



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 300 OF 2017

(FORMERLY NAIROBI ELC CASE NO. 186 OF 2017)

PETER CHEGE KIARIE.....PLAINTIFF

VERSUS

GEORGE MATU, PROF. MUIGAI WA GACHANJA,

MRS BETTY MWENDE MUTUVI and EPHANTUS

WAHOME NGEACABI (Being sued as the Chairman, Secretary,

Treasurer and Organizing Secretary respectively

VERSITYWILLE RESIDENTS ASSOCIATION.....DEFENDANTS

JUDGMENT

1. By a Plaintiff dated **29th April, 2011** and filed on **4th May, 2011** Plaintiff has sued defendant for the following reliefs:

a) An order of Permanent Injunction restraining the Defendants by themselves, agents, servants and or any person whatsoever from entering, encroaching, occupying, taking possession, constructing, building any structure or in any manner interfering with the Plaintiff's right of ownership and possession of those properties known as RUIRU/RUIRU EAST BLOCK 7/21 and RUIRU/RUIRU EAST BLOCK 7/18

b) An order of Mandatory Injunction compelling the Defendants whether by themselves, their agents, servants and or any other person however to forthwith vacate the Plaintiff's premises known as RUIRU/RUIRU EAST BLOCK 7/21 and RUIRU/RUIRU EAST BLOCK 7/18.

c) General Damages

d) Cost of the suit.

e) Interest on (c) and (d) above

f) Any other relief that this Honourable court may deem fit and necessary to grant.

2. The Plaintiff is represented by Njoroge O. Kimani and Company Advocates. The defendant are represented by Wamae and Allen advocates.

3. The gist of the Plaintiff's case is that in the year **2010**, he bought the suit property, **L.R. No. RUIRU/RUIRU EAST BLOCK 21** (the 1st suit property) and **L.R NO. RUIRU/RUIRU EAST BLOCK /182** (the 2nd suit property) from **Samuel Muthiora Mwangi** as shown on the sale agreement dated **19th July, 2010 (P Exhibit 4)** having conducted Official Search as per a certificate of Official search date **14th July, 2010 (P Exhibit 1)**. The Plaintiff then obtained consents dated **13th July, 2010** from the area Land Control Board (**P Exhibits 2(a) & (b)**) and paid stamp duty to Kenya Revenue Authority as revealed in receipts dated **13th August, 2010 (P Exhibits 3a & 3b)**.

4. The Plaintiff's further claims that the suit property was transferred to him as reflected on P Exhibit 1 and obtained titles to the property (**P Exhibit 6 a & b**). Later, he charged the suit property to Co-operative Bank of Kenya Ltd as shown on certificate of official search dated **19th**

July, 2014 (P Exhibit 7 (a) & (b)), The Plaintiff also states that he is the registered absolute proprietor of the suit property. That the defendants trespassed into the suit property, demolished its perimeter fence and removed its beacons hence provoking the present suit.

5. In their statement of defence and counterclaim dated **16th February, 2012** and filed on **27th to February, 2012**, the defendants deny the Plaintiff's claim. They state that the 1st suit property was reserved for construction of a cinema hall while the 2nd suit property was reserved for construction of a health centre. That the suit property was reserved for Public use and the same cannot be lawfully converted into a different use without following due process as well as consultation of the residents including the defendants and consent of various authorities, among them the Commissioner of Lands.

6. The defendants further claim that they have acquired overriding interests over the suit property under section 30 of the Registered Land Act (Cap 300- repealed Act). That the defendants' rights are protected under Articles 22 and 40 of the Constitution of Kenya, **2010** (the Constitution). They contend that the Plaintiff's suit has no reasonable cause of action on the grounds which include that they have a collectively higher title on interest of the suit property

7. The defendants counter claim that the Plaintiff's fraudulently obtained the alleged titles to the 1st and 2nd suit property and pleaded particulars of fraud on the part of the Plaintiff. They sought dismissal of the suit and that Judgment be entered on the counter claim in their favour for:

a. An order of Permanent Injunction restraining the Defendants by themselves, agents, servants and or any person whatsoever from entering, encroaching, occupying, taking possession, constructing, building any structure or in any manner interfering with the Plaintiff's right of ownership and possession of those Properties known as RUIRU/RUIRU EAST BLOCK 7/21 and RUIRU/RUIRU EAST BLOCK 7/18

b. An order of Mandatory Injunction compelling the Defendants whether by themselves their agents, servants and or any other person howsoever to forthwith vacate the Plaintiff's premises known as RUIRU/RUIRU EAST BLOCK 7/21 and RUIRU/RUIRU EAST BLOCK 7/18.

c. General Damages

d. Costs of this suit

e. Interest on (c) and (d) above.

8. On 6th March, 2012, the Plaintiff filed a reply to the defendants' defence and defence to the defendants' counter claim dated **1st March, 2012** whereby he sought the dismissal of the defence and the counter claim. He reiterated the contents of his Plaintiff and denied the defendants' counterclaim. He stated that the defendants' are sued in their representative capacity being the registered officials of Versity Ville Residents Association who have fettered his absolute and indefeasible titles to the suit property. He also stated that he exercised due diligence and followed due process in acquiring titles to the said property.

9. Initially, the instant suit was heard by **Justice P. Nyamweya**, at **Nairobi Environment and Land Court** and the Plaintiff adduced evidence on **2nd December, 2014**. The suit was transferred to this court on **6th March, 2017**. It was ordered to start afresh on **2nd November, 2018** and hearing started instantly.

10. At the hearing, P.W.1 relied on his statement dated **29th April, 2011** and a further statement dated **30th June 2014** which the court adopted as his evidence in examination in Chief. P.W.1 urged the court to find in his favour and produced P Exhibits 1 to 7 and a survey map of Kenya dated **26th April, 1991** (P Exhibit 8).

11. On the other hand, the defendants' evidence was hinged on the testimony of one **JOHN NJOROGI WANJAGI (DW1)**, a former Chairman of Versityville residents association. He stated that the suit property was acquired illegally by individuals and titles thereto cannot be allowed to stand. He did rely on documents **D Exhibits A (1) to (4)** and **D Exhibits B (1) to 23** which include abstract of titles to the suit property (D Exhibit (1) and 2), Pleadings in Nairobi ELC Case **No. 510 of 2015, D.W.1 and 3 others -Vs- Ruiru Academy Ltd & 4 others (D Exhibit B 18)**, Letters to the Commissioner of Lands (**D Exhibit B (13)** and **(20)**), Letter to National Land Commission (**D Exhibit B 19, 21 to 23**) and the Kenya Gazette special issue **Vol. -IXIX-No. 97 of 17th July, 2012** (D. Exhibit B 20).

12. The Plaintiff's Counsel filed submissions dated **16th November, 2018** and framed seven (7) issues for determination. He gave the background of the case, analysed the seven (7) issues and cited **sections 24 and 26** of the **Land Registration Act, 2012**, in support of his submissions.

13. I have carefully considered the entire pleadings, evidence of P.W.1 and D.W.1 as well as submissions of the Plaintiff's case. In the case of **Galaxy paints Ltd -Vs- falcon Grounds Ltd (2000) 2 E.A 385**, it was held that the issues for determination in a suit generally flow from the pleadings or as framed by the parties. From the Plaintiff's statement of issues dated **13th June, 2012**, the defendants' issues for determination dated **17th May, 2013** and the issues **(a) to (f)** in the Plaintiff's submissions, I find the issues for determination herein compressed as hereunder:-

a. Whether the Plaintiff is the absolute registered proprietor of the suit property.

b. Whether the suit property is private or Public land

c. Whether the Plaintiff and the Defendants are entitled to the reliefs sought in their respective pleadings.

14. On the 1st issue, this Court is conscious of the definition of the term “**Proprietor**” under section 2 of the Land registration Act, 2012. The rights of a proprietor are absolute and indefeasible under **sections 24 and 25** of the same Act; see also **section 27 and 28** of the **repealed Act (Cap 300)**.

15. The Plaintiff (P.W.1) holds titles (P Exhibit 6 (a) and (b)) in respect of the suit property. The registration of a title to Land is a creation of the Law (**Mwangi & another –Vs- Mwangi (1986) KLR 328**). By dint of P Exhibit **6(a) and (b)**, the suit property **(b)** was registered under the repealed Act. P.W.1 named in **P Exhibits 6(a) and (b)**, is the absolute and indefeasible owner of the property under Section 26 of the Land Registration Act, 2012. Nonetheless, P exhibits 6(a) & (b) may be challenged on the grounds of fraud, misrepresentation, unprocedural or corrupt or illegal acquisition of the same under same section.

16. It was the statement of D.W.1 that the defendants made concerted efforts to secure the suit property and termed their subdivisions null and void. It is noted that by **D Exhibit B (3), (4) and (9)**, the defendants are a registered society.

17. D.W.1 further stated that the defendants wrote a letter to the Cabinet Secretary for Lands (D Exhibit 17) by which they complained of illegal allocation and acquisition of the suit property. That the defendants made an application to the National Land Commission seeking, inter alia, that the suit property is Public land and for revocation of P exhibits **6(a) & (b)**. Clearly, **P Exhibits B(10) to (19)** show that the registration of P.W.1 as the proprietor of the suit property became a subject of challenge.

18. In the case of **Munyru Maina –Vs- Hiram Gathina Maina (2013) eKLR**, the Court of Appeal held thus:-

“---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--- 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---“ (Emphasis added)

19. According to P.W.1, he was registered as proprietor of the suit property on **17th August, 2010**, and that P Exhibits 6(a) & (b) were issued to him on **17th August, 2010**. However, abstract of titles to the suit property (**D Exhibit A (1) and (2)**) reveal that as at **21st May, 1991**, the suit property was registered in the name of the Government of Kenya. It then raises eyebrows on how P.W.1 acquired ownership thereof.

20. On the 1st and 2nd issue, D.W.1 stated that the 1st and 2nd suit property were reserved for use by the defendants **D Exhibit B 19** is to the effect that the defendants applied to the National Land commission to regularise and approve titles to the suit property as Public Land, and for revocation and or cancellation of titles held by Private developers. By D Exhibit B 21, the said suit property was reserved for Social/Townhall and health centre respectively. The decision in **D exhibit B 20** was informed by documents including **D Exhibits B 21 to 23** on public participation regarding the property under **Article 10 of the Constitution**.

21. This Court is aware of overriding interest under sections **28 and 30** of the repealed Act and **section 28** of the **Land Registration Act, 2012**, Moreover, fundamental rights and freedoms including protection of rights to property may be limited under reasonable and justifiable circumstances as stipulated under **Article 24(1)** of the Constitution.

22. P.W.1 asserted that he has Constitutional right to the suit property, and this court cannot lose sight of that right under **Article 40 of the Constitution**. I endorse the position taken by **Majanja, J in Isaac Gathungu Wanjohi & another –Vs- the Honourable A.G & 6 others (2012) eKLR** that Article 40 must be read as a whole so that protection to right to property excludes property unlawfully acquired under **Article 40(6)** of the Constitution.

23. As already noted, **D Exhibits A (1), and (2)** show that the Government of Kenya owned the suit property as at **25th May, 1991**. One Muthiora Mwangi obtained title to the suit property on **14th April, 2010** as Per **P Exhibits 1** and it changed hands to **P.W.1** on **25th August, 2010** as revealed in **P Exhibits 6(a) & (b)**. Therefore, the defendants have proved that **P Exhibits 6(a) & (b)** were obtained by P.W.1 through fraudulent means. He has proved so, though not beyond reasonable doubt, is at least on a balance higher than a balance of probabilities; see **Koinange & 3 others – Vs- Koinange (1986) KLR 23**.

24. The defendants have demonstrated that the suit property was acquired by P.W.1 through fraudulent process. The property belongs to the Public and is reserved for public use as **per D exhibit B 21**. It is pretty clear that the property was acquired in strict conformity with the Constitutional provisions and in good faith; see **Onyango & others –Vs- Town Council of Awendo (2010) 1EACA 321**.

25. In the final analysis, I find that the Plaintiff’s has not proved his case against, the defendants herein on a balance of, probabilities. He is therefore not entitled to the reliefs sought in the Plaintiff.

26. On the part of the defendants, their case has been proved against the Plaintiff’s to the required standard. They are entitled to the reliefs sought in the counterclaim.

27. The upshot is that the entire suit is determined in the following terms:

a. The Plaintiff’s suit is hereby dismissed

b. I enter Judgement for the defendants against the Plaintiff in terms of orders (a) and (d) sought in their Counterclaim dated 16th February, 2012.

c. Costs of the suit and the Counterclaim to be borne by the Plaintiff.

Dated, signed and delivered at Thika this 29th day of November, 2018.

G.M.A ONG'ONDO

JUDGE

In the presence of

Ms W. Leah holding brief for Wawire for the defendant

Tom Court Clerk