



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 183 OF 2017

TERESIA WANJIKU KOIGI.....PLAINTIFF

VERSUS

LINCOLN WARIUA NGONYO & 16 OTHERS.....DEFENDANT

JUDGEMENT

1. Vide a plaint dated 7/2/2017, the Plaintiff prayed for judgment against the Defendants THAT;

a. The Defendants by themselves, their servants and agents be permanently restrained from in any way whatsoever interfering with any part or portion of land parcel JUJA KIAORA/10087/47.

b. There be issued an EVICTION ORDER requiring all the Defendants be evicted from the land portion or parts they have illegally encroached and all the illegal structures by the Defendants be demolished.

c. Costs of the suit.

d. Any other relief that the Court may deem just to grant.

2. In opposing the Plaintiffs claim, the Defendants filed a joint statement of defence dated 28/4/2017 and maintained that they are rightfully in possession of LR no. JUJA/KIAORA/10087/47 (*hereinafter referred to as the suit land*). That they lawfully purchased the suit and from the personal representative of the estate of **Paolina Wanjiku Wabacha**. They urged the Court to dismiss the Plaintiff's suit with costs.

3. The Plaintiff testified as the sole witness in support of her claim. She adopted her witness statement dated 7/2/2017 that she is the registered owner of the suit land measuring approximately 3.5 acres. That the Defendants had trespassed on the suit land without her permission and impugned their alleged sub-division of the smaller parcels of land. She also produced the copy of certificate of title as contained in the List of Documents of even date as **P.exh.1**. The Plaintiff informed the Court that she inherited the land from her deceased mother in law, **Paolina Wanjiku Wabacha**.

4. On cross-examination, the Plaintiff explained that the late Paolina had one son only, the Plaintiff's deceased husband, Patrick. That the late Paolina and her son died in 2006 and 2008 respectively. She conceded that it took her a long time to apply for letters of administration. She denied knowledge of an application for revocation of her grant issued in 2017. That the Defendants invaded the suit and in the same year. That she was not aware that Muchiri Njuguna sold the suit land to the Defendants.

5. On re-examination, the witness clarified that she was granted the land vide Thika Succession Cause no. 580 of 2014 on 3/3/2014. That was the end of the Plaintiff's case.

6. The defence called a total of four witnesses. The 1st Defendant **Lincoln Ngonyo** testified as DW1. He adopted his witness statement dated 27/8/2019 and List of documents dated 28/4/2019. He produced copies of the suit land certificate of title, sale agreement, share certificate and photographs as Dexh. 1-4. It was his testimony that he bought his parcel of land plot 1 from Warura Investment company through a land agent named Kihara. That he entered into a sale agreement with Warura Investment after paying Kshs. 100,000/= for a share certificate. That he did not know the Plaintiff and refuted her purported ownership of the suit land.

7. On cross-examination, DW1 stated that his plot measured 40 x 60 feet and did not have a title deed in his name. He admitted receiving a demand letter from the Plaintiff's advocate asking him to vacate the suit land. That he took the letter to his advocate and Warura Investment who summoned the deceased owner's wife.

8. **Titus Kinyua Ndegwa**, the 16th Defendant testified a DW2. He similarly adopted his witness statement dated 28/4/2017. Just like DW1, DW2 told the Court that he purchased his plot in 2008 from Warura Investment and constructed a permanent house thereon in 2010. That he got a share certificate after completion of payment. Regarding Pexh.1, DW2 elaborated that the Plaintiff was registered as the owner on 7/6/2016 way after he had been in occupation of the suit land.

9. On cross-examination, DW2 explained that he bought his land from Warura Investment which had an office in Juja town. That the registered owner of the suit land was one Muchiri Njuguna who also signed the share certificate. That all the transactions were done by Warura Investments. DW2 acknowledged that he did not attend any land control board to obtain relevant consent.

10. The next witness was DW3, Paul Wakahiu Ruo. He adopted his statement dated 27/8/2019. He said that he knew his elder brother the late Muchiri who died in 2012. That Muchiri had 3 wives namely; Paulina Wanjiku, Hannah Wanjiku and Esther Wanjiku. That Pauline Wanjiku passed on in 2006 without any issue. He denied knowing the Plaintiff at all or the alleged Patrick Wabacha, Pauline's purported adopted son.

11. The last witness was **DW4 - Esther Wanjiku Muchiri**. She adopted her statement dated 27/8/2019. She admitted knowing the Plaintiff when she was summoned by the area chief concerning the late Pauline Wanjiku's properties. DW4 corroborated DW3's testimony that Pauline Wanjiku was her eldest co-wife who died in 2006 before their husband, the late Muchiri. That she did not know Patrick Wabacha since Pauline had no children. That after Pauline's demise, their husband Muchiri subdivided the land and sold it through Warura Investments. That by the time the Plaintiff got her Grant, the suit land had long been subdivided and sold to third parties.

12. The firm of **Kamiro R.N Advocates** filed submissions dated 1/11/2021 on behalf of the Plaintiff. The Plaintiff submitted that the suit land was initially registered in the names of Paolina Wanjiku Wabacha who had adopted Patrick Wabacha Wanjiku, the Plaintiff's deceased husband. That the late Patrick and the Plaintiff had three children who are all settled on the suit land. That the Plaintiff filed **Thika Succession Cause No. 580 of 2014** and obtained her Grant and subsequently the suit land in her name. That the Plaintiff was duly introduced by the Kalimoni Chief where the suit land is situate, as the daughter in law of Paolina. She implored the Court to dismiss the Defendants' defence and enter judgment in her favour.

13. Conversely, the Defendants through the firm of **Mbigi Njuguna & Co. Advocates** filed submissions dated 28/10/2021 and raised three issues for determination; whether the Plaintiff is the rightful owner of the suit property, whether the Defendants are trespassers thereon and whether the Plaintiff has proven her claim on a balance of probabilities.

14. On the first issue, the Defendants submitted that the Plaintiffs' alleged acquisition was highly contested and her allegation as late Paolina's daughter in law was questionable. That no evidence was tendered to demonstrate the alleged daughter in law relationship and acquisition of the suit property. That the Plaintiff failed to explain the origin of her title laid down in the case of **Munyu Maina vs. Hiram Gahitha Maina [2013]eKLR**.

15. Secondly, the Defendants averred that they are not trespassers on the suit land having legally purchased their parcels of land from the late Muchiri Njuguna. That they adduced copies of the sale agreements and share certificates issued by Warura Investments and thus cannot be termed as intruders.

16. Lastly, the Defendants submitted that the Plaintiff had not discharge the burden of proof placed on her by Section 107 of the Evidence Act to warrant the prayers sought. Reliance was also placed on the case of **Karen Roses Limited vs. Attorney General & 4 others [2019] eKLR**.

Analysis & Determination

17. The main issues for determination are; whether the Plaintiff is the registered owner of the suit land; whether the Plaintiff has proven her case for eviction and who bears the costs.

18. It is trite that he who alleges must prove. The balance of proof in civil cases as this is on a balance of probabilities. Sections 107, 108 and 109 of the Evidence Act state;

“107. Burden of proof

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

19. Moreover **Section 26** of the Land Registration Act provides;

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

20. The Plaintiff contends that she is the rightful proprietor of the suit land by way of transmission as legal administrator upon the demise of the late of Paolina Wabacha. She produced a copy of the Certificate of title as **P.Exh 1** issued on **5/7/2016**. That the transmission was by way of **Thika Succession Court Case No. 580 of 2014** Order dated 26/2/2016. The Defendants and in particular DW3 and DW4 deny the Plaintiffs’ alleged relationship to the late Paolina. They maintained that the late Paolina had no children and upon her demise, her estate was succeeded by her late husband Muchiri. It is the said Muchiri who, according to the Defendants, sold the suit land through Warura Investments. DW4 in her statement averred that she had filed an application to revoke the grant but at the hearing she changed her mind and informed the Court that no such application had been filed and neither did Muchiri her husband file any succession proceedings with respect to the estate of Paolina Wanjiku Wabacha.

21. The Courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in her name. That position was not challenged by the Defendants apart from generalized allegations which failed to mount an attack against the title of the Plaintiff.

22. The second issue is whether eviction is founded. Section 3(1) of Trespass Act cap 294 states as follows:-

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

23. Black’s Law Dictionary 10th Edition at page 1733 defines trespass as an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant encroached his land without any justifiable reason.

24. It is the Plaintiff’s case that the Defendants have encroached on her land without her consent and knowledge. Section 24 and 25 of the Land Act affords the Plaintiff the right to peaceful enjoyment of the suit land.

25. It is not in dispute that the Defendants are in possession of the suit lands. It was their evidence that they purchased portions of land in 2007/2008 from an agent by the namely Warura Investments Limited and a Mr Muchiri Njuguna who is alleged to be the deceased husband of Paolina Wabacha. There was no evidence to show that upon the death of Paolina, the alleged Muchiri took out letters of grant of administration in the estate of Paolina. It is not in dispute that Paolina passed away in the year 2006. If the Defendants evidence is anything to go with it means that the land was sold to the Defendants in 2007/8 before the estate of Paolina had been succeeded. Any purported sale of the land amounts to intermeddling of the estate of the late Paolina. The Defendants failed to present any evidence of ownership of the land by the alleged Muchiri or Warura Investments Limited. The share certificates held by the Defendants are incapable of conveying any interest in the land. Neither Muchiri Njuguna nor Warura Investments had any legal capacity to dispose of the suit land to the Defendants. They therefore conveyed no interest rights or estate with respect to the suit land and the Defendants received nothing.

26. In the end it is the view of the Court that the Defendants have not proffered any justifiable reason for their continued occupation of the land.

27. Having considered the pleadings, the evidence and the written submissions of the parties and the law, the Court has reached a conclusion that the Plaintiff has proved her case on a balance of probabilities. I make the following orders;

a. The Plaintiffs suit succeeds.

b. The Defendants by themselves, their servants and agents be permanently restrained from interfering with any part of the suit land namely JUJA/KIAORA/10087/47.

c. The Defendants be and are hereby ordered to vacate the suit land within 60 days from the date hereof in default eviction to issue.

d. The costs shall be in favour of the Plaintiff.

28. Orders accordingly.

DELIVERED, SIGNED & DATED AT THIKA ON THE 24TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff - Absent

Ms. Maina holding brief for Mbigi for 1st – 16th Defendants

Ms. Phyllis – Court Assistant