



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC NO. 595 OF 2016**

**JOHNSTONE KIMUTAI MARINDANY..... PLAINTIFF**

**VERSUS**

**EMILY MOSONIK.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 21<sup>st</sup> December, 2016, the plaintiff averred that the defendant had trespassed onto, cultivated, constructed a house upon and grazed her cows on his parcel of land known as LR NO. Nakuru/Saino Settlement Scheme/2371 measuring approximately 1.92 hectares, hereinafter ‘the suit property’, without his consent.

2. The plaintiff therefore prayed for judgement against the defendant for an order of eviction of the defendant from the suit property, damages for trespass and costs of the suit.

3. The defendant filed statement of defence wherein she denied the plaintiff’s allegations and averred that she was allocated the suit property around the year 1996 and that she then settled on it, developed it and planted crops. She stated that the suit property was fraudulently registered in the name of the plaintiff. Although she did not specifically title her said pleading as a counterclaim, she prayed that the plaintiff’s case be dismissed with costs and “*for cancellation of title no. Plot No NAKURU/SAINO SETTLEMENT SCHEME 2370 measuring 1.92 hectare until the dispute between the two is resolved*”. She also prayed for costs.

4. At the hearing, the plaintiff testified as the sole witness in respect of the plaintiff’s case. He stated that he is the registered owner of the suit property and that he was issued with a title deed in the year 2005. He showed the court the original of the title deed and produced a copy thereof. He added that he had peaceful enjoyment of the property until the year 2010 when the defendant invaded it, built a house on it, cultivated it and brought livestock to it. That despite being summoned by the area Chief, the defendant remained on the property and became hostile. He added that the defendant had cut down his trees and that the forest department wrote a letter dated 22<sup>nd</sup> January 2016 in which they assessed the damage.

5. During cross examination the plaintiff was referred to his witness statement wherein he had stated that he bought the suit property in the year 2000 and he stated that he never bought it but applied for it from the government and it was allocated to him. He denied that the defendant has been occupying the suit property since 1996 or that it was allocated to her by the government. He equally denied knowledge of proceedings in Olunguruone Land Dispute Tribunal Claim No. 293/2009.

6. The plaintiff’s case was then closed.

7. The defendant also testified as the sole witness in respect of her case. She stated that she was allocated the suit property and that she has been in occupation since 1996. That in January 2009, the plaintiff went to the suit property and claimed it stating that he had a title deed. That she lodged Claim No. 293 of 2009 against the plaintiff at the Olunguruone Land Disputes Tribunal and that the tribunal decided in her favour. She produced a copy of the tribunal’s proceedings and findings. That as at the time of her testimony, she was growing maize on the plot, had constructed 7 houses on it and had fenced it with a hedge.

8. The defendant further testified that she does not have a title deed because she did not have money when title deeds were being issued in the year 2005. That when she later got money and went to Nakuru Land office she was informed that a title had been issued to the plaintiff. That the plaintiff’s wife and two daughters each have a plot in the neighbourhood. That her husband passed away in 1992 and that she has seven children two of whom have built houses on the suit property and that she has nowhere else to go. She stated that the plaintiff’s title was obtained using strange ways and urged the court to allow her to remain on the plot.

9. She further stated that she was not given any document when the suit property was allocated to her and that she did not have any receipt showing payment for the suit property or any document showing that the plaintiff was summoned to the tribunal. That when she lodged the

tribunal claim, she knew that the plaintiff already had a title.

10. The defence case was closed at that point. Parties thereafter filed and exchanged written submissions.

11. The plaintiff argued that **Article 23** of the **Constitution of Kenya 2010** enjoins the Judiciary to breathe life in to the Constitution and uphold its provisions such as **Article 40** as regards protection of right to own property. It was further argued that the plaintiff proved by way of evidence that he has good title to the suit property which title should be protected by the law. That the certificate of title ought to be taken by court as prima facie evidence that the person named a proprietor of the land is the absolute and indefeasible owner and that the defendant dismally failed to prove any fraud to the required threshold. That accordingly, the plaintiff is entitled to the reliefs sought.

12. The defendant on her part argued that the plaintiff has not come to court with clean hands since he did not seem to be sure as to the exact time when the parcel of land was encroached in to. That she has been on the suit property since 1996 for approximately 25 years ago and that the plaintiff's suit is statute barred by virtue of the provisions of **Section 7** of the **Limitation of Actions Act**.

13. I have considered the parties' pleadings, evidence and submissions. It must be noted that the issue of limitation was not pleaded in the defence and it is therefore not available to the defendant in view of the provisions of **Order 2 Rule 4** of the **Civil Procedure Rules**. The issues that arise for determination are who between the parties is the proprietor of the suit property and whether the reliefs sought should issue.

14. Both parties claim that they acquired the suit property through allotment by the government. None of them has produced any letter of allotment or evidence of compliance with terms of the allotment through, for example, payment to the government. The plaintiff has a title deed without demonstrating how the allotment translated to a title deed. The defendant acknowledges that indeed the plaintiff is the registered proprietor of the suit property. Although she claims that the suit property was allocated to her in the year 1996, she categorically stated that she was never given any letter of allotment and that she never paid anything to the government for the plot.

15. From the copy of the title deed that was produced in evidence as well as from the defendant's own admission, I am satisfied that the plaintiff was registered as proprietor of the suit property on 12<sup>th</sup> October 2005 and that a title deed was issued to him on that date. As a registered proprietor of land, the plaintiff is by law accorded privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept his title deed as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are established.

16. The defendant claimed in her statement of defence that the registration of the plaintiff as proprietor was fraudulent. Fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. Beyond questioning the circumstances under which the plaintiff became a registered proprietor, the defendant did not offer any evidence that demonstrates fraud. Further, the defendant's attempt at seeking cancellation of title was in respect of "title no. Plot No NAKURU/SAINO SETTLEMENT SCHEME 2370" which is totally different from the suit property herein which is LR No. Nakuru/Saino Settlement Scheme/2371.

17. In view of the foregoing, I am satisfied that as between the parties herein the plaintiff is the proprietor of the suit property. It follows therefore that the plaintiff is entitled to an order of eviction. The defendant pleaded that she is a widow with seven children. While that may make her vulnerable deserving of compassion, the law must take its course. The best I can do is to give her a reasonable period within which to vacate, failure to which eviction will ensue.

18. The plaintiff prayed for damages for trespass. As already noted, the plaintiff did not demonstrate when he obtained a letter of allotment and when the defendant entered the suit property. Further, the plaintiff did not offer any submissions under the heading of damages for trespass. I will not therefore make any award under that head.

19. In the result, I enter judgment in favour of the plaintiff as follows:

**a. The defendant to vacate the parcel of land known as Nakuru/Saino Settlement Scheme/2371 within 6 (six) months from the date of delivery of this judgment.**

**b. In default of the defendant vacating as above, an order of eviction of the defendant from the parcel of land known as Nakuru/Saino Settlement Scheme/2371 shall issue.**

**c. Each party shall bear own costs.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2022**

**D. O. OHUNGO**

**JUDGE**

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma