



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC. CASE NO. 2110 OF 2007

DOROTHY NJERI KAMAU..... PLAINTIFF

VERSUS

NELSON WARUINGI GITOGO1ST DEFENDANT

SIMON KAHURIA MBUGUA..... 2ND DEFENDANT

MUYA KABUTU..... 3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

This suit was commenced by Plaint dated 19th December 2006 which was later replaced with an Amended Plaint dated and filed on 5th December 2008 in which the Plaintiff sought for judgment to be entered in her favour as follows:

- a. A declaration that the title issued in favour of the 1st Defendant respecting Plot No. 40 was fraudulent and illegal.
- b. A declaration that Plot No. 40 now known as LR. No. 209/8363/40 is legally and lawfully the Plaintiff's.
- c. An order cancelling the title to LR No. 209/8363/40 in the name of the 1st Defendant and issue a new title in the name of the Plaintiff.
- d. The honourable court be pleased to issue any order it deems fit for the ends of justice
- e. Costs of this suit.

Plaintiff's Case

In her Amended Plaint, the Plaintiff stated that she is the wife of the late Charles Alexander Kamau and is the Administratrix of his estate and was suing on her own behalf and that of the other beneficiaries of her late husband's estate. She indicated that the first three Defendants are former group leaders of Ruaraka Riverside Bar after the former directors left, the 1st Defendant Nelson Waruingi Gitogo being the Chairman, the 2nd Defendant Simon Kahuria Mbugua the secretary and the 3rd Defendant Muya Kabutu the treasurer. She stated that she sued the 4th Defendant, the Attorney General in his capacity as the Chief Legal Adviser of the government of Kenya representing the Registrar of Titles. She further indicated that the subject of this suit is a plot of land under Grant No. 77203/2 now registered as Land Reference

Number 209/8363/40 measuring 0.0883 of a hectare situated at Baba Dogo area of Nairobi (hereinafter referred to as the “suit property”). She then stated that on 20th February 1974, she and her late husband purchased a plot of land from one John Karanja which was hived off from Land Reference Number 336/29 in the area commonly known as Baba Dogo area of Nairobi along Outering Road and were given a share certificate. She stated that the said share certificate was signed by the original owners and the then owners of Ruaraka Riverside Bar, an organization which owned and had physical possession of the said plot before subdivision. She averred further that they continued paying for the plot and were issued with several receipts on different dates as demanded by the said organization until the late 1980s when her late husband was away in Congo. She confirmed that her husband returned to Kenya and passed on in 1994 before they could complete paying for the plot. She averred further that the original plot owner who sold the plots to the Plaintiff and others were unable to process the titles as promised and the plot allottees decided to elect a committee among themselves to enable them pursue the issuance of titles and among these officials were the 1st to 3rd Defendants. She further indicated that the newly chosen persons requested for payment for various accounts such as rates, rent, drainage manhole covers, sewer, advocate fees, water inspection fees, survey fees and other utilities and such requests amounting to Kshs. 17,600/-. The Plaintiff further stated that after the death of her husband, she was not able to pay the money so demanded by the committee as she had other pressing responsibilities over her small children. She indicated that she fenced her plot in the year 1995 with barbed fence and posts which were subsequently stolen. She further stated that in 1997 she hired some people to dig the trench with a view to developing the plot upon which she was stopped on the ground that the plot belonged to someone else and she was a trespasser. She indicated that upon making further enquiry, she was informed that the plot belonged to one Mr. Nelson Warungi, the 1st Defendant. She confirmed having looked for the 1st Defendant who claimed to have purchased the plot from the original owners. She averred that the 1st Defendant and his committee fraudulently, illegally and unlawfully acquired her plot by getting a title issued in his favour. She averred that the Defendants conspired and colluded to deprive the Plaintiff her rightful ownership of the said plot. She set out the particulars of fraud as follows:

1. Using his position as a leader of the group to irregularly and illegally transfer unto himself plot No. 40.
2. Misusing the position so entrusted unto them by members of the public to unfairly and unjustly enrich themselves.
3. Using their leadership position to acquire other person’s property and more particularly, the Plaintiff’s.
4. Causing a title of plot no. 40 to be issued in his name.
5. Taking advantage of the Plaintiff’s lack of financial means and ability at the material time
6. Fraudulently obtaining false and fake documents to facilitate the issuance of a title document.
7. Making a claim that he bought the plot from persons undisclosed to the Plaintiff.

She further indicated that the 1st Defendant wrote through his lawyers offering to give back the plot to her on condition of payment of Kshs. 104,214/- over and above the alleged purchase price.

Defendants’ Cases

The 1st Defendant filed his Statement of Defence dated 7th February 2007 and filed on 9th February 2007 in which he stated that he is not called John Karanja and is not aware of the purported transaction between the said John Karanja and the Plaintiff. He stated that he purchased the suit property in 1995 from one John Kagai Gachenga and others who were the owners of a huge parcel of land in the Baba Dogo area. He admitted that the Plaintiff had spoken to him about her land problems but he could not assist much as he was just a purchaser like many other people who had bought land there. He denied the particulars of fraud listed by the Plaintiff and put her to strict proof thereof.

The 4th Defendant filed his Statement of Defence dated 1st December 2009 and filed on 2nd December 2009 in which he denied each and every particular of alleged fraud or illegality on his part set out in the Amended Plaintiff and further indicated that this suit discloses no reasonable cause of action against him. He further averred that the Plaintiff’s claim against him is statutorily barred by limitation **under section**

3(1) of the Limitation of Actions Act and that a preliminary objection to that effect would be raised at the hearing. He also averred that the Plaintiff's suit is incompetent for contravening the **mandatory provisions of section 13A of the Government Proceedings Act** as the purported notice of intention to sue was served on him after filing the suit and that the notice did not set out the facts on which it is alleged that the liability of the government or of any government officer has arisen.

The Evidence

Hearing of this suit commenced on 8th October 2013 when the Plaintiff, Dorothy Njeri Kamau (PW1), gave her evidence that she was a widow whose husband Charles Kamau passed on in 1994. She stated that her late husband purchased a plot of land being Plot No. 40 from one John Karanja by way of a share certificate from Ruaraka Riverside Bar. She produced receipts showing payments that they had made towards the purchase of the plot which receipts were in the name of her late husband. She testified further that as owners of the land, they elected their office bearers being the 1st Defendant Nelson Waruingi Gitogo being the Chairman, the 2nd Defendant Simon Kahuria Mbugua the secretary and the 3rd Defendant Muya Kabutu the treasurer. She further testified that her late husband did not get issued with a title deed for that plot and that after his death, she tried to follow up on the issuance of a title but was unsuccessful. She testified that the 1st Defendant claims ownership over Plot No. 40 who offered to sell the same to her at Kshs. 500,000/- which was the price he bought it for and an additional Kshs. 104,274/- which was the sum spent on the plot. She testified having approached the 1st Defendant again who offered to sell to her the plot at Kshs. 1 million which was the alleged market value of the plot at that time. She referred to a document containing a list of names and plot numbers which did not have her name or her late husband's name. She however stated that her Plot No. 14 is shown on that list as belonging to the 1st Defendant. She referred to a map of plots which she claimed as showing her plot as L.R. No. 209/8363/40 in respect of which the 1st Defendant holds a title deed. She claimed that her Plot No. 14 became L.R. No. 209/8363/40. Upon cross examination, the Plaintiff admitted that she has no sale agreement in respect of the purchase of her plot. She claimed to have a share certificate which she exhibited. She stated that her late husband was issued with a share certificate for

Plot No. 14. She stated that when the subdivision was done, Plot No. 14 was assigned No. 40. She testified further that the 2nd Defendant's Plot No. 15 was after subdivision assigned No. 36 and 26. She testified that she did not understand how the new numbers were assigned and that the numbers did not correspond. She also admitted that she had not produced any document to show that she had made any payments for L.R. No. 209/8363/40. She confirmed that the title to L.R. No. 209/8363/40 was in the name of the 1st Defendant and that she had not purchased that parcel from him. Upon cross-examination by the 4th Defendant, she confirmed that she had not presented any document to the Ministry of Lands for her to be issued with a title to her plot but stated that she sued the 4th Defendant as it was the one which issues title deeds. As to the delay in filing suit, she explained that no one had previously come to claim her plot.

On 1st July 2014, the Defence brought its witness being Nelson Waruingi Gitogo (DW1) who testified that the parcel of land known as L.R. No. 209/8363/40 belongs to him. He stated that he has a title to that parcel of land and produced a copy thereof to the court as his evidence in this suit. He stated that he bought that parcel of land from Chiengo and John Kagai who were the previous owners. He testified that his title was genuine and should not be cancelled as prayed by the Plaintiff. He stated that he does not know the organization referred to by the Plaintiff called

Ruaraka Riverside Bar. Upon cross-examination, he stated that he did not know the Plaintiff's late husband. He confirmed that as purchasers of land in the same area they formed Ruaraka Riverside Bar to develop the infrastructure. He further stated that they contributed to construct manholes, to connect water to each plot. He stated that he did not remember the land reference number of the larger parcel. He stated that the list produced by the Plaintiff showed that he had purchased 10 plots in the area and stated that he got title to those plots. He referred to the letter dated 12th January 1981 exhibited by the Plaintiff and confirmed that the name of the Plaintiff's late husband, Charles Kamau was on the list showing that he bought Plot No. 14 while his name appears as having purchased the 10 listed plots. He testified that he did

not know the relationship between Charles Kamau and the Plaintiff. He denied ever having been elected as an official but stated that the purchasers of plots in that area came together. He denied having taken over anyone's plot illegally as claimed by the Plaintiff. Upon re-examination, he stated that he paid all the sums required by the government for the title to be issued to him. He also stated that all the receipts produced by the Plaintiff show that payment was made for Plot No. 14 not Plot No. 40. He denied ever having been appointed the chairman of Ruaraka Riverside Bar.

Issues for Determination

1. What parcel of land is the subject matter of this suit
2. Who owns it?

Determination

The main document of ownership exhibited by the Plaintiff in claiming ownership over the disputed parcel of land is a Share Certificate No. 40 issued by Ruaraka Riverside Bar in the name of Mr. Charles A. Kamau for Plot No. 14 of L.R. No. 336/29. The Plaintiff alleged that L.R. No. 336/29 was subsequently renumbered to L.R. No. 209/8363. No proof in support of that change was furnished. The copy of receipt no. 1478 issued to Charles A. Kamau by Ruaraka Riverside Bar referred to Plot No. 14. In her evidence, the Plaintiff was not clear on which parcel of land she claims ownership of. She claimed that her late husband's plot was Plot No. 40 which was subsequently renumbered as L.R. No. 209/8363/40 in respect of which the 1st Defendant holds a title deed. It emerged quite clearly, particularly during cross-examination, that the Plaintiff was not aware which particular plot she was claiming. She claimed Plot No. 40 but produced documents bearing Plot No. 14 and then she also claimed L.R. No. 209/8363/40. A receipt No. 1630 dated 9th August 1982 forming part of the Plaintiff's documents is stated to be in respect of plot rates for Plot No. 14 (L.R. No. 209/8363/14). To my mind, the plot being claimed by the Plaintiff is not known. The Plaintiff has failed to indicate clearly which plot she is claiming. To that extent therefore, she cannot lay a valid claim over L.R. No. 209/8363/40 which the 1st Defendant claims belongs to him.

The issue of who owns the suit property cannot be addressed where the court has made a finding that the suit property is unknown.

To that extent therefore, this suit is hereby dismissed. Each party shall bear their own costs.

DELIVERED AND DATED AT NAIROBI THIS 29TH

DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE