



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC NO. 1165 OF 2014

INTIME INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....1ST DEFENDANT

ROBERT LOITARI.....2ND DEFENDANT

WYCLIFFE OYOKO.....3RD DEFENDANT

JOHN LOIBAKUTA.....4TH DEFENDANT

BENJA METISHELE.....5TH DEFENDANT

SAITOTI SIKOLE.....6TH DEFENDANT

SAYAYA SAITOTI.....7TH DEFENDANT

NATIONAL LAND COMMISSION.....8TH DEFENDANT

JUDGMENT

BACKGROUND

The history of this case is that plaintiff is the registered owner of a leasehold property No. L.R 209/2252/6, herein after referred to as the suit property having bought the same on 28/4/2014 from K.R. Gudka and A.R Gudka who in turn had purchased the said property in a public auction on 4/4/2002. There was a tenant Glory Car Hire at the time Plaintiff bought the property and they decided to continue with the tenancy. However, on 9/7/2014 the tenants were evicted from the property by agents of 1st defendant. Thereafter, the agent of 1st defendant kept on harassing the plaintiff, who then decided to file this case.

The prayers sought by plaintiff are:

- a) A declaration that the Plaintiff is the only lawful and registered proprietor of the Property known as L.R No. 209/2252/6 and that the said parcel of land is private property.

- b) An injunction to restrain the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants by themselves, their agents, servants and/or employees from entering, remaining upon, trespassing, disposing, alienation, encumbering, charging, interfering, transferring or in any way howsoever dealing with all that Property know as L.R No. 209/2252/6.
- c) An order directing the Officer Commanding Station, Parklands Police Station to assist the Plaintiff in enforcement of the order sought in prayer (b) above.
- d) In the alternative to prayer (c) above, an order directing the Officer Commanding Station, Parklands Police Station, to supervise the enforcement of the order sought in prayer (b) above.
- e) Exemplary and general damages for the wanton destruction of property by the 1st Defendant.
- f) General Damages for trespass by the 1st and 7th Defendants
- g) Costs of and incidental to this suit on a full indemnity basis plus interest thereon.
- h) Any other or further relief that this Honorable Court may deem fit and just to grant in the circumstances.

In the defence filed by 1st Defendant, it is averred that the purported Certificate of Title in favour of the Plaintiff is irregular, and was issued through unauthorized allocation and/or grabbing of public land and hence invalid.

1st defendant further states that the suit land still remains public property.

It is also pleaded by 1st defendant that subsequent to the unlawful acquisition of the suit property by the Plaintiff, the plaintiff has moved to make developments on the suit property without first seeking the relevant approvals as is required by law.

For the 2nd to 8th Defendants, service of summons had been effected by way of advertisement pursuant to a court order of 9/9/14. A return of service filed on 22/9/14 plus a Daily Nation Newspaper cutting of 12/9/14 confirms that indeed service was effected, upon 2nd to 8th Defendants.

Meanwhile plaintiff had filed an application for injunction on 1/9/14, praying for orders restraining the defendants or their agents from entering and remaining on the suit land or in any way alienating the suit property. On 23/9/14 Counsel for plaintiff and 1st defendant agreed to have the application dealt with by way of maintaining status quo and for the parties to comply with pre-trial conferences procedures for purposes of having a full trial. Parties were given 21 days to comply. This order kept on being extended over quite a long period.

By 23/5/16 only plaintiff's side had fully complied. The 8th defendant was represented by a Miss Kirua who requested for more time to comply. The court gave 1st and 8th defendants 21 days to comply failure to which the matter could be set down for hearing.

That positioned remained the same as at the time I was handling the file about a year later on 29/3/17. The 1st defendant despite having filed a defence never appeared though service had been effected.

A Miss Njuguna appeared for 8th defendant and requested for their defence case to be deferred to another date. The court gave directions for plaintiff's case to proceed but the defence of 8th defendant to be adduced on another date. Hearing was scheduled at 10.45 am on 29/3/17 for plaintiff's case. Come 10.45am and there was no appearance for 8th defendants counsel but she made her appearance in the course of the trial. Plaintiff's case was heard and closed on 29/3/2017.

Defence hearing was put off to 18/5/17 and the court directed plaintiff to serve 1st defendant too. On 18/5/17 Miss Mwai, counsel for 1st defendant did appear in the morning. The court gave directions for defence hearing to start at 9.40 am. However, at 9.40am the said defence counsel had disappeared. There was also no appearance for 8th defendant. The court marked defence case as closed.

PLAINTIFF'S CASE

PW1, Bhavin Ramji Gudka told the court that he is one of the directors of the plaintiff. He relied on his statement filed in court on 29/8/14 as his evidence in chief. He also produced the documents in the plaintiff's bundle of documents as Exhibits 1-5. He gave the historical background of how the land was acquired. Pw1 states that Mr. K.R. Gudka and Mr, A.R.Gudka bought the suit property at a public auction in year 2002 and the two acquired title to the property on 30/10/2003. The two individuals in turn transferred the property to plaintiff with registration to that effect being effected on 28/5/2014. Plaintiff has faithfully been paying the land rates. Pw1 further stated that on 9/7/14, agents of 1st defendant descended on the suit property causing a lot of destruction as is evident from the photographs produced as exhibits 15.

It is averred that between 21/7/14 to 30/7/14 the agents of 1st defendant along with Administration Police Officers remained on the suit property. The actual nature and extent of the harassment occasioned by 1st defendants' agent is captured in paragraph 8 to 10 of the statement of PW1.

DETERMINATION

The issues for determination are summarized as follows;

- 1) Whether the plaintiff is the rightful owner of the suit property.
- 2) Whether the prayer for permanent injunction is meritorious.
- 3) Whether plaintiff is entitled to damages.

Ownership of the suit property

As rightfully submitted by the plaintiff, the right to own property is anchored under article 40 of the Constitution; ***“Every person has the right either individually or in association with others to acquire and own property.”***

Further, S.26 of the Land Registration Act stipulates that:

“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, 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, un- procedurally or through a corrupt scheme”.**

The document produced as Plaintiff Exhibit 3 is a Certificate of Title under the now repealed Registration of Titles Act (Cap 281). The lease hold is for a term of 99 years from 1978. Plaintiff became the registered owner of the property on 28/5/14. It is the view of this court that plaintiff's rights of proprietorship in the suit property crystallized upon registration. No evidence has been adduced to

challenge the legality of this registration.

In Kepha Maabe & 365 others vs Benson I. Mwangi and City Council of Nairobi Civil Appeal No. 8/2004 (Waki, Karanja and Ouko JJA), the court was dealing with a case where the Nairobi City Council had failed or was reluctant to produce particular documents, namely the original grant from the Government of Kenya and approved survey plans which were in its possession. The court went ahead to state that; ***“The irresistible presumption is that if they were produced they would have been adverse to its case.”***

The logical conclusion to make herein is that the evidence in possession of 1st defendant with regard to the suit property could have been adverse to their case and it is no wonder that the 1st defendant became evasive when it was their turn to defend the suit.

I therefore conclude that plaintiff is the rightful and lawful registered owner of the suit property.

Is the prayer for a permanent injunction merited?

Having established that plaintiff is the absolute and indefeasible owner of the suit land, then it is incumbent upon this court to give orders ensuring that plaintiff's rights under article 40 of the Constitution are **observed, protected** and **respected**. The prayer for the permanent injunction is the appropriate order in the circumstances.

is plaintiff entitled to damages?

The evidence of PW1 paints a very grim picture of how ruthless 1st defendant was as from 9/7/14. 1st defendant's agents not only destroyed property of plaintiff's tenant's, but they even attacked plaintiff's employees. The photographs produced as Plaintiff Exhibit 1- 15 are quite graphic. They depict the viciousness that was meted upon the occupants of the suit property. One of the photographs (No. 34) is a sign placed reading as follows: ***“ONYO! WARNINGS! This property belongs to Nairobi City County. No Trespass!”***

It is apparent that 1st defendant was the master mind of the invasion upon plaintiff's property.

Plaintiff avers that when the harassment continued, police did take action and arrested 2 -7 defendants who were then charged.

It is rather surprising that the zeal exhibited by 1st defendant and its agents before the trial, disappeared after the suit was filed. What happened? Why didn't 1st defendant proceed to defend the claim after filing a very elaborate defence?

In the present case it appears that 1st defendant had shied off from adducing evidence. This is not surprising, seeing that what the 1st defendant and its agent had done prior to the trial was too damaging and too horrendous.

I find that plaintiff is entitled to damages as against 1st to 7th defendant. As for 8th defendant, there is no evidence to indicate that it in any way participated in the invasion that was occasioned upon plaintiff's property. However, in light of 1st defendant's claim that the suit land was public land, then 8th defendant ought to have given its stand on the matter, pursuant to its constitutional mandate.

Under Article 21 of the Constitution ***“It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the Rights and fundamental freedoms in the Bill of Rights.”*** 8th defendant has exhibited a very lackluster attitude in this matter ,yet It was represented by an advocate. This court even gave this defendant (National Land Commission) sufficient time to put its house in order by postponing defence case to another date after plaintiff's case had been closed. It was

incumbent upon 8th defendant to give its views on the claim by 1st defendant that the suit property was public land. 8th defendant is therefore not blameless but will not be condemned to pay damages to the plaintiff.

No assessment has been availed regarding the computation of the loss. However, plaintiff has claimed damages to the tune of Kshs. 2, 500,000 citing the cases of Arnachestry Limited vs Attorney General (2014) e KLR where an award of Kshs. 3,000,000 was given and the case of Simon Ndungu Mungai & Anor. Vs. Municipal Council of Kiambu (2011) e KLR where Kshs. 2,000,000 was awarded in respect of violation of the right under article 40 of the Constitution.

Having regard to the nature and extent of the invasion on the Suitland and the destruction occasioned thereof, I do find that the cited figure of sh. 2,500 000 is reasonable in the circumstances.

Conclusion.

I hereby enter Judgment for the plaintiff against the defendants in the following terms;

(a) A declaration is hereby issued that the Plaintiff is the lawful and registered proprietor of the Property known as L.R No. 209/2252/6 and that the said parcel of land is private property.

(b) An injunction is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants by themselves, their agents, servants and/or employees from entering, remaining upon, trespassing, disposing, alienation, encumbering, charging, interfering, transferring or in any way whatsoever, dealing with all that Property known as L.R No. 209/2252/6.

(c) An order is issued directing the Officer Commanding Station, Parklands Police Station to assist the Plaintiff in enforcement of the order sought in prayer (b) above.

(d) General Damages are awarded to the p[plaintiff as against the 1st to 7th defendants jointly and severally to the tune of Kshs. 2,500 000.

(e) Plaintiff is awarded costs of the suit as against all the defendants.

(f) Plaintiff is awarded interest thereon at courts rates on the award of damages as against 1st to 7th defendants.

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

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

1. Mr. Nyamburi for Plaintiff

2. Mr. Ndulo H/B for Mr. Koseo for 1st Defendant