



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. NO. 724 OF 2012

JOHN ARAP KOECH..... PLAINTIFF

VERSUS

AINU SHAMSI AUTOMOBILE &

HARDWARE LIMITED.....1ST DEFENDANT

THE CHIEF REGISTRAR OF LANDS.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE DIRECTOR OF SURVEYS.....4TH DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 17th October 2012 and filed on 18th October 2012 in which the Plaintiff seeks for judgment to be entered against the Defendants as follows:

- (a) A Declaration that Grant for L.R. No. 209/18773 was obtained unlawfully and the same be cancelled.
- (b) A Declaration that the Plaintiff's ownership of L.R. No. 209/11319 (hereinafter referred to as the "suit property") cannot be defeated by Grant for L.R. No. 209/18773.
- (c) A permanent injunction restraining the 1st Defendant by itself or its servants from interfering or in any way encroaching, building on, interfering with or trespassing upon the suit property.
- (d) An order that the Defendants pay the costs of demolishing the illegal structures upon and restoring the suit property.
- (e) General damages for loss of use of the suit property against all the Defendants and for misfeasance of office against the 2nd, 3rd and 4th Defendants.
- (f) Mesne profits.
- (g) Any other relief that this Honourable Court may deem fit to grant.

(h) Costs of this suit.

The Pleadings

In his Complaint, the Plaintiff stated that he is the registered proprietor of the suit property which is located in Embakasi area within the Nairobi County, having purchased it from the original allottee thereof M/s Engineering Equipment Limited. He stated further that the 1st Defendant has without lawful excuse encroached into the suit property using fraudulent, forged and fabricated survey plans and title documents which cannot stand in law. He proceeded to set out the particulars of fraud on behalf of the 1st Defendant as causing registration of its alleged property L.R. No. 209/18773 without a proper survey plan, relying on survey plan FR 480/195 which was unlawful, fraudulent, did not make reference to FR 200/71 and was superimposed on the suit property. He added that there are currently two opposing title documents to the suit property and that his title document was issued prior to the title document held by the 1st Defendant. He further indicated that the 1st Defendant has denied him access to the suit property and was erecting some illegal structures thereon.

Interlocutory Judgment against the 1st Defendant was entered on 11th February 2014 for failure to file a statement of defence within the stipulated period after being served with summons to enter appearance. The suit proceeded for formal proof on 3rd June 2014.

The Evidence

The Plaintiff, John Arap Koech (PW1) was the first to testify. He stated that he purchased the suit property from M/s Engineering Equipment Ltd in the 1990s. He produced his original title deed along with a Certificate of Official search dated 30th May 2014, both of which showed that he was the current registered proprietor of the suit property. He stated further that since he purchased the suit property, he has not transferred it to anybody. He pleaded with the court to issue an order to evict the 1st Defendant out of the suit property and allow him to demolish the structures erected thereon. He prayed that judgment be entered against the Defendants as prayed in the Complaint. In cross-examination, he disclosed that he came to learn that there was another title document over the suit property in existence.

PW2 was David Kikemei Rotich who stated that he is a businessman dealing with the buying and selling of parcels of land. He stated that he is known to the Plaintiff (PW1) who assigned him to investigate the illegal encroachment and construction work going on at the suit property. He testified that he went to City Hall to find out who was constructing on the suit property. It was his evidence that he found no approval given for the construction. He further stated that he was accompanied by a Licensed Surveyor by the name of Mr. Wambua (PW3) who accompanied him to the suit property to find out who was constructing there. It was his evidence that they met a Mr. Abdi Ralman who was in charge of the construction who informed them that the Chairman was away in Dubai and that the suit property belonged to them.

The third and final witness (PW3) to testify was Henry Fonte Kilonzi Wambua who stated that he is a licensed land surveyor. He stated that PW2 contacted him and asked him to locate the beacons of the suit property. To do this, he proceeded to the Survey of Kenya where he obtained Folio Register 200/71 which covered the area in which the suit property is located. He testified further that upon visiting the suit property in the company of PW2, he discovered that what was on the ground did not match up to the Survey Plan he had bought at the Survey of Kenya. He stated that they saw a writing stating L.R. No. 209/18773. They returned back to the Survey of Kenya to find out about L.R. No. 209/18773. He stated that they obtained Folio Register No. 480/109 whereupon he realized that the suit property had been encroached upon and made a part of L.R. No. 209/18773. He clarified that the suit property was swallowed into the bigger parcel L.R. No. 18773. He stated that he observed from the two plans bought at the Survey of Kenya that FR 200/71 was supposed to have been cross-referenced on FR 480/109 but this was not done. He stated further that the suit property was surveyed on 3rd March 1988 after which it was presented to the Director of Surveys for checking and authentication on 23rd March 1990 and approved on the same day. He further stated that the survey for L.R. No. 209/18773 was received by the Director of

Surveys on 8th September 2008, checked and approved on 25th September 2008. He noted that there was a difference of 18 years between the two surveys. It was his testimony that when a surveyor goes to the ground to do a new survey, he should go to the Survey of Kenya to get survey data which records the surveys done around that area. He should base his computations on the surveys available. When a survey is carried out and is being presented to the Director of Surveys, the surveys used are usually cross-referenced and are indicated on the new survey plan. He stated that in this case, the survey for the suit property was not cross-referenced when the survey that yielded L.R. No. 209/18773 was done. He expressed the opinion that this omission was either a mistake or deliberate. He further pointed out that a survey cannot be done over another and deed plans issued as happened in this case. He testified that the deed plan for L.R. No. 209/18773 was issued for processing of the title. He produced the two conflicting survey plans.

The Issues for Determination

The following are the issues arising for determination:

- (a) Whether to issue a declaration that the Plaintiff's title to the suit property is valid and to cancel the 1st Defendant's title for L.R. No. 209/18773 as having been obtained unlawfully.
- (b) Whether to issue an order that the Defendants pay the costs of demolishing the illegal structures that were built upon the suit property.
- (c) Whether to issue a permanent injunction restraining the 1st Defendant by itself or its servants from interfering or in any way encroaching, building on, interfering with or trespassing upon the suit property.
- (d) Whether to order the Defendants to pay the Plaintiff general damages for loss of use of the suit property and for misfeasance of office against the 2nd, 3rd and 4th Defendants.
- (e) Whether to order the Defendants to pay to the Plaintiff mesne profits.
- (f) Whether to award the Plaintiff the costs of this suit.

The Determination

(a) Whether to issue a declaration that the Plaintiff's title to the suit property is valid and to cancel the 1st Defendant's title for L.R. No. 209/18773 as having been obtained unlawfully.

In asserting his ownership over the suit property, the Plaintiff produced to this court his original title deed as well as a recent certificate of official search, both of which showed that he is indeed the registered proprietor of the suit property. This suit having proceeded as a formal proof, the Defendants did not challenge this position. The Plaintiff admitted that there exists another title deed over L.R. No. 209/18773 which is a larger parcel of land within which the suit property is situate. This second title deed was not produced for this court to examine. **Section 107** of the **Evidence Act Cap 80** provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

On his part, the Plaintiff produced to this court a copy of his title deed to the suit property. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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.”

In this suit, the title deed produced by the Plaintiff was not challenged on any of the grounds set out in the legal provisions set out above. Going by the evidence produced by the Plaintiff before this court, this court finds that the suit property does indeed belong to the Plaintiff. As there cannot be two titles over the same parcel of land, this court further finds that the title deed held by the 1st Defendant is invalid and is hereby cancelled.

(b) Whether to issue an order that the Defendants pay the costs of demolishing the illegal structures that were built upon the suit property.

It was the Plaintiff's unchallenged testimony that the 1st Defendant has encroached into the suit property and has erected certain illegal structures thereon. As a duly registered proprietor of the suit property, the Plaintiff is the only person clothed with the right to possess the suit property to the exclusion of all others as set out in **section 24(a)** of the **Land Registration Act** which provides as follows:

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

One of the rights belonging to absolute ownership of land is the right to possession of the same to the exclusion of all others. This is precisely the right that the Plaintiff is seeking in this suit. This court has no difficulty in finding that indeed the Plaintiff is entitled to occupy the entire suit property to the exclusion of the Defendants. The Plaintiff is therefore entitled to vacant possession of the suit property by the 1st Defendant. I order that the 1st Defendant do give the Plaintiff vacant possession of the suit property and do bear the costs of demolition of the illegal structures erected by its agents thereon.

(c) Whether to issue a permanent injunction restraining the 1st Defendant by itself or its servants from interfering or in any way encroaching, building on, interfering with or trespassing upon the suit property.

As I have found earlier, the Plaintiff as the duly registered proprietor of the suit property is entitled to occupy the suit property to the exclusion of all others. I therefore issue a permanent injunction restraining the 1st Defendant by itself or its servants from interfering or in any way encroaching, building on, interfering with or trespassing upon the suit property.

(d) Whether to order the Defendants to pay the Plaintiff general damages for loss of use of the suit property and for misfeasance of office against the 2nd, 3rd and 4th Defendants.

The Plaintiff has claimed general damages for trespass and loss of use. As regards general damages, it is a fact that the 1st Defendant has been in occupation of the suit property and have prevented the Plaintiff from utilizing or making use of his property. As the fact of trespass is already established, damages are awardable as a matter of course. Having regard to the circumstances of this case, I assess damages for trespass against the 1st Defendant in the sum of Kshs. 3,000,000/- in favour of the Plaintiff.

(e) Whether to order the Defendants to pay to the Plaintiff mesne profits.

On the prayer for mesne profits, the Plaintiff did not make a specific claim of mesne profits of the amount it is claiming from the Defendants. Without pleading this amount, the court will not be in a position to

grant the mesne profits the Plaintiff has sought. This is because the court cannot pluck figures from the air and award him without justifying how those figures arose. The Court of Appeal in **Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No.NAI No.38 of 2004** stated the law on mesne profit as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

It is therefore my opinion that the Plaintiff is not entitled to mesne profits as claimed as he did not state or prove the amount of the said mesne profits.

(f) Whether to award the Plaintiff the costs of this suit.

Judgment is entered in favour of the Plaintiff as set out in the Determination above. The 1st Defendant is ordered to give the Plaintiff vacant possession of the suit property and pay to him the awarded general damages of Kshs. 3 million within 30 days from the date of delivery of this Judgment. I also award the Plaintiff the costs of this suit.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE