



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 354 OF 2016

SABINA KEMUNTO NYANGACHA.....PLAINTIFF

VERSUS

RAYMOND NYAGWOKA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff who is the registered owner of land parcel number KITARU SETTLEMENT SCHEME/13 (hereinafter referred to as the suit property) filed suit against the Defendant claiming that the Defendant had unlawfully entered upon the suit property, started constructing a permanent house and cultivated a portion thereof without the Plaintiff's authority. The plaintiff alleged that as a result of the Defendant's acts of trespass, the Plaintiff has been deprived of the usage and/or development of the suit property. Consequently, the Plaintiff seeks the following reliefs:

- a) A declaration that the Plaintiff is the lawful registered owner of land parcel number KITARU SETTLEMENT SCHEME/13.
- b) An order of eviction directed against the Defendant, his agents and/or servants from L.R No. KITARU SETTLEMENT SCHEME/13.
- c) A permanent injunction restraining the Defendant either by himself or his agents, servants, employees and/or anyone claiming under the Defendant from entering upon, re-entering, trespassing onto, cultivating, building structures and/or in any other manner dealing with the suit land that is L.R No. KITARU SETTLEMENT SCHEME /13.
- d) Costs of this suit and interest.

2. Upon being served with the Plaint and Summons, the Defendant filed a Defence dated 20th May, 2019 in which he denied the Plaintiff's claim and alleged that the Plaintiff acquired the suit property by way of fraud.

3. The case was set down for hearing but only the Plaintiff testified as the Defendant could not be traced. For this reason, counsel for the Defendant filed an application to cease acting for the Defendant and the Plaintiff had to serve him with a hearing notice by way of substituted service pursuant to the court's directions.

PLAINTIFF'S CASE

4. The Plaintiff testified that she was the registered owner of land parcel number KITARU SETTLEMENT SCHEME /13. She relied on her witness statement filed in court on 1st November, 2016. She produced the documents in her List and Bundle of documents as Plaintiff's exhibits 1 to 5. She told the court that she had planted trees and tea bushes on the suit property. She said that she had requested the Defendant's father to take care of her land but he refused to vacate when requested to do so. He later died and left the Defendant on the land.

5. Upon cross-examination, she stated that she was allocated the suit property and she was initially given an allotment card. She was subsequently issued with a title deed in 1964. She confirmed that she does not reside on the suit property. She said she did not know where the Defendant's father and mother were buried.

6. After the close of the Plaintiff's case the Defendant's case was marked as closed as he failed to attend court after being served with a hearing notice.

ISSUES FOR DETERMINATION

7. From the pleadings and evidence on record the issues that arise for determination are:-

- i. Whether the Plaintiff is the registered proprietor of land parcel number KITARU SETTLEMENT SCHEME/13;
- ii. Whether the Defendant has trespassed upon the suit property.
- iii. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

8. With regard to the first issue, it was the Plaintiff's uncontroverted evidence that she is the registered proprietor of land parcel number KITARU SETTLEMENT SCHEME/13. She relied on her witness statement filed in court on 1st November, 2016 in which she stated that the suit property was allocated to her late husband Samwel Nyang'acha, before it was eventually registered in her name. She produced the documents in the Plaintiff's List of Documents which include the title deed in respect of the suit property, a Certificate of Official Search, the extract of the register (green card), a demand letter from her advocate and copies of photographs depicting the developments on her land. The same were marked as Plaintiff's exhibits 1-5.

9. The Plaintiff testified that she knew the Defendant and his late father. She stated that the Defendant's father was known as Barasa. She stated that she had requested him to take care of the suit property, but he refused to leave when she asked him to vacate her land and stayed thereon upto the time of his death. Thereafter, the Defendant continued occupying the suit property without her consent. She said the land had a tea plantation. She stated that she did not reside on the suit property as she had her home on a different parcel of land. The Plaintiff did not call any witnesses.

10. Even though the Defendant was initially represented by the firm of Nyamurongi and Company Advocates, the said advocates filed an application to cease acting for him as they were unable to contact him. When the case came up for Defence hearing, the Defendant failed to attend court although he had been served by substituted service. The court therefore marked his case as closed.

11. In his submissions learned counsel for the Plaintiff submitted that the Plaintiff had proved her case on a balance of probabilities and that she was therefore entitled to the reliefs sought. He contended that even though the Defendant had filed a Defence, he failed to attend court to testify as to the veracity of the averments in his Defence and therefore the same was of no use to his case.

12. Section 22 of Land Registration Act No. 3 of 2012 states that;

“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....”

Section 24 of the said Act provides that;

“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”.

13. The Plaintiff testified that she is the registered owner of land parcel number KITARU SETTLEMENT SCHEME/13 as demonstrated by Plaintiff's Exhibit 1.

14. Since the Plaintiff's evidence was not challenged at the hearing, it is my finding that the Plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

15. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that:

“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”.

16. The second issue is whether the Plaintiff has proved that the Defendant trespassed onto her land. The Plaintiff testified that she had requested the Defendant to vacate the suit property but he had refused to do so. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No. 277 of 2018** Okong'o J observed as follows:

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is *prima facie* proof of possession”

17. From the evidence on record, it is my finding that the Defendant is unlawfully occupying the suit property. This amounts to trespass to land. It is therefore my finding that the Plaintiff has proved that the Defendant has trespassed on her land.

18. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks three remedies; a declaration that

the Plaintiff is the lawful owner of the suit property, a permanent injunction against the Defendant and an order of eviction against the Defendant.

19. Having arrived at the finding that the Plaintiff has proved her case, she is entitled to all the reliefs sought in her Plaint.

Consequently, I enter judgment for the Plaintiff and make the following final orders:

- a) A declaration is hereby issued that the Plaintiff is the lawful registered owner of land parcel number KITARU SETTLEMENT SCHEME/13.
- b) The Defendant is hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c) A permanent injunction is hereby issued restraining the Defendant either by himself or his agents, servants, employees and/or anyone claiming under the Defendant from entering upon, re-entering, trespassing onto, cultivating, building structures and/or in any other manner dealing with the suit land that is L.R No. KITARU SETTLEMENT SCHEME/13.
- d) The Defendant shall bear the Costs of this suit together with interest.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2022.

J.M ONYANGO

JUDGE