



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 53 OF 2014

GRACE WAMBUI MUNENE.....PLAINTIFF

VERSUS

UMA INVESTMENTS LIMITED.....DEFENDANT

JUDGMENT

1. By plaint dated 19th February 2014, the plaintiff averred that she as a member of Kasarani Mathare No. 4A Dancers she purchased and paid for a parcel of land known as plot No. Gilgil/Gilgil Block 1/12824 (Kikopey) formerly identified as plot No 46. She later discovered that the defendant got the land registered in its name. The plaintiff therefore sought judgment against the defendant for:

- a) A declaration that the plaintiff is the legal lawful (sic) owner and proprietor of plot No. Gilgil/Gilgil Block 1/12824 (Kikopey).***
- b) The title deed issued to the defendant be rightfully cancelled and the same be issued in favour of the plaintiff.***
- c) An order of permanent injunction restraining the defendant by themselves, their agents, servants and/or employees from interfering and/or dealing with the subject land.***
- d) Any other relief that this honourable court may deem fit to grant.***

2. Through Statement of Defence dated 15th July 2014, the defendant denied the plaintiff's allegations and urged the court to dismiss the plaintiff's case with costs.

3. At the hearing, the plaintiff testified as PW1 and told the court that has been a member of Kasarani Mathare No. 4A Dancers Group since 1997. She produced a copy of a membership card as PExb 3. She added that the group bought a parcel of land then subdivided it through the group's officials. The chairman was called Mr Kinyanjui and secretaries were Mr Johnson Kilyuru and Mr Gathua. The plaintiff was allotted plot No. 70 whose number changed after survey to plot No. 46 though on the ground it remained the same plot. Title deeds were processed through the firm of Chuma Mburu & Co. Advocates. By then the members were already cultivating their plots. She paid for title deed in respect of plot No. 46 and was issued with receipts (P.Exb2). I was paying for plot No. 46. She was later issued with a title for a different plot being plot No. 45 whose title read Gilgil/Gilgil Block 1/12/823 (Kikopey). She ought to have been issued with title for Gilgil/Gilgil Block 1/12824 (Kikopey). Instead, the title for Gilgil/Gilgil Block 1/12824 (Kikopey) was issued to Uma Investment. She added that although she had cultivated plot 46 since its allocation to her, she stopped the cultivation when she realized that the title had been issued to someone else. She went back to Chuma Mburu & Co and they confirmed to her that a mistake had occurred. They summon Uma Investment but Uma Investment refused to respond to the summons.

4. Under cross examination, she stated that she has a title for Gilgil/Gilgil Block 1/12/823 (Kikopey) in her name which was issued to her in the year 2011, some 3 (three) years before she filed this case.

5. PW2 was Johnstone Kinyuru Njorge. When his turn to testify came, counsel for the defendant objected to him testifying since he had been sitting in court during the testimony of PW1. After some deliberations, it was mutually agreed that his witness statement be adopted as his evidence in chief followed by cross examination.

6. In his witness statement, he stated that he was the General Secretary of the society known as Kasarani Number 4A Mathare Dancers and that Grace Wambui Munene was also a member of the society and the allottee of plot number 70. He added that he had in his possession a register which showed that plot number 70 was allocated to Grace Wambui Munene and that the plot is the same one known as Gilgil/Gilgil Block 1/12824 (Kikopey). He further stated that although he knew Mercy Wambui Nicholas who went to his office, the plot she sold was not Gilgil/Gilgil Block 1/12824 (Kikopey).

7. Under cross examination, he told the court that his witness statement concerned with plot No. 70 while the plaintiff was referring to plot

No. 46 in her claim.

8. The plaintiff's case was closed at that point.

9. For the defence, Abdul Samad Mwangi Mucheru a director of the defendant, testified as DW1, the sole defence witness. He told the court that he was looking for a plot near Lake Elementaita. He met a village elder called Benson Mwangi who took him to a lady called Mama Njora. She told them that a neighbouring plot was on sale and then the telephone number of the owner. They called him and he came from Nairobi, accompanied by two other women. They agreed on one plot, No. 12824. Mama Njora who was deceased as at the date of his testimony was cultivating the plot when it was shown to him. They inspected the plot and DW1 was shown trees which had been planted. The owner was a teacher in Nairobi and had allowed mama Njora to cultivate. DW1 and the rest then went to Kasarani Mathare Dancers where they met Mr Johnstone Kinyuru (PW1) who was the secretary of the group. He confirmed that the lady from Nairobi was in society records as owner. He referred DW1 and the rest to Chuma Mburu & Co. Chuma Mburu also had a register and verified from his register that the lady was the owner. DW1 and the owner agreed on purchase price and executed agreement dated 21st October 2011. DW1 paid KShs 105,000/=. The purchase price was KShs 180,000. DW1 paid the balance on 27th December 2011 and there was a further agreement. DW1 then started cultivating the plot by planting maize and beans. Eventually, he was issued with title for Gilgil/Gilgil Block 1/12824 (Kikopey) in the name of Uma Investments Ltd, a company where he is a director. The title is dated 20th December 2011. He added that nobody ever challenged him when he was cultivating the land upon taking possession in 2011. He further stated that he followed all necessary steps before buying the plot and that he has been cultivating it in broad daylight.

10. Under cross-examination, he stated that when the plot was sold to him, Kasarani Mathare No. 4A Dancers retained the documents of the seller and issued to him new documents which they called a transfer (D Exb 2). The document was signed by the chairman. He added that at the time of buying the plot already had a number being Gilgil/Gilgil Block 1/12824 (Kikopey) but there was no title deed as yet. The vendor, Mercy Wambui Nicholas, was in the register book at Chuma Mburu as owner. DW1 further testified that he paid Kshs.20, 000/= for title processing and that he was called later to collect the title. The process of transferring and obtaining title was done by Chuma Mburu Advocates.

11. Defence case was closed at that point. Parties then filed and exchanged written submissions. The plaintiff's submissions were filed on 28th February 2018 while the defendant's submissions were filed on 6th April 2018. I have considered the pleadings, the evidence and the submissions. Two issues emerge for determination: Firstly, whether the plaintiff is entitled to plot No. Gilgil/Gilgil Block 1/12824 (Kikopey) and secondly, what reliefs should issue.

12. There is no dispute that the defendant is currently the registered proprietor of plot No. Gilgil/Gilgil Block 1/12824 (Kikopey) while the plaintiff is the registered owner of plot No. Gilgil/Gilgil Block 1/12823 (Kikopey). Both became registered owners on 20th December 2011 and both plots measure 0.20 hectares.

13. Pursuant to the provisions of **sections 25 and 26 of the Land Registration Act**, the rights of a registered proprietor of land are protected and such ownership can only be challenged on limited grounds. The sections provide:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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. ...

14. It follows therefore that to successfully challenge the defendant's title to of plot No. Gilgil/Gilgil Block 1/12824 (Kikopey) the plaintiff would need to prove that the said property was registered in favour of the defendant irregularly, illegally or unprocedurally and further show that the defendant was party to such ills.

15. The plaintiff's case is that she was allotted plot No. 70 whose number changed after survey to plot No. 46 though on the ground it remained the same plot. Title deeds were processed through the firm of Chuma Mburu & Co. Advocates and that by the time titles were issued in 2011, she was cultivating her plot. She insists that she was allocated and paid for plot No. 46. According to her, her ownership of plot no 46 should have translated to her being issued with title for Gilgil/Gilgil Block 1/12824 (Kikopey). Instead, she was issued with title for Gilgil/Gilgil Block 1/12823 (Kikopey) which according to her was plot No. 45. In support of her case, the plaintiff called Johnstone Kinyuru Njoroge who testified as PW2. Both parties agree that he is the secretary of Mathare Kasarani 4A Dancers. In his witness statement which was admitted as his evidence in chief, he stated that the plaintiff was allocated plot No 70 and that plot No 70 is the same as Gilgil/Gilgil Block 1/12824 (Kikopey). He did not explain how plot 70 became plot 46, if at all such a change took place. Neither he nor the plaintiff produced any map or register showing how the plots were allocated to various members of the group including the parties to this case. If the plaintiff's plot was switched, and I have not seen any evidence of a switch, it is highly unlikely that the switch would have been

by the defendant. Instead, such a switch could only be done by Mathare Kasarani 4A Dancers, yet the plaintiff has not joined the group to this case.

16. Regarding the testimony of Johnstone Kinyuru (PW2), I note that he was the secretary of the group. On one hand he supported the plaintiff's case while on the other he declared that he did not know the defendant yet it came out clearly in DW1's testimony that he is the one who met DW1 and confirmed to him that the person who the defendant was purchasing from was duly registered in the group's records as owner of plot No. Gilgil/Gilgil Block 1/12824 (Kikopey). Owing to these conflicts, I do not find PW2's testimony reliable at all. It has neither been shown that Gilgil/Gilgil Block 1/12824 (Kikopey) was registered in favour of the defendant irregularly, illegally or unprocedurally nor that the defendant was party to any such misdeeds. I am therefore not persuaded that the plaintiff is entitled to plot No. Gilgil/Gilgil Block 1/12824 (Kikopey).

17. The final issue for determination is what reliefs should issue? In view of my finding above, I am not satisfied that the plaintiff has established her case. The plaintiff has plot Gilgil/Gilgil Block 1/12823 (Kikopey) in her name. She should settle in her said plot and leave the defendant to enjoy its plot Gilgil/Gilgil Block 1/12824 (Kikopey).

18. In the end, the plaintiff's case is dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 18th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Chege for the Plaintiff

Mr Ikua for the Defendant

Court Assistants: Gichaba & Lotkomoi