



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 41 'B' of 2008

LUCY NDUTA KAMAU.....PLAINTIFF
VERSUS
MACHITHI AUTOSPARES.....1ST DEFENDANT
MUTOTHORI MUGO.....2ND DEFENDANT
THE COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGMENT

The substantive suit is expressed in the Complaint dated 17th April 2008 in which LUCY NDUTA KAMAU, the Plaintiff herein, sought for judgment in the following terms:

- (a) *A permanent injunction to restrain the 1st defendant and 2nd defendant whether by themselves, their agent Mwangi Ndabi, other agents, employees and/or servants from evicting, ejecting removing and/or harassing and/or in any other manner whatsoever from interfering with the Plaintiff's quiet enjoyment of Plot No. NYERI MUNICIPALITY/BLOCK 1/1323 as she goes about her lawful business thereat; a declaration that the certificate of title issued to the 1st defendant company by the 3rd defendant is invalid and/or of no legal consequence (worthless) and that the interest of the said plot do vest in the Plaintiff; and, Plaintiff is the only bona fide allottee and owner and a new title be issued in the names of the Plaintiff.*
- (b) *Costs of the suit plus interest.*

She named MACHITHI AUTOSPARES LIMITED, MUTOTHORI MUGO and THE COMMISSIONER OF LANDS as the 1st, 2nd and 3rd Defendants. The 1st and 2nd Defendant filed a defence to deny the Plaintiff's claim. They also filed a counter-claim whereupon they prayed for judgment against the Plaintiff in the following terms:

- (a) *"An order for vacant possession and mesne profits until delivery of possession in default the Defendant be forcefully evicted therefrom.*
- (b) *Permanent injunction restraining the Plaintiff, her family, agents or whomsoever through himself from entering, destroying, developing or in any manner whatsoever interfering with the suit land.*
- (c) *Costs and interests."*

When the suit came up for hearing, the Plaintiff's suit was dismissed for want of attendance on her part and that of her advocate. The 1st and 2nd Defendants were granted leave to proceed *ex parte* with their counter-claim. MUTOTHORI MUGO (P. W. 1) told this Court that he was a director with Machithi Autospares Limited, the 1st Defendant herein. P. W. 1 stated that Lucy Nduta Kamau, the Plaintiff herein, used to operate a Kiosk on premises standing on Plot No. NYERI/MUNICIPALITY/BLOCK 1/1323. He produced a copy of the title deed in respect of the above Plot showing the same is owned by the 1st Defendant. P. W. 1 claimed that the Plaintiff was given a licence to operate a Kiosk on a temporary basis by the Nyeri Municipal Council before the Plot was allocated to the 1st Defendant. It is alleged that the Plaintiff was given a quit notice by the 1st Defendant but the Plaintiff has refused to vacate. P. W. 1 produced proceedings of Nyeri Chief Magistrate's Court, i.e. NYERI C.M.C. CRIMINAL CASE NO. 3017 OF 2007 which indicated that the Plaintiff was tried on a charge of two counts. In Count I, the Plaintiff faced a charge of willfully and unlawfully cutting down trees standing on Plot No. NYERI MUNICIPALITY/BLOCK 1/1323 contrary to *Section 334 (c)* of the Penal code. In count II, the Plaintiff faced a charge of forcible detainer contrary to *Section 91* of the Penal Code. After undergoing a trial, the Plaintiff was convicted in both counts. She was sentenced to pay a fine of Ksh.30,000/= and Ksh.20,000/= in counts I and II respectively in default to serve six (6) months imprisonment.

I have considered the evidence tendered by the 1st and 2nd Defendants. I have already set out the prayers the 1st and 2nd Defendants sought in the counter-claim. Though they did not draw the issues, I think the following issues arose for my determination:

- (i) Whether or not the 1st and 2nd Defendants have any proprietary interest over Plot No. NYERI MUNICIPALITY/BLOCK 1/1323.
- (ii) Whether or not the Plaintiff is in trespass.
- (iii) Whether or not the Plaintiff should give vacant possession.
- (iv) Who is to pay costs.

Let me begin with the first issue. The question is whether the 1st and 2nd Defendants have proprietary interest over the suit land. I have examined the evidence tendered. The Defendant through the evidence of 2nd Defendant, has tendered the title documents showing that the 1st Defendant was registered as the proprietor of the aforesaid Plot on 13th June 2003. Pursuant to the provisions of Sections 27 and 28 of the Registered Land Act, interest in respect of Plot No. NYERI MUNICIPALITY/BLOCK 1/1323 were conferred to the 1st Defendant by registration. Its rights are therefore protected. The second issue is whether or not the Plaintiff is a trespasser! The 2nd Defendant's evidence is to the effect

that the Plaintiff was operating a Kiosk on the suit land on a temporary licence given by the Nyeri Municipal Council. There was no evidence to controvert this assertion. It would appear the 1st Defendant obtained title documents in respect of the suit Plot while the Plaintiff was on the land operating a Kiosk. There is no evidence that the Plaintiff has title documents over the suit land. The moment the 1st Defendant was registered as a proprietor of the aforesaid land, the Plaintiff became a trespasser. She is not a tenant of the Plaintiff. There is no evidence that she has overriding interest. There is no doubt that the Plaintiff was convicted for the offence of forcible detainer. In other words the Plaintiff was found to be in actual possession of the aforesaid land without any colour of right. I am convinced that the Plaintiff is a trespasser. It goes without saying that a trespasser must give way to a title holder. This finding settles issue No. 3. In other words the 1st and 2nd Defendants are entitled to vacant possession. Costs follows the event. I will give the 1st and 2nd Defendants costs of the counter-claim.

In the end I enter judgment as prayed in the counter-claim with costs to the 1st and 2nd Defendants.

Dated and delivered at Nyeri this 21st day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Wanyonyi for the Defendant. Kingori holding brief Muthoni for the Plaintiff.