



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO 3 OF 2012

SUSAN WAIRIMU MATHAI..... PLAINTIFF

VERSUS

PETER WAITARA WATHOKO..... DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint against the defendant on **12th January 2012** seeking among other orders, a **permanent injunction restraining the defendant, whether by himself, servants or agents or otherwise howsoever from entering, alienating or in any way dealing with land reference number Nyandarua/Kitiri/3118 ("the suit property"), as well as an order of eviction against the defendant and costs of the suit.**

2. In the plaint, the plaintiff states that she is the registered owner of the suit property having inherited it from her parents. Without colour of right, the defendant, her brother, entered the suit property with his family, started cultivating and destroyed the beacons, despite her warnings and entreaties.

3. By an affidavit of service sworn by **Mathew Musotsi** dated **23rd January, 2012**, the defendant was served with summons, Plaint, verifying affidavit, and a list of witness statements but he did not enter appearance nor file a defence. He refused to sign the summons stating that he wished to consult his sons as there was a similar matter pending before the Nyahururu Law courts. The matter was set down for formal proof for **12th February, 2014**.

4. When the matter came up for hearing, the plaintiff gave her oral evidence and produced the following documents:

1. *Original title deed of Nyandarua/Kitiri/3118 registered in her name.*

2. *A court order dated 17th June 2011.*

5. **Susan Wairimu Mathai**, the plaintiff herein (**PW1**) testified that she lived in Njoro and worked with the County Government as a Community Development Officer. She testified that the defendant was her elder brother and after going through succession, she got 9 acres of the suit property as per her parent's wishes. After the death of their mother, the defendant started making claims that she had a bigger portion (i.e. 9 acres) than him as he had only 6 acres. He filed a dispute before the Land Disputes Tribunal where an award was issued in her favour, that she was entitled to the 9 acres. This decision was however quashed by the High Court on **15th June, 2011** prompting her to institute the current suit and pray for eviction of the defendant from the suit property and an order of permanent injunction.

6. In his submissions, counsel for the plaintiff reiterated what was stated in the pleadings and the plaintiff's testimony in court. He further submitted that the plaintiff was unable to exhibit photographs of the defendant's trespass because she had no access to the suit property. Counsel further submitted that **Article 40** of the **Constitution** granted everyone a right to property and prayed for interlocutory judgment as the defendant had not entered appearance.

7. There is no doubt that the plaintiff is the registered owner of the suit property. She has exhibited a title deed evidencing this. **Section 24 (a)** of the **Land Registration Act (No 3 of 2012)**, provides as follows:

"(a) 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;"

8. These rights are adequately captured by **Section 25** of the same **Act**. The plaintiff being the registered owner of the suit land is entitled to these rights and privileges and the title deed she holds must be taken by court as prima facie evidence of ownership. **Section 26** captures this point by providing:

"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."

9. Although the plaintiff has proved that she is the registered owner of the suit property, the prayers she seeks are for a permanent injunction against the defendant and an order of eviction. She has not adduced any evidence on the alleged trespass by her brother. She did not call any witnesses in this case and the only document she offered as evidence was the title deed. This goes against **Section 107** of the **Evidence Act (Cap 80) Laws of Kenya** which provides: -

(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 those facts exists.

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

Or to put it more succinctly, he who alleges must prove.

Section 109 of the same **Act** also provides:

"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."

10. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in **Kirugi & Another v Kabiya & 3 Others [1987] KLR 347** where the Court of Appeal held that the burden was always on the plaintiff to prove his case on the

balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof, although it becomes much easier to discharge.

11. For the above reasons, I decline to grant the orders sought and dismiss the suit without costs as the defendant did not enter appearance.

Dated, signed and delivered in open court this 19th day of September 2014.

L N WAITHAKA

JUDGE

In the presence of:

- Waambeyi holding brief for Mr. Simiyu.
- N/A for the Defendant.
- Court clerk: Emmanuel Maelo.