



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 349 OF 2014

(Formerly NYERI HCC 81 OF 2010)

ALAN KARIUKI WACHIRA PLAINTIFF

-VERSUS-

GEORGE MUNYEKI MATHENGE DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **7th July, 2010** the plaintiff filed the suit herein seeking judgment against the defendant for:

(a) An order of injunction to restrain the defendant, his agents servants or anyone claiming interest under him from constructing/building on the parcel of land known as Mweiga/Block 5/Muthuini/760 (the suit property) or committing any acts of waste thereon;

(b) An order directing the defendant to remove any building materials and any structures he may have erected therein;

(c) Costs of the suit;

(d) Any other or better relief that the court may deem fit to grant.

2. The plaintiff who is the registered proprietor of the suit property accuses the defendant of having entered into the suit property illegally without any colour of right and began preparation for erecting a permanent building thereon (dug foundation and brought building materials like stones and sand).

3. Upon being served with summons to enter appearance, the defendant filed a statement of defence and counter-claim in which he contends that he is in occupation as a beneficial owner of the property. In that regard, the defendant explains that his entry was sanctioned by his father, Paul Mathenge Munyeki (deceased) who had been allocated the property by Muthuini Farmers Company Limited.

4. Arguing that the registration of the plaintiff was effected irregularly and fraudulently, the defendant prays for rectification of the register in respect of the suit property and cancellation of the title issued in favour of the plaintiff and registration of the suit property in his name.

EVIDENCE

The plaintiffs case

5. When the matter came up for hearing, the plaintiff who testified as P.W.1, informed the court that he got registered as the proprietor of the suit property after he bought it from Joseph Wariuki Gichuki, (P.W.2).
6. P.W.2, on the other hand got allocated the suit property in place of his father who was a member of the land company herein.
7. P.W.2 was shown the plot by the officials of the company and obtained ballot number 34. (He produced the ballot number as Pexbt 1).
8. As P.W.2 had the intention of selling the property to the plaintiff, at the time of paying for the plot, he presented the plaintiff to be issued with a clearance certificate in his place. The plaintiff paid the Kshs. 3000/- payable for the plot. A clearance certificate was issued in his name by the officials of the land buying company herein.
9. Armed with the clearance certificate, the plaintiff got the property surveyed and later on registered in his name.
10. Both the plaintiff and P.W.2 informed the court that the suit property was not occupied by anybody when they gained interest in it.
11. According to the evidence produced in support of the plaintiff's case, the suit property was registered in the name of the plaintiff on 6th June, 2002.

The defence case

12. On his part, the defendant led evidence to the effect that his father (now deceased) was allocated the suit property by the company herein and issued with a clearance certificate. Later on his father took possession and fenced the suit property.
13. After his father passed on in 2009, he continued utilising the suit property.
14. He obtained the necessary approvals from the defunct county council of Nyeri to construct a house thereon. However, immediately after he brought construction materials on site and started constructing thereon, he was served with a court order restraining him from continuing with the construction.
15. Wondering what the plaintiff's claim against him is, the defendant informed the court that the plaintiff has never occupied the suit property.
16. Maintaining that the property was allocated to his father, the defendant produced a list of the company's members showing that his father was a member of the company and that the suit property was allotted to his father, **Dexbt-9**.
17. Pointing out that the clearance certificate issued to his father was signed by the area District Officer (D.O) while the one issued to the plaintiff was not, he stated that he does not know how the plaintiff obtained title to the suit property.
18. **D.W.2 Herman Kairu Mutitu**, a director of the land buying company herein gave a detailed account of how the company conducted its affairs and upon being shown the documents produced by the plaintiff and the defendant, he stated that the suit property is subject of double allocation, first to the plaintiff and subsequently to the defendant's father.

19. At the close of hearing, advocates for the respective parties filed submissions which I have read and considered.

Analysis and determination

20. From the pleadings and the submissions by the respective parties, the sole issue for determination is whether the plaintiff has made up a case for being granted the orders sought.

21. In determining this question, I begin by pointing out that according to the testimony of D.W.2 the suit property is a case of double allocation.

22. The evidence on record shows that the property was registered in the plaintiff's name after the person to whom it was allocated sold it to the plaintiff. Whilst the defendant contended that the registration of the plaintiff was effected fraudulently, no evidence capable of proving the pleaded fraud was adduced.

23. I hasten to point out that the pleaded particulars of fraud cannot be urged against the plaintiff in the absence of the persons the plaintiff allegedly colluded with to get the property registered in his name.

24. Whereas the defendant or his predecessor had a right to claim entitled to the suit property based on the letter of allotment issued to him, the said letter of allotment did not confer on him superior rights to those conferred on the plaintiff upon registration as the absolute proprietor of the suit property.

25. In the absence of any evidence capable of showing that the plaintiff's registration of the suit property was effected illegally and/or fraudulently, I find and hold that the plaintiff has made up a case for being granted the orders sought. Consequently, I find his case to be merited and allow it as prayed.

26. For the reasons stated above I find the defendant's counter-claim to be lacking in merit and dismiss it with costs to the plaintiff.

Dated, signed and delivered at Nyeri this 28th day of February , 2017.

L. N. WAITHAKA

JUDGE

In the presence of:

Ms Maina h/b for Mr. Kebuka Wachira for the plaintiff

Mr. Kingori – absent

George Munyeki Mathenge - defendant

Court clerk - Esther