



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 436 OF 2009

1. SAMMY LEONARD ASANDA OGETO

2. MICHAEL KORIR KIPNGENO

3. JAMES NYAKUNDI NYARIENDA.....PLAINTIFFS

VS

1. NURIA ABDI NUR

2. STEPHEN NYAGAKA

3. PAULINE MUSYIMI

4. JAMES N. NYANGOKA.....DEFENDANTS

JUDGMENT

1. The Plaintiffs's filed suit on 2nd September 2009 against the Defendants claiming *inter alia* vacant possession of LR No. 209/10939 (suit land), a permanent injunction restraining the Defendants by themselves or their agents from trespassing into the land and costs of the suit.

2. The Plaintiffs averments in the Plaint are that they are the registered owners of Parcel No.LR No. 209/10939 as lessees from Government of Kenya from 1st December 1995.

3. The Plaintiffs claim arises from alleged wrongful occupation and possession by the Defendants onto the suit property amounting to continued trespass to the detriment of the Plaintiffs who claim to have been deprived of the use and enjoyment of the land and suffered loss and damage.

4. The 1st and 2nd Defendants have filed a defence against the Plaintiffs claim in which they have denied the claim and contend that the Plaintiffs were irregularly and unlawfully registered as lessees of the suit land. They contend that they have been in possession and occupation since the 1990s. They aver that the Plaintiffs had filed two cases at the CMCC Court in Milimani against them in respect of the suit property and are not aware whether the cases were withdrawn. The cases were; CMCC 13975 of 2005 and CMCC No 6927 of 2007.

The Plaintiffs case

5. At the hearing of the case Sammy Leonard Asanda Ogeto was mandated by the Michael Korir Kipngeno and James Nyakundi Nyarienda (his co-Plaintiffs) to give evidence in Court on his behalf and

that of the Co-Plaintiffs. This is vide a letter of authority on record dated 30th July, 2014.

6. The 1st Plaintiffs testified in Court on 21st November 2014. He stated that the Plaintiffs applied for allocation of land to the Commissioner of lands in 1995. The Commissioner of Lands allocated them the suit property vide Letter of Allotment dated 30th November 1995 ref LR No 209/10939-Vila Franca-Nairobi, which was identified on the Plan attached to the said Letter of allotment was LR No 209/10939. That they accepted the Letter of allotment and paid the sum of Kshs. 26,890/= vide receipt No. 448126 on 13th May 1996. That thereafter were issued with a title on 8th February 1996 IR No 100534 which title was registered at the Lands Registry on 6th March 2006 indicating the Plaintiffs as tenants in common in equal shares.

7. That at the time the suit land was allocated to them it was vacant and unoccupied just like most parts of Villa Franca. That the only house that had been constructed was one that belonged to a Dr. Manduku, which was next to the Plot. That Dr. Manduku was the first person to settle and built a house in 1999 in Villa Franca aforesaid. That they immediately on allotment, took possession of the plot and fenced it off for purposes of carrying out developments.

8. That after they had fenced the suit land some people including the Defendants forcefully gained entry into the suit land, occupying it without the Plaintiffs consent, damaged the fence and erected structures on the suit land. That despite reporting the encroachment to the chief, Villa Franca and Embakasi Police Station in 2004 and despite the Chief advising them to leave, they did not. They continued occupying the land defiantly on grounds that they were allocated the said suit land by the area District officer. That the Defendants have constructed both temporary and permanent structures on the suit property.

9. That they also filed 2 cases in the Magistrates Court at Milimani: CMCC 13975 of 2005 and CMCC No 6927 of 2007. That both cases were withdrawn before this instant suit was filed.

10. The Plaintiffs contend that though the title was registered in 2006 while the suit CMCC No 13975 of 2005 subsisted. That there was no Court order to bar the Commissioner of Lands from processing and registering the title in their names. That the Plaintiffs have not developed the suit land because they have been prevented from doing so by the illegal trespass and occupation of the Defendants.

11. The Plaintiffs called two witnesses; James Nyamari Ontori and Beatrice Kwamboka who testified on behalf of the Plaintiffs. The gist of their testimony is that they are residents of Imara Daima and they are aware that the Plaintiffs own the suit land and that the Defendants have encroached on the same by erecting structures both temporary (mabati) as well as permanent. That there is a Primary School constructed on the property. That in the electioneering year of 2001-2002 the then MP for the area Hon. Mwenje, (now deceased) encouraged residents in Embakasi constituency to take over any vacant land in the area and occupy. That as a result of the direct political and campaign utterances the suit property, amongst others, was invaded by the Defendants. This information was not controverted by the Defendants. They placed the time of entry into the suit to be 2002/2003.

The Defendants case

12. It is noted that it is only the 1st and 2nd Defendants who filed a defence against the Plaintiffs claims. The 3rd and 4th Defendant did not file their defence and therefore their case against the Plaintiffs is undefended. In the 1st and 2nd Defendants pleadings they have pleaded that they have been on the land since the 1990s that is to say for over 12 years and therefore have gained ownership by adverse possession; that the Plaintiffs have not demonstrated the basis for allocation of the land by the Commissioner of Lands; That the Plaintiffs worked at the Lands office and irregularly obtained the lease of the suit land.

13. At the hearing of the suit the Defendants called 3 witnesses. DW1 Nelson Charles Ombaki testified on behalf of the 2nd Defendant who was said to be away in South Africa and was unable to attend the hearing due to difficulties in procuring a visa. He stated that he lives on the suit property with the

permission of the 2nd Defendant. He was invited to the land later; that though he had knowledge that his brother, the 2nd Defendant was allocated land in 1990s by the District Officer, he had no evidence to support that assertion nor a title held by the 2nd Defendant. He was also not present when the alleged allocation of the suit property was done.

DW 2 and DW 3 (Nuria Abdi Mohammed & Habibi Abdi Noor Abdurahi) testified that they are co-wives of the late Noor Abdi. That they have lived on the land for over 20 years but they have no title to the land nor are aware if the husband did have title. They do not know how their husband acquired the suit land. When challenged on cross examination to state the exact year they moved onto the land, they were uncertain. They confirmed that they are in occupation of the land pursuant to their late husband's occupation of the same. They testified that the husband had title and may have been allocated the land by the District Commissioner, though they did not produce any evidence to support that assertion.

14. Though the 3rd Defendant Pauline Musyimi did not file a defence, there is a witness statement on record which is totally like the evidence given by the other 3 witnesses. She however did not produce any title to support her claim onto the land.

15. The Plaintiffs filed written submissions which I have reviewed carefully. The Defendant did not file any.

16. Issue, analysis & determination.

Whether the Plaintiffs are the registered owner of the suit property; Have the defendants proved adverse possession; Whether the Defendants are trespasses to the suit land.

17. Whether the Plaintiffs is the registered owner of the suit property. The 1st Plaintiffs testified on behalf of 2nd and 3rd Plaintiffs that they applied to the Commissioner of Lands for allotment of the suit property for which they were allocated on 30th November 1995 as evidenced by a copy of the Letter of allotment of Ref No. 30120/ix of even date. The Letter of allotment identifies the land for allocation as LR No. 209/10939 – Villa Franca – Nairobi. The area is 0.0537 Ha (approx) for a term of 99 years from 1st December 1995 and the suit land is edged red on the attached plan.

There is on record a payment receipt in the sum of Kshs. 26,890/- for LR 209/10939 paid by the 2nd Plaintiffs as consideration for stand premium to the Commissioner of Lands. There is also on record a copy of the title IR No 100534 for a period of 99 years with effect from 1st December 1995 issued in the names of the Plaintiffs to hold as tenants in common in equal shares. The title was registered in the names of the Plaintiffs on 6th March 2006.

18. It is the Defendants case that they were allocated the suit land by the area District Officer at Villa Franca. No particulars of the District Officer have been produced nor any documents of title that they hold to support their claims on the suit land. They attribute the authority to settle on the suit property on the local administration (i.e. Chief, District Officer and the District Commissioner- Embakasi). The Government Land Act (now repealed) vested the power to allocate public land to the president, who exercised the same through the Commissioner of lands. No such power was donated to the local administrator in the rank of Chief, District Officer or the District Commissioner. The claims that the Defendants were therefore allocated the suit land by the District officer/District Commissioner is unfounded in law and is hereby rejected.

19. In their pleadings, the Defendants have challenged the Plaintiffs title on the grounds that the Plaintiffs were unlawfully and irregularly registered as lessees of LR No 209/10939 in 2006 in an unclear circumstances and when there was a pending case in Court CMCC 13975/20. The Plaintiffs have responded admitting filing this case and state that there was no order barring the Commissioner of Lands from issuing the title as the process of title preparation started in 1996 when they accepted the offer and paid the stand premium. That there was nothing illegal or untoward with the title being issued then.

20. The Defendants have pleaded that they were in possession and occupation of the suit land since 1990 and that they have occupied the land for over 12 years thus have become entitled by way of adverse possession. At the hearing, no evidence was tendered to support the assertion that they entered the land in the 1990s or that they have been on the land for over 12 years. The defendants did not make any submissions either. It would appear from the evidence of the defendants that the date of entry into the land was disjointed; each came on the land at various times and unclear exactly when. The right of adverse possession if any, has not been proved.

21. The Plaintiffs have testified that at the time of taking possession of the land in 1995, the suit land was vacant and the only plot that had been occupied was that of Dr. Maduku which neighbours the suit land. That they fenced the suit property to denote exclusive ownership on the ground. The Land Registration Act Section 24 (a) read together with section 26(1) states as follows;-

24 (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”

26(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”.

From the above the law is very clear. A title can only be impeached on grounds of fraud misrepresentation for which the person is proved to be a party to. Further a title can be challenged where it is proved that it has been acquired illegally, unprocedurally or through corrupt scheme. The Defendants have not tabled any evidence to the contrary.

22. In the end, I hold and find that the Plaintiffs have proved their case on a balance of probability that they are the registered owners of the suit land.

23. Whether the Defendants are trespassers to the suit land to the suit. It is the evidence of the Plaintiffs that they occupied and fenced the property immediately after allocation and prior to registration of title. It shows that the Plaintiffs were in possession of the suit land prior to the registration of title. The act of fencing the land denotes exclusive possession. The registration of the suit land in 2006 fortified the Plaintiffs interest in the land. It is on record that the Plaintiffs tried to remove the Defendants using legal means i.e. the Chief, the Police and even filed two suits at the Chief Magistrate Court.

24. From the evidence on record it shows that trespass first happened in 2002/2003 when the Defendants forcefully occupied the suit property and has continued to date.

25. Having found that the Plaintiffs are the registered owners of the suit land, and that the Defendants occupation is unauthorized by the Plaintiffs. I hold that the Defendants are trespassers. This is grounded on the Defendants own evidence where they testified that they neither have title to the suit land nor are they aware of the legal authority that the District Officer/District Commissioner had to allocate them the land.

26. Based on my finding on ownership and that the Defendants being in continuous trespass of the suit land, I hold that the Plaintiffs have proved their case on a balance of probability and that they are registered owners of the land and that the Defendants entered the suit land by force with no color of right to do so. I have no reason to disabuse the plaintiffs of the reliefs as prayed in the Plaintiff.

27. It is on record that the Defendants were requested to vacate the property severally but have continued in their unlawful occupation on the ground that they were given the land by the District Officer. In that case they caused the suit to be filed and are condemned to pay costs.

28. In the upshot, judgement is entered in favour of the Plaintiffs as follows; -

- a. The Defendants, Agents, Servants be hereby ordered to vacate LR No 209/10939 – Villa Franca Nairobi.
- b. In default, the Plaintiffs be at liberty to apply for eviction orders.
- c. Permanent injunction to restrain the Defendants by themselves, their agents or servant upon the suit land.
- d. Costs are payable by the Defendants to the Plaintiffs.

SIGNED DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

J. G. KEMEI

JUDGE