



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 665 OF 2012

KAMU VENTURES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

PAUL MUNGAI MWANGI.....DEFENDANT/RESPONDENT

JUDGMENT

The Pleadings

This suit was commenced by way of a Plaint dated 3rd October 2012 and filed on 4th October 2012 in which the Plaintiff sought for judgment against the Defendant for:-

- (a) A permanent injunction restraining the Defendant, his servants and/or agents in any manner howsoever from trespassing, constructing, alienating, selling, transferring, wasting, leasing and/or disposing of the parcel of land known as Nairobi/Block 102/340 (hereinafter referred to as the "suit property").
- (b) An order of eviction against the Defendant from the suit property.
- (c) A declaration that the Plaintiff is the registered owner of the suit property.
- (d) Costs of this suit.
- (e) Interest on (d) above
- (f) Any other relief that this Honorable Court may deem fit to grant.

In the Plaint, the Plaintiff stated that it is the registered proprietor of the suit property, having purchased the same from the previous owner Buru Buru Farmers Co. Ltd (the 2nd Defendant in the Counterclaim) and being subsequently issued with a Certificate of Lease in April 2011. The Plaintiff then informed the court that in July 2012, the Defendant without any colour of right trespassed onto the suit property and started construction thereon and has totally refused to vacate even after being shown the title documents of the Plaintiff.

In response, the Defendant filed his Statement of Defence and Counterclaim dated and filed on 22nd February 2013 in which he stated that the suit property had hitherto been allocated by the 2nd Defendant in the Counterclaim to one Patrick Kimani Mwangi on or about the year 1991. He stated that the suit property having been allocated to the said Patrick Kimani Mwangi, the rights and interests of the 2nd Defendant in the Counterclaim over the suit property became extinguished as at 1991. He then stated that on 2nd August 1995, the said Patrick Kimani Mwangi transferred the suit property to one John Kahuha Gacheru. He then stated that on 16th December 1995, the said John Kahuha Gacheru sold the suit property to him and he duly paid the requisite fees for the certificate of lease to the 2nd Defendant in the Counterclaim. He then said that he immediately took possession of the suit property, fenced it, and since 1995 has developed it by constructing structures thereon to the exclusion of everyone including the Plaintiff. He then stated that the 2nd Defendant in the Counterclaim did not have a good title capable of passing to the Plaintiff hence the purported sale, transfer and registration of the suit property to the Plaintiff was irregular, fraudulent, unlawful and void *ab initio*. He then said that this suit is a fraudulent attempt and collusion between the Plaintiff and the 2nd Defendant in the Counterclaim to deprive the Defendant of his proprietary rights in the suit property. He laid out particulars of fraud/collusion as being the 2nd Defendant in the Counterclaim offering the suit property for sale to the 1st Defendant in the Counterclaim while being aware that the same had been allotted to its member and sold to the Plaintiff in the Counterclaim, not informing the Plaintiff in the Counterclaim of the purported sale and deceiving the 1st Defendant in the Counterclaim that the suit property was free of any encumbrances when it knew that the same had been sold to the Plaintiff in the Counterclaim. He added that he is not a trespasser in the suit property but is a purchaser thereof so his entry into the suit property is lawful and with just cause. In the Counterclaim, he sought for judgment to be entered against the Defendants in the Counterclaim jointly and severally for:-

(a) a permanent injunction to issue restraining the Defendants in the Counterclaim either by themselves, their authorised agents, servants, employees or otherwise whomsoever from selling, charging, alienating, disposing, transferring, wasting, leasing and/or otherwise whatsoever from interfering with the Plaintiff's use, possession and/or ownership of the suit property.

(b) A declaration that the sale and transfer of the suit property by the 2nd Defendant in the Counterclaim to the 1st Defendant in the Counterclaim was irregular, fraudulent and avoid *ab initio*.

(c) A declaration that the Plaintiff in the Counterclaim is the owner and entitled to possession, use and ownership of the suit property.

(d) An order cancelling the Certificate of Lease issued to the 1st Defendant in the Counterclaim in respect of the suit property and/or a mandatory injunction issued compelling the 1st Defendant in the Counterclaim to forthwith transfer the suit property to the Plaintiff in the Counterclaim.

(e) Costs and interest of the suit.

The Plaintiff in the original suit filed its Reply to Statement of Defence and Defence to Counterclaim dated 18th June 2013 and filed on 19th June 2013 in which it reiterated that it is the registered owner of the suit property and that it has a valid and indefeasible title which has not been challenged in any way by the Defendant in the original suit. The Plaintiff further denied that the Defendant was in possession of the suit property since 1995 as alleged or at all and then reiterated that upon purchasing the suit property in April 2010, it has been in quiet and peaceful possession thereof and the Defendant only trespassed into and took forceful possession thereof in July 2012. The Plaintiff further denied that registration of its title was obtained through any fraud as alleged by the Defendant. In its Defence to Counterclaim, the 1st Defendant in the Counterclaim denied each and every allegation contained in the Counterclaim and reiterated the entire contents of the Plaintiff. The 1st Defendant in the Counterclaim then averred that the Counterclaim as filed discloses no cause of action as against it and sought that it be struck out with costs.

The 2nd Defendant in the Counterclaim filed its Reply to Defence and Defence to Counterclaim dated 22nd April 2014 and filed on 25th April 2014 in which it denied that the Plaintiff in the Counterclaim has had possession of the suit property since 1995 as alleged or at all. It then denied that the suit property was ever allocated to the said Patrick Kimani Mwangi. It then stated that it had a good title to the suit property hence the sale and subsequent transfer thereof to the original Plaintiff in this suit was regular, lawful and valid. It then stated that at no time has the Plaintiff in the Counterclaim ever had any proprietary interest in the suit property capable of being violated or infringed hence all the allegations of fraudulent acts attributed to the 2nd Defendant in the Counterclaim either singly or in purported collusion with the original Plaintiff in the suit are untrue. It further denied any knowledge of the Plaintiff in the Counterclaim ever purchasing the suit property and stated that if at all he purchased the same, it was a fraudulent sale by total strangers. It then said that the entry by the Plaintiff in the Counterclaim into the suit property was therefore an act of trespass. The 2nd Defendant in the Counterclaim then stated that the original Plaintiff in the suit is the bona fide registered proprietor of the suit property. The 2nd Defendant in the Counterclaim stated further that the Counterclaim filed herein discloses no cause of action as against it and that the same is fatally defective, frivolous, vexatious and an abuse of the court process and should be struck out with costs and judgment be entered for the original Plaintiff as prayed in the Plaintiff.

The Evidence

This suit commenced hearing before Justice Onguto (now deceased) on 10th November 2014 when the only witness on the Plaintiff's side gave his evidence. The Plaintiff called its only witness called Migui Macharia Muigai who stated that he is a director of the Plaintiff in the original suit. It was his testimony that the Plaintiff purchased the suit property from the 2nd Defendant in the Counterclaim in the year 2010. He told the court that the Plaintiff was issued with a title deed to the suit property after all the transfer formalities had been completed. He then informed the court that in July 2012, the Defendant in the original suit trespassed on the suit property and started constructing thereon. He stated that he personally approached the Defendant in the original suit and asked him why he was building on the suit property. He stated that they could not agree so they referred the matter to the Chief of Mwiki Location. He stated that they were still not able to resolve the issue despite his producing not just his title deed but also a search certificate. He stated that it is then that he decided to file this suit for the court to adjudicate upon and resolve this ownership dispute. He stated further that he did not agree with the Defendant's allegation that the Defendant purchased and occupied the suit property in the year 1995. He asserted that when he purchased the suit property in April 2010, the suit property was in vacant possession and had no structure or fence. He denied that he was a son of any of the directors of the 2nd Defendant in the Counterclaim and denied there having been any fraud or collusion between him and the 2nd Defendant in the Counterclaim in the Plaintiff gaining ownership over the suit property. In cross-examination, he told the court that the 2nd Defendant in the Counterclaim is a land buying company but he was not a member thereof. He stated that the suit property was sold to the Plaintiff in the original suit at a price of Kshs. 500,000/-. He admitted that the Defendant in the original suit was in possession of the suit property.

The Defense called its first witness who was the Defendant himself Paul Mungai Mwangi. He informed the court that he bought the suit property in the year 1995 from one Kibui Mwangi (the "vendor"). He informed the court that at the time of purchasing the suit property, the vendor took him to the offices of the 2nd Defendant in the Counterclaim who confirmed that he was the owner of the suit property. He then said that on the basis of that confirmation, he paid all the monies for the suit property to the vendor. He added that he paid an additional Kshs. 3000/- to the 2nd Defendant in the Counterclaim for the lease certificate. He produced the receipt issued in that regard by the 2nd Defendant in the Counterclaim dated 16th December 1995. He told the court that when the suit property was sold to him, he was shown the physical location of the then Plot No. 340 which was the suit property. He then said that he took immediate possession of the suit property in 1995 and started to cultivate the same. He then said that in the year 2007, he built a temporary structure on the suit property and started to build a boundary wall in the year 2010. It was his testimony that the 2nd Defendant in the Counterclaim has no property of its own but it assists its members to buy and sell the plots. He further testified that it is not possible that the suit property could be sold in the year 2011. He told the court that since he purchased the suit property in the year 1995, he has never sold it to anybody. He added that if the 2nd Defendant in the Counterclaim sold the suit property to the 1st Defendant in the Counterclaim, then that was done fraudulently. During cross-

examination, he informed the court that he bought the suit property from Patrick Kimani Mwangi in 1995. He also disclosed that he paid KShs. 135,000/- for it in cash. He added that the transaction was witnessed by the secretary of the 2nd Defendant in the Counterclaim who had since died. He testified that though he paid the 2nd Defendant in the Counterclaim for the certificate of lease for the suit property, it has never been issued to him to date. He told the court that he asked for the title in 2010 but was informed that the titles have not come out yet and he should wait. He further testified that the Plaintiff's Certificate of Lease shows that the suit property was given to the 2nd Defendant in the Counterclaim in the year 1986 by the Government. He added that he is member number 340 of the 2nd Defendant in the Counterclaim. He further informed the court that he pulled down the temporary structure he had built on the suit property, built a boundary wall and put up a permanent house which was finished in December 2010.

The defense called its second witness who was called Patrick Kimani Mwangi. It was his testimony that he purchased the suit property from one Mwangi Kibui on 8th December 1990 but completed paying for it in January 1991. He further told the court that both he and Mwangi Kibui went to the offices of the 2nd Defendant to the Counterclaim where he confirmed that he was selling the suit property and was told to pay development fees. He then stated that his name was inserted in the register of the 2nd Defendant in the Counterclaim as the new owner of the suit property on 28th January 1991. He then stated that he returned a few days later to the offices of the 2nd Defendant in the Counterclaim where he paid KShs. 1,500/- for the certificate of lease. He then told the court that he started using the suit property by first gathering the many stones and cultivating it for about 5 years. He then testified that he subsequently sold the suit property to one John Gacheru. He disclosed that by the time he was selling the suit property, the certificate of lease had not been issued. It was his testimony that though the 2nd Defendant in the Counterclaim was a land buying company, it stopped selling plots to members in 1990 therefore in 2010, it never owned the suit property.

The 2nd Defendant in the Counterclaim called one witness called Waweru Njinya, who told the court that he was the Chairman of the 2nd Defendant in the Counterclaim. It was his testimony that he has been a director in the 2nd Defendant in the Counterclaim since the year 1974 and became the Chairman in 1984. His further testimony was that the 2nd Defendant in the Counterclaim sold the suit property to the Plaintiff in the original suit in the year 2010. He further told the court that at the time of selling the suit property, the same was in the name of the 2nd Defendant in the Counterclaim. He further testified that he has never seen the Defendant in the offices of the 2nd Defendant in the Counterclaim.

The Issues for Determination

The issues arising in this suit for determination are as follows:

1. Who is the legally recognized owner of the suit property.
2. Whether the court should issue a permanent injunction in this suit and in whose favour.
3. Whether the court should issue an order of eviction against the Defendant in the main suit.
4. Which party shall bear the costs of this suit.

The Determination

1. Who is the legally recognized owner of the suit property.

Both the Plaintiff and the Defendant in the original suit have laid claim to the suit property. The Plaintiff informed the court that it purchased the suit property from the 2nd Defendant in the Counterclaim and as proof of this assertion, it produced to this court a copy of its Certificate of Lease and search certificate both of which indicate that the Plaintiff became the registered proprietor of the suit property on 12th April 2011. According to that Certificate of Lease, the Plaintiff's interest in the suit property is a lease from the Government of Kenya for a period of 99 years from 1st June 1986. The Defendant, on the other hand, stated in his Statement of Defence that he purchased the suit property from one John Kahuha Gacheru who purchased it from one Patrick Kimani Mwangi. He stated further that the suit property had hitherto been allocated by the 2nd Defendant in the Counterclaim to Patrick Kimani Mwangi on or about the year 1991. However, when he gave his testimony in court during the hearing of this suit, the Defendant in the original suit testified that he bought the suit property, not from Patrick Kimani Mwangi, but from one Kibui Mwangi. During cross-examination, he informed the court that he bought the suit property from Patrick Kimani Mwangi in 1995. Clearly, the Defendant in the original suit was not clear from whom he purchased the suit property, having named three different persons as the ones from whom he bought the suit property. He claimed to have bought the suit property from John Kahuha Gacheru, Patrick Kimani Mwangi and Kibui Mwangi. The situation is compounded by the testimony of Patrick Kimani Mwangi who contradicted the Defendant's evidence by stating that he was not allocated the suit property by the 2nd Defendant in the Counterclaim but actually purchased the same from one Mwangi Kibui. The only evidence produced by the Defendant as proof of his ownership claim was copies of various receipts issued by the 2nd Defendant in the Counterclaim. This is contrasted to the copy of Certificate of Lease produced by the Plaintiff. The law is very clear on the position of a title holder of land such as the Plaintiff. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1) of the Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

In this suit, the Plaintiff's title deed has been challenged by the Defendant in the original suit on the ground of fraud. The Defendant asserted that the 2nd Defendant in the Counterclaim colluded to fraudulently transfer the suit property to the 1st Defendant in the Counterclaim knowing well all along that he was the owner of the suit property. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

I have considered the statement by the Defendant in the original suit that the Defendants in the Counterclaim were involved in fraudulent dealing in the sale of the suit property. Other than a bare statement of fraud, the Defendant in the original suit and Plaintiff in the Counterclaim has not led any evidence in support to show beyond a balance of probabilities that they were involved in fraud. That being the position, this court finds no difficulty in refuting the claims for fraudulent and proceeds to hold that the Plaintiff has succeeded in proving that it is the duly registered proprietor of the suit property.

2. Whether the court should issue a permanent injunction in this suit and in whose favour.

The court has found in no. 1 above that the Plaintiff is the duly registered proprietor of the suit property. With this finding, it follows that the Plaintiff has the rights over the suit property as set out in **section 24(a)** of the **Land Registration Act** provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

I find that the Plaintiff is entitled to have vacant possession of the suit property to the exclusion of the Defendant and I do issue a permanent injunction as prayed in the Plaint.

3. Whether the court should issue an order of eviction against the Defendant in the main suit.

Again, with the finding that the Plaintiff is the duly registered proprietor of the suit property and in whom all rights of use belong, this court issues an eviction order as prayed in the Plaint against the Defendant.

4. Which party shall bear the costs of this suit.

The upshot of the above is that Judgment is entered as prayed in the Plaint and the Counterclaim is hereby dismissed with costs to the Plaintiff.

SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 11TH DAY OF MAY 2018

MARY M. GITUMBI

JUDGE

DELIVERED AT NAIROBI BY JUSTICE SAMSON O. OKONG'O THIS 18TH DAY OF MAY 2018

SAMSON O. OKONG'O

PRESIDING JUDGE