



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT NYAHURURU

ELC CASE NO 349 OF 2017

ESTERY KANOTHU KIRITU.....PLAINTIFF

VERSU

FRANCIS NJIHIA KIRITU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd April 2015 the plaintiff herein instituted this suit against the defendant seeking for orders that:

i. The Defendant, his servants, agents and/or any other persons working under him be evicted and do vacate on the Plaintiff's parcel of land title No. Nyandarua /South Kinangop/9470.

ii. Costs of the suit.

iii. Any other and/or better relief the Honorable Court may deem just and expedient.

2. The pleadings were filed by the Plaintiff in person who informed the court that she had served her papers to the defendant, who was her son, through the village elder Mr. Muchiri Gicheru, who was in court and confirmed service through the Assistant chief M/s Esther Nduta.

3. The court having satisfied itself that service was effected after interrogating the village elder, proceeded to list the matter for hearing on the Application by Notice of Motion dated the 22nd April 2015 for hearing interpartes, for the 27th September 2017 so as to give the Plaintiff/Applicant sufficient time to effect service.

4. That on the hearing day, the Defendant was absent despite service having been effected as evidenced in the Affidavit of service, dated the 21st June 2017 and filed on the same day.

5. The court then explained to the Applicant, who stated that she was 80 years old, that since the Defendant was already on the suit land, the prayers sought in her application would amount to an eviction order which at that stage the court would be reluctant to issue for reason that the same was premature at that stage.

6. The plaintiff after having been translated for the opinion of the court in Kikuyu language and upon having understood the repercussions of her Application, opted to withdraw the same and proceed with the hearing of the case.

7. The application dated the 22nd April 2015 was subsequently marked as withdrawn where, the court having noted that the defendant had not filed any papers despite service, entered judgment against him and set the matter down for formal proof for the 22nd November 2017.

8. The Plaintiff's evidence, in kikuyu language and while on oath, was to the effect that she was the registered proprietor of the suit land Ref No. Nyandarua /South Kinangop/9470. She produced an original copy of the title deed which was marked as exhibit 1

9. The court having compared the original to the copy retained the copy and returned the original copy of the title to the plaintiff who continued with her evidence stating that she was an illiterate 80 years old woman who practiced mixed farming for her livelihood.

10. That the suit land had once belonged to her father-in-law who had passed it on to her husband who died some 30 years ago thus leaving the suit land for her.

11. That she had subsequently subdivided the land into 3 pieces wherein she had given each of her sons being Kibe and Njehia, the defendant herein their shares of land and had remained with one piece That whereas one of her sons accepted his share and moved thereon, the Defendant refused to leave her piece of land to go and settle on his own share of land.

12. That the defendant was greedy and wanted to grab the two pieces of land for himself yet she housed orphans on her own piece of land.

13. The Plaintiff submitted that all she wanted from the court was to have the Defendant evicted from her land so that he could go and build on his own land which she had given him

14. I have reviewed and considered the uncontroverted evidence of the plaintiff, which was precise and to the point, in support of her claim.

15. I find the issue for determination as being whether the plaintiff is entitled to be declared as the registered as the owner of the suit property.

16. Having duly considered the evidence adduced before court by the plaintiff and having found she was an old woman aged 80 years if not more, her evidence came to me was that of a truthful suffering woman who only wanted the defendant her son to move out of her land to settle upon the land that she had given him.

17. I also perused through the Plaint and Notice of Motion application herein and found that in addition to her evidence, the Plaintiff had stated in her pleadings that in the year 2010 she had sub-divided her land being Nyandarua /South Kinangop/8832 into three pieces being Nyandarua /South Kinangop/9470, 9471 and 9472 whereas she given plot No.9471 to the defendant and plot No. 9472 to her other son. That she remained with plot No.9470. That despite the defendant having been given his own share of land, he had refused to leave the plaintiff's land and had even built thereon a semi-permanent house. That upon refusing to leave he had become very abusive to the Plaintiff which had caused her mental anguish.

18. The Plaintiff's evidence was believable and was backed by a genuine document being the Title deed which was marked as exhibit 1 and which was not contested as the defendant had filed no papers to defend himself.

19. From the documentary evidence, being copy of the Title deed for No. Nyandarua /South Kinangop/9470 which was produced as Exh. 1, the Plaintiff herein proved that she was the registered proprietor of the said parcel of land as at 30th March 2012. Her registration as owner of the suit land was also a first registration.

20. The provision of section 24(a) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

'the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

21. Section 25(1) of the Land Registration Act also stipulates that ;

'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...'

22. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

"the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

23. In light of the above, this court finds that the Plaintiff has established that she is indeed the duly registered proprietor of the suit property

and is entitled to all the rights appurtenant thereto.

24. It has been demonstrated that despite service, the Respondent failed to file his papers and/or defend the suit. The court thus makes the following orders:

- i. The Defendant, his servants, agents and/or any other persons working under him do forthwith vacate the land parcel No. Nyandarua /South Kinangop/9470 within 30 days of the delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.
- ii. A permanent injunction is hereby issued restraining the Defendant from entering into, dealing or in any way interfering with the land parcel No. Nyandarua /South Kinangop/9470.
- iii. Costs to the Plaintiff at the lower scale since the suit was undefended.

Dated and delivered at Nyahururu this 15th day of February 2018.

M.C. OUNDO
ENVIRONMENT & LAND – JUDGE