



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE. NO. 264 OF 2012

JOAN WAIRIMU MBUTHIA1ST PLAINTIFF/RESPONDENT

DANIEL SAMSON MBARATHI.....2ND PLAINTIFF/RESPONDENT

VERSUS

PENINAH WANJIKU MUGO.....DEFENDANT/RESPONDENT

JUDGMENT

The Plaintiffs filed this suit against the Defendant by their Plaint dated 10th May 2012 seeking the following reliefs:

- a. Permanent injunction to be issued restraining the Defendant from occupying the parcel of land known as Dagoretti/Thogoto/2369 (hereinafter referred to as the “suit property”),
- b. Vacant possession of the suit property,
- c. Mesne profits the exact amount to be assessed by this court,
- d. Costs of this suit, and ,
- e. Any other order or further relief that is court may deem fit to grant.

The facts are that the Plaintiffs and the Defendant entered into an Agreement for Sale dated 23rd July 2011 in which the Plaintiffs agreed to buy the suit property from the Defendant for a consideration of Kshs. 1.1 million. The Plaintiffs confirmed that they paid the full consideration to the Defendant through various instalments and the Defendant transferred the suit property to the Plaintiffs. The Plaintiffs produced their original title deed to the suit property in which they are registered as joint proprietors thereof. This notwithstanding, the Defendant has refused to grant the Plaintiffs vacant possession over the suit property. That is the reason why the Plaintiffs have sued the Defendant.

Despite having been duly served with all the pleadings in this suit, the Defendant has not entered appearance or filed any defence as a consequence of which interlocutory judgment was entered against her and this suit proceeded for formal proof. During formal proof, the 1st Plaintiff and her husband, who were the only witnesses, confirmed the facts set out above. The 1st Plaintiff also produced the documents evidencing the purchase of the suit property which included the original title deed to the suit property.

The issue for determination is whether the Plaintiffs are entitled to exclusive possession of the suit property by means of a permanent injunction restraining the Defendant from dealing therewith in any

manner whatsoever and whether they are also entitled to mesne profits.

The law is very clear on the rights of a registered proprietor of a piece of land where they hold a valid title deed thereto and this may be found in section 24(a) of the Land Registration Act which 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.”

In addition, 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 courts as prima facie evidence that the person named as proprietor of the land is the 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.”**

The Plaintiffs are the holders of a valid title deed over the suit property. That title has not been challenged by the Defendant. According to the law cited above, the Plaintiffs are therefore the absolute and indefeasible owners of the suit property and are entitled to enjoy all rights and privileges belonging or appurtenant thereto. One of those rights is the right of exclusive possession to the exclusion of all others including the Defendant. I am convinced that the Plaintiffs have proved their ownership of the suit property and are entitled to the permanent injunction they seek.

On the issue of mesne profits, these are defined in the Free Dictionary as profits which have accrued while there was a dispute over land ownership. If it is determined that the party using the land did not have legal ownership, the true owner can sue for some or all of the profits made in the interim by the illegal tenant, which are thus called "mesne profits.". In this case, no evidence was led by the Plaintiffs to support their claim for mesne profits. Hence, I am unable to exercise my discretion to award the same to the Plaintiffs.

However, I do award the Plaintiffs costs of this suit together with interest at court rates from the date of this judgment.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE