



Gikonye v City Council of Nairobi & another; Maina (Interested Party) (Environment & Land Case 504 of 2009) [2023] KEELC 528 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 528 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 504 OF 2009
MD MWANGI, J
JANUARY 31, 2023

BETWEEN

AMEDEO MUNG'ERI GIKONYE PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

MIRIAM NJERI NJOROGE 2ND DEFENDANT

AND

HUMPHREY AARON GITHUKU MAINA INTERESTED PARTY

JUDGMENT

1. By a plaint dated October 5, 2019 and filed in court on October 6, 2009, the Plaintiff sought an order of mandatory injunction to restrain the 1st Defendant – City Council of Nairobi (the predecessor in title to the Nairobi City County) from trespassing, demolishing any buildings and structures or in any other way interfering with the Plaintiff's quiet possession and occupation of all that parcel known as Plot No 50 Komarock Community Shopping Centre (hereinafter referred to as the suit property). The Plaintiff also sought damages and costs of the suit.
2. The basis of the Plaintiff's case is that he was allocated the suit property by the 1st Defendant for commercial purposes. The Plaintiff avers that he duly complied with all the terms of the allotment, making the requisite payments before taking physical possession of the suit property. The 1st Defendant has since issued the Plaintiff with a beacons certificate and approved architectural plans/drawing for construction of a permanent structure(s).
3. The Plaintiff further states that he has remained in Physical possession of the suit property paying Land rates and Land rent. At the time of filing the suit, the Plaintiff's case was that he had borrowed money from financial institutions and commenced construction on the suit property at substantial cost.



4. As the construction was going on, officers from the 1st Defendant visited the suit property demanding stoppage of the construction until the Plaintiff presented ownership documents. Thereafter, the Plaintiff received a letter from the 1st Defendant stating that the suit property belonged to another person.
5. The Plaintiff pleaded that the action by the 1st Defendant was, an attempt to ‘wrestle’ the ownership of the suit property from him. He termed the 1st Defendant’s actions as illegal, malicious and attempted conversion. The Plaintiff insisted that he had a valid letter of allotment, beacon certificate, approved architectural drawings, search certificate and receipts for various payments issued by the 1st Defendant; he too had been in physical possession and occupation of the suit property with the full knowledge, consent and authority of the 1st Defendant, for 15 years. That is what prompted the Plaintiff to move to court.
6. The Plaintiff pleaded that the 1st Defendant was estopped from challenging and or interfering with his possession, ownership and occupation of the suit property.
7. The Plaintiff alleged that he had suffered damage as a result of the 1st Defendant’s interference with the suit property and with his construction and unless stopped by the court, he would continue suffering loss and damage.

Response by the 1st Defendant.

8. The 1st Defendant filed its statement of defence dated July 20, 2015 in court on July 22, 2015. The 1st Defendant in essence denied the Plaintiff’s claim in its entirety denying that the Plaintiff had been paying land rent and rates promptly as averred in his plaint. The 1st Defendant further denied any malice on its part. It prayed for the dismissal of the Plaintiff’s suit with costs.

Response by the 2nd Defendant.

9. The 2nd Defendant was joined into the suit much later on her own application. Her statement of defence and counter-claim is dated January 22, 2014 and was filed in court on January 24, 2014.
10. The 2nd Defendant while denying the Plaintiff’s claim averred that she was allocated the suit property in the year 1993 by the 1st Defendant vide a letter of allotment dated November 22, 1993. She duly accepted the letter of allotment and commenced payment of the requisite ‘local authority fees’ and ‘government dues’. She was issued with a beacon certificate and shown the ground location of the land by the 1st Defendant.
11. Sometimes in the year 2011, the 2nd Defendant learnt that the Plaintiff had encroached into the suit property and dug a foundation with the intention of putting up a building on the suit land. When she enquired from the 1st Defendant, she was informed that the Plaintiff was enjoying an order from this court allowing him quiet possession pending the hearing and determination of this suit.
12. The 2nd Defendant reiterates that she is the rightful owner of the suit property being the 1st allottee by the 1st Defendant. The Plaintiff is a trespasser on the suit property.
13. The 2nd Defendant further averred that the 1st Defendant is in breach of contract established upon her acceptance of the terms and conditions set out in the letter of allotment. The 2nd Defendant particularized the breach of agreement by the 1st Defendant at paragraph 6 of the statement of defence and counter-claim. She claimed damages from the 1st Defendant and the Plaintiff jointly and severally.



14. The 2nd Defendant further asserted that the action of trespass by the Plaintiff into the suit property was unlawful and she seeks vacant possession of the suit property. In the alternative, the Plaintiff prays that the Plaintiff and the 1st Defendant jointly and severally do pay her the current open market value of the suit property plus damages plus costs of the suit with interest at court rates.
15. I have keenly perused the record of the court. The Plaintiff filed a statement of defence and defence to the 2nd Defendant's counter claim with leave of the court granted on 3.3.2021.
16. In the said statement of defence to counterclaim, the Plaintiff alleged that the suit against the Defendant save for costs had been compromised as the suit property was in the hands of a 3rd party. Further that if the 2nd Defendant was issued with any allotment letters she did not comply with the terms and conditions therein.
17. In any event, the Plaintiff averred that the 2nd Defendant's suit against him was time barred and prayed for its dismissal with costs.
18. The interested party on his part was joined into the proceedings as such on May 31, 2021 when his application was allowed.
19. I have not seen any pleadings filed by the interested party save for the interested party's list of documents dated January 18, 2022 filed in court on January 21, 2022 and the witness statement dated January 18, 2022. Amongst the documents on the list is a certificate of lease issued under the provisions of the repealed Registered Land Act, Cap 300 Laws of Kenya to the Interested party, Humphrey Aaron Githuku Maina on October 31, 2016 for Nairobi Block 111/2027 measuring 0.03 Ha.

Evidence adduced.

20. This case proceeded to full hearing with each of the parties in this matter calling one witness.

Evidence adduced on behalf of the Plaintiff and Interested Party.

21. The Plaintiff's case was that he was allocated plot No. 50 Komarock Community Shopping Centre (the suit property) by the 1st Defendant as evidenced by the allotment letter issued in his name.
22. The Plaintiff averred that he took possession immediately until 2008 when he sold it to the interested party in this case for valuable consideration.
23. Before effecting the transfer, the Plaintiff and the Interested Party sought approval of building plans from the 1st Defendant which were granted. The development commenced on the suit property until sometimes in the year 2009 when the Plaintiff was told about the 2nd Defendant who was also laying a claim of ownership of the suit property. Officers from the 1st Defendant's Office issued orders to stop the construction necessitating the filing of this suit.
24. The Plaintiff was granted an interlocutory injunction stopping the 1st Defendant from interfering with the suit property. The Plaintiff and the Interested Party therefore proceeded with the construction on the suit property.
25. In the year 2011, the 1st Defendant confirmed the Plaintiff as the lawful allottee of the suit property while undertaking in the letter of July 21, 2011 to compensate the 2nd Defendant with an alternative plot. The 1st Defendant has unequivocally stated that the Plaintiff is the lawful owner of the suit property. The Plaintiff produced the minutes confirming that position.



26. The suit property is now fully developed with residential/commercial premises and duly registered in the name of the Interested Party.

Issues for Determination.

- i. Whether the Plaintiff is entitled to the orders sought in his plaint in view of the change of circumstances.
- ii. Whether the 2nd Defendant has established a cause of action against the Plaintiff.
- iii. Without prejudice to 2 above, whether the 2nd Defendant's claim against the Plaintiff is time barred.
- iv. Whether the 2nd Defendant could lawfully counter-claim against the 1st Defendant.
- v. Whether the 2nd Defendant has established a cause of action against the 1st Defendant.

A. Whether the Plaintiff is entitled to the orders sought in his plaint in view of the change of circumstances.

27. The Plaintiff filed his case way back in the year 2009. The case was against the 1st Defendant only, the City Council of Nairobi. The Plaintiff sought for judgment against the Defendant for: -
- i. A mandatory injunction restraining the Defendant, either by itself, its agents and or servants or any other person acting on instruction from the Defendant from trespassing on, demolishing any buildings and structures on, or in any other way from interfering with the Plaintiff's quiet possession and occupation of all that Plot No 50 Komarock Community Shopping Centre.
 - ii. Damages.
 - iii. Costs of the suit and interest thereon at court rates from the date of filing suit till payment in full.
 - iv. Any other relief deemed just and expedient.
28. Since the year 2009, 'a lot of water has passed under the bridge'. At the time of filing the suit, the Plaintiff had not transferred his proprietary interests over the suit property to the Interested Party. The situation has since changed and the Interested Party, as came out from the evidence adduced before the court is now the sole registered proprietor of the suit property. The suit property on the other hand is now fully developed with residential/commercial premises.
29. The Plaintiff's suit is therefore as a matter of fact overtaken by events. The Plaintiff is no longer entitled to, as he put it in his plaint, quiet possession and occupation of the suit property.
30. I would have expected the Plaintiff, after transferring the title to the suit property to at least amend his plaint in view of the change of circumstances. He did not do so.
31. The object of amendment of pleadings as the court observed in the case of the *Institute for Social Accountability & Another vs Parliament of Kenya & 3 others* (2014) eKLR, is to enable parties alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of facts already pleaded or the relief or remedy already claimed but rather on the basis of the true state of the facts which the parties really and finally intend to rely on.
32. From the evidence of both the Plaintiff and the Interested party, as well as the submissions filed on their behalf, the Interested Party and the Plaintiff entered into an agreement for sale of the suit property on



November 5, 2008. It is the Interested Party who was actually constructing on the suit property even at the time the Plaintiff filed this suit.

33. From the foregoing, if any loss was suffered then, it is the Interested party who suffered the loss from the actions of the 1st Defendant of suspending the ongoing construction. The upshot is that the Plaintiff is not entitled to the orders sought in his plaint against the 1st Defendant. The Interested Party is the lawful and registered proprietor of the suit property.
34. The Interested Party in his testimony exhibited the title to the suit property. Under Section 26(1) of the [Land Registration Act](#), 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...’

B. Whether the 2nd Defendant has established a cause of action against the Plaintiff.

35. The case of the 2nd Defendant is rather unique. The Plaintiff had not initially sued the 2nd Defendant. It is the 2nd Defendant who applied to be joined into the suit. Her application was allowed and she subsequently filed a statement of Defence and Counterclaim. The Counterclaim strangely was against both the Plaintiff and the 1st Defendant. I term it strange because a Counterclaim can only be against a Plaintiff not against a co-defendant. I will address that issue later on.
36. In the Counterclaim, the 2nd Defendant prays for: -
 - a. General Damages
 - b. An order that the 2nd Defendant is the lawful leaseholder of that plot known as Plot No. 50 Community Shopping Centre and that she is entitled to quiet possession and enjoyment of the said plot.
 - c. In the alternative and without prejudice to prayer (b), the Plaintiff and the 1st Defendant jointly and severally do pay the 2nd Defendant the prevalent open market value of that plot known as Plot No. 50 Komarock Community Shopping Centre.
 - d. Costs of the suit and interest.

Against the Plaintiff and the 1st Defendant jointly and severally.

37. The facts presented by the 2nd Defendant however, do not justify the grant of orders sought against the Plaintiff. The question that the 2nd Defendant ought to have asked herself was what wrong the Plaintiff had committed against her to justify her claim against him because that is what would constitute the cause of action against the Plaintiff. A cause of action as defined in the case of [DT Dobie & Co \(K\) Ltd vs Muchina](#) (1982) KLR is “an act on the part of the Defendant which gave the Plaintiff a cause of complaint.”
38. In her Counterclaim, the 2nd Defendant alleged breach of contract. The alleged breach however as particularized at paragraph 6 of the Counterclaim was against the 1st Defendant not against the Plaintiff. The Plaintiff was allotted the suit property by the 1st Defendant just like the 2nd Defendant claims to have been allotted the same by the same entity.



39. My finding is that the 2nd Defendant has not established a cause of action against the Plaintiff.

B. Without prejudice to 2 above, whether the 2nd Defendant's claim against the Plaintiff is time barred.

40. In any event, and in determining the 3rd issue identified herein, I find that the 2nd Defendant's claim against the Plaintiff is time barred. I say so because, from the evidence adduced before the court, the Plaintiff took possession of the suit property in the year 1994. The 2nd Defendant alleges that she was allocated the same in 1993 when she accepted the allotment and commenced payment of the requisite local authority fees as well as the requisite government dues. In other words, she alleges that she acquired legal ownership of the same in 1993.

41. The Counter-claim by the 2nd Defendant was only filed in the year 2014, over 20 years after the event - the taking of possession by the Plaintiff. The *Limitation of Actions Act*, Cap 22 of the Laws of Kenya at Section 7 bars the filing of any action to recover land after the expiry of 12 years from the date on which the right of action accrued.

B. Whether the 2nd Defendant could lawfully counter-claim against the 1st Defendant.

42. The *Black's Law Dictionary*, 11th Edition defines a counter-claim as "a claim for relief asserted against an opposing party after an original claim has been made; especially a Defendant's claim in opposition to or as a set off against the Plaintiff's claim."

43. Halsbury's Laws of England, 4th Edition, vol. 42 on its part explains a Counter-claim by giving a case scenario as follows: -

"When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim."

44. It goes further to elaborate that,

"any claim in respect of which the Defendant could bring an independent action against the Plaintiff may be enforced by a Counter-claim subject only to the limitation that it must be such as can conveniently be tried with the Plaintiff's claim. Thus not only claims for money but also other claims such as a claim for injunction or for specific performance or for declaration may be the subject of a counter-claim."

45. Strictly speaking, a counter-claim can only be filed by a Defendant(s) as against a Plaintiff(s). It is a 'cross-suit' by the Defendant against the Plaintiff. It is a 'Counter-action' or a 'Counter-suit'. The 2nd Defendant cannot therefore purport to counter-claim against the 1st Defendant (a co-defendant). She ought to have instead filed 'a claim against a co-defendant' to even enable the 1st Defendant respond appropriately.

46. My finding therefore is that the 2nd Defendant did not actually file a valid claim against the 1st Defendant. I will therefore proceed to strike out the so called counter-claim against the 1st Defendant. I am deliberately 'striking it' out rather than dismissing it so as not to inhibit the 2nd Defendant from filing a proper claim against the 1st Defendant should they deem it fit so to do.

47. I will refrain from going into the merit of the claim by the 2nd Defendant against the 1st Defendant so as not to prejudice the meritorious hearing of such a claim in future should the 2nd Defendant opt to



pursue one against the 1st Defendant. I will therefore not consider the issue number 5 having already struck out the Counterclaim by the 2nd Defendant against the 1st Defendant.

48. Finally, on the issue of costs of the suit and Counter-claim; this court having considered the unique circumstances of this case orders that each party bears its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2023.

M D MWANGI

JUDGE

In the virtual presence of:

Mrs Kingoo Wanjau for the 2nd Defendant.

Mr Nyakoe for the 1st Defendant.

Mr Gakaria for the Plaintiff and Interested Party.

Court Assistant – Yvette.

M D. MWANGI

JUDGE

