



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 154 OF 2012

GRACE MWAKIRIA MUGAMBI.....PLAINTIFF

VERSUS

PHILIP KIMANI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed on 18th September 2012, Grace Mwakiria Mugambi(the Plaintiff) prays for Judgment against the Defendant for:-

- a. *A permanent injunction restraining the Defendant by himself, his agents, servants, representatives, assigns or any other person claiming under him from continuing to occupy the Plaintiff's land, and/or constructing or erecting any temporary or permanent structure, developing or making any use of all that parcel of land known as Plot No. 421 situated at Hindi/Magogoni Settlement Scheme.*
- b. *Vacant possession.*
- c. *General damages.*
- d. *Interest on 'c' above at Court rates.*
- e. *Costs of the Suit; and*
- f. *Any other or further relief that the Court shall deem fit and just to grant.*

2. The basis of the Plaintiff's suit is her contention that she purchased the said parcel of land from one Mohamed Said Abdulrehman on 3rd September 2001 for a consideration of Kshs 80,000/-. It is the Plaintiff's case that after the purchase and upon obtaining consent to have land transferred into her name, she discovered that the Defendant herein had not only placed a caution on the land but was also illegally occupying the same. Despite numerous requests made to the Defendant, he has refused to vacate the land and hence this suit.

3. In his Written Statement of Defence filed herein on 25th October 2012, Philip Kimani (the Defendant) however refutes the Plaintiff's contention and avers that he has been in occupation of the suitland continuously for a period in excess of 18 years having entered the land upon the invitation of the Settlement Fund Trustees (SFT). It is the Defendant's case that he accepted the offer from the Settlement Fund Trustees (SFT) and paid the requisite fees as demanded by the Settlement Fund Trustees (SFT).

4. The Defendant avers that having accepted the offer and performed his obligations as per the Letter of Offer, he was entitled to be registered as the owner of the suit property and any registration inconsistent with his right was made in contravention of the law and is null and void.

5. Further and in addition to the foregoing, the Defendant contends that the registration of the Plaintiff's Predecessor in title one Mohamed Said Abdulrehman was fraudulent of the Defendant as he was the one who was in occupation. Accordingly, he did file a caution at the Land Registry in the year 2001 in order to protect his interest in the land.

6. In the alternative, the Defendant avers that the Plaintiff was reckless and/or negligent in the manner in which she went ahead to purchase

land that was in occupation of the Defendant without having the Defendant's interest in the land extinguished. In the circumstances he prays that the Plaintiff's suit be dismissed with costs.

THE PLAINTIFF'S CASE

7. At the trial hereof, the Plaintiff called two witnesses. Testifying as PW1 in support of her case, the Plaintiff testified that she bought the said Plot No. 421 Hindi Magogoni Settlement Scheme pursuant to a Sale Agreement dated 3rd September 2001 between herself and one Mohamed Said Abdulrehman for a consideration at Kshs 80,000/-

8. PW1 told the Court that upon purchase of the land, she obtained consent to transfer from the Land Control Board Lamu and the land was transferred to her on 20th January 2006. But when she presented the documents at the Land Registry to effect the transfer, she discovered that the Defendant had placed a caution thereon and was illegally occupying the said land.

9. The Plaintiff told the Court that she severally requested the Defendant to leave and/or vacate the land but he adamantly refused to do so. She therefore urged the Court to find that she was the rightful owner of the piece of land and to grant her the orders sought in the Plaintiff.

10. PW2-MOHAMED SAID ABDIRAHMAN on his part testified that he is the one who had sold the said Plot No. 421 Hindi Magogoni Settlement Scheme to the Plaintiff. It was PW2's testimony that he had acquired the land through a Letter of Allotment dated 14th September 1992 and thereafter on or about 12th May 1993, he paid the requisite fee of Kshs 7,000/-

11. PW2 told the Court that he found the Defendant on his land at the point in time that he was selling it to the Plaintiff. He then wrote a demand letter asking the Defendant to vacate the land but he refused.

THE DEFENDANT'S CASE

12. The Defendant testified as his sole witness at the trial. Testifying as DW1, he told the Court that he has been in occupation of the subject piece of land for a continuous period of 18 years after entering the same at the invitation of the Settlement Fund Trustees (SFT). DW1 told the Court that the registered owner of the land first visited the land in 2001 when he sought to identify it.

13. It was the Defendant's case that the Plaintiff never went to the land although her husband visited thereafter in the company of a Surveyor. DW1 testified that his entry upon the land was with the singular purpose of owning it and developing the same and his occupation has always been adverse to the rights of the registered owner.

14. According to the Defendant, the registered owner of the land has not sued him and he does not understand why the Plaintiff has not brought him to Court yet he does not have a registered interest in the land.

15. DW1 further testified that upon the declaration of the area as an adjudication area, the Portion of land which he occupied was adjudicated to himself by the Settlement Fund Trustee vide their Letter of Offer dated 15th June 1993. He accepted the offer and proceeded to make the necessary payments.

ANALYSIS AND DETERMINATION

16. I have reviewed and considered the pleadings and the evidence adduced before me by the parties. I have equally considered the rival submissions filed before me by the Learned Advocates-Mr. Omwancha for the Plaintiff and Mr. Ole Kina for the Defendant.

17. As the parties did not file any agreed issues, each and everyone of them submitted on various issues which they considered to be material to their respective cases. Having considered the matter before me, this Court identified the following issues as being relevant for determination:-

- i. *Whether the Plaintiff had the requisite Locus Standi to bring this Suit.*
- ii. *Whether the Defendant has acquired right(s) to the land by virtue of the Limitation of Actions Act or by Prescription.*
- iii. *Whether the Plaintiff is entitled to the Orders of injunction as sought herein.*

Whether the Plaintiff has the Locus Standi to bring this Suit.

18. I think given its ramifications, this Court ought first to ask itself whether the Plaintiff has the requisite standing to bring this suit. I say so because if a party is found to have no locus standi, it would mean that he/she cannot be heard even on whether or not he has a case worth listening to. In other words, if this Court were to find that the Plaintiff has no locus standi, then the Plaintiff cannot be heard and that point alone may dispose of the suit.

19. According to the Defendant, the Plaintiff lacks the locus standi to institute and maintain the present suit as at present, she is not the registered owner of the land. From the record, Mohamed Said Abdulrehman (who testified herein as PW2) is the registered owner of the suit property and it is therefore the Defendant's submissions that the Plaintiff cannot be granted the reliefs sought as she is not the registered owner of the suit property.

20. Black's Law Dictionary, 4th Edition (Revised) defines the term Locus Standi as:-

“A place of standing; standing in Court. A right of appearance in a Court of justice or before a Legislative body on a given question.”

21. Thus to have locus standi, a party must be able to demonstrate to the Court sufficient connection to support that party's participation in the case. Traditionally therefore locus standi arises where a party stands to directly and/or personally suffer some harm, injury or prejudice as a result of the situation which gives rise to the relief being sought. There are of course instances where the Constitution now grants parties standing even where such party has not demonstrated any personal injury or loss.

22. In the matter before me, the Plaintiff brings this suit as the person who purchased the suit property from the current registered owner, the said Mohamed Said Abdulrehman (PW2). It is the Plaintiff's case that he purchased the property on 3rd September 2001 for a consideration of Kshs 80,000/-. In support of this claim she produced a copy of an agreement executed on the same day between herself and PW2. Thereafter, the Plaintiff states that she obtained the Land Control Board Consent to have the land transferred to her name but when she moved to the Land Registry to have the transfer done she discovered that the Defendant had lodged a caution on the land which he was also occupying.

23. It is not disputed that the Plaintiff entered into the Sale Agreement with PW2 in regard to the land. Neither does the Defendant deny that he lodged the caution at the Land Registry in regard to the suit property, when he got wind that PW2 who is registered as the owner of the suit property was in the process of selling the same. Clearly, the Plaintiff had a legitimate interest in having the suit property transferred to her name as a purchaser from PW2. While PW2 remains the registered owner on records, and perhaps was best suited to bring the suit either solely or in conjunction with the Plaintiff, it cannot be said that the Plaintiff absolutely had no interest in the suit property.

24. This in my view, is the scenario envisaged in Order 1 Rule 1 of the Civil Procedure Rules which provides as follows:-

“All persons may be joined in one suit as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

25. In the circumstances, I am unable to sustain the submissions that the Plaintiff has no locus standi to bring this suit. On the contrary, I think the Plaintiff has demonstrated her interest in the suit property and she therefore has proper standing to bring this suit.

Whether the Defendant has acquired any right(s) to the land by virtue of the Limitation of Actions Act or by Prescription.

26. As it were, the Plaintiff's case is premised on her statement that she bought the disputed parcel of land from the registered owner- Mohamed Said Abdulrehman on 3rd September 2001 at a consideration of Kshs 80,000/-. After the said purchase, it was the Plaintiff's case that she found out that the Defendant had not only placed a caution on the suit property but was also illegally occupying the land.

27. The Defendant on his part does not deny that he was in occupation of the land. It is however his case that the said occupation was lawful as he took over the land pursuant to a letter of offer dated 15th June 1993 made to him by the Settlement Fund Trustees. It is further the Defendant's case that he did accept the offer and paid the requisite fees required thereunder upon which he proceeded to occupy the suit property.

28. The Defendant therefore submitted strongly, that he had been in occupation and active development of the suit property for a period in excess of 18 years as at the time these proceedings were instituted. Accordingly it was the Defendant's case that as at the time the title deed was issued to PW2 and the subsequent sale of the land to the Plaintiff, an overriding interest had been created over the suit property as previously provided under Section 30 of the Registered Land Act (now repealed) and reflected under the provisions of Section 28 of the Land Registration Act. In this regard, this Court was told that the alleged sale of the suit property does not affect those rights as they are attached to the land in question which land remains in the Defendant's possession to-date.

29. Indeed from the material placed before me, it is apparent that during or around the time that the Plaintiff bought the suit property, the Defendant was for one reason or the other in occupation of a Portion of the suit property and that he proceeded, upon learning of the impending sale to lodge a caution thereon at the Land Registry, Lamu. In his testimony before me, PW2 told the Court that he found the Defendant on his land at the point in time that he was selling it to the Plaintiff. He then wrote a demand letter asking the Defendant to vacate the land but he refused.

30. From the record, it was evident to me that for some unclear reason, the Defendant and PW2 were beneficiaries of the same parcel of land- the suit property herein. PW2 was the first allottee of the Plot which is said to measure 12.3 acres situated at Hindi Magogoni Settlement Scheme. PW2's Letter of Allotment was issued to him on 14th September 1992. While the terms and conditions thereof required the requisite fees to be paid within 90 days, it is apparent that PW2 did not make any payments until 12th May 1993, some 8 months later, when he paid a sum of Kshs 7,000/- to the Government.

31. Apparently and while there was no formal cancellation of the offer made to PW2, the same Settlement Fund Trustees issued another offer for the self-same parcel of land to the Defendant on or about 15th June 1993, about one month after the Fund had belatedly accepted payment from PW2. Upon receipt of payment from PW2, the Defendant moved with haste and accepted the offer by paying the Land Deposit and Conveyance Fees on 27th August 1993.

32. It was not clear from the evidence placed before me whether or not the Defendant thereafter made any effort to have the land registered in

his name. As it turned out, PW2 pursued the registration and was on 17th May 2002 issued with a title deed for the land. On 3rd September 2001, PW2 sold the land to the Plaintiff herein. It would appear from the Certificate of Official Search produced herein by the Plaintiff dated 3rd August 2007 that as at the time of the sale, there was no indication of the Defendant's interest on the land. The Certificate indicates that the Defendant lodged a Restriction pursuant to Section 136 of the Registered Land Act (now repealed) on 24th December, 2001, some three months after the sale to the Plaintiff.

33. According to the Defendant, PW2's registration of the entire disputed land as his own failed to take cognisance of the existence of the Defendant and his occupation of the suit property and hence his title became subject to the Defendant's overriding interest, notwithstanding that it was not noted on the register.

34. Section 28 of the Land Registration Act 2012 provides for overriding interests as follows:-

“Unless the contrary is expressed in the Register all registered land shall be subject to the overriding interest without being noted in the register which include rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or Prescriptions.”

35. As it were, it is indeed true that possession and occupation of part of the land may amount to an overriding interest not required to be noted on the register and any subsequent proprietorship of the land would be subject to it (see for instance *Obiero –vs- Opiyo(1972) EA 227*). In the Court of Appeal decision in *Janet Ngendo Kamau –vs- Mary Wangari Mwangi, Civil Appeal No. 173 of 2003*, the Court observed as follows:-

“The suit land is and has been at all material times registered under the Registered Land Act, Cap 300 Laws of Kenya. Under Section 30(f), above, rights in the process of being acquired under the Limitation of Actions Act, are in the nature of overriding interest and go with the land and not the registered proprietor. Change of ownership does not affect those rights as they attach to the land. In the circumstances as the Plaintiff's occupation started long before the defendant became the registered owner, his rights were in the nature of an overriding interest over the land and could be enforced at the expiry of the limitation period.”

36. In the matter before me, the Defendant's position is that he moved in and occupied the land at the invitation of the Settlement Fund Trustees who offered to him the land vide their Letter of Offer dated 15th June 1993. He accepted the offer by making the required payments on 27th August 1993. In my mind, if the Defendant was to be believed and in the absence of any other evidence of earlier occupation, his entitlement to the land by virtue of occupation can only be contrived to have commenced on the date he accepted the offer from the Fund. That would mean that in the year 2001, when PW2 got title to the land and subsequently sold the same to the Plaintiff, he would have been in occupation of the land for 8 years.

37. Where the Defendant was claiming interest in the land by virtue of adverse possession, the proper way of assessing proof of the same would in my view be whether or not the title holder has been dispossessed of, or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

38. In this regard, Section 7 of the Limitation Actions Act(Cap 22) provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some persons through whom he claims, to that person.

39. Accordingly, it is clear to me that as at the time PW2 became registered as the owner of the suit property, no overriding interest had been created thereon in favour of the Defendant as the period of occupation was less than the stipulated period of 12 years. As at the time the Plaintiff bought the land in September 2001, the Defendant was yet to lodge any restriction on the parcel as he only did so in December of the same year.

40. It is indeed curious that while the Defendant casts aspersions on the circumstances under which PW2 obtained the disputed title he has not taken any action to nullify the title whose existence he has been aware of since December 2001. Nor has he taken any steps to validate his claim thereto despite his assertions that he has occupied the land for a period in excess of 18 years. As it were Section 38 of the Limitation of Actions Act provides that:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the Act....he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

41. As matters stand now, the fact remains that PW2 is the registered proprietor of the suit property. As at the time he acquired his title to the property on 17th May 2001, no overriding interests had been created over the parcel of land and I therefore find and hold that the Defendant had not acquired any Prescriptive rights over the suit property and there were no overriding interests other than those that may have been noted on the title.

Whether the Plaintiff is Entitled to the Orders Sought

42. The last question that this Court would then ask is whether or not the Plaintiff is entitled to the Orders sought herein. Section 26 of the Land Registration Act provides that:-

“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... 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.*

43. On the material placed before me, I have no reason to conclude that the title obtained by PW2 on 17th May 2001 was acquired illegally, unprocedurally, corruptly or is otherwise tainted with fraud. There was however evidence tabled before me that shows that the registered owner of the land (PW2) sold his interest thereon to the Plaintiff on 3rd September 2001. The Seller and the Purchaser have since been trying to transfer the title to the Plaintiff but their efforts to do so have ever since been thwarted by the Defendant who moved to the Lamu District Land Registry on 24th December 2001 and lodged a restriction on the title.

44. Section 24 of the Land Registration Act stipulates that:-

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

45. From the testimony of PW2 in which he admits that he passed his interests in the suit property to the Plaintiff pursuant to a Sale Agreement dated 3rd September 2001, I am convinced that the Plaintiff is presently the legal owner of the property and is as a result entitled to enjoy the benefits of such registration and ownership. The caution registered by the Defendant on the land and his continued stay thereon have hindered the Plaintiff in her enjoyment of the rights vested upon her under Section 24 of the Land Registration Act aforesaid.

46. Accordingly, I do find merit in the Plaintiff's suit and hereby make orders as follows:-

a. ***The Defendant is hereby directed to grant vacant possession of the suit premises to the Plaintiff within 45 days from the date hereof failure to which the Court Bailiff shall proceed to evict him forthwith.***

b. ***A permanent injunction is hereby issued restraining the Defendant by himself, his servants, agents, representatives, assigns or any other person claiming under him from continuing to occupy the Plaintiff's land and/or constructing or erecting any temporary or permanent structure, developing or making any use of all that parcel of land known as Plot No. 421 situated at Hindi/Magogoni Settlement Scheme.***

c. ***The Plaintiff shall have the costs of this suit.***

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE