



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 405 OF 2002

SAMMY MAGERA.....PLAINTIFF

=VERSUS=

KURIA KIARIE.....1ST DEFENDANT

NJUGUNA KURIA.....2ND DEFENDANT

KIMANI KURIA.....3RD DEFENDANT

J U D G M E N T

1. Up to the year 2001, the whole of Land Title Number **Nyandarua/South Kinangop/586** (hereinafter referred to as **“Parcel No. 586”**) measuring approximately 15 hectares was registered in the name of Sarah Njoki Mugacha (hereinafter referred to as **“PW2”**). In the year 2001, PW2 subdivided the parcel of land into two parcels, **Nyandarua/South Kinangop/6059** (hereinafter referred to as **“Parcel No. 6059”**) measuring 12.95 hectares and **Nyandarua/South Kinangop/6058** (hereinafter referred to as **“Parcel No. 6058”**) measuring 2.023 hectares respectively. In the year 2001, PW2 sold to the Plaintiff Parcel Number: Nyandarua/South Kinangop/6058 measuring 2.023 hectares [hereinafter referred to as **“the suit property”**]. The Plaintiff was issued with a Title Deed to the suit property on or about 25/10/2001.

2. The 1st defendant, Kuria Kiarie, owns a neighbouring parcel of land, Title Number: Nyandurua/South Kinangop/587 (hereinafter referred to as **Parcel No. 587**) measuring about 17 Acres. Both PW2 and the 1st Defendant were allocated their respective parcels of land in the South Kinangop Settlement Scheme by the Settlement Fund Trustees.

3. The 2nd and 3rd defendants are adult sons of the 1st defendant. They both reside in South Kinangop.

4. On 7/3/2002, through a plaint dated 4/3/2002, the plaintiff initiated this suit, alleging that the defendants were trespassing on his parcel of land. He seeks an order restraining the defendants against “remaining, entering or trespassing or doing any acts and/or continuing occupation “the suit property”. He also seeks an eviction order and mesne profits against the defendants. Thirdly, he seeks costs of the suit.

5. In a defence dated 3/5/2002, the defendants contend that Parcel No. 586 was excised from the 1st defendant’s piece of land, Parcel No. 587 and that the former is a subject of ownership dispute in **Nairobi HCCC No. 3649 of 1993; Kuria Kiarie Vs District Land Registrar-Nyandarua and Sarah Njoki Mugacha**. The defendants further contend that they have resided on the suit property since 1963. In April 2013, the defendants amended their statement of defence to plead adverse possession, contending that the suit property was hived out of Parcel No. 586 which they (defendants) have occupied since 1963.

Evidence

6. The Plaintiff testified that he bought the suit property from PW1 in June 2001. He stated that he obtained an official search from the relevant land registry and a consent from the relevant land control board. Thereafter, he applied for transfer of the suit property and the transfer was effected. He was issued with a title deed on 25/10/2001. He is registered as the absolute proprietor of the suit property.

7. PW2, Sarah Njoki Mugacha testified that in June 2001 she sold to the plaintiff 5 acres out of Parcel No. 586. After signing the agreement for sale, she applied for and obtained consent to subdivide and consent to sell. She thereafter caused the mutation to be prepared, approved and registered. Thereafter she transferred the 5 acres to the plaintiff. The plaintiff was issued with Title Number: Nyandarua/South Kinangop/6058.

8. In cross examination, PW1 testified that the case she had with the 1st defendant ended in 2001. She stated that the 1st defendant lost the case. She further stated that the 1st defendant lost the case. She further stated that the 1st defendant has never lived on the suit property.

Determination

9. DW1-Kuria Kiarie, testified that he owns Parcel No. 587 and that this Parcel is an amalgamation of, interalia, Nyandarua/South Kinangop/586. He further testified that Parcel No. 587 measures 48.5 Acres. He contended that he has not collected his title deed because he feared if he went for his title the acreage of his land would reduce. In cross examination, DW1 testified that he has had a running dispute with PW2 over Parcel No. 586.

10. The pleadings on record raise the following key issues to be determined in this suit.

(a) Whether or not the defendants are trespassers on Land Title Number: Nyandarua/South Kinangop/6058.

(b) Whether the plaintiff is entitled to mesne profits against the defendants.

(c) Who should bear costs of this suit.

11. The right to acquire and own property is secured and protected under Article 40 of the Constitution of Kenya 2010. It was similarly protected within the framework of the repealed Constitution. Neither the state nor a private individual is permitted to arbitrarily deprive a person of private property. Similarly, the proprietary interests of a registered proprietor of land are protected by Section 24 of the Land Registration Act which provides as follows:-

“24 Subject to this Act-

(a) 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; and

(b) the registration of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

12. The rights of a proprietor of land are further protected by Section 25 (1) of the Land Registration Act which provides as follows:-

“25 (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 the privileges and

appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

13. Both the title deed and the certificate of official search confirm that the plaintiff is the absolute registered proprietor of the suit property, Title Number Nyandarua/South Kinangop/6058. This parcel and Parcel No. 6059 were subdivisions out of Parcel No. 586 which was originally registered in the name of Sarah Njoki Mugacha. Currently, Parcel No. 6059 is registered in the name of Kinangop Windpark Leases Ltd and is charged to Deloitte Limited. There is no evidence of any physical development by the defendants on the suit property. The plaintiff testified that the defendants have been grazing on the suit property.

14. The 1st defendant's evidence is that the suit property belongs to him because it was part of Parcel No. 586. They contend that Parcel No. 586 was amalgamated with Parcel No. 587. It is not disputed that Parcel No. 587 belongs to the 1st defendant who is father to the 2nd and 3rd defendants.

15. Land amalgamation entails the combination of two or more adjoining pieces of land existing under separate titles but in the name of the same proprietor. The end result of amalgamation is that the separate titles are collapsed into a single title in the name of the same proprietor. Amalgamation process involves the drawing of an amalgamation scheme showing the pieces of land to be combined. The schemes are presented for approval. Once approved by relevant authorities, titles of the pieces of land proposed for amalgamation are surrendered to the lands registry for cancellation, noting in the register and registration of the amalgamated title.

16. At this point I pause to ask: has the 1st defendant presented any evidence of his alleged ownership of Parcel No. 586? Has he presented any evidence of the amalgamation process and the resultant amalgamated title? The answer to the two questions is in the negative. I have carefully examined the survey map contained in the 1st defendant's bundle of documents. Parcel No. 586 and Parcel No. 587 exist on it as separate parcels of land. I would therefore reject the defendants' contention that Parcel No. 587 and Parcel No. 586 were amalgamated into Parcel No. 587 or into any other parcel. I accordingly reject the contention that the suit property (Parcel No. 6058) which is a subdivision out of Parcel No. 586 was the subject of the alleged amalgamation. As a matter of fact, there is no evidence of amalgamation.

17. At Paragraph 4 of the Amended Statement of Defence, the defendants contend that Parcel No. 586 was excised from the 1st defendant's piece of land, Parcel No. 587. Excision is regulated by a regulatory legal framework. It is documented and approved in the same manner as an amalgamation. No evidence has been tendered by the defendants to support the contention that the suit property is part of land that was excised from the 1st defendant's land Parcel No. 587.

18. The third limb of the defendants' defence is that the defendants have been in continuous occupation of the suit property and that at the time the plaintiff purchased it, the defendants had acquired overriding interest in the suit property. According to the 1st defendant's Exhibit No. 4, which is a letter dated 1/7/1977 from the Kinangop Settlement Officer to the Director of Settlement, Parcel No. 586 was vacant in 1977. The 1st defendant requested to be given the piece of land and have it amalgamated with Parcel No. 587. The Settlement Trustees instead allocated the Parcel No. 586 to PW2-Sarah Njoki Mugacha. Paragraph 2 of the defendants' Exhibit No. 5 [Letter dated 24/12/1992] indicates that the allocation triggered a suit by the 1st defendant, Nairobi HCCC No. 3776 of 1983. The 1st defendant withdrew the case and opted for an out of court settlement with the Settlement Trustees. Subsequently, in 1993, the 1st defendant filed yet another suit, Nairobi HCCC No. 3649 of 1993 against the District Land Registrar – Nyandarua and PW2. The 1st defendant sought a nullification of PW2's title and an order compelling the land registrar to register him as owner of "Parcel No. 587 measuring 37.05 Acres". It is not clear what

came of this suit. What is clear, whoever, is that in 1993 the High Court (Justice Shields) declined to injunct the Land Registrar against demarcating clear boundaries between Parcel No. 587 and Parcel No. 586. What is also clear is that in 2002 the 1st defendant made an application seeking to consolidate this suit with Nairobi HCCC 3649 of 1993. On 7/12/2002 Rawal J [as she then was) rendered a ruling dismissing the application for consolidation of the two suits. The court record also reveals that at some point prior to the year 2000, PW2 filed a complaint against the 1st defendant in the Nyandarua District Land Tribunal. Subsequently the 1st Defendant filed judicial review application, Nairobi Misc Civil Application No. 558 of 2000 seeking an order quashing the proceedings of the land disputes tribunal.

19. From the foregoing, it is clear that the 1st defendant unsuccessfully lodged a number of cases seeking to impugn PW2's title to Parcel No. 586. It is also clear that at all times PW2 resisted those cases and asserted her rights as proprietor of Parcel No. 586. The defendants cannot therefore be said to have acquired overriding interest during the period those of court battles. I therefore reject that plea.

20. The last limb of defence by the defendants is that they have acquired title to the suit property under the doctrine of adverse possession. Evidence on record shows that in 1977 the suit property was vacant. In the same year it was allocated to PW2. Six years later, in 1983, the 1st defendant filed his first suit challenging the plaintiff's title. The suit, and indeed subsequent litigations were resisted by PW2. There is sufficient evidence that PW2 fully asserted her rights over Parcel No. 586 from the time she was allocated the property. In those circumstances a plea of adverse possession cannot be upheld.

21. The plaintiff has prayed that he be awarded mesne profits. Other than making the prayer, nothing was tendered in evidence to support the plea for mesne profits. The plaintiff testified that the defendants would occasionally graze on the suit property. Nothing more was said to assist the court consider an award of damages in the nature of mesne profits. In the circumstances I will not award mesne profits to the plaintiff as prayed.

Disposal

22. In light of the foregoing, I make the following orders in disposing the suit herein:

(a) A permanent injunction shall issue against the defendants, jointly and severally, their servants and or agents, restraining them against remaining on, entering upon, trespassing upon or doing any acts and/or continuing to occupy that piece of land known as Nyandarua/South Kinangop/6058 which belongs to the plaintiff.

(b) Should the defendants fails to voluntarily comply with order (a) above within thirty (30) days from today, an eviction order shall issue and the same shall be executed under the supervision of the police officer in charge of the sub county within which the suit property is situated.

(c) There shall be no order as to mesne profits.

(d) The plaintiff shall have costs of this suit against the defendants jointly and severally.

Dated, signed and delivered at Nairobi on this 28th day of July 2017.

B M EBOSO

JUDGE

In the presence of:-

Mr. Osoro Advocate for the Plaintiff

Ms Mwiricha Advocate for the Defendant

Halima Abdi-Court clerk