



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 450 of 2017

(FORMERLY NAIROBI ELC CASE NO. 655 OF 2005

MARY WANJIKU.....PLAINTIFF

VERSUS

ALICE MUTHONI.....1ST DEFENDANT

NYAKINYUA INVESTMENT LIMITED.....2ND DEFENDANT

THE LAND REGISTRAR, THIKA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff formerly represented by *Gichuru and Gichuru advocates* and currently by *John Mwangi advocate* has sued the four (4) defendants by way of a Plaint amended on **19th April 2010** and filed on **21st April, 2010** further to leave of the court granted on **16th April 2010**. She is seeking the following orders:

- a) A permanent injunction restraining the 1st, 2nd and 3rd defendants jointly and severally from transferring, disposing, alienating and/or in any other way whatsoever dealing with land parcel number Ruiru/Ruiru East Block 2/567***
- b) A declaration that the Plaintiff is the lawful registered owner of the parcel of land known as L.R. No. Ruiru/Ruiru East Block 2/567.***
- c) A permanent injunction restraining the defendants jointly and severally from interfering or encroaching onto the Plaintiff's proprietary rights in L.R. No. Ruiru/Ruiru East Block 2/567 otherwise than by a properly recognized legal and/or statutory process.***
- d) An order directing the 3rd defendant to recall and cancel the title deed for L.R. No. Ruiru/Ruiru East Block 2/567 dated 23rd July, 1993 and in the name of Alice Muthoni Kahuni.***
- e) The defendants do jointly and severally pay punitive and exemplary damages to the Plaintiff for the loss and suffering caused to the Plaintiff by their patently illegal actions.***
- f) Costs of this suit.***
- g) Any other relief this Honourable court may deem fit and just to grant.***

2. The gist of the Plaintiff's case is that she is paid up member of the 2nd defendant and the registered proprietor of the suit property namely **L.R. No. RUIRU/RUIRU EAST BLOCK 2/567** measuring approximately **0.4 hectares** since **1973**. That in the year **2005**, the 1st defendant colluded with some directors of the 2nd defendant and the 3rd defendant in his official capacity and allegedly tried to defraud her of the suit property by purporting that the property belonged to the 1st defendant. That the 3rd defendant illegally issued the 1st defendant with a title deed to the suit property yet the Plaintiff had been issued with title deed to the property thus provoking the instant suit.

3. The 1st defendant through Kanyangi and Company Advocates denied the Plaintiff's claim in her statement of defence dated **23rd June**,

2005 and filed on **24th June, 2005**. She stated that the purported fraud has not been particularised. That in any event, if the Plaintiff is a registered owner of the suit property then the title deed was acquired illegally and un-procedurally hence she is not the lawfully registered proprietor of the property. She did not file any amended statement of defence to the amended Plaint.

4. The 2nd defendant who is represented by **Kimani Githongo & Company Advocates**, denied the Plaintiff's claim in a statement of defence dated **25th June, 2010**. The 2nd defendant filed no amended defence but sought dismissal of the suit with costs.

5. The 3rd and 4th defendants denied the Plaintiff's claim in their statement of defence filed on **14th October, 2018**. They stated that the 1st defendant presented documents which were registered by the 3rd defendant on bonafide belief that they were genuine. They didn't file an amended statement of defence.

6. In her reply to the defendants' statement of defence, the Plaintiff reiterated the contents of his Plaint and that the 1st and 2nd defendants' committed fraud was done with the full knowledge of the 3rd and 4th defendants. She urged the court to strike out the defendants' statements of defence.

7. The 1st and 2nd defendants were duly served for hearing of the suit as shown in an affidavit of service sworn on **2nd November, 2018** by a process server, **Bonface Muinde**. Therefore, hearing proceeded inspite of their absence. The 3rd and 4th defendants' did not adduce any evidence in this matter.

8. On her part, the Plaintiff (P.W.1) testified that she is the registered owner of the suit property. That the 1st defendant obtained a purported title to the suit property on **23rd July, 1993** by way of fraud. P.W.1 produced the following documents of exhibits;

a. Receipts appearing as document No. 8 of her list of documents dated 13th July, 2018 (P Exhibit 1).

b. A ballot paper in respect of the property (P Exhibit 2).

c. Share certificate of 13th April 1991 issued to P.W.1 by 2nd defendant (P Exhibit 3).

d. Title deed issued to P.W.1 on 15th November, 1996 (P Exhibit 4).

e. Green card/register of 11th March 1996 (P Exhibit 5).

f. A certificate of official search dated 4th March 1996 (P exhibit 6).

g. A letter dated 3rd November 1994 by Chair of 2nd defendant showing that the suit property belongs to P.W.1 (P Exhibit 7).

9. In his submissions dated **21st November, 2018**, the Plaintiff's Counsel give brief facts of the Plaintiff's case, the defendant's case, and identified issues for determination and analysed them. He submitted that title to the suit property must be established on the basis of evidence adduced before court as noted by O.A Angote Judge in **Republic –Vs- Chief Land Registrar & 3 others (2014)eKLR**.

10. Counsel further cited the case of **Munyu Maina-Vs- Hiram Gathina Maina (2013) eKLR** where the Court of Appeal held, inter alia:

“---when a registered proprietor's proof 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 proof the legality on how he acquired the title and show that the acquisition was lawful, formal and free from any encumbrances----“

10. Counsel also cited the case of **David Mutahi Inganyi –Vs- Fredrick M-Obare (2015) eKLR** where the defendants didn't assert their rights and the court granted a permanent injunction. The Plaintiff contended that the plaintiff is the owner of the suit property.

12. On the amount of punitive and exemplary damages, Counsel asserted that the same is within the discretion of the Court. He relied on the decision **in Nakuru Industries Ltd –Vs- S.S. Mehta and Sons (2016) eKLR**.

13. The 1st, 2nd and 4th defendants offered no evidence. There were no submissions filed by the defendants' Counsel.

14. I have carefully examined the entire pleadings, the evidence of P.W.1 and submissions herein. I am guided by the case of **Great Lakes Company (U) Ltd – Vs- Kenya Revenue Authority (2009) KLR 720**, the Plaintiff's statement of issues dated **27th August, 2018** and issues framed in the Plaintiff's submissions. In that regard, the issues for determination are compressed as follows:-

a. Who is the lawful proprietor of the suit property?.

b. Did the 1st, 2nd, & 3rd defendants collude to defraud the Plaintiff of the suit property?

c. Is the Plaintiff entitled to the reliefs sought in this suit?

15. On the first issue, the Plaintiff (PW1) contends that she is the registered owner of the suit property hence her title to the suit property (PEXhibit 4) which is a first registration is absolute and indefeasible. Quite clearly, PW1 obtained PEXhibit 4 on **15th November, 1996** under the repealed Act namely the registered Land Act (Cap 300). She stated, interalia:

“I am the registered owner of the suit land, L.R. No. RUIRU/RUIRU EAST BLOCK 2/567---

16. P.W.1 further stated that she was allocated the property by the 2nd defendant. She was shown the Land, and paid for its title deed. She then obtained P Exhibit 4 which is inviolable and indefeasible under sections 27 and 28 of the repealed Act.

17. It is notable that **section 30** of the repealed Act provided for exceptions to infeasibility of title to land. The exceptions are overriding interest including the rights of a person in possession or actual possession of land to which he is entitled in such possession or occupation.

18. It is trite law that it is not essential that adverse possession claim should be of the whole or defined portion of land: see **Muthuita – Vs- Wanoie and 2 others (2008) 1KLR (Gef) 1024.**

19. In the instant case, the Plaintiff stated that the 1st defendant has never occupied the suit property. The 1st, 2nd and 3rd defendants merely denied the Plaintiff’s claim. Going by the evidence of P.W.1 and the definition of “**a proprietor**” under **section 2 of the Repealed Act**, P.W.1 remains the proprietor of the suit property.

20. In respect of the second issue, P.W.1 claimed that the 1st defendant colluded with the 2nd & 3rd defendant, and allegedly attempted to defraud him of the suit property. She pleaded particulars of fraud on the part of the defendants at paragraph 6 of the amended Plaintiff which include issuing a title deed to the 1st defendant.

21. It was the testimony of P.W.1 that P Exhibit 4 was genuine. She stated as follows:-

“I am the proprietor of the suit land. The purported title deed issued on 23rd July, 1993 to the 1st defendant was obtained by fraud.

22. According to the 1st defendant, if P.W.1 is the registered owner of the suit property then P. Exhibit 4 was acquired illegally and un-procedurally. By **Exhibits 1 to 7**, the Plaintiff has proved how she acquired **P. Exhibit 4** and that the acquisition was legal, formal and free from any encumbrances; see **Munyu Maina case (Supra).**

23. The Plaintiff has proved by way of P Exhibit 4 that she is the proprietor of the suit property. Her rights are exclusively secured under sections **24 and 25** of the Land Registration Act, **2012** and formerly at sections **27 and 28** of the repealed Act. The defendants’ case is mere denial. The evidence of P.W.1 is uncontroverted as recognised **in Ingunyi case (Supra).**

24. In the premises, the Plaintiff is entitled to the orders sought in her amended Plaintiff. Bearing in mind the decision in **Nakuru Industries, Ltd case (Supra)**, and since it has been proved that the 1st defendant is not in occupation of the suit property, I would not award general damages for trespass in the circumstances. Nonetheless the plaintiff has proved her case against the defendants jointly and severally on a balance of probability.

25. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally for orders (a), (b), (c), (d) and (f) sought in the plaintiff amended on 19th April, 2010. Order (e) sought in the plaintiff is declined accordingly.

Dated, signed and Delivered at Thika this 5th day of November, 2018.

G.M.A ONG’ONDO

JUDGE

Present:

Mr. Gicheru holding brief for Mwangi for the Plaintiff

Court Clerk - Tom

G.M.A ONG’ONDO

JUDGE