



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

HIGH COURT CIVIL SUIT NO. 1825 OF 1999

GITATHURU KARIOBANGI COMPANY LIMITED.....PLAINTIFF

VERSUS

JAMES GACHERU MURIU.....1ST DEFENDANT

ALICE MARY WACHERA.....2ND DEFENDANT

JAMES GITAU KIIRU.....3RD DEFENDANT

PENINAH WAMBUI NJENGA.....4TH DEFENDANT

MUIRURI MUTONGORO.....5TH DEFENDANT

GRACE GATHONI KARUNDE.....6TH DEFENDANT

NJERI KARURI.....7TH DEFENDANT

ESTHER WAKALE.....8TH DEFENDANT

LAWRENCE NG'ANG'A9TH DEFENDANT

BONIFACE K. NGUI.....10TH DEFENDANT

JUDGMENT

Introduction

The Plaintiff in its Complaint dated 17th September 1999 as amended on 14th November 2007 prays for declarations that it is the rightful and/or legal owner of the plot known as L.R. 209/8553/334 (hereinafter referred to as “the suit property”), and that that any document held by the Defendants or any other person suggesting that the suit property is not its exclusive property is null and void. The Plaintiff also prays for orders of injunction restraining the Defendants from trespassing on the suit property and from putting up any structure thereon; for general damages for trespass; and for costs of the suit.

The hearing of the suit proceeded on 22nd February 2010 when the Plaintiff and Defendant’s counsel were present, and on 7th August 2013 after the Defendants were served with the hearing notice by way of advertisement after failing to attend court during various hearing dates.

The Plaintiff's Case

The Plaintiff's claim is that at all material time it was the registered proprietor of the parcels of land known as L.R. 209/8553 and L.R. 209/8554 Kariobangi. Further, that on acquiring the said parcels of land it sub-divided the same with a view of allocating plots to its shareholders, and that L. R. 209/8553 was sub-divided into residential plots while L.R 209/8554 into commercial plots. The Plaintiff states that during the said sub-divisions and on advice of the Nairobi City Council it created some open spaces to cater for public utilities, and that one such sub-divisions reserved for utilities was the suit property which was to cater for a nursery school and which remained the property of the Plaintiff.

However, that on or about the month of April 1999 the Defendants with their agents and servants unlawfully invaded the suit property and started alienating it for their personal use, and have commenced constructing structures there in for commercial purposes to the detriment of the Plaintiff. Further, that the Plaintiff has suffered damage by reason of the Defendants' trespass.

The Plaintiff called two witnesses who gave oral evidence and also filed witness statement. PW1 was Isaac Kamande Njuguna, a Director and Secretary of the Plaintiff company. He stated that the Plaintiff company originally acquired 3 plots being number L.R 336/36, 32 and 38 which were consolidated to give rise to L.R. No. 209/8553/8554, and which land was later sub-divided in 1970 into two parcels, namely L.R 209/8553 and L. R. 209/8554.

PW1 stated that the parcels of land were to be allocated to the Plaintiff's members. Further, that the Plaintiff was upon sub-division of the parcels required to create open utility spaces for institutions like schools, market places, and stadiums which were to be surrendered to the government of Kenya free of charge. PW1 confirmed that the suit property, L.R. No. 209/8553/334 was initially one of such open spaces. However, that the Plaintiff later applied to have the suit property returned to it to develop a nursery school thereon, which the City Council of Nairobi agreed to. PW1 testified that the Plaintiff thereafter submitted their building plan for the nursery school and the same was approved on 6/2/1979, and title with respect to the suit property was subsequently issued to the Plaintiff on 25th June 1999.

PW1 produced the following exhibits in support of his testimony: a Certificate of Incorporation and Memorandum and Articles of Association of the Plaintiff company as Exhibit 1; letters showing the current directors of the Plaintiff as Exhibit 2; a letter dated 28/6/1978 from the City Council of Nairobi approving the Plaintiff's proposed sub-division and conditions to be observed as Exhibit 3; and as Exhibit 4 a letter dated 23/8/1978 from City Council of Nairobi clarifying on the issue of open spaces and that the nursery school plot should remain property of the Plaintiff.

The approval letter for building the nursery school was also produced as Exhibit 5, the building plans were produced as Exhibit 6, and the Plaintiff's title to the suit property was produced as Exhibit 7. PW1 also produced as Exhibit 8 an Environment Impact Assessment Licence from the National Environment Management Authority granted to the Plaintiff, allowing it to proceed with the re-planning of its properties, including the suit property.

PW2 was Ndungu Mungai a member of the Plaintiff who stated that he was conversant with the suit herein, and that the testimony by PW1 was a true reflection of what happened with regard to the land owned by the Plaintiff.

The Plaintiff's counsel filed submissions dated 26th October 2013, in which he argued that the contention by the Defendants in their defence that the suit property was surrendered to the Government is borne out of ignorance that this particular plot was left in the hands of the Plaintiff, who had built a nursery school thereon as early as August 1978. The Counsel further submitted that the physical title documents for the suit property was processed in the names of the Plaintiff on 25/6/1999 and it is still in its possession to date. Further, that for the Defendants to contend that the City Council was able to sub-divide the land and allocate the same to them without the original title being surrendered to the lands office made such an exercise illegal.

On the prayer for general damages for trespass, the Plaintiff's counsel submitted that a rate of Kshs.500,000/= per year for the half portion of the suit property the Defendants had been using since 1999 would be reasonable, as this is land within Nairobi where space and/or houses is usually at high price. Further that entire the suit property measures approximately 0.3027 hectares.

The Defendants' Case

The 1st – 8th Defendants entered appearance on 6th October 1999 and filed a Defence dated 4th October 1999. The said Defence was later amended by the 2nd -8th Defendants on 20th August 2000, and after the 1st Defendant died during the pendency of the suit. The said Defendants denied the Plaintiff's averments and stated that the Plaintiff was required to surrender to the Government some portions of LR 209/8553 and LR 209/8554 upon sub-division.

The said Defendants averred that the surrendered portion of the suit property namely L.R. 209/8553/334 was further sub-divided into three portions, being L.R. 209/8553/378, L.R. 209/8553/379 and L.R. 209/8553/380, to cater for a market, church and nursery school respectively. Further, that the Defendants were occupying L.R. 209/8553/378 which was surrendered to the Kenya Government, while the land being occupied by the Plaintiff was L.R. 209/8553/380.

The 9th and 10th Defendant do not appear to have entered appearance after they were joined as Defendants on 7th February 2008, and summons served on them on 11th July 2008.

None of the Defendants called witnesses to give evidence, nor did they file any submissions, despite having been served with the hearing dates.

The Issues and Determination.

I have carefully considered the pleadings and evidence by the parties herein. It is not disputed that the two parcels of land, namely L.R 209/8553 and L. R. 209/8554.were initially owned by the Plaintiff and later sub-divided. What is in dispute is whether one of those sub-divisions namely the suit property, was surrendered to the government and later subdivided to form three different parcels of land as claimed by the Defendants. The issues for determination are therefore as follows:

1. Whether there was a lawful subdivision of the suit property.
2. Whether the Plaintiff owns and is in occupation of the suit property.
3. Whether the Plaintiff is entitled to the remedies sought.

a. Whether there was a lawful subdivision of the suit property.

The issue of sub-division of the suit property into three portions being L.R. 209/8553/378, L.R. 209/8553/379 and L.R. 209/8553/380 was raised by the 2nd-8th Defendants in their Defence. However, they did not bring any evidence of such sub-division by the relevant authorities, approved plans and/or ownership of the alleged sub-divided plots. This court therefore finds that no lawful subdivision of the suit property was undertaken.

b. Whether the Plaintiff owns and is in occupation of the suit property.

The Plaintiff brought evidence of the correspondence relating to the suit property, and in particular a letter dated 23rd August 1978 by the City Council of Nairobi to the Commissioner of Lands approving the sub-division of the Plaintiff's land and that road reserves, and that open spaces to be surrendered to the Government except for a nursery plot which was to remain in the ownership of the developers. The said letter was also copied to the Plaintiff. The Plaintiff also brought evidence of the nursery and primary school they have constructed on the said property which fact was admitted by the Defendants in their Defence, their only point of contention being the portion of the suit property that the nursery was to be built upon.

More importantly, the Plaintiff has also produced a title to the suit property issued to them on 25th June 1999 which has an approved deed plan, and which shows the suit property to measure 0.3027 hectares. The Plaintiff has therefore on a balance of probabilities proved its ownership of the suit property. It is thus the finding of this court that the Plaintiff is the lawful and registered owner of the suit property.

(c) Whether the Plaintiff is entitled to the remedies sought.

Arising from the above findings, this court is of the view that the Plaintiff is entitled to the declaration that it is the legal owner of the suit property, as well as to the order of injunction sought, as it has proved the said ownership. However, the court declines to grant the declaration sought that any documents held by the Defendants or any other person suggesting that the suit property is not the exclusive property of the Plaintiff is null and void. This is for the reason that the Plaintiff did not bring any evidence of any documents of ownership or interest in the suit property held by the Defendants or any other person.

On the remedy sought of general damages for trespass, it is an established principle of law that trespass to land is a direct interference with the possession of another person's land without lawful authority. The Court of Appeal in **M'Mukanya v Mbijiwe 1984(KLR) 761** held that the tort of trespass is a violation of a right to possession, and that the Respondent in that case needed to prove on a balance of probabilities that he had the right to immediate and exclusive possession of the suit land, which is different from ownership. The Court of Appeal further held that exclusive possession supporting a claim for trespass does not necessarily mean continuous physical possession and occupation, and that once a person had paid due rent and had been given a plot number upon allocation, he is presumed to be in possession and to sue for trespass. In addition, in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, it was held by the Court of Appeal that an absolute and indefeasible owner of land is entitled to take proceedings in trespass.

As this court has already found the Plaintiff to be legal owner of the suit property, he is thus entitled to damages for trespass. The law on the measure of damages for trespass to land is that a plaintiff is entitled to nominal damages for trespass, even if no damage or loss to the land is caused. If damage or loss is caused to the said land then the damages awarded is the diminution in value of the land, or cost of reinstatement of the land. The Plaintiff in its submissions in this respect claims special damages of Kshs 500,000/= per year which it neither pleaded nor proved. No evidence was brought as to how the Plaintiff had reached a valuation of Kshs 500,000/= per year, nor of the damage or loss caused to the suit property by the Defendants. This court can therefore in the circumstances only grant nominal damages as provided by law.

Lastly on the prayer for costs, the applicable law is found in section 27 (1) of the Civil Procedure Act (Cap. 21) which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. The Plaintiff is accordingly entitled to the costs of this suit, since this court has reached conclusions that are largely in its favour the findings hereinabove.

The Orders

Arising from the above-stated findings and reasons, this Court enters judgment for the Plaintiff as against the Defendants as follows:

1. That Gitathuru Kariobangi Company Limited is hereby declared to be the legal owner and proprietor of the property known as L.R. 209/8553/334 situated in Kariobangi, Nairobi.
2. The Defendants either by themselves or their servants and agents be and are hereby permanently restrained from trespassing on the property known as L.R 209/8553/334 and/or from erecting any structures thereon.
3. The Plaintiff is awarded a global sum of Kenya Shillings 100,000/= as general damages for trespass as against the Defendants both jointly and severally.
4. The Defendants shall jointly and severally meet the costs of this suit.
5. The parties herein are at liberty to apply.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____21st____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE