



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 434 OF 2010

STANLEY T. MUGACHA.....PLAINTIFF

VERSUS

JAMES MBUGUA KINYUA.....DEFENDANT

JUDGMENT

The Plaintiff filed the instant suit vide a plaint dated 17th September 2010 filed in court on the same date. The Plaintiff seeks the following orders:-

1. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as L.R. No. LIMURU/BIBIRIONI/1409 (“the suit property”) and that the Defendants whether by themselves or their servants or agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
2. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from accessing, cultivating, constructing or in any other way entering or remaining, continuing in occupation of the suit property.
3. A mandatory injunction is issued compelling the defendant his servants assigns and/or agents to vacate the suit property.
4. General damages for wrongful occupation and denial of occupation.
5. Costs of the suit together with interest thereon.

The Defendant upon being served with the plaint on 20th May 2011 filed a statement of defence and counterclaim in which the Defendant admits the Plaintiff to have been registered owner of Title L.R. LIMURU/BIBIRION/1409 but contends that the transfer to the Plaintiff was unlawful on account fraud perpetrated by the Plaintiff, the 2nd Defendant and the 3rd Defendant. The 1st Defendant counterclaims for a declaration that he is the rightful owner of L.R. LIMURU/BIBIRIONI/1409 and seeks an order retransferring the suit property to him and a permanent injunction to restrain the Plaintiff, the 2nd and 3rd Defendants from in anyway interfering with the suit land. In his defence the Defendant names Daniel G. Kariuki T/a Watts Enterprises and National Bank of Kenya Ltd as the 2nd and 3rd Defendant respectively. These parties were never formally enjoined to the suit and hence in this judgment the court will not make any findings that touches on them.

However Justice Mbogholi Msagha on 13th July 2011 while declining to grant the order of injunction sought by the Plaintiff directed the suit property to be preserved in the form it was in and that the parties do fast track the hearing of the suit to enable the matters in contention to be finally determined pursuant to the ruling the parties were directed to make compliance with Order 11 of the Civil Procedure Rules. The Plaintiff complied with the provisions of Order 11 and on 17th November 2011 filed all the necessary documents envisaged under Order 11 of the Civil Procedure Rules.

The Defendant did not make compliance with Order 11 and the Defendants Advocates, M/s Gachoka Mwangi & Company Advocates on 23rd April 2012 filed a Notice of Motion dated 20th April 2012 seeking leave of the court to cease to act for the Defendant who had failed to furnish them with instructions to enable them to defend the suit by the Plaintiff and prosecute the Defendants counterclaim. The Defendant advocate's application to cease to act was granted on 16/5/2012. The Plaintiff subsequently fix the suit for hearing on 17th October 2012 and going by the affidavit of service filed on 15th October 2012 the Defendant was personally served with the hearing notice. No proceedings took place in court on 17th October 2012 and the Plaintiff on 13th December, 2012 had the suit fixed for hearing on 14th May 2013 when the matter was listed before me for hearing. The Defendant had been personally served with the hearing notice on 23rd May 2013 as per the affidavit of service filed in court by Mr. Kimatu Kitili Kivake on 10th May 2013. I allowed the hearing to proceed *ex parte* when the Plaintiff Mr. Stanley Mugacha testified.

The Plaintiff testified that he purchased the suit property at a public function conducted by Watts Enterprises Auctioneers on behalf of the National Bank of Kenya who held the property under chargee. The Plaintiff stated that he saw an advertisement of the property in one of the local daily newspapers and was interested in the same prompting him to attend the public auction sale on 26th June 2009 where he bid Kshs.550,000/= and he was declared the highest bidder. The Plaintiff testified that he subsequently paid the full purchase price whereupon the bank released all the title documents including a duly executed transfer by chargee and the original title. The Plaintiff sought and obtained the consent of the Land Control Board for the transfer. The Plaintiff had the transfer registered and was issued with a certificate of title on 10th June 2010. The Plaintiff has produced in evidence the documents contained in his bundle of documents filed in court which corroborate his evidence given in chief and his witness statement dated 18th August 2011 filed in Court.

The Plaintiff stated that when he visited the suit premises to take possession the Defendant resisted and denied him entry and threatened violence and on that account filed the instant suit seeking declaratory orders that he is the lawful and rightful owner of the suit premises and further seeking an order for the Defendant to vacant the suit premises.

The Plaintiff denies that the defendant has any defence to his claim and states that the Defendants counterclaim is baseless as the Plaintiff did not in any manner act fraudulently as alleged by the Defendant when he acquired the suit property and urges the court to dismiss the counterclaim. The Plaintiffs' counsel filed written submission after the conclusion of the hearing in which he contends the Plaintiff has proved his case on a balance of probabilities and is entitled to judgment as prayed.

I have considered the evidence tendered by the Plaintiff and the documents produced as part of the evidence and I am satisfied that the Plaintiff purchased the suit property at the public auction and did infact pay the full purchase price of Kshs.550,000/=. The documents of ownership were released to the Plaintiff by the Bank and the Transfer by Chargee was regularly registered in favour of the plaintiff. The Plaintiff is the registered absolute proprietor of Title Number Limuru/Bibirion/1409 and in the absence of it being demonstrated that he acquired the title fraudulently his title is indefeasible in terms of section 28 of the Registered Lands Act Cap 300 Laws of Kenya (now repealed) and presently under section 25 (1) of the Land Registration Act No. 3 of 2012 which provides as follows:-

25(1) the rights of proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in 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.....”

Under section 26(1) of the Registration of Land Act No. 3 of 2012 a validly issued title by the Registrar can only be challenged in the following instances:-

- 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.*

The Defendant in his defence and counterclaim has alleged fraud on the part of the Plaintiff in acquiring the land but no-evidence has been adduced to demonstrate or prove any fraud and the Defendant did not attend the court to prosecute his counterclaims. On the evidence adduced by the Plaintiff in support of his claim I did not discern any evidence of fraud and I therefore find and hold there was no evidence of fraud tendered to establish the plaintiff acquired the suit property through fraudulent means and find the Defendants allegations of fraud on the part of the Plaintiff to be unfounded. At any rate as the Plaintiff purchased the suit property at a public auction upon his bid having been accepted the defendant lost his right to exercise his right of redemption of the property under the provisions of section 77 of the Registered Land Act (now repealed). In the circumstances the Defendant could only have a claim against the chargee for damages if he considers the sale to have been carried out irregularly.

It was held in the case of ***Kitur & Another –vs- Standard Chartered Bank & Another (2002) I KLR 640*** as follows:

“The Law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneers, shall be compensated by an award of damages (See Section 77(3) of the Registered Land Act and Section 26(1) of the Auctioneers Act.”

Hon. Mr. Justice Kimaru in the case of ***Bomet Beer Distributors Ltd & Another –vs- Kenya Commercial Bank Ltd & Another (2005) eKLR in Nakuru, HCCC No. 147 of 2004*** while placing reliance in the ***Kitur & Another –vs- Standard Chartered Bank & Another (Supra)*** observed as follows:-

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

The circumstances in the present case are not dissimilar to the circumstances in the Bomet Beer Distributors case where Judge Kimaru held that the purchaser of the property at the public auction was entitled to the property notwithstanding that the chargor was aggrieved and dissatisfied by the way the chargee exercised its statutory power of sale. I would likewise hold that the Defendant herein can only be entitled to seek damages from the chargee if he is able to prove that the sale by public auction was irregularly carried out.

The plaintiff in the instant case has made a claim for general damages for wrongful occupation and denial of occupation. The Plaintiff testified that he has charged the property to secure a loan of Kshs.1,000,000/= and that he is servicing this loan without making use of the suit property. There is no evidence that this loan was taken to be utilized in this property. Indeed the charge instrument in favour of Family Bank Ltd dated 20th October, 2010 indicates that M/s Galaxy Auctioneers Ltd was the borrower and the Plaintiff was just a guarantor for the loan. The Plaintiff in his filed submissions seeks general damages of Kshs.1,000,000/= ostensibly on the basis that he has been unable to use the land and he is servicing the loan. The Plaintiff did not testify on what use he wanted to put the land into and I am not satisfied he would be entitled to general damages of Kshs.1,000,000/= as claimed. However, there is no denying the fact that he has been denied occupation of the land as the registered owner and of course use of the land. I would award general damages in the sum of Kshs.75,000/= for forcible detainer against the Defendant.

In the premises I am satisfied that the Plaintiff has proved his claim against the Defendant on a balance of probabilities and I enter judgment in favour of the Plaintiff as against the Defendant in terms of prayers 1 and 2 of the Plaint and additionally make orders that:-

- i. That the Defendant do vacate the suit property L.R. LIMURU/BIBIRIONI/1409 within 30 days of being served with a copy of the Decree herein and failing which an eviction order shall issue on application to evict the Defendant and put the Plaintiff into a vacant possession of the suit property.
- ii. The Plaintiff is awarded general damages in the sum of Kshs.75,000/= with interest at court rates from the date of this judgment.
- iii. The Plaintiff is awarded the costs of the suit.
- iv. The Counterclaim by the Defendant is dismissed with costs to the Plaintiff.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 16TH day of JULY, 2013.

J. M. MUTUNGI

JUDGE