



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 71 OF 2019

JANE MUTHINI MATILIKU.....PLAINTIFF

VERSUS

VERONICA MAKAU.....DEFENDANT

JUDGMENT

1. By a Plaint dated 19th of September 2019, the Plaintiff is seeking for the following orders against the Defendant: -

a) An order of a permanent injunction restraining the Defendant from encroaching or in any other manner interfering with the Plaintiff's land parcel number Ukia/Utaati/159.

b) An order of an eviction against the Defendant compelling her to remove the offending structures that have encroached into the Plaintiff's parcel of land number Ukia/Utaati/159.

c) Cost of the suit.

2. The Defendant was served with Summons to Enter Appearance but never entered Appearance nor filed a Defence. Interlocutory Judgment was entered against the Defendant on 11th of April 2021.

3. The matter proceeded to formal proof on 8th of October 2021.

4. The Plaintiff adopted her statement filed on 23rd of September 2019 as her evidence. The Plaintiff further produced the documents in her list of documents dated 19th of September 2019 as exhibit 1 to 4 respectively. It is the Plaintiff's evidence that she is the registered proprietor of land parcel number Ukia/Utaati/159 while the Defendant is the owner of land parcel number Ukia/Utaati/152. The Plaintiff stated that the Defendant had encroached and occupied her land without her authority. It is her further evidence that being aggrieved by the Defendant's acts of encroachment, she reported the matter to the Ministry of Lands and Urban Development. That as a result of the report, the District Surveyor Makueni County visited the site on 15th of October 2015 and conducted the survey in the presence of both parties and the area chief. It is the Plaintiff's testimony that the District Surveyor in his findings and report concluded that the Defendant had encroached on her parcel of land. The Plaintiff maintains that despite the report by the District Surveyor, the Defendant had persisted in encroaching on her land.

SUBMISSIONS

5. The Plaintiff's submissions were filed on 26th of November 2021 which I have considered. Counsel for the Plaintiff submitted that the Plaintiff having established that she was the registered owner of the suit land was entitled to the rights and privileges appurtenant thereto.

ANALYSIS AND DETERMINATION

6. Although the suit was undefended, the Plaintiff has a duty to formally prove its case on a balance of probabilities as is required by the law.

7. In the case of **Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347** the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

8. Similarly, in the case of Gichinga Kibutha Vs Caroline Nduku (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

9. I have considered the evidence on record, the pleadings and the documents produced by the Plaintiff and I find that the issues for determination are;

(i) Whether the Plaintiff is the registered owner of the suit land.

(ii) Whether the Plaintiff is entitled to the orders sought in the plaint.

WHETHER THE PLAINTIFF IS THE REGISTERED OWNER OF THE SUIT LAND

10. The Plaintiff testified that she is the registered owner of the suit land. In that regard, the Plaintiff produced a certificate of official search (exhibit 1) to prove her ownership over the suit land.

11. Section 35 of the Land Registration Act provides that;

a) Every document purporting to be signed by the Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.

b) Every copy of or abstract from a document certified by the Registrar to be a true copy or extract shall in all proceedings, be received as prima facie evidence of the contents of the document.

c) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.

d) No process for compelling the production of the register, or of the cadastral map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued shall bear thereon a statement that it is issued with the leave of the court.

12. In view of the above provisions of the law, I find that the copy of the certificate of official search produced as (exhibit 3) in respect to land parcel number Ukia/Utaati/159, is conclusive evidence that the Plaintiff is the registered proprietor of the suit land.

13. The law is very clear on the position of a holder of a title in respect of the land.

14. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

15. Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

16. According to the certificate of official search, the registration of the Plaintiff on the suit land was pursuant to a succession cause. There was no evidence that she obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme. I therefore find that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has proved that she is the registered owner of the suit land and therefore the rightful owner.

WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT IN THE PLAINT

17. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides as follows;

Subject to this Act;

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.

18. Section 25 of the Land Registration Act provides for the rights of a proprietor. It provides as follows:

(I) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by 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, but subject;.....

19. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.

20. The Plaintiff stated that the Defendant had encroached on the suit land and put up structures. It is her evidence that the surveyor conducted a survey on the suit land and concluded that the Defendant had encroached on her parcel of land. She produced the District Surveyor's report (exhibit1) and a sketch map as (exhibit 2) in support of her evidence. That despite demand, the Defendant had persisted in encroaching on her land. She produced a demand letter dated 6th of September 2019 issued to the defendant as (exhibit4) to corroborate her evidence.

21. As to whether the Defendant had encroached on the Plaintiff's land, the uncontroverted evidence as well as the production of the District Surveyor's report and the certificate of official search is sufficient proof.

22. Having established that the Plaintiff is the registered owner of the suit property, I find that she is entitled to all the rights and privileges belonging or appurtenant thereto. The Plaintiff is therefore entitled to the protection of the law.

23. In the end, I find that the Plaintiff has proved her case on a balance of probabilities as required.

24. I therefore enter judgment for the Plaintiff against the Defendant in the following terms: -

a) An order of permanent injunction be and is hereby issued restraining the Defendant from encroaching or in any other manner interfering with the Plaintiff's land parcel number Ukia/Utaati/159.

b) An order of eviction be and is hereby issued against the Defendant compelling her to remove the offending structures that have encroached into the plaintiff's parcel of land number Ukia/Utaati/159.

c) The Plaintiff is awarded costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGEMENT SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MARCH, 2022.

IN THE PRESENCE OF: -

KITHUKA FOR THE PLAINTIFF

COURT ASSISTANT - MR. KWEMBOI