



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 45 OF 2016

STEPHEN M. CHALO - PLAINTIFF/APPLICANT

VS CITY CHICKEN & EGGS DEALERS

CO-OPERATIVE SOCIETY LTD - 1ST DEFENDANT

GEORGE KANYONGO GITHUKU - 2ND DEFENDANT

JUDGMENT

1. The Plaintiff claims an equitable and beneficial ownership in the property comprised of Plot No. 26 (LR No. Nairobi Block /122/61 (referred to as suit premises).
2. The Plaintiff filed suit against the Defendants seeking the following orders;
 - a) Vacant possession.
 - b) General damages for the Tort of Trespass.
 - c) An Order directing the 1st Defendant to forthwith rectify the anomaly in their Register Book and recognize the Plaintiff as owner of all that property known as Plot No. 26 within Block 122/61 (NAIROBI).
 - d) Costs of the suit and interest.
 - e) Any other relief that the Honourable Court may deem fit to grant.
3. The 1st Defendant is a Co-operative Society maintaining a register of members and land details of which the vendor of the suit land was a member. The 2nd Defendant is currently registered as the owner of LR No. Block 122 /61 Plot 26.

The Plaintiff's case

4. The Plaintiff claims equitable and beneficial interest in suit premises and is entitled to possession and occupation of the suit premises.
5. That on 20th May 1995 the Plaintiff stated that he entered into an agreement for sale with one Victoria Wanjiku Mburu being the absolute owner of the suit premises. That the 1st Defendant sanctioned and approved the transactions. That the sale Agreement was done at the offices of the 1st Defendant and

witnessed by its representatives Mr. Kaunda.

6. Briefly the terms of the agreement were that the purchase price is Kshs 520,000/= which was paid in full vide cheque No 126993 and receipt acknowledged by the vendor; The vendor was to surrender to the purchaser all the documents in relation to the suit premises including signing all the documents to effect the transfer in favour of the Plaintiff; That the vendor's name was to be substituted with that of the Plaintiff in the 1st Defendant's register.

7. That later he came to know that the 2nd Defendant had illegally, fraudulently and under unclear circumstances transferred or acquired ownership of the plot and endorsed his name in the 1st Defendant's Register book. That the 1st Defendant irregularly, negligently and maliciously caused the 2nd Defendant to tamper with the Register Book and enter his name while the 1st Defendant knew the land was the Plaintiff's. That the 2nd Defendant has entered the said land without consent/authority (trespassed) of the Plaintiff and made constructions thereon. That the Plaintiff has been deprived of use and quite enjoyment of the suit premises and thereby suffered loss and damage.

8. In his evidence in Chief, the Plaintiff stated that he did not sell the suit premises to the 2nd Defendant nor authorize the 1st Defendant to change the register to the Defendant. That upon signing of the Agreement dated 20th May, 1995 the vendor did not hand over any documents of title in respect of the suit property.

9. On cross-examination, he responded that he was not aware who in the 1st Defendant office tampered with the Register. That the land moved from Mr. Karanja, Victoria Mburu to himself. That the 2nd Defendant is listed as the 6th owner in that sequence in the 1st Defendants register. That he reported the complaint to the Society who promised to resolve in vain and that on 28th July 1999 he also reported the matter to the CID at Kasarani and recorded a statement. That to his dismay the police did not action the complaint by way of investigations or arrests.

The 1st Defendant case

10. The 1st Defendant denied the Plaintiff's claim and stated that the actions complained of were done in 1995 and the officials who were in the office to wit: Zakaria Marwa and Bernard Muswa are long dead. That the onus is on the Plaintiff and the 2nd Defendant to establish ownership of the suit property.

11. DW 1 – Mr. Duncan Kioli Mutiso produced the records of the 1st Defendant which showed that the Plaintiff was the 5th owner of the property having acquired it from Victoria Wanjiku Mburu who succeeded her late husband James Kabura Karanja. That the 6th transferee is the 2nd Defendant. That other than the Register there was no other records which shows how the transactions between the Plaintiff, Victoria Mburu and the 2nd Defendant were processed. He confirmed that the Plaintiff's letter dated 4th August 2009 was received but to his knowledge the same was not investigated by the 1st Defendant. He confirmed that Plot No 26 in the 1st Defendant records is indeed Plot No. LR No. 122/61. He stated that he did not witness the Agreement between the Plaintiff and the said Victoria Mburu nor between Victoria Wanjiku Mburu and the 2nd Defendant.

12. The witness further confirmed that the letters dated 1st November 1995, 27th March 1997 to the Commissioner of Lands stating that the said LR No 122/61 belonged to the Plaintiff and the 2nd Defendant respectively. In answer to a query whether Mr. Kaunda is known to him/official of the 1st Defendant, the witness responded that he does not know Mr. Kaunda nor who in the 1st Defendants office witnessed the agreement between the Plaintiff and the so-called Victoria Mburu.

13. Further the witness stated that it was the policy of the 1st Defendant not to concern itself with what members do with their parcels once the parcels are allocated to them. That there is a possibility that sale

transactions are ongoing between members and third parties. It is also possible that the resultant purchaser may take action to register the land in their name without the knowledge of the 1st Defendant.

14. Further the witness put the Plaintiff and the 2nd defendant to strictly prove their individual ownership of the suit property without dragging the 1st Defendant into the fray.

The 2nd Defendant's case

15. In denying the Plaintiff's claim the 2nd Defendant filed a defence on 27th October 2016. He reiterated that he is the registered owner of LR No. NBI/Block 122/61 having been registered as such on 19th October 1999. He denies that he acquired the suit property illegally or fraudulently as alleged by the Plaintiff. That on acquisition he took possession and carried out construction thereon. He denies trespassing on the land that he owns.

16. The 2nd Defendant testified through one witness Joseph Ngethe who had a power of attorney dated 23rd December 2014 to testify on his behalf. At the trial, the 2nd Defendant's witness produced various documentary evidence in support of ownership of the suit premises.

17. The witness further informed the Court that he is the 2nd Defendant's cousin and has lived on the suit premises for 8 years with the authority of the 2nd Defendant who lives in the USA. That he is the caretaker of the property which has several single rooms for rentals; which he collects rents. He stated that he was not present when the 2nd Defendant acquired the land. He however testified that the suit premises belong to the Defendant.

18. Nonetheless the 2nd Defendant's evidence is that he bought the suit property from one Victoria Wanjiku Mburu at the sum of Kshs. 530,000/= on 9th September 1994. He paid a down payment of Kshs 200,000/= as evidenced by a receipt dated 9th September 1994 (*Ref 1847*). The 2nd payment was made on 17th November 1994 in the sum of Kshs. 75,000/=. That on demand by the law firm of Mutua Mboya & Nzissi Advocates he paid the last payment of Kshs. 255,000/= to the said vendors Advocates.

19. The 2nd Defendant avers that the claim of the Plaintiff is time barred by dint of the provisions of the Limitations of Acts Cap 22.

20. I have read the written submissions filed by the parties and have had time to carefully consider each one of them in preparing this judgement.

21. The issues for determination and analysis

Whether the Plaintiff has established illegality in the 2nd Defendant title to the land.

Whether the suit is time bared.

Is there collusion between the 2nd Defendant and the 1st Defendant to deprive the Plaintiff his right in the land?

Whether the Plaintiff is entitled to an order directing the Land Registrar to rectify the Land Register.

22. Has the Plaintiff proved his case against the 2nd Defendant?. It is not in dispute that the 2nd Defendant is the registered owner of NBI Block 122/61. It is also not in dispute that the 2nd Defendant is in possession of the property having occupied the same way back in 1994/95 and constructed single rooms for rental.

23. It is the Plaintiffs case that he bought the land from one Victoria Wanjiku Mburu vide an agreement of sale dated 20th May 1995 and made a single bullet payment of Kshs 520,000/= vide Cheque No. 126993 drawn by National Bank of Kenya dated 9th May 1995 in the name of Victoria Wanjiku Mburu. The terms of the aforesaid agreement are scanty except that the suit property is described as No. 26 lease No 61 in Kariokkor; The vendor was to surrender to the purchaser all documents pertaining to the titles and effect the transfer in favour of the purchaser; That the vendors name was to be substituted with the purchaser in the Register maintained by the 1st Defendant.

24. It is the Plaintiff's case that the 2nd Defendant and the 1st Defendant colluded to change the Register thus depriving him of ownership of the suit property in favour of the 2nd Defendant. He stated that at no time that he sold his land to the 2nd Defendant.

25. I have seen the document dated 9th September 1994 which indicates that the 2nd Defendant bought the suit premises from one Victoria Wanjiku Mburu PP No. 201706 and received Kshs 200,000/= and the balance was to be paid upon successful transfer of the land. It contained signatures of parties and witnesses. From the onset and read together with the receipts for payment of Kshs. 75,000/= and Kshs 255,000/= the Court finds that the same meets the requirements of a contract which stipulates that a contract should be in writing, signed by parties and witnessed.

From the evidence on record it follows that the Agreement for the 2nd Defendant was entered into on 9th September 1994 and that of the Plaintiff is 20th May 1995. The agreement of the Plaintiff was concluded on 20th May 1995, some days before that of the 2nd Defendant was concluded. It then follows that the one for the 2nd Defendant was first in time. I hold that the Plaintiff brought the suit property that had already been sold to the 2nd Defendant.

26. It is on record that the Plaintiff was aware and as early as 1995 that the suit land had a problem i.e that there was another person in occupation. He states that he filed a complaint with the police and wrote to the 1st Defendant in 1999 but no evidence was presented in Court on the outcome of this complaint. Could it be that the Plaintiff had knowledge of the presence of the 2nd Defendant in occupation?

On further cross-examination, he stated that he was busy as he was a Civil servant working in Geneva and only filed suit in 2011.

27. It would appear from the evidence on record that upon acquisition the 2nd Defendant proceeded to have the title prepared in his name culminating in the issuance of the title No. NBI/Block 122/61 in the name of the 2nd Defendant. There is evidence that he applied for change of user of the suit property on 31st August 2005 from single housing units to multi dwelling units. The 2nd Defendant's witness one Joseph Ngethe confirmed that the plot is developed with rental houses. There is no evidence that the Plaintiff challenged the change of user advert or even the construction of the houses on site.

28. It is on record that the Plaintiff and the 2nd Defendant allege to have bought the land from one Victoria Wanjiku Mburu. There are two agreements for sale and the two amounts i.e. 520,000/= and 530,000/= allegedly paid by the Plaintiff and the 2nd Defendant do not differ much. The Plaintiff had listed the said Victoria Wanjiku Mburu as his witness but he failed to call her on trial. He also failed to enjoin her as a Defendant in the suit. No plausible reason was given to the Court why the said Victoria Mburu was not called to testify. From the evidence on record this party was not only a necessary party but an important one to shed light on the transactions. She did hold the key to who between the Plaintiff and the 2nd Defendant was the legitimate buyer of the property and when. In the absence of calling her the court can only make an inference that the evidence held by Victoria Mburu may have been adverse to the Plaintiff and that explains why he failed to call her. In my view the two parties fell victim to the tricks of Victoria Mburu. However having found that the agreement of the 2nd Defendant was first in time, it is actually the Plaintiff who was cheated out of his money by this lady. Ms Victoria Mburu, upon selling the land to the 2nd Defendant did not have anything to sell to the Plaintiff. She had already sold the land to

the 2nd Defendant in 1994.

29. Section 26 of the Land Registration Act states as follows;-

“ (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.

It fell on the Plaintiff to challenge the title of the 2nd Defendant on grounds of fraud, misrepresentation, illegality or unprocedural and corrupt scheme. The Plaintiff has asserted that the 1st and 2nd Defendant colluded to defraud him of the suit property. However no material evidence was laid before the Court to support this assertion. He has stated that he did not sell the suit land to the 2nd Defendant. That position holds true as the 2nd Defendant was sold the land in 1994 before the plaintiff bought in 1995. The burden of proof that he is the rightful owner of the suit property rests on the Plaintiff and on a balance of probabilities, I hold that he has not assailed the title of the 2nd Defendant.

30. Whether there was collusion between the 1st and 2nd Defendant to deprive the Plaintiff his right in the suit land?. Evidence on record shows the land ownership movement in the 1st Defendants register moved from James Mburu Karanja to Victoria Wanjiku Mburu to Stephen M. Challos to George Kanyongo Githuku. I must at this point express my disappointment and frustration with the 1st Defendant. The so called Register is a piece of paper hand written with no letter head to signify that it originates from the 1st Defendant. It's probative value is in doubt. Having said that the 1st Defendant witness did not help much as the totality of his evidence is to distance the 1st Defendant from the transaction and on grounds that the officials who handled the transaction are dead; the policy of the 1st Defendant is not to get involved in the transactions that members have with 3rd parties; That records are not available. It painted a pathetic scene of a callous entity who in law has a legal duty to its members to keep and maintain proper records. I also note that there is no nexus between the ownership of the land and membership of the Cooperative and that may explain why the cooperative is run poorly. That notwithstanding the 1st Defendant witness stated that neither the Plaintiff nor the Defendant were their members. The Plaintiff did not lead evidence to demonstrate that the 1st Defendant colluded with the 2nd Defendant to deprive him the suit land. It is the 1st Defendant's evidence that it inserted the name of the 2nd Defendant in their Register when he presented a registered title to them in his name. They therefore confirmed the list of plot owners to the Commission of Lands vide letter dated 27th March 2007.

I hold and find that there was no collusion between the 1st and 2nd Defendant.

31. Whether the Plaintiff's suit is time barred? It is the Plaintiffs case that he brought the suit property in 1995 and filed this suit in 2011, 17 years down the line. Section 7 of the Limitations of Actions Act is clear and states as follows;-

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

It is on record that the Plaintiff alleged to have bought the land in 1995, at which time he appeared to have had knowledge that the land had an occupant. Nevertheless he stayed away from suit land till 2011

when he filed suit. By which time the 2nd Defendant is in possession, acquired title, developed the land and enjoying quiet and peaceful and uninterrupted occupation of the suit property. The learned Justice Asike – Makhandia J in **Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR** stated that:

“ a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the little owner”.

I hold and find that the suit is statute barred.

32. Whether the Plaintiff is entitled to an order directing the Land Registrar to rectify the Land Register. I must point out that at the close of the Plaintiff case, and with the consent of the other parties the Plaintiff amended his prayer No. C in the plaint to read:

“ an order directing the Land Registrar to forthwith rectify the anomaly in their register book and recognize the Plaintiff as owner of all that property known as Plot No. 26 within Block 122/61 NBI”.

This amendment fundamentally altered the prayers of the Plaintiff by letting the 1st Defendant off the hook. Their claim against the 1st Defendant then collapsed as that was their only claim against them. It replaced the 1st Defendant with the Land Registrar. Order 1 rule 1 of the Civil procedure rules provide 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 transaction 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.

The Plaintiff had the right to sue or enjoin whoever he wished so as to realize his claim, including the Land Registrar. But he did not. Article 50 of the Constitution provides that:

“ (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

The right to fair hearing as enshrined in the Constitution is a right that is available to all parties to a suit, the Land Registrar included. The Land Registrar was not accorded the opportunity to be heard and no orders can be made against him. The Court declines that prayer.

33. Regarding the matter of general damages for the tort of trespass, this Court holds and finds that there was no trespass and declines to grant the prayer.

34. The totality of the evidence is that the Plaintiff has failed on a balance of probability to proof his case against the 1st and 2nd Defendant and this suit is dismissed with costs to the 1st and 2nd Defendant.

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

J.G. KEMEI

JUDGE