



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

ELC CIVIL SUIT NO.88 OF 2013

ALICE CHEPNGETICH TABSINET.....PLAINTIFF

VERSUS

FRANCIS NJOROGE KIMANI.....DEFENDANT

JUDGEMENT

Background

1. The suit herein is in respect of a parcel of land known as **L.R No.Nakuru/ Miti Mingi/112** (hereinafter referred to as “the suit property”). The suit property which measures approximately 2 hectares is registered in the name of the plaintiff, **Alice Chepngetich Tabsinet**.
2. It is the plaintiff's case that after the post election violence, in 2008, the defendant without any colour of right to the suit property, trespassed into the suit property, took possession thereof and began effecting developments thereon.
3. The plaintiff contends that all her attempts to get the defendant give her vacant possession of the suit property have been in vain. Further that, owing to the defendant’s illegal dealings with the suit property, she has suffered and continues to suffer loss and prejudice.
4. For the foregoing reasons, the plaintiff prays for judgment against the defendant for a declaration that she is the registered proprietor of the suit property; an order of eviction against the defendant, his servants and/or agents from the suit property; a permanent injunction to restrain the defendant, his servants and/or agents from using, entering and/or in any other way interfering with her enjoyment of the suit property and costs of the suit.
5. Vide the statement of defence dated **2nd May, 2013** the defendant denied all the allegations leveled against him, save for the allegation that he faces a criminal charge for his alleged unlawful dealings with the suit property.

EVIDENCE

The plaintiff’s case

6. When the matter came up for hearing the plaintiff informed the court that she was allocated the suit property by the Government. To prove that fact, she produced the charge issued to her in respect of the suit property as Pexbt 1; she also produced a receipt for Kshs. 295/= she had paid in respect of the charge as Pexbt 2 (a) and receipts for the other charges she paid in respect of the suit property as Pexbts 2(b) to (e).

7. After she completed paying for the suit property, the plaintiff was issued with a title deed, Pexbt 3. To prove that she is the registered owner of the suit property, the plaintiff produced a search certificate issued to her at the lands' office as Pexbt 4.

8. The court heard that although the plaintiff had not been living on the suit property, she had leased it to a woman known as Naomi to take care of the property on her behalf.

9. The plaintiff maintained that during the 2008 post election clashes the defendant entered into the suit property without her permission/consent and constructed a semi permanent structure thereon. He also began growing maize, beans and bananas on the suit property.

10. Owing to the defendant's unlawful dealings on the suit property, the plaintiff reported to the authorities and the defendant was charged with the offence of forcible detainer contrary to **Section 91** of the Penal Code in Nakuru Chief Magistrate's Criminal Case No.3675 of 2012. To prove the defendant's alleged unlawful dealings on the suit property, she produced photographs showing the defendants' activities thereon as Pexbt 5.

11. The plaintiff also called as a witness a land registrar working at Naivasha District Land Registry one, **Susan Warindi Muchemi** (P.W.2).

12 P.W.2 explained that the suit property was under Settlement Fund Trustee (SFT). She informed the court that after an allottee completes payment in respect of a given allotment, SFT advises the lands office and a title deed is issued in favour of the allottee. In respect of the suit property, she informed the court that according to SFT records, the suit property had been allocated to the plaintiff.

13. She informed the court that the property was thereafter registered in the plaintiff's name on **31st March, 2009**. She produced an extract of the green card in respect of the suit property as Pexbt 6. In this regard, according to records held at the lands' office Naivasha the plaintiff is the legal owner of the suit property.

The Defence Case

14. On his part the defendant, **Francis Njoroge Kimani**, who testified as D.W.1, informed the court that he was allocated the suit property by SFT in 1983. He took possession thereof in 2000 and has been living with his family thereon ever since.

15. Contending that officers from SFT have never visited him to say he is not the owner of the suit property, he explained that he had fully paid for the suit property but failed to get the property registered in his name. He produced his charge in respect of the suit property as Dexbt I.

16. He acknowledged that he was summoned by the area chief in respect of the suit property on **15th October, 2011** and that he is facing a criminal charge over his alleged unlawful dealings on the suit property.

17. Concerning the allegation that he took possession of the suit property after the 2008 post election violence, he explained that there were no post election clashes in their area and reiterated that he entered the suit property in 2000.

18. The court heard that after the plaintiff instituted this suit, the defendant went to the National Land Commission offices in Ardhi house. The Commission set up a probe committee over the suit property which established that there was no double allocation in respect of the suit property.

19. He reiterated that he was allocated the suit property in 1983 and that he finished paying for it in 2001. Further that his mistake was failure to process title. He acknowledged that he was aware that if an allottee failed to pay for land property allocated to them, SFT would repossess the land.

20. With regard to his inability to avail the original receipts in support of the alleged payments to SFT, he stated that he had misplaced them.

21.D.W.2, **Joseph Waitirie Kamau**, one of the defendant's neighbours, informed the court that when he was allocated his parcel of land in 1987 he found the defendant in possession of the suit property.

22. Similarly, D.W.3, **Paul Otuko Simiyu**, also a neighbour of the defendant, informed the court that when he took possession of his land in 1997, he found the defendant on the suit property. The court heard that at that time the defendant had constructed a grass thatched house therein but was not living there. He stated that it is not true that the defendant entered the suit property in 2008.

23. Unlike the defendant who contended that there were no clashes in their area, D.W.3 acknowledged that there was post election violence in the area and stated that during the clashes, it is the defendant who came to his rescue when his house was burnt down.

24. On his part **Peter Mwangi Kinyanjui**, D.W.4 informed the court that his organization (Kenya National Organization of Victims of Post Election Violence Clashes) carried out investigations into the claims herein which revealed that the defendant did not enter the suit property during the post election clashes. Further that the investigations carried out by his organization revealed that the suit property was not one of the properties that had been double allocated. For that reason he contended that the title that the plaintiff produced in court is a forgery.

The foregoing notwithstanding, he stated that he had no document to show that the defendant was the owner of the suit property.

The Law applicable to this case:

25. Under **Sections 27** and **28** of the Registered Land Act, Cap 300 Laws (now repealed) which by dint of the provisions of **Section 106** (3) (a) of the Land Registration Act, 2012 applies to the rights, liabilities and remedies the plaintiff gained by having the suit property registered in her favour. Her registration as the owner of the suit property conferred on her the absolute ownership of the suit property together with all rights and privileges belonging or appurtenant thereto. See **Section 27** of the registered land Act, Cap 300. Under **Section 28** of the registered land Act, Cap 300, the rights conferred on the plaintiff by the said registration are indefeasible except as provided in that Act.

Analysis and determination:

26. Under the foregoing provisions of the law, registration of the plaintiff conferred on her an indefeasible interest in the suit property.

27. Under **Section 143** of the said Act (Cap 300) the plaintiff's registration of the suit property having been first registration is incapable of being rectified by an order of court.

28. The only way through which the defendant could lawfully maintain and/or challenge the plaintiff's rights as the proprietor of the suit property, is if he was claiming the suit property under **Section 30** of the registered land Act, Cap 300 aforementioned.

29. Since the defendant's claim is based on a letter of allotment which does not confer ownership rights, I find his claim to be unmaintainable as against that of the plaintiff. In this regard see Nairobi ELC NO.498 OF 2004 reported as **Muthithi Investments Limited v Andrew S.Kyendo & 22 others [2014] eKLR** where **J.M Mutungi J.**, observed:-

“...In my view even if the defendants had a letter of allotment of the same property, the letter of allotment until there was acceptance and compliance with the terms of the allotment remained just an intention on the part of the City Council which the council could rescind. Further on the basis of competing interests the interest of the holder of a validly registered title would be superior to that

of the holder of a letter of allotment over the same property even if the letter of allotment may have been issued earlier than the title.”

30. The upshot of the foregoing is that judgement is entered in favour of the plaintiff as follows:

- a) The plaintiff is found to be the registered proprietor of LR Nakuru/Mitimingi/112.
- b) An eviction order is hereby issued against the defendant either by himself, his servants and/or agents from L.R Nakuru/Mitimingi/112.
- c) A permanent injunction is hereby issued restraining the defendant by himself, his servants and or agents from using, entering and/or in any way interfering with the plaintiff's peaceful enjoyment of the parcel of land known as LR Nakuru/Mitimingi/112.
- d) Costs of the suit are awarded to the plaintiff.

Dated, signed and delivered in Nakuru this 30th day of December 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Rubiru holding brief for Mrs Wanderi for the plaintiff.

N/A for the defendant

Emmanuel Maelo : Court Assistant.

L N WAITHAKA

JUDGE