



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 271 OF 2015

DAVID MWANGI TATEI

MARGARET NJERI WANJIKU PLAINTIFFS/APPLICANTS

-VERSUS-

ABIGAEI WANJIRU TATEI

JOSEPH KIMANI TATEI

ANTONY NJOGU TATEI

MBUGUA TATEI

ALICE MUTHONI MBUGUA.....DEFENDANTS/RESPONDENTS

RULING

1. This ruling is in respect of the notice of motion dated **11th November, 2015** in which David Mwangi Tatei and Margaret Njeri Wanjiru (hereinafter referred to as “the applicants”), seek to restrain Abigael Wanjiru Tatei, Joseph Kimani Tatei, Antony Njogu Tatei, Mbugua Tatei and Alice Muthoni Mbugua (hereinafter jointly and severally referred to as “the Respondents”) by themselves, their servants or in any other manner whatsoever from committing any acts of waste or in any other way interfering with the applicants’ possession and use of the **L.R No. Loc. 7/Gakoigo/715** (hereinafter referred to as “the suit property”) pending the hearing and determination of the application and the suit herein.

2. The applicants who are the registered proprietors of the suit property complain that the respondents have, without their consent or any justification. The applicants have deposed that owing to the respondents’ contact they have suffered and continue suffering great loss and inconvenience.

3. In support of the application, the applicants have annexed to the affidavit they swore in support of the application the following documents:

- a. Title deed and certificate of official search showing that they are the registered proprietors of the suit property;
- b. Copy of a ruling delivered on 31st July, 2015 in which the High Court, (Ngaah Jairus J.), dismissed the respondents’ application dated 1st July, 2010;

c. Photographs showing the respondents activities in the suit property.

d. Notice issued to the respondents to vacate the suit property, dated 23rd October, 2015.

4. In reply and opposition to the application the respondents have explained that they are descendants of Johana Tatei Kagiki (deceased).

5. It is the respondent's case that the registration of the suit property, in the name of the applicants was effected by fraud.

6. Maintaining that they have an interest in the suit property, the respondents blame the the applicants for having attempted to evict them without a court order.

7. When the matter came up for hearing, parties relied on the filed pleadings.

Analysis and determination

8. From the pleadings filed in this matter, the following facts are common ground and/or uncontroverted:

1. The applicants are the registered proprietors of the suit property;

2. The registration of the applicants was effected pursuant to orders obtained in Nyeri High Court Succession Cause No. 133 of 1998;

3. The respondents' predecessor in claim, Margaret Njeri Wanjiku, protested the confirmation of grant issued to the respondents, which protest was dismissed by court;

4. The respondents' predecessors in entitlement applied for review of the orders of dismissal of their protest, which application was similarly dismissed.

5. Upon being registered as the proprietors of the suit property the applicants issued the respondents, who are and have been in occupation of the suit property with an eviction notice.

6. The respondents refused to heed the notice causing the applicants to seek the court's intervention in their removal.

9. As the registered proprietors of the suit property, the applicants are *prima facie* the absolute and indefeasible owners of the suit property. In this regard see **Section 26** of the Land Registration Act, 2012 which provides as follows:

“26. (1) 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, restrictions 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, unprocedurally or through a corrupt scheme.”

10. The applicants as the registered proprietors of the suit property are entitled to the rights conferred on a proprietor of land by law, subject only to the limitations contemplated by law to those rights. In this regard see **Section 25** of the Land Registration Act which provides as follows:

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for

valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

11. Have the respondents’ shown any interest known in law that can justify their continued occupation of the suit property against the wishes of the applicants’ who are *prima facie* the owners of the suit property?

12. In determining this question, I begin by taking note of the contention by the respondents that the title held by the applicants was obtained by fraud. With regard to that contention, no evidence whatsoever has been provided by the respondents capable of proving the said allegation. Contrary to the said allegation/contention, the evidence on record shows that the registration of the applicants’ as the proprietors of the suit property was effected pursuant to orders obtained in the succession proceedings hereto. In this regard, see the ruling annexed to the affidavit sworn in support of the applicants’ application herein where it was observed:

“A certificate of confirmation of grant dated 3rd June, 2010 shows that grant of letters of administration intestate for the deceased’s estate was made to the respondents...”

13. The respondents in the above cited ruling are the applicants in the current application. There is no evidence that the grant issued to the applicants’ was set aside varied or reviewed. That being the case, I find the alleged fraud against the applicants to be unsubstantiated. As such, the allegation is incapable of forming the basis of issuance of any orders in favour of the respondents or interfering with the applicant’s rights to the suit property.

14. Whereas the respondents’ claim that they have filed an appeal against this court’s refusal to review its orders or against their predecessors’ in claim, I find that claim to be equally incapable of forming the basis of interfering with the applicants’ rights as the absolute and indefeasible proprietors of the suit property.

15. The other ground that has been urged against issuance of the order sought is that the applicants have approached the court with unclean hands. In this regard, the applicants are blamed of attempting to evict the respondents from the suit property without a court order. With regard to this ground, I note that the respondents did not annex any evidence capable of proving that the applicants wrongfully or illegally tried to evict them out of the suit property. Without any evidence to show that the applicants illegally tried to evict the respondents from the suit property, I find that ground to be incapable of forming a ground for denying the orders sought by the applicants.

16. Despite the fact that the respondents have been and are in occupation of the suit property, being of the view that their continued occupation of the suit property is against the rights of the applicants, which rights they have not successfully challenged in any court of law, I find and hold that in the absence of any order staying the execution of the orders issued in favour of the applicant in the succession proceedings hereto, the respondents’ continued occupation of the suit property is without any basis in law and to that extent illegal.

17. The upshot of the foregoing is that the application herein has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 28th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence:

Ms Kaingia for the respondent

Mr. Macharia h/b for Mr. King'ori for the applicant

Court assistant - Lydia