



REPUBLIC OF KENYA



**Gikaria v Wanyoike & 3 others (Environment and Land Case
97 of 2020) [2024] KEELC 726 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 97 OF 2020
EK WABWOTO, J
JANUARY 25, 2024**

BETWEEN

NDIRITU GIKARIA PLAINTIFF

AND

MARGARET NJERI WANYOIKE 1ST DEFENDANT

CHARLES MWANGI NGUMI 2ND DEFENDANT

MICHAEL NGUGI KARANJA 3RD DEFENDANT

**FRANCIS KIRIMA N'IKINYUA (SUED AS CHAIRPERSON OF ZIMMAN
SETTLEMENT SCHEME SOCIETY) 4TH DEFENDANT**

JUDGMENT

1. The Plaintiff filed the suit vide a Complaint dated 8th June 2020 seeking the following reliefs;
 - a. A declaration that the Plaintiff is the legal owner for Plot Number 1379 and 1380 –Kasarani; being a sub-division of LR Kasarani/Block 12/1-259.
 - b. A declaration that the 1st, 2nd and 3rd Defendants have by their acts unlawfully encroached and trespassed onto the Plaintiff's Plot Numbers 1379 and 1380-Kasarani; being a sub division of LR Kasarani/Block 12/1-259 and thereby committed acts of trespass and nuisance.
 - c. A permanent injunction restraining the 1st, 2nd and 3rd Defendants, their servants, workmen and/or agents from trespassing, occupying, erecting structures and/or interfering with the Plaintiff's right over Plot Numbers 1379 and 1380-Kasarani; being a sub division of LR Kasarani/Block 12/1-259.
 - d. An order that the 1st, 2nd and 3rd Defendants do remove the modifications they have made on the Plaintiff's development



- e. General damages for trespass against the 1st, 2nd and 3rd Defendants.
 - f. Costs of the suit
 - g. Interests at court general damages for trespass and costs of the suit from the date of filing suit until payment in full.
 - h. Any other relief that the Court may deem fit.
2. It was the Plaintiff's case that he is the legal owner of Plot numbers 1379 and 1380 Kasarani being a subdivision of L.R No. Kasarani/Block 123/1-259 which were allocated to him on 27th July 2004. It was averred that after being allocated the suit property he paid a purchase price amounting to Ksh 2,000,000/- and was issued with a receipt on 17th June 2019.
 3. It was also averred that on or about 15th April 2020, while visiting the suit property he found the 1st, 2nd and 3rd Defendants and their agents purporting to undertake construction on the suit property without his authority or notice and despite them being warned of the trespass they continued with the said actions.
 4. During trial, he testified as PW1. It was his testimony that he brought the case because some people were interfering with his plot. He relied on the witness statement dated 8th June 2020. He testified that he purchased land (1379 and 1380 adjacent to each other) from Zimmerman Settlement Scheme Society and had a share certificate in the bundle. He also referred to a sketch map which was produced as (PEXh 2).
 5. On cross examination, he stated that he had not gone through the constitution of the society. He also confirmed having made payment of the membership fees but could not remember the exact amount. He also stated that he used to pay the monthly contribution. He also stated that he was not aware how this property was acquired by the society. He confirmed that he did not attend executive committee but attended AGM of which the minutes will confirm. He stated that the initial payment made was captured on the ledger, which he saw. He stated that he did not know how the plot was designated for society offices. Furthermore, it was not his first time on his premises since he had been in possession from 2009. He also had not obtained title as the same was still being processed.
 6. When asked about the authenticity of his membership certificate he confirmed that it was genuine and denied any forgeries in relation to the same.
 7. On reexamination, he stated that the certificate that he obtained confirmed his membership. He also stated that he dealing with the officials of the society despite being aware of the disputes that they had.
 8. The 1st to 3rd Defendants filed a statement of defence dated 16th April 2021. They denied that the society never sold the suit property to the plaintiff because if such sale occurred then there would have been minutes of the same. It was contended that the society does not own any land and does not have the capacity to enter into any agreement for sale of land and that only the officials and trustees can authorize a sale.
 9. The 1st to 3rd Defendants also denied that the 4th Defendant is the chairman of the society and averred that the 1st Defendant was its chairlady. It was also averred that plot no. 1379 and 1380 were excised from L.R No. Kasarani/Block 123/1 -259 and referenced as plot No. 793 and 794 which were set aside by the society for the construction of its office.



10. During trial, Michael Ngugi Karanja, the 2nd Defendant herein testified as on behalf of the 1st to 3rd Defendants. He relied and produced his witness statement dated 14th April 2021 and he also produced the 1st to 3rd Defendants bundle of documents that was on record as his evidence in chief.
11. He testified that he is the secretary of Zimman Settlement Scheme Society. He stated that they do not have any records confirming that the Plaintiff bought the property since there was no meeting called to approve the sale. He also stated that there was no evidence of payment of Ksh 2,000,000/= made by the Plaintiff. He also denied that the Plaintiff was a member of the society.
12. When cross-examined by counsel for the 4th Defendant, he stated that the 4th Defendant was chairman since 2008 upto 2019. He also stated that he became an official of the society in 2019. He also stated that the did not inherit any records from the previous officials when he took office as the secretary.
13. On cross examination by counsel for the Plaintiff, he stated that the map in his records was not certified. He also stated that he did not know when the excision too place. He also stated that the Plaintiffs certificate was fraudulent because he did not know when the meeting confirming the sale of the property was held. He further stated that the Plaintiff was not a member in 2004 and that the members did not have any knowledge of the sale.
14. On reexamination, he stated that the issue in respect to plot 1380 was raised by the person claiming the land. He also stated that the plaintiff's certificate was issued in 2004
15. The 4th Defendant never filed any pleadings herein but was participated during trial and was represented by his counsel. However he filed written submissions dated 6th April 2023 in which he submitted that confirmation of the society officials could only be confirmed vide an official search and confirmation from the registrar of societies and not a mere extract of the document. Moreover, he submitted that he had filed a JR Application to quash the letter dated 4th September 2020. He further submitted that in Suit 160 of 2020, Korir J. (as he then was) had granted temporary injunctive orders barring the 1st-3rd Defendants from tampering with the register and society records. It was argued that the 1st-3rd Defendant were not fully cognizant of the true position of the property and therefore their testimony amounted to hearsay evidence. Additionally, the averments that the said plots were set aside for construction of their offices were untrue seeing that no details of committee minutes or authorization were tabled.
16. The Plaintiff filed written submissions dated 16th March 2023. The Plaintiff submitted on the following four issues; whether the Plaintiff is the legal owner of the suit property, Whether the 1st, 2nd and 3rd Defendants trespassed on the suit property, whether the plaintiff is entitled to damages and whether permanent injunctive orders restraining the defendants from dealing with the suit property should be given.
17. It was submitted that the Plaintiff gained ownership of the suit property though allotment and purchase. He was allotted the suit property and was issued with a share certificate of share certificate number 2123. After allotment, he thereafter began paying for the suit property in instalments and upon paying the full purchase price, was issued with a receipt for purchase for the sum of Ksh 2,000,000/-
18. It was contended that the share certificate is conclusive proof of membership to a society and could only be issued if officials are satisfied that a member has met the requirements of the society's constitution. The Plaintiff also contended that the receipt bearing the official stamp of Zimman Settlement Scheme should be held to be conclusive proof of payment.



19. As to whether the suit property was preserved for the purposes of constructing society's offices, it was submitted that there were no minutes provided by the 2nd Defendant showing the alleged excision plot numbers and that the purported extract of the minutes that was provided raised more questions than answers and cannot be considered as evidence.
20. The Plaintiff also submitted that the 1st, 2nd and 3rd Defendants had trespassed to the property having proved that he is the legal owner of the suit property. Reliance was placed to the cases of *Ochako Obinchi vs Zachary Oyoti Nyamongo* [2018] eKLR.
21. The Plaintiff also urged the court to grant the reliefs sought together with costs of the suit.
22. The 1st, 2nd and 3rd Defendants filed written submissions dated 11th April 2023. They submitted on the following two issues; Whether the plaintiff is the absolute owner of the suit property and whether the plaintiff is entitled to the prayers sought.
23. On their first issue it was submitted that the property in dispute does not have a certificate of title in the name of either parties and also the society doesn't have the capacity to own the land. Reliance was made to the case of *Caroline Awinja Ochieng vs Jane Mbithe Gitau & 2 Others* [2015] eKLR.
24. It was contended that the plaintiff did not adduce any sale agreement between himself and the society and that a contract for sale cannot be inferred from a receipt.
25. The court was urged to dismiss the plaintiff's suit as he was not entitled to the reliefs sought.

Analysis and Determination

26. The Court having considered the pleadings of the parties, evidence tendered and submissions, is of the view that the following issues arise for determination herein;
 - i. Who is the bonafide and legal owner of Plot Number 1379 and 1380 Kasarani?
 - ii. Whether the Plaintiff is entitled to the prayers sought?
 - iii. Who bears the costs of the suit?
27. This court shall now address the said issues sequentially.
28. It is undisputed that the society- Zimman Settlement Scheme Society and the respective parties have been involved in numerous suits all involving the leadership and structure of the said society.
29. *Black's Law Dictionary 9th Edition* defines a *bonafide* purchaser as;
30. "One who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other Person claiming a better right to it."
31. *Bonafide* purchaser may also be defined as;

"One who has purchased property for value without any notice of any defects in the title of the seller or One who pays valuable consideration, has no notice of outstanding rights of others, and acts in good faith."
32. The question of ownership is directly linked to the legitimacy of various leadership regimes within the society. On one hand the Plaintiff claimed to purchase the land during the tenure of the 4th Defendant which lasted from 2008 until sometime in 2019. On the other hand the 1st-3rd Defendants denied any



- sale or record of the Plaintiff's transaction. This is in spite of the fact that DW1 testified to not receiving records from previous leadership and moreover, the 1st-3rd Defendant took up leadership in 2019.
33. Perusal of the judgment in Nairobi JR Misc No. 318 of 2013 by Odunga J. (as he then was) delivered on 12th November 2014 confirmed that the officials, including the 4th Defendant were to remain in force pending expiry of their term and or conducting of an all-inclusive general elections. This would mean, in the former scenario, expiry of the officials' terms would be in 2019 whereas in the latter, proof of an all-inclusive elections would be necessary, and in this case that had not been proven. Moreover, DW1 testified that the 4th Defendant's term lapsed in 2019 when new officials were elected. However, no evidence and or proof of an all-inclusive elections was submitted as evidence and as such this still casts doubt upon the legitimacy of the current officials.
34. It is trite evidentiary procedure and law under Section 107(i) of the *Evidence Act* that "he who alleges must prove". In this context, the 1st- 3rd Defendant refuted both the share certificate and receipt produced by the Plaintiff yet did not provide a sample of the society's certificate and receipt templates.
35. I have also considered that the Society's Constitution whose copies presented by the parties differ in content, objective and procedure. For example, the Society special general meeting minutes dated 27th April 2020 in which the members allegedly discussed "construction of the society's office on plot number 1380" is incomplete seeing that it list members, who as per the constitution have not been qualified to meet the quorum of a third in attendance and does not particularly exhibit the discussion, deliberations and resolution of members.
36. I do agree with the reflections in *Sen v Headley* [1991] Ch 425 at 437, that the most crucial issue is whether there is good root of title. The Plaintiff's beliefs of the 4th Defendant's culpability are based on the fact that the 4th Defendant was the society's Chairperson at the time of the transaction. The same is bolstered by the 4th Defendant's Replying affidavit dated 27th August 2020.
37. From the evidence that was adduced, it is the finding of this Court that indeed the plaintiff has satisfactory established his root to the ownership of the suit property and he is therefore the rightful legal owner of the suit property.
38. On whether the plaintiff is entitled to the prayers sought. The Plaintiff sought several reliefs as were stipulated in the plaint. Having made a finding that the plaintiff is the genuine and lawful proprietor of the suit property, the plaintiff's claim against the 1st to 3rd defendants is proved and as such the plaintiff is entitled to the declaratory and injunctive reliefs sought. The plaintiff also sought general damages for trespass and costs of the suit.
39. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:
- "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
40. In the case of *Entick v Carrington* [1765] as quoted in the case of *Maina Kabuchwa v Gachuma Gacheru* [2018] eKLR, Lord Camden CJ had this to say:-
- "Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave"
41. In the case of *Maina Kabuchwa v Gachuma Gacheru* (*supra*), the Learned Judge defined trespass "as the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of



trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant.”

42. From the evidence that was tendered, the Plaintiff is the legal owner of suit-land and that he never authorized the 1st to 3rd defendants to enter into, occupy or possess the land, it is obvious that the 1st to 3rd defendants have trespassed onto the same.
43. Further, the plaintiff is entitled to quiet possession and enjoyment of the suit-land. Accordingly, the order of a permanent injunction against the 1st to 3rd defendants jointly and severally as prayed is appropriate.
44. On the issue of general damages for trespass, the plaintiff did not indicate any amount to guide the court in assessing general damages for trespass. The court would have expected the Plaintiff to do so in their submissions but none was provided. That notwithstanding this court is still obligated to consider the same. In the case of *Nakuru Industries Limited v S. S. Mehta & Sons* [2016] eKLR where the court faced such a similar situation, it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

Similarly, in the case of *John Chuma Nganga v Attorney General and Another* [2019] eKLR, the court held as follows: -

“In terms of prayer No.(d), the Court awards the Plaintiff General and Exemplary Damages for trespass and conversion of property and nuisance to the tune of Kshs.1,000,000/=”

45. In the instant case, noting the duration of the trespass it is my view that a figure in the sum of Kshs. 500,000/- being an award of general damages is reasonable in the circumstances.
46. In respect to costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. Looking at the conduct of the parties who seem to be stuck in a rut of endless litigation cycles, it is paramount that litigation must come to an end. For this reason, I therefore direct that each party will bear own costs of this suit.

Final Orders

47. From the foregoing analysis, the Plaintiff has proven his case on a balance of probabilities against the 1st, 2nd and 3rd Defendants and in this regard, this Court makes the following final orders:
 - i. A declaration is hereby issued that the Plaintiff is the legal owner for Plot Number 1379 and 1380-Kasarani; being a sub-division of LR Kasarani/Block 123/1-259.
 - ii. A declaratory order is hereby issued against the 1st, 2nd and 3rd Defendants having unlawfully encroached and trespassed onto the Plaintiff’s Plot Numbers 1379 and 1380-Kasarani; being a sub division of LR Kasarani/Block 12/1-259 and thereby committed acts of trespass and nuisance.



- iii. An order of injunction is hereby issued restraining the 1st, 2nd and 3rd Defendants or their servants, workmen and/or agents from trespassing, occupying, erecting structures and/or interfering with the Plaintiff's right over Plot Numbers 1379 and 1380-Kasarani; being a sub division of LR Kasarani/Block 12/1-259.
- iv. General damages for trespass for Ksh 500,000/- payable by the 1st, 2nd and 3rd defendants.
- v. Each party to bear its own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

E. K. WABWOTO

JUDGE

In the presence of:

Ms. Kiru for the Plaintiff.

N/A for the 1st, 2nd, 3rd and 4th Defendants.

Court Assistant: Caroline Nafuna.

