtained a temporary injunction to restrain the defendant from continuing with the construction but he ignored the court order and even accelerated his pace. He ended up putting up a 3 storey building.

10. It was the plaintiff's testimony that earlier on in 2001 she applied to have the TOL converted to a long-term lease but she did not get any response though DW2, a Senior Land Administration Officer, Kericho later testified that he had sent a response to the plaintiff which was returned undelivered with remarks "RTS". She further testified that she had been paying land rates for the suit premises over the years and she produced receipts to that effect dating up to 2013.

11. The Plaintiff called a neighbour Rahab Nyambura as PW2. She testified that she had lived two plots away from the suit premises for almost 60 years and she knew that the plot belonged to the plaintiff's late father. She said the only time she had ever witnessed another person claim the plot was in 2014 when the defendant moved into the plot.

12. PW3, Wahome Murakaru, a legal officer with the National Land Commission testified that he could not trace the correspondence file relating to plot no 584/711 which the defendant claims and was therefore not in a position to tell if a lease was issued to the defendant. He was also not in a position to tell if a letter of allotment was issued to the defendant before the Certificate of Lease.

13. He testified that under the Government Lands Act (repealed) a licence could be terminated by giving a 3 months' notice. He stated that he did not find any correspondence in the file terminating the licence issued to the plaintiff's father. He however admitted that the file he found had scanty details and some documents may either have been lost or destroyed. He did not rule out tampering with the file. Critical documents showing how the lease certificate was issued and whether there was an allotment letter and a consent to charge the property to KCB were all missing from the file.

DEFENDANT'S CASE

14. On his part the defendant called Geoffrey Kibowen, the District Surveyor, Kericho as DW1. He testified that property claimed by the plaintiff is different from the one claimed by the defendant as they occur at different locations on the ground.

15. DW2, Omollo Patrobas the County Land Administration Officer, Kericho corroborated DW's 1 testimony that according to the documents in his possession, the two plots are indeed different. He stated that he had advised the plaintiff to seek the services of an independent surveyor. He also testified that when he received the plaintiff's application to have the TOL in respect of L.R No 584/711 converted to a long-term lease he sent her a letter by registered post explaining that this could not be done as the plot in respect of which she had made the application had been allocated to the defendant.

16. The defendant who testified as DW3 stated that plot no L.R 584/711 on which he constructed a 3- storey commercial building belongs to him. He testified that he was allocated the plot in 1997 and he was later issued with a grant No. I.R 80109 on 13.2. 1999. He testified that he charged the property to KCB Limited in 2014 to secure a loan. He sought to rely on the copy of the grant certificate produced by the Plaintiff as Exhibit 5. In cross-examination he denied that he had moved into the suit premises after the land clashes. He stated that he worked in the Ministry of Lands from 1991 up to 2013.

ISSUES FOR DETERMINATION

17. I have evaluated the pleadings, oral and documentary evidence as well as the rival submissions and the following issues arise for determination:

- i. What is the status of a TOL?
- ii. Whether L.R No. 584/111/20 and L.R No. 584/711 refer to the same property
- iii. If the answer to (i) is in the affirmative, who is the lawful owner of the suit property?
- iv. Whether the plaintiff is entitled to the reliefs sought

ANALYSIS AND DETERMINATION

18. A Temporary Occupation License (T.O.L) is defined under section 2 of the Land Act as follows:-

"a permission by the Commissioner in respect of public land or a proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit"

19. As the custodian of unoccupied government land in Kenya, the Commissioner of Lands was empowered by the Government Lands Act (Cap 280, Laws of Kenya, now repealed), to grant and revoke Temporary Occupation Licences. Section 40 of the Act provided –

“40(1) Licences to occupy unalienated Government land for temporary purposes may be granted by the Commissioner;

(2) Unless it is expressly provided under this section shall continue for one year and thenceforth until the expiration of any three months’ notice to quit.

PROVIDED that the notice to quit may be served upon the licensees at any time after the expiration of nine months from the date of the licence.”

(3) The rent payable under a licence under this section, the period and the agreements and conditions of the licence shall be such as may be prescribed by rules under this Act or as may be determined by the Commissioner.

(4) The benefit of a licence under this section may, with the consent of the Commissioner, be transferred by the licensee, and the transfer and the consent thereto shall be endorsed on the licence.

21. Under the mandatory provisions of section 40 the government is required to give notice to the licensee to terminate the licence. A licence issued under section 40 may also be forfeited under section 42 for failure on the part of licensee to meet the conditions stated in the licence. Section 42 of the GLA provides as follows:-

“If the rent payable under a licence granted under section 40 is unpaid for one month after it became due, or if any tax or taxes imposed upon the land, or upon the huts erected on the land, or upon the licensee, are unpaid for two months after they became due, or if the occupant of the land fails to keep the land in a reasonably clean condition, the Commissioner may declare his licence to be forfeited.”

22. It is the Plaintiff’s case that her late father was granted a TOL dated 9th November 1967 for a stated period of 9 months over all that parcel of land known as L.R No. 584/111/20. In his testimony PW3 stated that a TOL does not confer on the licence-holder any proprietary rights but rather permission to enter the land and carry on some activities. Even though the licence was for 9 months there is no evidence that the licence was ever terminated in accordance with the provisions of section 40 of the Government Lands Act.

23. A pertinent question is whether a TOL can be inherited or transferred by succession. The plaintiff testified that she filed this suit as the only surviving daughter of the late Nahashon Muchembe who was the licence-holder in respect of the suit premises. She has therefore instituted this suit as the legal representative of the estate of the deceased.

24. With regards to whether a TOL can be inherited, the Court of Appeal in the case of **Runda Coffee Estates Ltd vs Ujagar Singh [1966] E.A 564 at p. 568** stated as follows:

“It is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed of by the licensee. As has been stated well over 100 years ago, it creates nothing which is assignable...”

25. This means that any license over land even if the term is still running is extinguished upon the death of the licensee and cannot be inherited or be the subject of succession.

26. This position was re-stated in the case of **Faraj Maharus V J.B Martin Glass Industries & 3 others(2005)eKLR** where the Court of Appeal stated as follows:

“ the Temporary Occupation licence issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act...The Appellant does not possess title under the Act.

We would agree therefore with the learned judge that the license to occupy the suit property came to an end upon the death of Efendi Maharus and his widow and as the appellant has nothing to show for the continued occupation of the suit land, his occupation amounted to trespass as against the registered proprietor”

27. As these decisions are binding on this Court I need not say more.

28. The second question is whether plot number 584/711 and 584/111/20 refer to the same plot.

29. **It is the Plaintiff’s case that the plot number** L.R No. 584/III/20 is the same as that claimed by the Defendant being L.R No. 584/711. PW1 indeed stated in her testimony that the Defendant Koech grabbed the suit premises. It is therefore the Plaintiff’s case that the different parcel numbers refer to the same plot. The Plaintiff stated that her father had a letter of allotment against the parcel of land and had been paying rates over the same. She testified that her father had constructed a house made of iron sheets on the parcel of land where he used to live until he died in 1985.

30. DW2 Patroba Ojwang Omollo; the County Land Administration Officer, Kericho testified that he had discovered through his investigations that L.R. No. 584/III/20 and L.R No. 584/711 occur at 2 different locations within Londiani township.

31. DW1 one Geoffrey Kibowen stated that he was the District Surveyor in Kericho. He further stated that the 2 plots of land in issue fall in different locations and that they do not share a boundary. DW3 the Defendant herein maintained that the plot claimed from the Defendant was different from that of the Plaintiff.

32. It is common ground that the dispute herein stems from the fact that both the Plaintiff and the Defendant are claiming the same parcel of land albeit with different parcel numbers. The question that this court must grapple with is whether the parties herein are referring to the same parcel of land.

33. DW2 further stated that after the ground inspection he realized that the property on the ground was not the same as that for which she had made an application for conversion. He stated in his cross examination that the letter to the Plaintiff that her application had been rejected was never delivered but instead returned with the remarks RTS.

34. It is worth noting that the all the relevant offices including the District Surveyor approved and had no objections on the conversion of the TOL into a long lease. One would expect that if there were any anomalies on identification of the parcel these would not have escaped the notice of the District Surveyor. He would have at least raised the same.

35. In the letter from the County Land Administration Officer dated 16th September 2014, the Chief Land Administration officer advised the Plaintiff to seek the services of a registered surveyor to show her the actual demarcations of her plot. The Plaintiff as aforesated alleges that she never received the said letter.

36. In his report, PW3 concludes that it is imperative to establish the current status of the plot on the ground and that this could only be ascertained by a licensed surveyor. The Plaintiff did not produce a report by a licensed surveyor identifying the said parcel on the ground and its demarcations.

37. It is trite that he who alleges must prove. Under Sections 107 and 108 of the Evidence Act, the person who alleges is under a duty to prove all allegations as contained his claim against the respondent on a balance of probabilities. As was held in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

38. It was therefore incumbent on the Plaintiff to prove that the parcel of land known as L.R No. 584/III/20 is the same as the Defendant’s property being L.R No. 584/711. This could easily have been achieved by engaging the services of a surveyor. However, the Plaintiff did not present sufficient evidence before this court to aid it in finding that indeed the parcels of land in dispute are one and the same.

39. Indeed, even the plaintiff’s star witness one Antony Murakaru, the legal officer of the National Land Commission conceded that he was not in a position to ascertain whether on the ground 584/111/20 is the same as LR No. 584/711.

40. In the circumstances and based on the evidence tendered before this court, it is indeed an uphill task for the Court to find that the parcels of land are one and the same. On this issue therefore it is my considered finding that the Plaintiff has failed to prove that L.R No. 584/111/20 and LR No. 584/711 are one and the same plot.

41. The third and most critical question is whether the defendant is the lawful owner of the suit property.

42. The Defendant presented before this court a certificate of title to L.R No. 584/711. On the face of it, the Defendant does hold what appears to be a Lease from the Government. The Lease was executed by the Commissioner of Lands on 1st April 1999 and it was registered at the Land Titles Registry in Nairobi as IR No. 80109/1 on 13th April 1999. It is on this basis that the Defendant asserts that he holds a good title to the suit land. His evidence is that he was allocated this land on 1st February 1997 but he did not tender any evidence to show that he has been paying land rent for the same since then.

43. The question that this court has to grapple with is whether the certificate of title presented before this court was lawfully acquired as it was highly contested by the Plaintiff. As was stated in the case of **Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR** it is not enough to wave the certificate of title before this court. A party must prove that the same was lawfully acquired. The court stated as follows:-

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

44. The plaintiff’s evidence was that the defendant used his position as an employee of the Ministry of Lands to unlawfully acquire a title in respect of the suit property. The evidence of PW3 lends credence to the plaintiff’s testimony. This is because PW3 admitted that there was scanty information relating to the manner in which the title was registered in the defendant’s name. He categorically stated that he could not

confirm that the title was genuine as only a certified copy of the same was produced. Asked about the missing supporting documents he said he could not rule out tampering as the file had been reconstructed meaning that the original file was either missing, misplaced, lost or destroyed. Curiously, even though the defendant alleged to have charged the title to KCB, he did not produce the charge document nor did he produce documents that were supposed to be in his custody such as the letter of allotment, consent to charge or receipts to show that he had been paying rates for the suit property since 1999.

45. The evidence of PW3 a legal officer from the National Land Commission which is the custodian of public land in Kenya suggests that there may be need to investigate the defendant's title further. Indeed in re-examination he stated that a certificate supercedes other interests, but if acquired illegally, it does not deserve protection of the law. He confirmed that an occupier of a TOL who had not been given a termination notice under S. 40 of the Government Land Act would be in rightful occupation of the land. From the oral and documentary evidence presented before the court, it is my finding that the defendant's title is doubtful.

46. Lastly, the court is called upon to determine whether the plaintiff is entitled to the reliefs sought. The plaintiff has filed this suit in her capacity as the legal representative of the estate of her father Nahashon Gichu Muchembe -deceased who until his death in 1985 was a licensee of L.R No 584/111/20 by virtue of a Temporary Occupation Licence issued to him by the Commissioner of Lands in November 1967. In line with the above cited cases of **Runda Coffee Estate** as well as **Faraj Maharus**, it is now a well settled principle of law that a licence is personal to the licensee and cannot be transferred by way of succession. In the circumstances the prayers sought by the plaintiff cannot be granted.

47. Consequently, the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it.

48. Given the circumstances of this case and particularly noting the plaintiff's blatant disregard of the temporary injunction issued by this court on 10th October, 2014, I do not think that he deserves any costs.

49. Each party shall therefore bear their own costs.

Dated, signed and delivered at Kericho this 18th day of May, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Kitur for Mr. Chelule for the Defendant
2. Both parties present
3. Court Assistant – Abdi