



REPUBLIC OF KENYA



Gachuhi v Mzee; Nyakundi (Interested Party) (Environment & Land Case 119 of 2013) [2024] KEELC 915 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 119 OF 2013
EO OBAGA, J
FEBRUARY 22, 2024**

BETWEEN

LILIAN WAITHERA GACHUHI PLAINTIFF

AND

DAVID SHIKUKU MZEE DEFENDANT

AND

WILSON NYABERI NYAKUNDI INTERESTED PARTY

JUDGMENT

Introduction

1. By an amended Plaint dated 5th February, 2018, the Plaintiff sought for the following reliefs against the defendant;
 - a. A declaration that Defendant is a trespasser on land Parcel Number Eldoret Municipality Block 11/610.
 - b. An eviction order directing the Defendant's immediate eviction from land Parcel number Eldoret/Municipality block 11/610.
 - c. General damages for trespass.
 - d. Costs of the suit.
 - e. Interest on (c) and (d).

Plaintiff's Case;

2. The Plaintiff testified that Land reference number Eldoret Municipality Block 11/610 was originally known as Plot 436 before title was issued (suit property). The suit property had been allotted to Wilson



Nyaberi Nyakundi the Interested Party herein. The Interested Party was in the process of selling the suit property to her husband David Gichuhi who unfortunately died before completion of the process.

3. The Plaintiff then took over the transaction, entered into a sale agreement with the Interested Party for purchase of the suit property at a consideration of Kshs.70,000. The Interested Party applied to the defunct Municipal Council of Eldoret for transfer of the suit property into the Plaintiff's name. The Application was allowed and the suit property was transferred to the Plaintiff.
4. The Interested Party handed over the allotment letter together with receipts for payment of the stand premium and other required monies. The Plaintiff then embarked on the process of obtaining title. She obtained certificate of lease on 12.8.1997. An application for building approval from Municipal Council of Eldoret had been made on 28.6.1990.
5. In 1992 there were tribal clashes which forced her to move to Naivasha. She later came back only to find that the Defendant had trespassed on to the suit property where he erected structures. The Defendant is in the suit property despite the fact that he owns Land reference number Eldoret Municipality Block 11/609 which was originally known as Plot 435.
6. The Plaintiff testified further that as late as 13th September, 2017, the County government of Uasin Gishu which is the Successor of Municipal Council of Eldoret wrote a letter to the Plaintiff's Advocate confirming that the suit property was originally allotted to the Interested Party who sold it to the Plaintiff.

Defendant's Case;

7. The Defendant testified that he purchased Plot No.B11/609 from Debla Masinza for a sum of Kshs.60,000 on 5th August, 1998. The purchase price was later changed to Kshs.120,000. The Defendant denied that the Interested Party was ever allotted Plot No.536 and therefore he had nothing to sell to the Plaintiff.
8. The Defendant claimed that the title of the Plaintiff was obtained fraudulently and that the suit property does not exist on the ground. He denied ever trespassing on to the suit property and that he has confined himself to the boundaries of Eldoret Municipality Block 11/609.

Interested Party's Case;

9. The Interested Party testified in support of the Plaintiff's case. He stated that the suit property was allotted to him. He later sold it to the Plaintiff at a sum of Kshs.70,000. He applied to Municipal Council of Eldoret for approval of transfer of the suit property to the Plaintiff.
10. The Municipal Council of Eldoret convened a meeting where approval of transfer was allowed. The suit property was transferred to the Plaintiff who pursued title which she obtained. He denied ever changing the area map to show that Plot 536 existed as he had no power to do so.

Plaintiff's Submissions;

11. The Plaintiff submitted that she purchased the suit property from the Interested Party in a regular manner and proceeded to obtain title in a lawful manner. The Plaintiff submitted that the Defendant had failed to adduce credible evidence to prove that he bought the property which he alleges to be the suit property from Debla Masinza. She stated that the Defendant's own documents show that he paid a total of Kshs.139,000 for the property he purports to have purchased.



12. The Defendant never called any witness to confirm the alleged sale. The Defendant had sued Debla Masinza in Eldoret HCCC No.1542 of 1999 David Shikuku Mzee –Vs- Debla Masinza and 2 others over Plot No.B11/609. She submitted that in the Defendant’s own bundle of documents dated 11th April 2018, the author of the letter in paragraph 3 admits that the property belongs to Debla Masinza.
13. The Plaintiff submitted that as the Defendant failed to call any witness from the side of Debla Masinza, the court should make an adverse inference that if he called witness from Debla Masinza’s side, the evidence would have not been favourable to his case. The Plaintiff relied on Section 112 of the Evidence Act Cap 80 Laws of Kenya which provides as follows;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

14. The Plaintiff further submitted that the Defendant alleged that Debla Masinza had paid Kshs.1000 for the allotment letter dated 24th June, 1986. There was no evidence adduced to prove that this amount was paid. The Plaintiff relied on the Supreme Court Decision in the case of Torino Enterprises Limited – Vs- Attorney General (Petition 5(E006) of 2022 KESC 79 KLR 22nd September, 2023 where the Supreme Court stated as follows;

“.....so can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land being nothing more than an offer, awaiting fulfillment of conditions stipulated therein”.

15. The Plaintiff further relied on the case of Dr.Joseph Arap Ng’ok –Vs- Justice Moijo Keiwua & 4 Others and Gladys Wanjiru Ngacha –Vs- Teresa Chepsaat & 4 Others (2008) eKLR where the Superior Courts held that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all.
16. The Plaintiff went on to submit that the Defendant had failed to prove the allegations of fraud attributed to the Plaintiff and further that a temporary letter of allotment cannot defeat the interest of a registered proprietor. She relied on the case of Jaj Suter Power Cash and Carry Limited –Vs- Nairobi City Council & Others Civil Appeal No.11 of 2012 where it was held as follows;

“It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or a policy change by Parliament, to uphold the rights of a temporary allottee of land or trespasser, over those of a registered proprietor”.

Interested Party’s Submissions

17. The Interested Party submitted that the Plaintiff had proved that she obtained title to the suit property regularly and that the Defendant purchased land from Debla Masinza who only had an allotment letter and there was no evidence whether she met the conditions stipulated in the allotment letter. The Interested Party relied on the case of Isaac Gathungu Wanjohi & Another –Vs- Attorney General and 6 Others (2012) eKLR where it was stated as follows;

“I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah & 2 Others –Vs- City council of Nairobi & another (Supra) where the Court stated as follows;

“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where



it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest’.

18. The Interested Party also submitted that the Defendant had not proved the allegations of fraud attributed to the plaintiff. The Interested Party relied on the case of Kuria Kiarie & 2 Others –Vs- Sammy Magera (2018) eKLR where the Court of Appeal stated as follows;

The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –Vs- Nansingh Madhusingh Darbar& Another (2000)KLR, where Tunoi, JA (as he then was) stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”. (Emphasis added).

Defendant’s Submissions;

19. The Defendant submitted that no one could own a Plot unless his or her name was on the original list of allottees. He submitted that the name of the Interested Party was not on the list and as such he had nothing to sell to the Plaintiff. He submitted that Debla Masinza was allotted Plot number 435 which comprised Plot No. Eldoret Municipality Block 11/609 and 610. He stated that Plot No.435 was illegally subdivided to create parcel No. Eldoret Municipality Block 11/610 which was then allotted to the Interested Party who was an employee of the Municipal Council of Eldoret.
20. The Defendant submitted that he has all along been in possession of the suit property and that it is not true as the Plaintiff claims that she fled the tribal clashes of 1992 only to return and find him occupying her land. The Defendant further submitted that the Plaintiff’s title is not protected under Article 40(6) of *the Constitution* as the same has been proved to have been acquired fraudulently. The Defendant further submitted that the Plots were being given to squatters who had already settled on the land and that the Interested Party was not one of the squatters.
21. The Defendant relied in the case of Dina Management Limited –Vs- County Government of Mombasa & 5 Others (Petition 8(E010) of 2021 (2023 KESC 30(KLR) (21st April, 2023) where the Supreme Court stated as follows;

“...Indeed the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...

Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired..”

22. The Defendant also relied on the case of Funzi Development Limited and Others –Vs- County Council of Kwale (2014) eKLR where the Court of Appeal stated as follows;

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility



of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title”.

Analysis and Determination

23. I have carefully considered the evidence adduced by the plaintiff, the Interested Party and the Defendant. I have also considered the submissions by the parties. The parties herein filed agreed issues on 21st July, 2003. They are 21 in number but the same can be condensed to the following issues;
1. Whether or not the Plaintiff was procedurally registered as proprietor of Eldoret Municipality Block 11/610.
 2. Whether the Defendant purchased plot No.435 which comprises Plot No. Eldoret Municipality Block 11/609 and 610.
 3. Whether Plot No. Eldoret Municipality Block 11/610 exists on the ground.
 4. Whether the Defendant is a trespasser on Plot Eldoret Municipality Block 11/610
 5. Is the Plaintiff entitled to the reliefs sought in the plaint?
 6. Who is to pay costs of the suit?

Whether or not the Plaintiff was procedurally registered as proprietor of Eldoret Municipality Block 11/610

24. Evidence on record shows that the suit property which was originally known as Plot No.436 was allotted to Wislon Nyaberi Nyakundi. The allotment was produced as Plaintiff exhibit 2. Mr. Nyakundi paid all the required amounts as stipulated in the letter of allotment. These receipts were produced as Plaintiff exhibit 5.
25. Mr. Nyakundi began the process of selling the suit property to the husband of the Plaintiff but before the process could go far, the Plaintiff's husband died in a road traffic accident. Mr. Nyakundi then entered into a sale agreement with the Plaintiff. The sale agreement was produced as Plaintiff exhibit 1.
26. Mr. Nyakundi who is the Interested Party applied to Municipal Council of Eldoret to transfer the suit property to the Plaintiff. The request was placed before the Council which deliberated on it and approval was granted. The minutes of the Council approving transfer were produced as Plaintiff exhibit 7. The Council gave its consent to transfer vide letter dated 9th July, 1997 which was produced as Plaintiff exhibit 6.
27. The Plaintiff then proceeded to sign a lease with Municipal Council of Eldoret on 5th August, 1997. The lease was produced as Plaintiff exhibit 8. A certificate of lease in the Plaintiff's name was produced as Plaintiff exhibit 9. The certificate of lease was issued on 12th August, 1997. The County Government of Uasin Gishu wrote a letter dated 13th September, 2017 stating the history of the suit property confirming that the Plaintiff was the legal and rightful owner of the suit property. This letter was produced as Plaintiff exhibit 13.
28. The Defendant enumerated particulars of alleged fraud on the part of the Plaintiff. He did not prove any of those particulars of fraud in his evidence. He produced a list of allottees for both the Kipkaren Scheme and old Uganda road Plots. According to the list Plot No. 435 which he claims to have purchased from Debla Masinza is in the name of Florence Midega. Plot No.436 which is the suit property is under the name of Jackson N. Terah. Debra Masinza appears in Number 278. The Defendant cannot therefore be heard to argue that the name of the Interested Party, does not appear



on the list. If this is his argument, then one can equally ask how come he purchased Plot No.435 from Debla Masinza when that Plot did not belong to Debla Masinza but to Florence Midega.

29. The Defendant did not call anyone from the County Government to come and clarify on the said number and particularly how Debla Masinza who appeared at number 278 turned out to be number 435. It is the Municipal Council of Eldoret who had the final list and the County Government of Uasin Gishu who are the Successors of the Municipal council of Eldoret has confirmed that Plot No.436 was allotted to the Interested Party who sold it to the Plaintiff who proceeded to obtain certificate of lease.
30. The procedure which was followed was lawful and as per the procedure stated in the case of Dr. Joseph Ng'ok (Supra). The Plaintiff having shown that the process through which she was registered was above board and the Defendant having failed to prove any fraud attributed to the Plaintiff, I find that the Plaintiff was procedurally registered as owner of the suit property.

Whether the Defendant purchased Plot No.435 which comprises Plot No. Eldoret Municipality Block 11/609 and 610

31. It is the Defendant's contention that plot No.435 encompasses Plot Eldoret Municipality Block 11/609 and 610. He did not adduce any evidence to show that Plot No.435 encompasses Plot Eldoret Municipality Block 11/609 and 610. The Defendant's evidence is contradictory. Initially he claimed that he purchased half of plot No.435 from Debla Masinza at Kshs.60,000. The Defendant produced an agreement dated 5th October, 1998 as defence exhibit 1. In this agreement, the Defendant purchased a plot measuring 30x90. This is the plot described as B11/609.
32. In an affidavit which the Defendant swore on 17th September, 2003, he deponed in paragraph 12 that in 1998 he bought half of Plot No.435. There is evidence that Debla Masinza and the Interested Party had problems over encroachment of the suit property. The dispute was arbitrated by officers from the Municipal Council of Eldoret and it was agreed that Debla Masinza removes building stones which she had accumulated on plot 436 which is the suit property. The letter confirming this was produced as Plaintiff exhibit 16.
33. The Defendant cannot therefore turn around and claim that he purchased the entire plot No.435 which encompassed plot number Eldoret Municipality Block 11/609 and 610. The agreement which he signed with Debla Masinza is clear that he was purchasing Plot B11/609. The scheme to lay claim over the suit property started in 1999 when the Defendant signed an acknowledgement agreement with the son of Debla Masinza which indicated that the purchase price had changed from Kshs.60,000 to Kshs.120,000. It is not possible that the price of the purchased land will double in a year. The Defendant had conspired with Debla Masinza's son to take over the Plot owned by the Interested Party.

Whether Plot No.Eldoret Municipality Block 11/610 exists on the ground

34. The Plaintiff produced a Registry index map as Plaintiff exhibit 15. This Registry Index Map clearly shows that Plot 435 and 436 exist on the ground and are adjacent to each other. The Defendant claimed that Plot 436 was illegally created out of Plot 435. He did not adduce any evidence to prove his allegations. The Plaintiff or the Interested Party were not in a position to influence change of map or draw one. The Defendant in an affidavit sworn on 17th September, 2003 denied that he had trespassed on to plot 436. He stated that it is Debla Masinza who had trespassed on to plot 436 and put up permanent buildings. This clearly shows that plot 435 and 436 which became Eldoret Municipality Block 609 and 610 respectively are distinct plots and they both exist on the ground.



Whether the Defendant is a trespasser on Eldoret Municipality Block 11/610

35. As I have said hereinabove, the Plaintiff's defence is contradictory. At one stage, he claims that plot No. Eldoret Municipality Block 11/609 and 610 are one and the same and that he is occupying both plots. At another stage he claims that he is confining himself to plot No. Eldoret Municipality Block 11/609. The evidence adduced by the Plaintiff is that the Defendant is occupying both Eldoret Municipality Block 11/609 which belongs to him as well as Eldoret Municipality Block 11/610 which belongs to the Plaintiff.
36. The Plaintiff produced a bundle of photographs showing structures on the suit property. The Defendant did not dispute the fact that the photographs were taken from the suit property. It is the Defendant who is in occupation of the suit property. The Plaintiff has demonstrated that she has title to the suit property. She cannot access her property which is occupied by the Defendant. The photographs were produced as Plaintiff exhibit 14.
37. The Plaintiff's advocate wrote a demand letter to the Defendant (Plaintiff exhibit 10) asking the Defendant to vacate from the suit property. The Defendant's lawyer wrote back two letters in response to the demand letter (Plaintiff exhibit 11(a) and (b)) asking for proof of ownership documents by the Plaintiff. In one of the letters Plaintiff exhibit 11(b), the Defendant's lawyer intimated that the Plaintiff was harassing the Defendant's tenants. This is proof that the Defendant is the one who put up the structures on the suit property. The Defendant is therefore a trespasser as he has no title to the suit property.
38. The Defendant's lawyer was given a copy of the title to the suit property vide letter dated 2nd January, 2002 (Plaintiff exhibit 12(a)). The Defendant during hearing stated that he had not collected title for Eldoret Municipality Block 11/609 as there is an ongoing case. It is clear that the Defendant is a trespasser on the suit property.

Whether the Plaintiff is entitled to the reliefs in the Plaint;

39. I have demonstrated hereinabove that the Defendant is a trespasser on the suit property. The Plaintiff is seeking general damages for trespass. In the case of *Kimutai Tunoi Leonard -vs- Samuel Cheboi* (2017) eKLR Lady Justice Dr. Odeny stated as follows:

“Having determined that the Defendant is a trespasser, it follows that he should pay damages. It is trite law that trespass to land is actionable per se and therefore once it is proved, the Plaintiff is under no duty to prove that he had suffered any specific damage or loss. It is incumbent upon the Court to assess the reasonable damages to be awarded to the Plaintiff.

The Court can take into account amongst other factors the length of time of illegal occupation, the nature of the trespass and whatever the trespasser was doing on the land. It should be noted that the award of general damages is at the discretion of the Court which must be exercised judiciously”.
40. I notice from the photographs that the structures on the suit property are temporary structures. The Defendant has kept the Plaintiff out of her property for over two decades. The Defendant has been earning rental income from the suit property. Had the Plaintiff developed the suit property, she could be earning rental income. I find that the plaintiff is entitled to general damages. Considering the location of the property and the length of occupation by the Defendant, I assess general damages in the sum of Kshs.2,000,000 (two million shillings).



Disposition

41. From the above analysis, it is clear that the Plaintiff has proved her case on a balance of probabilities. I enter judgment for her against the Defendant as follows;
- a. A declaration is hereby given that the Defendant is a trespasser on land parcel No. Eldoret Municipality Block 11/610.
 - b. An eviction order is hereby given directing the Defendant to vacate from Eldoret Municipality Block 11/610 within 60 days failing which he should be evicted without any further recourse to court for an eviction order.
 - c. The Plaintiff is awarded general damages for trespass in the sum of Kshs.2,000,000 (two million).
 - d. Costs of this suit.
 - e. Interest on (c) and (d)

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 22ND DAY OF FEBRUARY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Rotich for Ms. Chesoo for Plaintiff

Defendant in person

Court Assistant –Laban

E. O. OBAGA

JUDGE

22nd FEBRUARY, 2024

