



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 376 OF 2011

SOPHIA MDULU MULWA.....PLAINTIFF

VERSUS

JOSEPHAT KARUTI RUKUNGA.....DEFENDANT

J U D G M E N T

The Plaintiff by a suit dated 13th July 2011 filed in court on 28th July 2011 claims to be the rightful owner of **plot NO. 120 Umagara Scheme** being a subdivision of **L.R. NO. 8469/4** having purchased the same vide an agreement dated 18th March 1992 from one **Charles Muriithi Kirigia** the original allottee from **Umagara Wiyonere Company**. The plaintiff avers that the Defendant has unlawfully encroached onto the said plaintiff's **plot NO. 120 Umagara Scheme** without any colour of right and has continued in possession and occupation as a trespasser without any approval and/or consent of the plaintiff.

The Plaintiff further avers that the Defendant has constructed unlawful and illegal structures on the plot from where he carries on business activities to the prejudice of the plaintiff who has been denied use of the premises. The plaintiff seeks judgment against the Defendant for:-

- (a) A permanent injunction restraining the Defendant by himself, his servants or any person claiming title through the defendant from trespassing, constructing on, transferring, disposing of, alienating, wasting or in any manner interfering with the parcel of land known as **plot NO. 120 Umagara Scheme** a sub-division of **L.R. NO. 8469/4**, pending the hearing and final determination of the suit.
- (b) A declaration that the plaintiff is the beneficial owner/proprietor of **plot NO. 120 Umagara Scheme** a subdivision of **L.R.NO. 8469/4**.
- (c) Eviction order against the Defendant and/or in the alternative an order that the Defendant render vacant possession.
- (d) Mesne profits.
- (e) Interest on mesne profits.

(f) Costs of the suit and interest.

(g) Any of her reliefs as the Honourable court may deem just to grant in the circumstances.

The Defendant was on the 13th September 2011 served with summons to enter appearance together with the plaint and the other pleadings as per the affidavit of service sworn by **Joseph K. Manzi** on 29th November 2011 and filed in court on 3rd February 2012. On 10th February 2012 the Deputy Registrar upon application for interlocutory judgment by the plaintiff against the Defendant in default of appearance and defence directed the plaintiff to reserve the summons to enter appearance as it was not clear, how the defendant was identified to the process server.

The plaintiff following an application for reissue of summons was issued with fresh summons to enter appearance which the same process server, **Joseph K. Manzi** served on the defendant on 13th May 2013 at the offices of the plaintiff's advocate as per the affidavit of service filed on 12th June 2013. The Defendant did not enter appearance and/or file a defence and interlocutory judgment was entered against the defendant on 20th June 2013.

The suit was fixed for formal proof hearing before me on 26th February 2015 when the plaintiff, **Sophia Ndulu Mulwa** testified in support of her case. The plaintiff in her evidence relied on her witness statement dated 13th July 2011 filed contemporaneously with the plaint and the bundle of documents as per the plaintiff's list and bundle of documents filed with the plaint as per the company's records.

I have reviewed the witness statement by the plaintiff and the agreement for sale dated 18th March 1992 and the copy of the plot certificate for **plot NO. 120** issued by **Umagara Wiyonere Company** and I am satisfied that the plaintiff indeed purchased **plot NO. 120 Umagara Wiyonere** Scheme from the original allottee of the plot one **Charles Murithi Kirigia**. The said **Charles Murithi Kirigia** made a statement dated 13th July 2011 confirming that he indeed sold the plot to the plaintiff. The Chairman of **Umagara Wiyonere Company Limited** vide a letter dated 4th May 2011 confirmed that the suit plot was indeed originally sold to **Charles Muriithi Kirigia** who resold the same to plaintiff in 1992 and that the plaintiff was still the proprietor of the plot.

Although the plaintiff has claimed mesne profits for none use of the suit plot owing to the occupation and possession by the defendant, the plaintiff did not provide any basis upon which the court could assess any mesne profits. The court however is satisfied the defendant is in unlawful occupation and possession of the plaintiffs plot and that the plaintiff would be entitled to general damages for trespass which are recoverable as of right once trespass is established.

On the basis of the evidence tendered by the plaintiff which evidence was not contraverted and/or rebutted by the defendant, I am satisfied the plaintiff has proved her case on a balance of probabilities and I accordingly enter judgment in favour of the plaintiff as against the defendant and make the following orders:-

(i) A declaration be and is hereby issued that the plaintiff is the beneficial owner of **plot NO. 120 Umagara Scheme** a subdivision of **L.R. 8469/4**.

(ii) The Defendant be and is hereby ordered to deliver vacant possession of **plot NO. 120 Umagara Scheme** within 30 days of being served with the decree herein failing which an eviction order against the defendant to issue on application by the plaintiff.

(iii) General damages for trespass in the sum of Kshs.75,000/- is hereby awarded to the plaintiff with interest from date of judgment until payment in full.

(iv) Costs of the suit with interest at court rates.

Judgment dated, signed and delivered this...24th.....day of.....April.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant