



**County Government of Baringo v Chelagat (Environment & Land Case
12 of 2023) [2024] KEELC 4444 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT & LAND CASE 12 OF 2023**

L WAITHAKA, J

MAY 23, 2024

BETWEEN

COUNTY GOVERNMENT OF BARINGO PLAINTIFF

AND

WILLIAM CHELAGAT DEFENDANT

JUDGMENT

1. By a plaint dated 13th February 2012 and amended on 4th May 2016, the plaintiff instituted this suit seeking judgment against the defendant for a declaration that the parcel of land known as Baringo/Radat^{“A”}/18 (hereinafter referred to as the suit property) is a public utility plot; that the defendant is a trespasser in the suit property; an eviction order against the defendant and an order of permanent injunction to restrain the defendant by himself, his servants and/or agents from further trespassing or interfering with the plaintiff’s proprietary rights; a mandatory injunction compelling the defendant to demolish the temporary structures/developments he has effected on the suit property.
2. The suit is premised on the grounds that the plaintiff is the registered proprietor of the suit property; that the plaintiff manages the suit property as a public utility, Radat Council Market and that the defendant has unlawfully and without any reasonable excuse and/or colour of right, encroached on the suit property and erected temporary structures therein thereby occasioning the plaintiff loss and prejudice.
3. The defendant filed a statement of defence and counterclaim denying the allegations levelled against him and contending that, if the plaintiff is the registered proprietor of the suit property, the registration was procured by fraud.
4. The particulars of fraud urged against the plaintiff are particularized in paragraph 4 of the defence and counterclaim thus, causing or occasioning the impugned registration;
 - a. Yet it was not the owner of the suit property;



- b. Secretly and in complete ignorance of the the defendant's interest therein;
 - c. When the suit property had been adjudicated, alienated and surveyed as private land;
 - d. In total disregard of his overriding interest therein;
 - e. Taking advantage of the circumstances;
 - f. Failing to use lawful means to obtain the suit property.
5. The plaintiff filed a reply to defence and a defence to counterclaim reiterating her pleaded case and denying the allegations levelled against her.

Evidence

6. When the case came up for hearing, parties adduced evidence that can be summarized as follows:-
7. That the plaintiff is the registered proprietor of the suit property; that registration of the plaintiff as the proprietor of the suit property was done on 8th May 1995; that the suit property was planned as a public utility plot in 1980 and that there is an approved plan attesting to that fact.
8. The evidence adduced further shows that land adjudication was done before the suit property was registered as a public utility plot.
9. Whilst the defendant claims to have been the one in use and occupation of the suit property at the time of land adjudication, hence entitled to have been the registered proprietor of the suit property, the evidence adduced in this case shows that the defendant did not raise any objection to the registration of the plaintiff as the proprietor of the suit property. However, sometime on or about 22nd February 1996, the defendant wrote a letter to the Clerk of the defunct County Council of Koibatek complaining that the suit property was registered in the name of the plaintiff yet it belonged to him. Through his letter under reference, the defendant pleaded with the County Council to have the suit property subdivided so that he could have his own share of the suit property.
10. The evidence adduced in this case further showed that the defendant is in use and occupation of 3 acres of the suit property or thereabout; that the defendant has been in use of the portion of the suit property he occupies for a long period of time and that he has effected massive development of the portion of the suit property he occupies. The developments the defendant has effected on the portion of the suit property includes a home, a shed for animals, an access road, a powerhouse and a farm.
11. The evidence further shows that a large portion of the suit property, which measures 82 acres or thereabout, is underutilized.
12. At close of hearing, parties filed submissions, which I have read and considered.

Submissions

13. From the pleadings, evidence and submissions, the issues for the court's determination are:-
 - i. Whether either of the parties has made up a case for being granted the orders sought or any of them?
 - ii. What orders should the court make?



Plaintiff's Submissions

14. On whether any party has made up a case for being granted the orders sought or any of them, in its submissions filed on 28th February 2024, the plaintiff has made reference to the evidence adduced showing that it is the registered proprietor of the suit property (Pexbt 1); it is further submitted that the report of the County Surveyor dated 20th November 2023 and the evidence adduced in court showing that the defendant participated in the adjudication process pursuant to which the suit property was registered in the name of the plaintiff has proved the plaintiff's case against the defendant on a balance of probabilities.
15. Maintaining that the defendant is a trespasser in the portion of the suit property, measuring three acres or thereabout which he occupies, the plaintiff submits that it is not in public interest to allow the defendant to continue occupying the portion he occupies as doing so may embolden land grabbers and create an avenue for other land grabbers to invade public land.
16. Because the defendant participated in land adjudication and neither objected nor appealed the decision that culminated in registration of the suit property as a public utility, it is submitted that it should be inferred that the defendant was satisfied with the decision that was made concerning the suit property.
17. The defendant is faulted for having failed to challenge the decision of the Land Registrar, by way of appeal, judicial review, after the Land Registrar decided on his complaint concerning the registration of the suit property in the name of the defendant.
18. It is further submitted that the defendant cannot claim adverse possession against a title held on behalf of the public.
19. The plaintiff urges the court to allow its suit and dismiss the defendant's defence and counterclaim.

Defendant's Submissions

20. In his submission's filed on 8th March 2024, the defendant has given an overview of the parties pleaded case and the evidence adduced in respect thereof and submitted that owing to the long period of time he has been in use and occupation of the suit property, the registration of the plaintiff as a proprietor of the suit property is subject to an overriding interest and/or trust in favour of the defendant. In that regard reference is made to sections 28 and 30 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed); section 28 of the Land Registration Act, 2012 and the cases of *Obiero v. Opiyo* (1972)EA 227; *Janet Ngendo Kamau v. Mary Wangari Mwangi* Civil Appeal No.173 of 2003 and *James Gathanua Mukoma (Suing on his own behalf and as a beneficiary of the Estate of the late Mukoma Wa Njiri) v. National Land Commission & Another* (2018)eKLR.
21. The defendant further submits that the suit property is by dint of the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, statute barred.
22. Citing the long period of time he has been in use and occupation of the suit property, the developments he has effected in the suit property; the vastness of the suit property and the fact that the suit property is largely underutilized, the defendant submits that the plaintiff has not demonstrated how his continued use of the suit property has hindered or compromised public interest to warrant his eviction from the suit property.
23. The defendant urges the court to dismiss the plaintiff's suit against him and allow his his defence and counterclaim.



Analysis and determination

24. It is common ground that the plaintiff is the registered proprietor of the suit property. It is also common ground that the defendant is in use and occupation of a portion of the suit property, measuring 3 acres or thereabout.
25. By operation of the law, in particular, section 26 of the *Land Registration Act*, 2012, the plaintiff is the absolute and indefeasible owner of the suit property. Section 26 of the *Land Registration Act*, 2012 provides as follows:-
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.”
26. The provisions of section 26 cited above accords with Article 40(6) of the *Constitution* of Kenya 2010 which does not afford protection to land found to have been unlawfully acquired. The sub-article provides as follows:-

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”
27. In the circumstances of this case, the defendant pleaded that the registration of the defendant was procured by fraud. However, the defendant did not adduce any evidence capable of proving the pleaded fraud in the registration of the suit property in the name of the plaintiff. The evidence adduced in this case shows that the plaintiff’s registration as proprietor of the suit property was preceded by the process of land adjudication under the *Land Adjudication Act*, Cap 284 Laws of Kenya.
28. It is common ground that the defendant participated in the land adjudication process and did not raise any objection to the adjudication register or appeal against the decision to register the whole of the suit property in the name of the plaintiff.
29. The evidence adduced shows that the defendant belatedly complained against registration of the plaintiff as the proprietor of the suit property. He did so in 1996.
30. As can be discerned from the totality of the defendant’s evidence and submissions, the defendant’s case is premised on his long period of use and occupation of a portion of the suit property.
31. According to the letter the defendant wrote to the Clerk, County Council of Koibatek, dated 22nd February 1996 (Pexbt 4), the defendant has been living in the suit property since 1986.
32. Through his letter referred to herein above, the defendant claimed that his land is inside the Council parcel; the suit property. He urged the Council to subdivide the suit property in order for him to get his parcel.
33. Other than proving that there was a dispute between himself and the plaintiff concerning the registration of the plaintiff as the proprietor of the suit property, the defendant did not produce any



evidence capable of proving that he was indeed the bona fide owner of the suit property or the portion of the suit property that he occupies.

34. Having based his claim on the allegation that the plaintiff fraudulently got itself registered as the proprietor of the suit property, the burden of proof rested on him to produce evidence capable of proving the pleaded fraud in the registration of the plaintiff as the proprietor of the suit property, which burden he failed to discharge to the required standard and at all. The plaintiff merely proved that he has been in use and occupation of the suit property for a long period of time, which per se is not proof that he is entitled to a share of the suit property.
35. The suit property being public land, it is not subject to the statute of limitation, in particular section 7 of the *Limitation of Actions Act*, as claimed by the defendant. In that regard see the case of *Ongwen & Another v Keya & Another* (Environment & Land Case E027 of 2021) (2023)KEELC 279 (KLR) (26 January 2023)(Judgment) where it was stated:-

“Section 41 of the *Limitation of Actions Act* excludes public land from application of the Act.

Section 41(a) provides:-

41. Exclusion of public land

This *Act* does not-

- a. enable a person to acquire any title to, or any easement over –
- i. Government land or land otherwise enjoyed by the government....”

36. There is evidence that the suit property was planned as a public utility land way before the defendant began laying a claim to a portion thereof, in 1980.
37. Arising from the foregoing, it is the considered view of this court that the defendant’s claim that he has acquired the suit property by adverse possession or that the suit property is subject to an overriding interest in his favour arising from his long use and occupation of the suit property is unmaintainable. Similarly, the defendant’s claim that the suit property is subject of a trust in his favour is unmaintainable as the defendant did not adduce any evidence capable of proving that registration of the suit property in the name of the plaintiff is subject to a trust in his favour.
38. I find the circumstances in the case of *James Gathanua Mukoma ... v. National Land Commission & another* (2018)eKLR, cited by the defendant to be distinguishable from the circumstances of this case in that unlike in that case where the land was unregistered, the land in the instant case is registered. In the instant case, the requisite legal processes were complied with before the suit property was registered in the name of the plaintiff. The defendant had the opportunity to challenge the adjudication process through the process provided for under the *Land Adjudication Act*, Cap 284, if he was aggrieved by the process but failed to do so.
39. Concerning the defendant’s claim that the plaintiff has not proved that the plaintiff has been prejudiced by his use and occupation of the suit property, it is the view of this court that being the registered proprietor of the suit property, the plaintiff is entitled to the rights of a registered proprietor guaranteed by law, in particular section 25 of the *Land Registration Act*, 2012.



40. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015)eKLR the court rendered it self thus:-

“...I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud; and no title holder will ever be deprived of his good title by the tricks of con artists.”

41. Being of the view that the mere fact that the suit property is vast and largely underutilized is not a good reason for allowing the defendant to continue occupying and using the suit property against the wish of its owner, I find the plaintiff’s case to be merited and allow it as prayed.

42. I order the defendant to, within 180 days from the date of delivery of this judgment, voluntarily vacate the suit property, failing which upon expiry of the time herein given, he shall be forcibly evicted from the portion of the suit property he unlawfully occupies.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 23RD DAY OF MAY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

N/A for the plaintiff

Mr. Ojou holding brief for Mr. Kibet for the defendant

Court Asst.: Ian

