



Take Over Investments Company Ltd v Otieno & 18 others (Environment & Land Case 678 of 2016) [2024] KEELC 1026 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 678 OF 2016
AA OMOLLO, J
FEBRUARY 29, 2024**

BETWEEN

TAKE OVER INVESTMENTS COMPANY LTD PLAINTIFF

AND

OSCAR OTIENO & 18 OTHERS DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the 1st -18th Defendants vide a Plaint dated 21st June 2016, seeking for the following orders;
 - i. A declaration that the Plaintiff is the lawful owner of the suit property known as LR NO. Nairobi Block 126/462.
 - ii. An order of permanent injunction restraining the Defendants by themselves, their servants, agents or any other person claiming interests through the Defendants or otherwise from entering, remaining or trespassing, constructing, erecting any structures, removing any beacons, disposing, alienating, dealing or otherwise howsoever from interfering with the Plaintiff's quiet enjoyment possession and occupation of the suit property known as known as LR NO. Nairobi Block 126/462.
 - iii. An order of vacant possession and/or eviction of the defendants.
 - iv. Costs of the suit.
2. The Plaintiff averred that it is the registered proprietor of the property known as Land Reference Number Nairobi Block 126/462 situate at Kamulu Location in Nairobi County comprising by measurement 0.108 Ha herein after referred to as "the suit property." It stated that on diverse dates in the year 2015 and 2016, the Defendants who have no proprietary interest in the suit property, entered the same, removed beacons and started constructing unapproved and illegal structures thereon.



3. The Plaintiff stated that despite demand and notice of intention to sue having been given, the Defendants have failed and or refused to stop the illegal trespass on the suit property thus has sought for an order of a permanent injunction against them by themselves, their servants, agents or any person claiming interest through them.
4. The Defendants filed a statement of defence dated 25th July 2017 not disputing that the Plaintiff is the registered owner of the suit property but contended that they are in occupation of LR No. Nairobi Block 126/461 which is owned by Milka Wambui Mbuthia (deceased) and who before her demise had sub divided the same and sold to each individual (Defendants) portions where they reside. They added that Nairobi Block 126/461 which they occupy is adjacent to Nairobi Block 126/462 which is owned by the Plaintiff and previously by Chege Kabita. That it comprises of vacant fenced land with two dug holes.
5. It was pleaded further in the defence that the Plaintiff's claiming LR No 126/461 is an act of fraud and deceit that cannot be entertained by this court. They argue that the Plaintiff has no justification to seek injunction over land they do not own or possess. The Defendants prayed that this suit be dismissed with costs.

Evidence

6. In support of their case, the Plaintiff's managing director, Kenyan Macharia Karema testified as PW1 and adopted his written statement dated 21/6/2016 as evidence in chief. He also produced the 10 documents listed in the Plaintiff's list and bundle of documents dated 20/6/2016 as PExh 1 to 10 to wit;

Certificate of Title for LR No.Nairobi/Block 126/462, Certificate of Incorporation for Takeover Investments Company Limited, Membership card for Chege Kabita in Ngundu Farmers-Dandora,Share Certificate for Chege Kabita in Ngundu Farmers' Co-operative Society Limited, Agreement for sale dated 22nd October 2010,Provincial Surveyor's report dated 19th October 2011, a copy of the charge sheet in Criminal Case No.3665 of 2012, Makadara Law Courts, Copies of bonds to attend Court in Criminal Case No. 3665 of 2012, Makadara Law Courts, Extract of from OB6/18/2016 Kamulu Police Station and Authority to Plaintiff's Advocate for the institution of the suit.

7. PW1 stated that they purchased the suit property on 22nd October, 2010 from Chege Kabita who was a shareholder of Ngundu Farmers Co-op Society Ltd. It is his evidence that between the years 2015 and 2016, the Defendants without lawful authority entered upon their land, removed beacons and started constructing unapproved structures on it and has continued with the unlawful construction. He continued that in 2012, the Plaintiff had reported Wanjiru Kimani-deceased for removing the one-roomed permanent structure they had put up on the suit land. The matter was reported to the area chief who summoned the Wanjiru Kimani and the director of the Plaintiffs and Ngundu Farmers Coop Society and Wanjiru Kimani claimed ownership of Nairobi Block 126/461. She was later charged with an offence of malicious damage and forcible detainer and we were directed to seek redress in court.
8. That upon submission of a report from the Provincial Surveyor produced as PExh11, Nairobi on 19th October 2011 to the area chief Kamulu, the same indicated that Nairobi Block 126/461 and Nairobi Block 126/462 were properly marked and defined on the ground and that the parcel that had barbed wire fence with some building material was Nairobi Block 126/462 which belongs to the Plaintiff.
9. That by the time the report was prepared, the Plaintiffs had taken possession of the suit property, fenced it and issued with certificate of lease and also had deposited concrete and sand on it as was confirmed



by the Surveyor. PW1 stated that when the Plaintiff purchased the suit property, there was no borehole and a latrine hole as claimed by the Defendants.

10. Further, that the Wanjiru Kimani the Plaintiffs are referring to is the same as Milka Wambui the Defendants are referring to and that the Defendants have not produced any document to prove ownership of Nairobi Block 126/461 and how they acquired the same from the alleged Milka Wambui.
11. During cross-exam by Mr Mbichile learned counsel for the Defendants, PW1 said that plots numbers 461, 462 and 463 all exist but he does not know the owners of plot 461 and 463. It was his evidence that after the Plaintiff purchased the suit property, it was given share certificate, membership number and an agreement for sale of land. That they have processed a title for their plot. Mr Macharia averred that he met Mr Chege Kabita in 2010 and he visited the land with Mr Kabita and a surveyor. He denied he was shown the land by an agent and when they bought, the land was vacant. He stated that the Defendants have developed the suit property next to an empty plot. The witness denied that it their plot which is undeveloped/empty and fenced with a live edge.
12. The witness admitted that they started having problems with Wanjiru Kimani soon after they purchased the suit property as the said Wanjiru was claiming the land they purchased. In re-exam, the witness said the boundary of the land sold to them was pointed out by Chege Kabita and the surveyor. That the Defendants have not produced any documents of ownership for plot 461 and 462. That the land shown to him had no borehole or latrine. This marked the close of the Plaintiff's case.
13. Ms Jecinta Muthoni Wawira testified as DW1 and introduced herself as the owner of plot no. 1 under title number Nairobi Block 126/461 which she inherited from her mother. DW1 stated that she is not one of the Defendants but is aware that parcel no 126/461 is occupied by 40 people, each who bought their plots from Milka Wanjiru Kimani. She said that her late mother Eurida Wawira Njiru had purchased the same from the late Milka Wambui as shown in the copies of purchase and transfer documents from Ngundu Farmers' Cooperative Society Ltd.
14. She continued in evidence that when this suit was commenced, the Defendants initiated a complaint at the CID Headquarters where the CID investigated the Plaintiffs claim. Through the investigations, they became aware that the suit property was initially owned by Chege Kabita who sold it to the Plaintiff through agents and that unfortunately the Plaintiff was shown the wrong land.
15. She added that they (Defendants) visited the late Chege Kabita at his home in Gatundu when he mentioned that the land sold had a latrine and a borehole which to date exist on Nairobi Block 126/463. They produced the statement recorded by Chege Kabita as part of their exhibits. That the dispute between the Plaintiff and the late Milka Wanjiru having not been settled before her death, the same is against them. In support of the Defendants' case, DW1 produced the documents attached to her recorded statement as DExh 1 to 14 inter alia;

Ngundu Farmers' Cooperative Society Limited Share Certificate Ltd, Share transfer form from Joseph Kamau to Wanjiru Kimani, Share certificate of Wanjiru Kimani, Ballot No.348 for Title No.461, Letter dated 26th September 2011 from Survey of Kenya, Surveyors Report dated 19th October 2011, Property Rates Payment Request and clearance certificate to Ngundu Farmers Coop, Certificate of Death for Millicah Wanjiru Mbuthia, Sale agreement dated 3rd June 2011 between Milka Wanjiru and Eurida Wawira, undated and unsigned Statement by Chege Kabita recorded by DCI, undated photographs of a house and land, an elderly man and woman separately and another together with other persons, ownership certificate of Scholastica Nduta from Murangathi Property Investment, certificate of ownership of Jennifer Kerubo from Jasho Real Estate Agents, Ownership certificate of



Daniel Chege Gichuhi from Magiki Property Investment, Certificate of ownership of Michael Omondi Opondo from Jasho Real Estate Agents and undated photographs showing mabati structures and a permanent house.

16. On cross examination, DW1 confirmed that the sale agreement for her plot produced was between her mother and the late Milka Wanjiru and that the agreement dated 3/6/2011 does not mention plot reference number. That the owner having no title to the land they were issued with share certificate by Ngundu Farmers. She testified that from the surveyor's report that did not mention her house, the sketch attached to it showed that Plot No.462 is fenced. She further stated that she had undertaken investigation with the CID where Chege Kabita recorded a statement but did not involve the police or the Plaintiff. She added that her mother was the first to occupy the land and the Defendants followed at different times.
17. DW2, Michael Omondi Opondo, testified and adopted his witness statement filed in court on 14th November 2018 stating that he has lived in Kamulu since the year 2016 where he has put up a house. He stated that he purchased his plot in the year 2014 from Patrick Gicheru of Jasho Real Estate Agents who had purchased the same from Milka Wanjiru.
18. He further stated there had been no complains when he was putting up his house and that after filing of this suit, he saw some people fence plot No.462. He produced photographs of his house and certificate of ownership dated 12/12/2014 as PExh 15 "a" and 15 "b" respectively.
19. On cross examination, DW2 confirmed that he did not produce any agreement for sale and did not get building approval for his house. It is his evidence that when he was putting up his house in the year 2014, few houses were already on the land. He added that they had a share certificate but he had not seen the original share certificate belonging to Milka Wanjiru.
20. DW3 was Johnson Wamutu Mwangi who adopted his written statement filed on November 14, 2018. He testified that he came to the land Block 126/461 on November 23, 2013 after buying two plots from Patrick Gicheru Ndegwa who was an agent of the owner. He stated that there are approximately 40 plots owned by different people among them the defendants and that when he started developing the land in 2016 the Plaintiffs started to claim the land. The matter was reported to the police/DCI and a search was done to show that the original owner was Chege Kabita who said that the land sold to the Plaintiff is the land next to them.
21. Mr. Wamutu testified that the whole land was initially owned by Ngundu Farmers Co-Op Society Ltd who sold to its members. He stated that DEx 11 is a photo of Chege Kabita and DEx 12 is wife of Chege who sold the land adjacent to which they occupy to the Plaintiff. He stated that the Plaintiff had engaged him to help in selling their land and the proposed purchaser paid some money but the Plaintiff later refunded the money.
22. On cross examination, DW3 stated that he bought his plot in the year 2013 but was not aware that prior to 2016, there was a dispute between Wanjiru Kimani and the Plaintiff. He admitted that he had not produced approvals for the Maisonette he has built on the land or the emails that the Plaintiff had sent him seeking for help to sell their land and that he was not aware that the Plaintiff had engaged the provincial surveyor to identify where their land is.
23. DW3 stated that neither did they come with Chege to the land but sent the son to show them the land. They also did not engage a surveyor to confirm the ground position of NBI Block 126/461.



Submissions.

24. The Plaintiffs filed submissions dated 25th October 2023 while the Defendants filed their submissions dated 20th November 2013. The Plaintiff outlined the background and facts of the matter and submitted that based on the provisions of Section 26 of [Land Registration Act, 2012](#) a certificate of title is conclusive proof of ownership of land. In support they cited the case of [Ahmed Ibrahim Suleiman and another vs Noor Khamisi Surur](#) (2013) eKLR.
25. The Plaintiff submitted further that by virtue of its registration of the suit property, the Plaintiff is entitled to enjoy all rights and privileges thereto and from the genesis of the dispute back in 2011 the alleged owner of Block 461 was arraigned in court for malicious damage to property belonging to the Plaintiff and forcible detainer thus the defendants claiming to occupy the same disputed parcel are all trespassers.
26. It is argued by the Plaintiff that the Defendants are claiming sub plots created from the unlawful subdivisions of the suit property noting that no evidence was tendered to prove that Milka Wanjiru was the registered owner of the suit parcel block 126/461. The Plaintiff stated that the Defendants did not contest the surveyor's report and neither did they engage an independent surveyor to counter the same.
27. The Plaintiff asserted that PW1 was categorical that he personally met Chege Kabita at Ngundu area when the Plaintiff company was purchasing the suit property and they went to the parcel with a surveyor for pointing out beacons and boundaries of the property. It was their case The Plaintiff stated that the Defendants did not call as witness the CID officers who recorded a statement from Chege Kabita adding that the alleged investigation whose report was not submitted did not involve the Plaintiff. They submitted that the photographs of Chege Kabita produced are not dated hence, the claim that Kabita advised them that the parcel he sold the Plaintiff had a borehole and pit latrine is unfounded.
28. Further, placing reliance to Section 107 and 119 of the [Evidence Act](#) and the case of [Mary Nasambu Makanda v Dennis Wanyama](#) (2017) eKLR, [Kiprotich Arap Chepkwory vs Simion Langat & 3 Others](#) (2017) eKLR the Plaintiff submitted that the defendants did not tender any evidence to prove that the Plaintiff ought not to enjoy their rights as proprietor of the suit property. They averred that they had demonstrated that they have a legal interest over the suit property and that no amount of money can compensate them for the infringement of their rights to the suit property by the Defendants and cited the case of [James David Gathuri vs Elaine Njeri & 8 others](#) [2020]eKLR .
29. The Defendants stated that it is not disputed that Block 126/461 occupied by the Defendants is distinct from Block 126/462 owned by the Plaintiffs and that although the Defendants do not have the title to Block 126/461, the Plaintiff is only claiming for Block 126/462. The Defendants submitted that all throughout the dispute since 2011, the Plaintiff has never summoned the previous owner, Chege Kabita but relied on the sanctity of their title. Thus, the dispute herein involves a fraudulent scheme to acquire parcel No.461 and not a dispute over ownership.
30. The Defendants submitted that the prayer sought on injunction is superfluous as no one has occupied Parcel No LR NO. Nairobi Block 126/462 which remains vacant and on the same note stated that an injunction to the Defendants who are currently in occupation would mean, locking them out of their residential homes and in effect resulting in an eviction from Parcel No LR NO. Nairobi Block 126/461.
31. It is their submission that there is no prima facie evidence that the Defendants are in occupation of Parcel No LR NO. Nairobi Block 126/462 as the Plaintiff has not shown their title is in dispute to claim irreparable damage. That the Defendants' houses were built long before this suit was filed. The



Defendants submitted that the Plaintiff has not proved that it would not recover adequate damages equal to the amount paid for the purchase of the land from the Defendants and that based on the evidence so far received, the balance of convenience is on maintaining the status quo that will result in the parties maintaining their respective parcels of land on the ground.

Determination:

32. The Plaintiff's claim against the Defendants is on the grounds that they are in occupation of its registered property, Nairobi Block 126/462. However, the Defendants contend that the property they are in occupation of and which they have developed is Nairobi Block 126/461 which they purchased from Milka Wanjiru also known as Wanjiru Kimani-deceased. The Plaintiffs added that the said Wanjiru Kimani had been arrested and charged in court for damaging the Plaintiff's property and forcible detainer of Nairobi Block 126/462.
33. There being no dispute on the title ownership of the suit property, the main issue for determination is whether the Defendants have encroached Nairobi Block 126/462, the suit property. Section 18 and 19 of the *Land Registration Act* No.3 of 2012, provides that the Land Registrar and the Surveyor who are the custodian of the land records have the power and mandate to handle issues relating to boundaries disputes.
34. As this court held in *Frankline Ngira Osenob v Elphas Barasa Okhonjo* [2022] eKLR which quoted the ruling in the case *George Kamau Macharia v Dexka Limited* [2019] eKLR, that the mandate to determine boundary disputes lies with the Land Registrar first and any other subsequent appeal to the Chief Land Registrar or a complaint to this Court.
35. In this instance, there is a survey report dated 19th October 2011 addressed to the Chief, Kamulu Location by E.N.Wandera, a Provincial Surveyor. This report which was not challenged by any party stated that the both parcels Nairobi Block 126/461 and 462 are in their true ground positions and are marked properly on the ground with 462 having a barbed wire fence around it and some construction materials while 461 has two structures, a small permanent structure and a temporary structure made of polythene bags adjacent to each other though not fenced. It means that both plots exist and the question this court is tasked to determine is whether the Plaintiff has discharged the burden of proof that the Defendants are occupying the suit property and not Block 461.
36. In a bid to prove its case, Pw1 stated in his evidence that during purchase of the land in question block 462, the Plaintiff was accompanied by Mr. Kabita (Vendor) and a surveyor who pointed out the location of the parcel. PW1 testified that he bought the suit property in the year 2010 and fenced the parcel and in the year 2012, constructed a 1-bedroom house, which Wanjiru Kimani demolished. It therefore makes sense that in the Surveyor's report made in the year 2011, the surveyor indicated Block 462 had concrete and building materials on it.
37. The fact of arrest of and charging of Wanjiru Kimani in 2012 is evidence that the Plaintiff was certain which land it had purchased and proceeded to even construct on it. They proceeded to also produce a copy of the title issued to them on 23rd December 2010 and sale agreement executed between them and Mr Chege Kabita. The Defendants are insisting that they are occupying land Block 126/461 and asserted that the Plaintiff's land is vacant adjacent to theirs. DEx1 testified that the previous owner of the land, Chege Kabita told her and indicated on the statement allegedly recorded by the DCI that the parcel sold to the Plaintiff had a borehole and a pit latrine. However, the agreement between the Plaintiff and Mr Kabita makes no mention of such.
38. The Defendants produced sale of agreements most of which are dated post the date (July 2012) of complaint raised by the Plaintiff which led to the arrest and charging of Wanjiru Kimani-deceased. For



instance, the 14th Defendant Michael Omondi Opondo produced a certificate of ownership of plot 2 issued to him on 12th December 2014 by Jasho Real Estate Agents; the 16th Defendant Elias Gitonga produced issued a receipt dated 20.09.2014 by Murangathi Property Investment for purchase of plot 4; a sale agreement dated November 23, 2013 between Johnson Wamutu Mwangi (purchaser); and certificate of ownership issued to the 2nd Defendant on 10th November 2014 for plot 16 by Murangathi Property Investments.

39. All the documents by the Defendants refer to the land reference Nairobi Block 126/461 which they claimed belonged to Milka Wanjiru Kimani-deceased and yet none of their documents of acquisition showed they had any dealings with the said Milka. not disclose the specific parcel being purchased with DW3 not producing the agreement. The witnesses called by the Defendants did not state who pointed out the boundaries to them taking into consideration the fact that they purchased their land after the demise of the said Wanjiru Kimani-deceased. Neither did they produce any evidence to link the deceased estate with the property agents who issued them with the certificates of ownership. The manner in which these Defendants acquired their plots raises a doubt on whether they knew the ground position of the land parcel 126/461.
40. It is possible that the Defendants would have been aware of the dispute between the deceased and the plaintiff if they had bought from Wanjiru Kimani. It would have been obvious to them which land the plaintiff was claiming as Block 126/462 as a result, and they would not have needed to go look for Mr. Kabita Chege to tell them about the land he had sold the plaintiff. It is unclear which of the defence witnesses actually spoke with the aforementioned Kabita Chege because their recorded testimonies (submitted in court) are similar. The fact that Mr. Chege's statement (Dex 10) was not recorded on the spot to identify the specific plot to which he was alluding does not strengthens the defendants' case that they are on Nairobi Block 126/461.
41. I am thus convinced that the Plaintiff has established a case against the Defendants after considering the entirety of the evidence presented by both sides. The land was acquired by the Defendants subsequent to the Plaintiff having brought a case against Wanjiru Kimani-deceased who allegedly put them (Defendants) into possession. In my opinion and I so hold, Nairobi Block 126/462 belongs to the Plaintiff, and the Defendants are occupying it illegally. As a result, I enter judgement for the Plaintiff in the following terms:
- a. A declaration that the Plaintiff is the lawful owner of the suit property known as LR NO. Nairobi Block 126/462.
 - b. The Defendants are hereby granted 120 days from the date of this judgement to voluntarily surrender vacant possession to the Plaintiff. In default, an eviction order to issue against them to be carried out in accordance with the law.
 - c. Subsequent to surrender of vacant possession and or eviction, an order of permanent injunction is issued restraining the Defendants by themselves, their servants, agents or any other person claiming interests through the Defendants or otherwise from entering, remaining or trespassing, constructing, erecting any structures, removing any beacons, disposing, alienating, dealing or otherwise howsoever from interfering with the Plaintiff's quiet enjoyment possession and occupation of the suit property known as known as LR NO. Nairobi Block 126/462.
 - d. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY, 2024

A. OMOLLO



JUDGE

