



REPUBLIC OF KENYA

IN THE HIGH COURT

ATMERU

Civil Case 76 of 2011

JOSEPH KARUU MUTIGA.....PLAINTIFF

VERSUS

CHARLES MAGU NYAKUYADEFENDANT

J U D G M E N T

The plaintiff through a plaint dated 12th May, 2011 and filed on 2nd June, 2011 seeks the following orders:

1.An order of eviction of the defendant and his family from L.R. No.Nyaki/Kithoka/613.

2.Costs of the suit.

The defendant was as per affidavit of service dated 29th June, 2011 served with summons to enter appearance together with the plaint and verifying affidavit on 8th June, 2011 by one Joseph Kithinji M'Kiambati a licensed court process server under license No.0053 issued on 14th February, 2011. The license was attached to affidavit of service. That the defendant was served on the same day at around 12.00 noon at his home at Gielo village, Kithoka sub-location, Nyaki location, Imenti North District. The defendant accepted service, took his copies but declined to sign at the back of the summons to enter appearance and copy of the plaint and verifying affidavit. The process server averred that the defendant's home and the defendant was pointed out to him by the plaintiff who had accompanied the process server at the time of service.

The plaintiff's counsel made a request for interlocutory judgment on 29th August, 2011. Interlocutory judgment was thereafter entered in favour of the plaintiff on 3/11/2011 as per court record.

That on 28th June, 2012 the case was set down for formal proof on 25th April, 2012. On 25th April, 2012 the plaintiff herein in his evidence testified that he comes from Kithoka Location, North Imenti District and he is a night watchman. He testified that he knows Charles Magu Nyakuya, the defendant in this suit. The plaintiff testified that land parcel No.Nyaki/Kithoka/613 is his land. That the land is registered in his name and he has land certificate No.Nyaki/Kithoka/613 which was issued to him on 28th February, 1979. The plaintiff showed the court the original land certificate and sought to produce the Photostat copy of the title. The Photostat copy of Nyaki/Kithoka/613 was produced as plaintiff's exhibit No.1. The Green card was produced as plaintiff's exhibit No.2.

The plaintiff in his evidence, testified that the defendant entered into plaintiff's land Nyaki/Kithoka/613 in March, 2000 without the plaintiff's consent and authority.

The plaintiff averred that he was still in occupation of his land and using the land for cultivation purposes when the defendant entered into the said land.

The plaintiff testified that he reported the matter to Senior Chief of Munithu. That the chief called the defendant and told him to vacate from the plaintiff's land together with his family. The plaintiff testified that the defendant has two timber houses on the plaintiff's land. The plaintiff testified further that the Chief wrote a letter to the Land Registrar to assist the plaintiff

The plaintiff testified that he gave notice to the defendant through his advocates to vacate from his land before filing this suit. The plaintiff produced his advocate's letter dated 4/2/2011 as plaintiff's exhibit No.3. The plaintiff testified that the defendant was also served with summons to enter appearance and has failed to appear and file defence.

In conclusion the plaintiff prayed for orders of eviction of the defendant and his family from his land parcel No.Nyaki/Kithoka/613 with costs of the suit. The plaintiff then closed his case.

The issue for consideration in this case is whether the plaintiff as proprietor of Nyaki/Kithoka/613 is entitled to orders of eviction of the defendant and his family members from the plaintiff's land.

The plaintiff in this suit has produced land Certificate exhibit 1 in respect of land parcel Nyaki/Kithoka/613. The copy of land certificate shows that one Joseph KaruuMutiga, the plaintiff was issued with land certificate on 28th February, 1979. The Green Card exhibit No.2 shows that one KaruuMutiga was the first registered proprietor. That on 2.9.79 the Green card shows that was change of name of Joseph KaruuMutiga otherwise known as KaruuMutiga and the title was issued to the plaintiff.

Under Section 28 of the Registered Land Act the rights and interest of a registered proprietor are free from all interests and claims except those shown in the register.

Section 28 of the Registered Land Act(Cap.300) provides:-

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee

Besides the above, in the case of **KANYI – V- MUTHIORA(1984) KLR 712** Court of Appeal held:-

1. The title of a registered owner under the Registered Land Act (cap300) is free from all interests and claims except all those shown in the register together with such overriding interests that exist and are not required to be noted in the register.

The plaintiff in this case has proved that Nyaki/Kithoka/613 is registered in his name. That he is the first registered proprietor. The defendant upon being served with notice to vacate from the plaintiff's land through the advocate's letter plaintiff Exhibit No.3 he did not respond. The defendant did upon being

served with summons to enter appearance both to appear and file defence. This court finds that the defendant had no defence to the plaintiff's claim.

The plaintiff in his evidence testified that the defendant entered into his land in March, 2000. That the defendant and his family has two timber houses on the plaintiff's land. That the plaintiff at the time of the defendant's entry into his land he was in occupation and was using the land for cultivation.

That the defendant and his family entered into the plaintiff's land without his consent and authority. That when the plaintiff summoned the defendant before the area Chief who ordered him to vacate from the plaintiff's land, defendant declined to do so.

Having considered the evidence adduced before me by the plaintiff and considering exhibits No. 1, 2 and 3 produced by the plaintiff, I am satisfied that the land parcel No. Nyaki/Kithoka/613 is registered in the name of the plaintiff and is sole property of the plaintiff and he is entitled to possession and use of the same.

The defendant having not contested this suit I find that he has no basis in occupying and maintain structures on the plaintiff's land Nyaki/Kithoka/613.

In the circumstances I enter judgment in favour of the plaintiff as follows:-

a) The plaintiff is sole proprietor of Nyaki/Kithoka/613 and solely entitled to occupation and enjoyment of the same.

b) The defendant, his family and agents do deliver vacant possession of NYAKI/KITHOKA/613 to the plaintiff within the next thirty(30) days from today in default court bailiff do demolish, and remove the defendants houses and structures and crops from the plaintiff's land at NYAKI/KITHOKA.613 at defendant's costs.

c) The defendant and his family are permanently restrained from further trespass into Nyaki/Kithoka/613.

d) Costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE, 2012.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. L. Kimathi Kiara for the plaintiff (absent)
2. N/A for the defendant.

J. A. MAKAU
JUDGE