



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 292 OF 2011

MICHAEL ABUONJI.....PLAINTIFF

VERSUS

1. NAIROBI CITY COUNCIL

2. FRANCIS GICHOMO.....DEFENDANTS

JUDGMENT

In his plaint dated 29th April, 2011, the plaintiff averred that he was the beneficial owner of all that parcel of land known as Plot No. A27/19 UMOJA INNERCORE SECTION II INFILL (hereinafter referred to as “the suit property”). The plaintiff averred that he purchased the suit property from one, Barrack Juma Shimunya on 20th December, 2009 at a consideration of Kshs. 400,000/-. The said Barrack Juma Shimunya is said to have purchased the suit property from one, Jacob Opar Omali who was the registered owner thereof on 13th August, 2009. The plaintiff averred that the suit property was allocated to the said Jacob Opar Omali by the 1st defendant to hold for a term of 99 years with effect from 14th October, 2002.

The plaintiff averred that after purchasing the suit property as aforesaid, he took possession of the same and commenced construction of a residential house thereon using a building plan which was approved by the 1st defendant. The plaintiff averred that on or about 3rd January, 2011, the defendants entered the suit property and destroyed a house he was constructing thereon.

The plaintiff averred that the demolition of the structure he had put up on the suit property was carried out illegally by the 1st defendant in collusion with the 2nd defendant who had an intention of grabbing the said property from the plaintiff. The plaintiff averred that as a result of the illegal demolition of its structure on the suit property, he suffered special damages in the sum of Kshs. 700,000/- and general damages.

The plaintiff sought judgment against the defendants for, a permanent injunction restraining the defendants from trespassing on, constructing on, transferring, disposing of, alienating, demolishing, wasting or in any manner interfering with the suit property, a declaration that the plaintiff is the beneficial owner of the suit property, an order compelling the defendants to transfer the suit property to the plaintiff, special damages in the sum of Kshs. 700,000/-, general damages and cost of the suit.

The 1st defendant entered appearance and filed a statement of defence on 25th October, 2011. The 1st defendant denied the plaintiff’s claim in its entirety. The 1st defendant denied that it allocated the suit property to Jacob Opar Omali. The 1st defendant averred that the plaintiff acquired the suit property from a person who had no interest in the same that he could pass to the plaintiff. The 1st defendant denied that

it was involved in the demolition of the plaintiff's structure on the suit property. The 1st defendant averred that if the plaintiff's structure on the suit property was demolished, the demolition was as a result of the plaintiff's act of carrying out development on a property in respect of which he had no title.

On its part, the 2nd defendant filed a defence and counter-claim against the plaintiff on 13th November, 2012. In its defence to the plaintiff's claim, the 2nd defendant averred that the suit property was part of a larger parcel of land known as CF.27 UMOJA INNERCORE SECTOR I (hereinafter referred to as "Plot No. CF.27") that was allocated to the 2nd defendant by the 1st defendant for the construction of a nursery school. The 2nd defendant denied that it was involved in the demolition of the plaintiff's structure on the suit property. The 2nd defendant averred that the said structure was demolished by the 1st defendant because the same was put up illegally. In his counter-claim, the 2nd defendant averred that the plaintiff had trespassed on Plot No. CF.27 and prevented him from developing the same. The 1st defendant averred that as a result of the plaintiff's said act of trespass, he had suffered loss and damage.

At the trial, the plaintiff stated as follows. He purchased the suit property from Barack Juma Shimunya ("Juma") in 2009 at a consideration of Kshs. 400,000/-. Juma had purchased the property from Jacob Opar Omali ("Opar"). Opar had furnished Juma with all documents of title which included the letter of allotment, beacon certificate, a demand for payment of plot allocation dues, receipt for the payment of stand premium, receipt for payment of survey fees and receipt for payment of ground rent. The defendants demolished the house which he had put up on the suit property whose stage of construction had reached lintel level. He spent Kshs. 700,000/- to put up the said house. He incurred damages which he was claiming from the defendants. He also wanted the court to stop the defendants from interfering with him when he resumes construction on the suit property.

The plaintiff's first witness was Barack Juma Shimunya (Juma) (PW2). PW2 told the court that he was the one who sold the suit property to the plaintiff. He stated that he had purchased the suit property from Jacob Opar Omali (Opar) who was the original allottee of the said property. He stated that Opar gave him the allotment letter, clearance letter and receipts for all the payments that he had made to the 1st defendant. He in turn handed over these documents to the plaintiff when he sold the suit property to him.

The plaintiff's second witness was Joseph Kakuli Muli (PW3). PW3 adopted his witness statement dated 25th January, 2011 as his evidence in chief. In the said statement, PW3 stated that on 3rd January, 2011 at around 12.30p.m, he heard a commotion in his neighbourhood. When he approached the location of the commotion, he saw a bulldozer and two vehicles belonging to the 1st defendant heading towards the direction of two houses which were under construction. He stated that when the said vehicles and the bulldozer reached the location of the said buildings, the bulldozer started knocking down the said buildings which had been built to the roof level. He stated that the said buildings were brought down after a few minutes.

The 1st defendant closed its case without calling evidence while the 2nd defendant gave evidence and did not call any witness. The 2nd defendant told the court that his parcel of land known as CF.27 UMOJA INNERCORE SECTOR 1 (Plot No. CF.27) was illegally subdivided into three (3) portions. In December, 2011, he found the plaintiff's contractor putting up a house on one of the portions of land that resulted from the said illegal subdivision of Plot No. CF.27. When he met the said contractor, he had only built three (3) courses from the ground. The 2nd defendant stated that the building was barely off the ground. He stated that after he showed the said contractor his documents of title to the said parcel of land, the said contractor demolished the structure that he was putting up and carried away the debris. He stated that the plaintiff had conceded that he (2nd defendant) was the owner of the suit property and as at the time the demolition complained of took place, the plaintiff had no building on the suit property.

He stated that the person who had a building on Plot No. CF.27 and whose building had reached lintel level was one, Dishon Gitau Mburu. He stated that it was the said Dishon Gitau Mburu's building which was demolished. The 2nd defendant stated that Dishon Gitau Mburu had also filed a suit against him which suit was pending determination. He denied that he was present when the demolition exercise was

being carried out by the 1st defendant. He stated that the structure that was brought down by the 1st defendant was put up without approved plans. He stated that the contractor on site was arrested and charged for putting up an illegal structure. He gave the name of the contractor as Dismus Mutisya.

The parties did not agree on the issues for determination by the court. From the pleadings, the evidence tendered and the submissions on record, the following in my view are the issues which arise for determination in this suit:

1. Whether the plaintiff is the beneficial owner of the suit property?
2. Whether the defendants demolished the structure which the plaintiff had put up on the suit property?
3. Whether the suit property is a portion of Plot No. CF.27?
4. Whether the plaintiff trespassed on Plot No. CF.27 and commenced construction of a structure thereon?
5. Whether the plaintiff is entitled to the reliefs sought in the plaint?
6. Whether the 2nd defendant is entitled to the reliefs sought in the counter-claim?

The first issue:

From the evidence on record, I am satisfied that the suit property was allocated to Jacob Opar Omali (Opar) by the 1st defendant on 14th October, 2002 and that Opar accepted the allotment and paid the requisite charges. I am also satisfied that Opar transferred his interest in the suit property to Barack Juma Shimunya (Juma) on 13th August, 2009 and that following an agreement for sale dated 20th December, 2009 between Juma and the plaintiff, Juma transferred his interest in the suit property to the plaintiff at a consideration of Kshs. 400,000/-. In its statement of defence, the 1st defendant has denied that it had allocated the suit property to Opar. At the trial, the plaintiff produced as exhibits 13 and 7 respectively the letter of allotment dated 14th October, 2002 and the Beacon Certificate dated 28th August, 2010 said to have been issued by the 1st defendant in favour of Opar. The plaintiff also produced as exhibits 14, 15 and 16 respectively receipts for the payments which were made to the 1st defendant by Opar on account of stand premium, survey fees and ground rent. The 1st defendant did not contest any of these receipts. The 1st defendant did not also produce any evidence at the trial in proof of its allegation that the allotment of the suit property to Opar was illegal and fraudulent. The 2nd defendant did not also place any material evidence before the court in rebuttal of the plaintiff's claim that the suit property was allocated by the 1st defendant to Opar from whom the plaintiff traces the root of his title. I am convinced from the evidence before me that the plaintiff is the beneficial owner of the suit property.

The second issue:

The plaintiff has placed evidence before the court that he prepared a building plan (Pexh.2) in the name of Opar which was approved by the 1st defendant for the development he intended to carry out on the suit property. The plaintiff also placed evidence showing that he did commence development on the suit property. At the trial there was no consensus as to the stage at which the plaintiff's construction had reached before it was brought down. The plaintiff and his witnesses contended that the building had reached lintel level before it was demolished while the 2nd defendant contended that the construction was barely off the ground when it was demolished. From the building inspection form (Pexh.21), the plaintiff had put up the ground floor slab and had commenced construction of the walls. The plaintiff had not started putting up the columns and had not reached the ring beam (lintel). From the foregoing, I am in agreement with the 2nd defendant that the stage of construction of the building which the plaintiff was putting up on the suit property was barely off the ground at the time the same was demolished. There was

no dispute that the structure that was put up by the plaintiff on the suit property was brought down. What was in dispute was the person who carried out the demolition. The plaintiff and his witnesses contended that the said structure was demolished by the 1st defendant in collusion with the 2nd defendant. The 2nd defendant denied any involvement in the destruction of the plaintiff's structure on the suit property. In his evidence, the 2nd defendant contended that the structure that was put up by the plaintiff on the suit property was demolished voluntarily by the plaintiff's own contractor after he met him and showed him his title over the suit property. The 2nd defendant contended further that the structure that was demolished by the 1st defendant did not belong to the plaintiff but to one, Dishon Gitau Mburu.

The plaintiff was not present when the building he was putting up on the suit property was demolished. He did not therefore give direct evidence on the issue. In his evidence in chief, he stated generally that the structure was demolished by the defendants. He denied that he voluntarily demolished the said structure. He stated that his contractor saw the 1st defendant's bulldozer demolishing the structure he had put up on the suit property and that the 2nd defendant's vehicle was also seen at the scene. The plaintiff did not call his contractor to give evidence. He instead called a neighbor, JOSEPH KAKULI MULI (PW3). PW3's evidence was that on 3rd January, 2011, he saw a bulldozer knocking down buildings which were under construction in his neighborhood which had reached lintel level. He stated that during the demolition, two vehicles belonging to the 1st defendant were at the scene of demolition. In addition, he saw another vehicle which belonged to the United Nations. The 2nd defendant admitted that he used to work for the United Nations at the material time but denied that he was present when the demolition took place. The 1st defendant did not give evidence in its defence. Having carefully considered the evidence on record and the circumstances under which the structure which the plaintiff had put up on the suit property was demolished, I am persuaded that the said structure was demolished by the 1st defendant. The 2nd defendant had claimed that the plaintiff and one, Dishon Gitau Mburu were carrying out construction on his parcel of land, Plot No. CF.27. The 2nd defendant lodged a complaint with the 1st defendant against what he termed as illegal development on his land by the plaintiff and the said Dishon Gitau Mburu.

The 1st defendant issued an enforcement notice(Dexh.1) to those who were carrying out development on Plot No. CF.27 to stop and to remove from the said plot the developments they had carried out thereon. It is not in dispute that the said notice was not complied with and that the 1st defendant came to the site to enforce the same. I can see no reason why the plaintiff would have taken the trouble of demolishing the building he had put up on the suit property in respect of which he claimed to have a valid claim. The evidence by PW3 that the demolitions were carried out under the watch of the 1st defendant was not controverted by the 1st defendant who tendered no evidence. I hold the 1st defendant responsible for the demolition of the plaintiff's structure which had been put up on the suit property. There is however no evidence linking the 2nd defendant directly to the said demolition.

The third issue:

The 2nd defendant has contended that he is the registered owner of Plot No. CF.27 and that the said parcel of land was subdivided illegally without the knowledge or approval of the 1st defendant into three (3) portions. The 2nd defendant has contended that the suit property is one of the portions of land that was illegally excised from Plot No. CF.27. In his plaint, the 2nd defendant contended that the documents of title held by the plaintiff in respect of the suit property are forgeries. The 2nd defendant did not provide the particulars of forgery alleged against the plaintiff in its statement of defence and counter-claim. In its statement of defence, the 1st defendant had also contended that the suit property was acquired illegally and fraudulently by the persons from whom the plaintiff obtained his title. In the particulars of fraud and illegality set out in paragraph 5 of the 1st defendant's statement of defence, the 1st defendant has alleged that the documents of title in respect of the suit property were obtained dishonestly from the 1st defendant. As I have stated above, the plaintiff placed sufficient evidence before the court showing that the suit property was allocated to Opar by the 1st defendant and that Opar accepted the allotment and made the requisite payments to the 1st defendant for the property. The letter of allotment, beacon

certificate and receipts for the various payments which were made by Opar to the 1st defendant in respect of the suit property were produced as exhibits. The plaintiff also produced as an exhibit the part development plan prepared by the 1st defendant pursuant to which the suit property was created. Also produced as an exhibit was an architectural plan drawn in the name of Opar and approved by the 1st defendant for the building that the plaintiff intended to put up on the suit property. Some of the receipts produced by the plaintiff in evidence show that the particulars of the suit property have been entered in the 1st defendant's integrated financial operations management system. There is no evidence before the court connecting the suit property with Plot No. CF.27 owned by the 2nd defendant. In his submission, the 2nd defendant admitted this fact. The 2nd defendant stated that *".....the 2nd defendant has provided sufficient and satisfactory evidence to demonstrate that UMOJA INNERCORE SECTION II INFILLS PLOT NO. A27/19(the suit property) and PLOT NO. CF.27 UMOJA INNERCORE SECTOR 1(Plot No. CF.27) are two different parcels of and thus not located in the same area."* The onus was upon the 2nd defendant to prove that the suit property was excised illegally and fraudulently from Plot No. CF.27 and for the 1st defendant to prove that the documents placed before the court by the plaintiff in proof of his interest in the suit property were forgeries.

There is no evidence before the court that the suit property was excised from Plot No. CF.27. There is also no evidence before the court showing that the 1st defendant did not allocate the suit property to Opar. The 1st defendant neither gave evidence nor made submissions. The letter of allotment in favour of Opar dated 14th October, 2002, the beacon certificate dated 23rd August, 2010 and receipts for the payments which were made by Opar for stand premium, survey fees and ground rent which were produced in evidence by the plaintiff were not challenged. There is no evidence of whatsoever nature that these documents were forged by the plaintiff Opar or Juma. The 2nd defendant's contention that the suit property is non-existent has no basis. The 1st defendant could not have entered the particulars of a non-existent parcel of land in its integrated financial management system. Furthermore, although the 2nd defendant has claimed that the suit property was created without 1st defendant's authority, there is no evidence in support of that contention. It is my finding that the suit property was created by the 1st defendant and that the same was allocated by the 1st defendant to Opar in the year 2002. It is also my finding that there is no proof that the suit property was excised from Plot No. CF.27. There is evidence that Plot No. CF.27 existed. There is also evidence that the said plot was allocated by the 1st defendant to the 2nd defendant on 22nd November, 1993 and that the 2nd defendant made the necessary payment for the stand premium and ground rent and was issued with a beacon certificate on 31st January, 1994. What is missing is the link between Plot No. CF.27 and the suit property. On the material before me, there is none.

The fourth issue:

As I have held above, Plot No. CF.27 and the suit property are separate and distinct. The plaintiff's contention is that he was in occupation of the suit property on which he was carrying out construction of a residential building. The 2nd defendant did not place any evidence before the court showing that the construction that was being carried out by the plaintiff was on Plot No. CF.27. The evidence placed before the court by the 2nd defendant relates to the construction that was being undertaken by one, Dishon Gitau Mburu on Plot No. A27/20 Umoja Innercore Sector II Infill in respect of which one, Dismus Mutisya was arrested and charged at the City Hall Court with the offence of erecting a building without approved plans. In the judgment that was made by the court in that case on 27th August, 2013, the court observed that there was no evidence that the construction that was being carried out by Dismus Mutisya on behalf of Dishon Gitau Mburu was on Plot No. CF.27 and not on Plot No. A27/20 Umoja Innercore Sector II Infill. Dismus Mutisya was acquitted accordingly of the said charge.

The plaintiff has placed before the court an architectural plan approved by the 1st defendant for a building which was to be put up on the suit property. The plaintiff has contended that that is the plan that he was using to construct a building on the suit property which building was brought down by the 1st defendant.

The burden of proving trespass on Plot No. CF.27 was upon the 2nd defendant. The 2nd defendant has failed to establish that the construction that was being carried out by the plaintiff was not on the suit property but on Plot No. CF.27. In the circumstances, there is no evidence on the basis of which this court can make a finding that the plaintiff trespassed on Plot No. CF.27.

The fifth issue:

From the findings which I have made above, I am satisfied that the plaintiff is entitled to some of the reliefs sought in the plaint. The first relief that was sought by the plaintiff is a permanent injunction against the defendants from interfering with the suit property. Having held that the plaintiff has a valid beneficial interest in the suit property and that the defendants had no valid reason for interfering with the said interest, I am of the view that the plaintiff is entitled to an injunction to prevent further interference with his quiet possession and enjoyment of the suit property. The second relief that was sought by the plaintiff was a declaration that he is the beneficial owner of the suit property. I have dealt with this issue when considering the first issue. The relief is merited. The plaintiff had also sought special and general damages. The law on special damages is that the same must not only be pleaded but must also be strictly proved. The plaintiff pleaded special damages but did not provide detailed particulars thereof. The plaintiff did not also prove how the sum of Kshs. 700,000/- which has been claimed as special damages was arrived at. The plaintiff placed before the court a number of receipts in the name of one, Mutisya. There was no evidence regarding the relationship between the plaintiff and the said Mutisya. Mutisya was not called as a witness to breathe life to the said receipts. The amount of money set out in the said receipts also exceeds Kshs.700,000/ which has been claimed by the plaintiff. It is my finding that special damages claimed by the plaintiff has not been proved.

I have already made a finding herein earlier that the building which the plaintiff was putting up on the suit property was demolished by the 1st defendant. The demolition was carried out following a complaint by the 2nd defendant. The 1st defendant did not provide any valid justification for its action. I did not also find any merit in the 2nd defendant's complaint that was lodged with the 1st defendant. It is my finding that the demolition of the said building amounted to an act of trespass for which the 1st defendant is liable to the plaintiff for damages. The plaintiff had also sought an order compelling the defendants to transfer the suit property to him. I am unable to grant this relief. The plaintiff was not the allottee of the suit property. The suit property was allotted by the 1st defendant to Opar. The plaintiff should get his title from Opar through Juma who sold the property to him. The 1st defendant has an obligation to issue a lease only to Opar. Once a lease is issued to Opar, Opar can thereafter transfer the lease to either Juma or the plaintiff as they may agree subject to the terms of the lease. This court cannot compel the 1st defendant to issue a title in respect of the suit property to a party to whom the property was not allocated.

The sixth issue:

From what I have stated above, the reliefs sought by the 2nd defendant cannot be granted. The 2nd defendant has failed to prove that the suit property is non-existent. The 2nd defendant has also failed to prove that the plaintiff had trespassed on Plot No. CF.27. The damages claimed by the 2nd defendant against the plaintiff was also not proved.

Conclusion:

In conclusion, it is my finding that the plaintiff has partially proved his case against the defendants. On the other hand, I find no merit in the 2nd defendant's counter-claim which I hereby dismiss. I therefore enter judgment for the plaintiff against the defendants for:

1. A permanent injunction restraining the defendants from trespassing on, constructing on, transferring, disposing of, alienating, wasting or in any other manner interfering with the plaintiff's quiet possession of all that parcel of land known as Plot No. A27/19 UMOJA INNERCORE SECTION II INFILLS. The injunction shall however not prevent the 1st defendant from exercising

or enforcing its rights as a lessor of the said property or from enforcing any powers conferred upon it by law over the properties falling within its jurisdiction in relation to the suit property. The injunction shall also not relieve the plaintiff from the obligations owed by Opar to the 1st defendant under the letter of allotment dated 14th October, 2002.

2. A declaration that the plaintiff is the beneficial owner of Plot No. A27/19 UMOJA INNERCORE SECTION II INFILLS.

3. Kshs. 300,000/- being general damages for trespass payable by the 1st defendant.

4. Costs of the suit and the counter-claim.

Delivered and Signed at Nairobi this 8th day of December 2017

S. OKONG'O

JUDGE

Judgment delivered in open court in the presence of:

Mr. Okello for the Plaintiff

No appearance for the 1st Defendant

Ms. Macharia for the 2nd Defendant

Catherine Court Assistant