



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 384 OF 2009

**ANN GLOAG ..... PLAINTIFF**

**VERSUS**

**MOSES GITHINJI & 121 OTHERS.. .....DEFENDANTS**

JUDGMENT

The plaintiff filed suit by her plaint dated 3/8/09 filed on 4/8/09 against the Defendants seeking for judgment to be entered as follows:-

- a. A declaration that the Defendants are trespassers on L.R. No. 209/9366 (hereinafter referred to as the "Suit Property") and that the sub-division of the Suit Property among the Defendants is null and void.
- b. An order requiring the Defendants by themselves, their agents, servants and/or tenants to vacate by demolishing all illegal structures put up on the Suit Property and that such vacation and/or demolition be done within 60 days from the date of judgment or within such a reasonable time as the court may impose do issue.
- c. That in default of the Defendants complying with the order as per prayer (b) hereinabove the Plaintiff either by herself, her agents, servants and employees and with the assistance of the Area District Officer (D.O) Embakasi Division, the Officer Commanding Station Buruburu Police Station, Kariobangi South Location Area Chief and assisted by the Area Administration Police (AP) Commander and using all reasonable force do offer security and/or logistical support in demolition and eviction of the Defendants from the Suit Property and such demolition and eviction be at the Defendant's cost.
- d. That the Defendants by themselves, their agents, servants, employees and/or tenants be restrained by way of an injunction from trespassing, constructing, occupying and/or dealing in whatever manner with the suit property.
- e. That the judgment herein do bind the Defendant named herein as well as the other unlawful occupants currently occupying, owning and/or constructing structures of whatever kind or any plots in the Suit property and whose names and/or identity are otherwise unknown to the Plaintiff.
- f. Costs of this suit.
- g. Any other or further relief that this Honourable court may deem fit and just to grant.

The Plaintiff visited the Suit Property before she purchased it in June 1997. At that time, the Suit Property was vacant. She bought the Suit Property at that time for the purpose of setting up a garage for her buses being run by the Stagecoach Company. The Stagecoach business did not however, succeed and she ended up selling the same to the management. The Suit Property remained vacant until the Defendants encroached on it. Being involved in many philanthropic activities in Kenya, the Plaintiff had the idea to set up a school on the Suit Property. This prompted her to pay a visit to the Suit Property in 2006. She was shocked to find many permanent structures on the Suit Property belonging to the

Defendants. Prior to that, she had received information that there was encroachment of the Suit Property in 2003 but she took no action. She instructed a lawyer to take over the matter to try and regain vacant possession of the Suit Property in 2008. When this was not forthcoming, she filed this suit on 4/8/09.

PW 2, Jecinta Warie Kalama, the Plaintiff's Personal Assistant testified that she accompanied the Plaintiff to go see the Suit Property in 1997 before the Plaintiff bought it. She testified that at that time, the Suit Property was vacant. She also testified that she visited the Suit Property again in 2003 and that she saw a few structures erected thereon and she informed the Plaintiff about that. She also testified that the encroachers were not given any authority to enter into the Suit Property. She asserted that the Defendants had not been on the Suit Property for more than 12 years.

PW 3, Simon Wamae, a resident of Kariobangi South testified that he knew the Suit Property as it was close to where he resides. He testified that the Suit Property was vacant in 1997 and that the Defendants encroached thereon in 2003 when he learnt that there were people sub-dividing the Suit Property. He testified further that the permanent structures on the Suit Property were put up in 2008. He also testified that he distributed notices to vacate to the Defendants on behalf of the Plaintiff in 2007/2008. He also testified that he worked with the Chief, Sub-Chief and Area Councilors for this purpose.

The Defendants only called one witness, Margaret Wanjiku, who testified that she entered the Suit Property in June 1997 and that the property was vacant at that time. She said that since that time, it was only in 2009 that she heard someone claiming ownership of the Suit Property. She testified that she together with the other Defendants had lived on the Suit Property for more than 12 years and that they are entitled to the Suit Property by adverse possession.

Clearly, there is no dispute to the fact that the Plaintiff is the registered proprietor of the Suit Property. She produced a copy of her Title Deed and the same indicated that she bought the Suit Property in June 1997. I am inclined to believe her testimony to the effect that at the time of purchase, the Suit Property was vacant. I also believe the testimony of PW 2 that she accompanied PW 1 to visit and see the Suit Property before the purchase and that the Suit Property was vacant. After that, neither the Plaintiff nor her other witnesses were aware what was going on at the Suit Property until 2003 when PW 2 visited and noted a level of encroachment and notified the Plaintiff. The Plaintiff herself next visited the Suit Property in 2006 by her testimony when she noted that there was indeed encroachment on the Suit Property.

The Defendants on their part assert that they entered the Suit Property in June 1997 to date. The Defendants further claim that they have acquired rights of ownership over the land by the principle of adverse possession.

In light of the competing claims in this suit, I am inclined to believe the Plaintiff that the Suit Property was vacant when she sought to buy it in 1997. I therefore do not believe the Defendants' witness who testified that the Defendants took possession of the Suit Property in 1997. This is because the Defendants were not aware of the purchase transaction that the Plaintiff was getting involved in that year. Further, it is plausible that a buyer of land would want to view the land they are buying before proceeding with the purchase. To that extent therefore, I do not believe that the Defendants entered the Suit Property in June 1997 as they claim. Even if they did, their stay on the Suit Property could not have been 12 years long by the time they received the Notice to Vacate from the Plaintiff's lawyer in the year 2008. The period between June 1997 to September 2008 when J. M. Njenga issued the first Notice to vacate is not 12 years.

Further to that, the Defendants did not file a counterclaim in their Defence seeking the court to determine that they were indeed the appropriate owners of the Suit Property. In that regard, this court cannot make a finding such as that one. This is not to mention that such a claim is required to be filed by way of an Originating Summons.

In light of the foregoing, I find that the Defendants have failed to establish any proprietary rights

over the Suit Property which can extinguish the Plaintiff's title thereto embodied in her Title Deed. Accordingly, I hereby enter Judgment against the Defendants as prayed by the Plaintiff in her plaint. Each party shall bear their own costs.

SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup>  
DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE