



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
CIVIL SUIT ELC NO. 1890 OF 2007

LOISE WANJIRU IRUNGU.....1ST PLAINTIFF
CHARITY NJOKI NJUGUNA2ND PLAINTIFF
JANEROSE KIMANI3RD PLAINTIFF
PURITY WANJOHI.....4TH PLAINTIFF
FLORENCE MUCEMI 5TH PLAINTIFF

VERSUS

JOEL NTHEI MWANZI.....1ST DEFENDANT
AGNES W. GATIMU.....2ND DEFENDANT
JEREMIA NGIGI KITHENDU.....3RD DEFENDANT
CATHERINE NGINA KITHENDU..... 4TH DEFENDANT
HELLEN CYRIC MAUGI.....5TH DEFENDANT
PETER MUINDI MUNYAO.....6TH DEFENDANT
CHARLES TUTI NDUMA.....7TH DEFENDANT

JUDGMENT

BACKGROUND

1. The suit land situated at Kamulu (in Nairobi) was initially an unregistered plot measuring 0.4046 ha (about one acre) and was originally owned by a Co-operative Society cum land buying company known as Drumvale. Drumvale sold the suit land to one Aaron Katiku Mummo, also identified as Haroun Katiku (deceased). None of the parties have mentioned when this happened but it was in the 90s or before.

2. Katiku Mummo then sold the land to another land buying company called Mbukoni Holdings in February 1997. Thereafter in March 1997, Mbukoni subdivided the land into unregistered plots of 1/4 and

1/8 acres and sold these plots to the present defendants. Katiku Mummo passed on shortly thereafter on 16th November 1997.

3. Katiku Mummo's wife Grace Maingi katiku and son John Maingi Katiku entered into an arrangement with one Dominic Musembi to have the land sold to the present plaintiffs. This transaction was done in November 2000. On 7/7/05, Plaintiff's acquired a Certificate of Lease (registered under the now repealed Registered Lands Act,Cap 300) in respect of the suit land, Title no. NAIROBI/BLOCK 118/58.

4. The plaintiffs have never resided on the suit land. Some defendants however have put up houses on the suit land. As for 7th defendant, he occupied his portion of the land soon after he bought it and this is where he and his family reside.

PLEADINGS/ CLAIM

5. The plaint was filed initially on 25/5/06 as H.C.C.C. No. 547/06, but somewhere along the way the suit became High Court ELC No. 1890/07. In the amended plaint filed on 20/3/07 plaintiffs' claim is for:

- a) A permanent injunction restraining the defendants from occupying, cultivating, erecting structures or in any manner whatsoever interfering with the plaintiff's quiet enjoyment of the property known as Title Number: NAIROBI/BLOCK 118/58.
- b) An order of eviction of defendants from the suit premises and for the removal of all structures erected thereon.
- c) General Damages
- d) Any other or suitable relief as the court may deem apt.

6. The defendants filed their Amended Defence and counter claim on 20/3/2007. They aver that they are the bona fide owners of the suit land and their claim is for:-

- a) An order of declaration that the defendants are the legal owners of land parcel number NIAORIBI/BLOCK 118/58.
- b) An order of cancellation of Certificate of Lease dated 7th July, 2005 in regard to land parcel number NAIROBI/BLOCK 118/58.
- c) An order of permanent injunction barring the plaintiffs from interfering in anyway with land parcel number NARIOBI/BLOCK 118/58.
- d) Any other relief this Honorable Court may deem fit to grant.

PLAINTIFF'S CASE

7. Plaintiffs who are five women came together to buy the suit land (NAIROBI/BLOCK 118/58) on 14/11/2000 from one Dominic Musembi Kioko. To advance the plaintiff's case was the testimony of 5th plaintiff as PW1, 3rd plaintiff as PW2 and 1st plaintiff as PW3. These plaintiffs stated that the land originally belonged to Drumvale Co-operative who then sold the land to Katiku Mummo (Deceased). Then Katiku Mummo's wife Grace Ngina and son John Maingi sold the land to Dominic Musembi vide the Sale Agreement of 16/8/1998. The agreement was produced as P Exhibit 5 (captured as item 5 in plaintiff's list of documents dated 10/6/09).

8. Dominic Musembi in turn sold the suit land to the plaintiffs vide the Sale Agreement produced as P Exhibit 3 (item 2 in plaintiff's list of documents dated 14/11/2000). The plaintiffs embarked on the process of having the suit land registered in their names. They succeeded and acquired the Certificate of Lease on 7/7/05. The title document was produced as P Exhibit 1, the same being the original document

which was returned to PWI, but the copy there of was retained by the court as P Exhibit 2.

9. Plaintiffs aver that the land was empty when they bought it but they did not take up occupation. In the year 2006, they found that some people had occupied the land and were developing the same. They decided to go to court. In further support of their case, plaintiffs also produced as exhibits the Certificate of Confirmed Grant dated 1/9/2000 (Exhibit 4), minutes from Drumvale as Exhibit 8, Search Certificate as Exhibit 7, property rates payments as P Exhibit 6, and Demand Letter as exhibit 5.

DEFENCE CASE

10. Defence case was advanced by 7th defendant as DW1 and 3rd defendant as DW2. They stated that Mbukoni Holdings had bought the land from one Aaron Katiku Mummo. They produced as D Exhibit 2 a Sale Agreement dated 4/2/97 to confirm the sale between Katiku Mummo and Mbukoni Holdings.

11. Mbukoni Holdings there after subdivided the land into plots of 1/4 and 1/8 acreages. It is these plots that defendants bought from Mbukoni Holdings in March 1997. Defendants were issued with a document titled "*Memo of particulars*", as prove of ownership. DW1 (7th defendant), occupied his plot immediately and that is where he has lived with his family since 1997. He has developed the land.

12. Defendants further state that Mbukoni Holdings have never been able to facilitate the issuance of title deeds.

13. Other documents produced by defendants in support of their case include;

- a copy of death certificate of Katiku Mummo showing he died on 16/11/97,
- Certificate of Confirmation of Grant dated 1/9/06 (D Exhibit 6)
- Order for Revocation of the Grant (D Exhibit 7).

ANALYSING AND DETERMINATION

14. This matter was to be mentioned before the Deputy Registrar in Nairobi on 18/7/17 to confirm filing of submissions. Plaintiff's side complied with this direction. I received submissions of defendants on 19/9/2017 and I will proceed to consider all the submissions filed herein.

15. **Undisputed facts;**

1. That some defendants, particularly 7th one are in occupation of the suit land and have built houses there.
2. That plaintiffs have never been in occupation of the suit land.
3. That plaintiffs have a Certificate of Lease to the suit land, title No. NAIROBI/BLOCK 118/58.
4. That Haron Katiku Mummo bought the land from Drumvale.
5. That Harun Katiku Mummo died sometime in November 1997.
6. That Grace Maingi Katiku and John Maingi Katiku acquired a Certificate of Confirmation of Grant in respect of the estate of deceased Katiku Mummo on 1/9/00.

16. **Issues for determination:**

1. Whether the parcel of land being claimed by plaintiffs and the one claimed by defendants are one and the same.

2. Whether the sale of the suit land from Katiku Mummo to Mbukoni Holdings and the subsequent sale from Mbukoni Holdings to defendants was un-procedural, irregular and/or unlawful.

3. Whether the sale of the suit land from Agnes Katiku and John Maingi to Dominic Musembi and the subsequent sale from Dominic Musembi to the plaintiff's was un-procedural, irregular and/or unlawful.

4. Who is entitled to the suit land?

Whether the suit land is one and the same parcel, or whether there are two different parcels of land.

17. It is PW2 and PW3 who attempted to advance the claim that defendant's land is No. 118/97 where as theirs is 118/58. PW1 stated that their land was No. 118/58 in Kamulu but that "the Kamulu plot was No. 97 before the titles were issued". The documents referred to by the plaintiffs' as minutes of Drumvale (P Exhibit 8) in Min4 state: ***"the society's record indicate that plot No. Nairobi/Block 118/58 was allocated to Harun Katiku Mumo whose membership number is 97"***.

18. The part of "Description of Property" in the Certificate of Confirmation of Grant has item No. 10 as Plot No 97 Kamulu for John Maingi Katiku which means that in the Succession Cause, John Maingi was set to acquire the land No. 97 from the estate of Aaron Katiku. It therefore follows that the land or the interest there of that Katiku Mummo owned in Drumvale was identified as parcel No. 97 and was recognized as such in his estate.

19. So where does the issue of parcel No. 118/97 come from?. It is derived from Minutes 7 in P Exhibit 8 (minutes from Drumvale). This piece of information was not derived from Drumvales society records but from the scrutiny of the documents presented by Charles Tuti to the society which showed that he, (7th defendant) was allocated " plot No 8 in 118/97 and not 118/58. The aforementioned minutes further indicate that when surveyor visited the site, they found 7th defendant on Plot No. 118/58. The documents that were allegedly scrutinized to reveal No. 118/97 are however not attached to the minutes.

20. A perusal of defence documents reveal that nowhere is reference made to land parcel No. 118/97. What is evident is that the interests of defendants in the suit land are captured in the document titled as **"Memo of particulars"**, where the mother number is 97 and the respective subdivided portions are given numbers 1,2,3,4,6,7,8 to appear as follows:

-Joel Nthei Mwanzia 1&2 (97)

-Agnes Gatimu 3 (97)

-Jeremiah Waigi Wandei 4 (97)

-Charles Tuti 8 (97)

-Catherine Maina 5 (97)

-Hellen Cyril Maingi 6 (97)

-Peter Muindu 6 (97)

21. It is only for documents of Agnes Gatimu which appears to have number 118/97 which writings are mixed up with a stamp and hence it can't be concluded that reference is to a parcel 118/97, going by what is captured in the other documents.

22. As for the sale agreement between Katiku Mummo and Mbukoni holdings, (D. Exhibit 2) it clearly states that;

"the property being sold is surveyed parcel of land No. 97 and measuring one acre of title No. Nairobi Block 118/58 Drum Vale Estate Kamulu".

23. To this end, I conclude that the land in dispute is one and the same. It is the land that had initially been owned by Katiku Mummo as no. 97 and which was captured as being part of his estate in the succession proceedings.

Was the sale of land from Katiku Mummo to Mbukoni and from Mbukoni to defendants procedural, irregular and an unlawful.

24. Defence Exhibit 2 shows that the agreement between Katiku Mummo and Mbukoni holdings was signed by Kutonyi Mummo (a brother of Aaron Katiku Mummo) on one hand and someone from Mbukoni holdings on the other hand. Paragraph 6 of the said agreement states that;

"The purchaser buys the said land undertaking that the vendor's family has no objection to this contract and the vendor, because of his ill health has authorized his brother Mr. Kutonyi Mummo to collect and transmit the purchase price to the vendor".

25. This information explains why Katiku Mummo did not sign the agreement. He had authorized his brother to represent him. The fact that Katiku Mummo died few months thereafter in November, 1997 confirms that indeed he had been of ill health. There is nothing to indicate that the transaction was unprocedural, irregular or unlawful.

26. Further in the said agreement, it is indicated that;

"the vendor agrees to give possession to the purchaser to start planning and surveying the said land for subdivision into small portions depending on the decision of purchaser".

27. This is exactly what Mbukoni Holdings did when they got the suit land in February 1997. They subdivided the same and sold the subdivided plots to defendants by March of the same year.

28. The transaction between Katiku Mummo and Mbukoni was however not finalized and the actual transfer was not affected. The fact that Mbukoni holdings took over possession of the land, subdivided it and sold it when Katiku was alive is however an indication that Katiku had ceded his possessory interests in the suit land to Mbukoni holdings. I am inclined to believe that this possessory interest is the one that Mbukoni holdings were able to pass on to the defendants.

29. The rights and interests acquired by Mbukoni Holdings and subsequently by defendants did not crystallize into rights of proprietorship. The situation has remained the same to date.

30. What I can conclude is that the procedures regarding the transfer of the suit land were not completed but I find no trace of illegality or unlawfulness.

Is the transaction of sale of land from Grace Ngina Katiku and John Maingi to Dominic Musembi and from the latter to Plaintiffs un-procedural, irregular and or unlawful?

31. It is not disputed that plaintiffs are the holders of the Certificate of lease (title to the suit property). Plaintiffs have submitted that they are the legitimate owners of the property and have cited the provisions of section 24 of the Land Registration Act and section 23 of the repealed Registration of titles act to buttress this point.

32. Plaintiffs have further proffered the case of **Gitwany Investment Limited v. Tajamal Limited&3 others (2006)eKLR** , touching on the indefeasibility of title.

However, under the provisions of article 40(6), of the constitution," **the rights under this article do not extend to any property that has been found to have been unlawfully acquired**".

33. This court will therefore trace the history of the land to establish if the transactions with regard to the suit property were un procedural, illegal or unlawful in so far as plaintiffs claim is concerned.

34. The plaintiffs admit that the land they are claiming is the one that was once owned by Katiku Mummo who died in 1997. The plaintiffs bought the Land from one Dominc Musembi who in turn had bought the land from the wife (Grace) and son (John) of Katiku Mummo.

35. The Sale Agreement between Grace and John Katiku on one land and Domiminic Musembi is dated 16/8/1998. It states that the property sold is;

“all that parcel of land situated in Kamulu area known as Katiku Mummo/Nairobi Block 118/58 (Plot 97) measuring on acre. The transfer of the land to the buyer will be done by Grace Ngina Katiku the representative of the estate of the late husband Katiku Mumo once the grant of representation in succession cause No. 598 of 1998 is confirmed by the Court.....”

36. The grant was confirmed on 01.09.2000. I find that the aforementioned transaction was invalidated by the operation of the law under S. 45 of the law of Succession Act which provides that;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

37. The transaction of 16/8/1998 amounted to intermeddling with the estate of the deceased (Katiku Mummo).

38. Further, defence have produced D Exhibit 7, which is an order of the Court dated 07.08.01 indicating that;

"the confirmed grant made to Jonh Maingi and Grace Ngina Katiku on 01.09.00 is hereby revoked. A new grant of letters of Administration intestate to the estate of Katiku Mumo be issued to Grace Ngina Katiku and Redempta Ndungu Kimeu and Munyiva Mutua jointly".

39. This order is not disputed by the Plaintiffs. It then follows that again the sale agreement between Grace Ngina and John Maingi on one hand and Dominic Musembi on the other hand was also invalidated by the operation of a lawful Court order.

40. It follows that Dominic Musembi did not acquire any rights of proprietorship in the land, nor any interest in the suit land thereof. Dominic Musembi was therefore not capable of passing any rights or interest in the suit land to the Plaintiffs. Therefore, the plaintiffs do not hold a good title in respect of the suit land.

41. To this end I do find that the authorities submitted by the defence are relevant on this point .For instance in the case of **Jacinta Wanja Kamau v. Rosemary Wanjiru Wanyoike and another (2013)eKLR**, the appellant unsuccessfully sought protection under section 93 of the law of succession act and it was held that **“ it would have been illegal for Beatrice Njeri to sell the land before the confirmation of the grant”**.

Are plaintiffs innocent purchasers?

42. Is the title held by plaintiffs impeachable by virtue of Section 26(1) (b)? of the Land Registration act. This was the question posed by Judge Munyao in **Elijah Makeri vs. Stephen Mungai Njuguna and another ELC 609/2012 Eldoret** , where the Judge stated that;

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title

was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

43. I find that all the land dealings in the suit land by Grace Katiku, John Katiku, Dominic Musembi and plaintiffs, including the registration of the land into Plaintiffs names are invalid for want of lawful procedure and due to illegality.

Who is entitled to the suit land?

44. Having established that the acquisition of the land by the Plaintiffs' is tainted with illegalities and hence unlawful, then I do find that plaintiffs are not entitled to the suit land.

Conclusion

45. I proceed to give orders as follows:-

1) Plaintiff's claim is hereby dismissed.

2) Defendant's counterclaim is allowed.

3) It is hereby declared that defendants are the lawful owners of land parcel No. Nairobi /Block 118/58.

4) An order is hereby issued for the cancellation of the certificate of lease dated 07.07.05 in parcel No. Nairobi block 118/58 issued in the names of plaintiffs.

5) An order of permanent injunction is hereby issued barring Plaintiffs from interfering in land parcel No. Nairobi Block 118/58.

6) As to costs, it would be rather harsh to condemn plaintiffs to pay costs now that they have lost the land. I therefore order that each party do bear their own costs of the suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

No appearance