



Kamanu v Kirima; Mahiira Housing Company Limited (Third party) (Environment & Land Case 1 of 2010) [2024] KEELC 3784 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1 OF 2010**

J OMANGE, J

APRIL 30, 2024

BETWEEN

PATRICK MWAURA KAMANU PLAINTIFF

AND

JAMES NJUGUNA KIRIMA DEFENDANT

AND

MAHIIRA HOUSING COMPANY LIMITED THIRD PARTY

JUDGMENT

1. This suit arises out of land title LRNo Ruiru /Kiu/Block 10/555 hereinafter, referred to as the suit property.
2. The Plaintiff vide a plaint dated 6th January 2010 seeks the following prayers;
 - a. An Order of vacant possession of the suit property and eviction of the Defendant, his servants and/or his agents from the suit property
 - b. A permanent injunction restraining the Defendant whether by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - c. A mandatory injunction to compel the Defendant to remove the buildings on the suit property and restore the same in the condition that it was prior to trespass.
 - d. Damages for trespass on the suit property.
 - e. Costs of the suit with interest thereon as such rate and for a period of time as this honourable court may deem fit to grant.



3. The Plaintiff deponed that he is the registered owner of the suit property which he purchased in 2008 from one Lucy Wambui Kamau who had purchased the same from the interested party herein, Maahira Housing Company. Transfer was effected after he paid transfer fees of Ksh 10,000/= and eventually acquired the title deed on 21st July of 2009.

He avers that he visited the suit property in 2009 and discovered the Defendant was in occupation of the same and had constructed claiming to be the owner of the suit property. He deponed that he demanded vacant possession of the suit property but the Defendant ignored and refused to comply to his demands hence this suit.

4. The Defendant was duly served with all the relevant pleadings and filed a statement of defence and counterclaim dated 14th January 2010 in which he denied the allegations in the plaint and instead, stated in his counterclaim that he was the legally registered owner of the suit property Plot 341 now LR Ruiru/Kiu Block/10/555 which he purchased from a third party herein and was issued with a plot certificate on 28th April, 1987.

That the actions of the Plaintiff in acquiring title over the same are acts of fraud occasioned by the Plaintiff and the third party herein and sought for the following orders:-

- a. A declaration that the transfer of plot 341 now LR Ruiru/Kiu Block/10/555 to the Plaintiff was unlawful and fraudulent and the Defendant is entitled to the same property
 - b. An order directing the District land registrar Thika to cancel the entry registering the Plaintiff as the owner of LR Ruiru/Kiu Block 10/555 and rectify it by registering the Defendant as the lawful proprietor.
5. The 3rd party Mahiira Housing company Limited filed its statement of defence in response to the counterclaim by the Defendant and indicated that the suit property ceased belonging to the Defendant who had failed to meet some of the laid down resolution passed by the company regarding the suit property which resolutions was that “if any purchaser of a plot does not occupy or develop the same within a period of 8 years from the date of purchase, then the purchaser shall have no claim” .These resolutions they indicated, formed part of the company’s memorandum and articles of association which were binding on all its members and were made available to all members for their knowledge. It was their case that their records indicate the Plaintiff is the duly registered owner, the Defendant having forfeited the rights to the suit property.
 6. The Plaintiff testified in court on 21st September 2021 and relied on his witness statement dated 8th October 2012 in which he told the court that he is the registered owner of the suit property after it was transferred from Lucy Wambui Kamau who had purchased from a 3rd Party at a consideration of Ksh 320,000/=which transfer is evidenced by receipt of payment of transfer fees in the sum of Ksh 10,000. He was issued with plot certificate and eventually title document issued on 29th July 2009.He relied on his bundle of documents that constituted the receipts referred to and the plot certificate number and a public gazette notice purportedly issued by the 3rd party communicating the resolution as passed by the 3rd party.
 7. The Defendant testified based on his witness statement dated 14th March 2013 that he had legal right over the suit property having purchased the same from the 3rd party on or about 1986 and 1987 and issued with a plot certificate dated 28th April, 1987. He stated that he had been in occupation ever since and the said resolution on time limitations on developing the suit property was never communicated to him despite him visiting the offices of the 3rd party severally. It was his case that not being aware of



the resolution he was still the owner of the suit property and any sale to the Plaintiff was null and void since the 3rd party could not pass title on property that had already been sold to him.

8. Counsel for the Plaintiff submitted on two issues

(i) Whether the Plaintiff had proved ownership of plot No 341 now LR Ruiru/Kiu Block/10/555

He submitted that the Plaintiff's rights were protected under Article 40 of *the Constitution* and Section 26 of the *Land Registration Act* No 12 of 2012. That the certificate of title is prima facie evidence that the person is the absolute and infeasible owner and that the Plaintiff having provided the title document was protected by the said section. To buttress this point counsel cited the case of *Tarabana Company limited Vs Sebmi & 7 others* (civil appeal 463 of 2019) (2021)KECA 76 (KLR)

9. It was the Plaintiff's submission that the Defendant has failed to produce any evidence to challenge the title on grounds of fraud and further, the Defendant has not produced any ownership documents to challenge the title by the Plaintiff.

10. On whether the Plaintiff was a bona fide purchaser without notice

The Plaintiff submitted that he is an innocent purchaser to the suit property having acquired it vide a transfer from the previous owner having paid full consideration and as such has absolute rights and claim over any prior purported owners. He relied on the Ugandan case of;

Katende Vs Haridar & Company Limited (2008) EA 173 to highlight the requirements one has to prove to establish that one is a bona fide purchase which requirements he stated he had met.

11. Counsel for the Defendant submitted that there was no evidence on record that the said Lucy Wambui Kamau had purchased the suit property from the 3rd party acquiring rights to transfer the same to the Plaintiff and further the transfer document as between the Plaintiff and the said Lucy Wambui Kamau was undated questioning its authenticity. Counsel submitted that the Defendant had produced receipts proof of purchase from the 3rd party. That it was impossible for the 3rd party to allocate the property to another person having sold the property to him. He relied on the provisions of Section 26 of the *Land Registration Act* No 12 of 2022 that indicated title to property can be challenged when the owner is proved to have acquired it through fraud.

12. Having looked at the evidence by both parties, the submissions filed herein, the issue that comes up for determination is;

Who between the Plaintiff and the Defendant has valid claim over LR No Ruiru /Kiu/ Block 10/555.

13. Section 26 (1) of the *Land Registration Act* provides|:-

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and infeasible owner... 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, un-procedurally or through a corrupt scheme.”

14. It is now settled jurisprudence that, when a title is under challenge the court must interrogate the root of the title. It is not enough to brandish the title and expect the court to uphold it. Indeed, in Kenya unfortunately titles without any supporting documentation have no worth at all.
15. The Plaintiff traced the root of his title to the transfer between him and Lucy Wambui Kamau the previous owner who purportedly purchased the same from the 3rd party. He indicated that he paid the relevant transfer fees evidenced by a receipt and the transfer was effected by the 3rd party and he acquired the title document on the 29th July 2009. There were no documents adduced either by the Plaintiff or the third Party establishing how Lucy Kamau came into possession of the suit property.
16. On the other hand, the Defendant has attached receipts from the 3rd party evidencing his purchase of the suit property and a plot certificate number issued to him on the 28th April 1987. The Defendant has a plot certificate which is earlier in time to the Plot Certificate the Plaintiff has. The third party confirms that the Defendant was allocated the suit property but that his ownership rights were extinguished following a resolution made by the company Min 15/ 86 in which it is alleged that Directors resolved that the company would repossess the plot of a plot owner who had not paid for the plot or developed the same.
17. A closer look at the Third Party documents tells a different story. Contrary to the assertion of the Third Party, the original extract of the minute 15/ 86 did not refer to development of the allocated plot. It only mentioned repossession of plots which had not been fully paid for which the Defendant produced documents to confirm he had paid for. As such the resolution to repossess undeveloped plots was not proved.
18. Furthermore, the gazette notice which the Third Party allege notified owners of the resolution was only published in December, 2009 yet the title in question was obtained on 21st July, 2009. How could the notice be issued after the fact? The Third Party who has all the company records maintains a deafening silence regarding how Lucy Kamau who sold the property came to acquire the suit property.
The Plaintiff too does not indicate to the court any action apart from the transfer, he took to confirm that Lucy Kamau had been allocated the property and had made the necessary payments.
19. Having considered the foregoing, I find that the Plaintiffs title, was so rooted in a lack of transparency on the part of the Third Party as to amount a corrupt scheme, to divest the Defendant of his property illegally.
The Defendant produced documentation that confirm that he was all along receiving communication from the Third Party on various issues. It is therefore, not clear why he was not given vital information that would have affected his ownership.
20. I find that, the circumstances of this case do not avail to the Plaintiff the protection of Section 26 of the *Land Registration Act*. As has been repeated by many courts before me, a purchaser who does not wish to face hurdles needs to go the extra mile to carry out due diligence and ensure that the person selling them property has proprietary rights to the property they are disposing of.
21. On the question of costs, I find that in the circumstances of this case, there are no sufficient grounds to depart from the general rule that costs should follow the event.
22. Consequently, Judgement is entered for the Defendant against the Plaintiff and the Third Party on the counterclaim in the following terms;



- a. That a declaration is issued that the transfer of Plot 341 Now LR Ruiru Block 10/555 was unlawful
- b. An order directing the Land Registrar Thika to cancel the entry registering the Plaintiff as owner of LR Block 10/555 and rectify the register and related documents to reflect the Defendant as the lawful proprietor.
- c. Costs of the suit

JUDGEMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 30TH OF APRIL, 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

No Appearance

Court Assistant: Steve Musyoki

