



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Case 147 of 2008

MWANGI PHILIP KIGUTA PLAINTIFF

Versus

WANJIRU MWANGI DEFENDANT

JUDGMENT

By the plaint dated 16th February 1998, Mwangi Philip Kiguta, the plaintiff herein, prayed for judgment against, Wanjiru Mwangi the defendant herein in the following terms:

- (a) *an order of eviction from the parcel of land known as Loc. 18/Gachocho/839.***
- (b) *Mesne profits.***
- (c) *Costs.***

The defendant filed a defence to deny the plaintiff's claim. The defendant further counter-claimed against the plaintiff for the following orders:

- (a) *A declaration that the aforesaid parcel of land belongs to the defendant.***
- (b) *Damages of Kshs. 217,000/= for the value of the defendant's property destroyed.***
- (c) *Costs of the suit***
- (d) *Interest of (b) and (c) above.***

When the suit came up for hearing neither the defendant nor her advocates turned up despite having been served with a hearing notice. This court allowed the plaintiff to proceed for hearing *ex parte*.

The plaintiff testified and summoned the evidence of two independent witnesses. It is the evidence of Mwangi Philip Kiguta (P.W.1) that he is the registered proprietor of the parcel of land known as Loc. 18/Gachocho/839. He produced the title deed as an exhibit (P.exh.1) in evidence. P.W.1 further produced an extract of the register relating to the aforesaid title in evidence as an exhibit. P.W.1 claimed that he inherited the land from Gicharu Mbutia, his grandfather. P.W.1 gave a somewhat complicated

past history of the land. He told this court that his grandfather left for Rift Valley leaving his land under the care of one Waiguru Kaniri. It is said a clan's man by the name Ngechu Chege approached Gichana Mbuthia to allow him to till the land in place of Waiguru Kaniri. P.W.1 said Waiguru Kaniri was to relinquish the land to Ngechu Chege after he was paid by the later a goat through his brother, Gaturu Kaniri. It is said Waiguru Kaniri was unhappy consequently he filed a complaint before the Divisional Tribunal at Kigumo against Ngechu Chege in 1951. P.W.1 produced copies of the proceedings and judgment as exhibits in evidence showing that the tribunal found the case in favour Ngechu Chege, in that he was to hold the land in trust for Gichana Mbuthia. An appeal was preferred by Waiguru Kaniri which appeal was dismissed. P.W.1 also produced the judgment on appeal as an exhibit in evidence. P.W.1 said when he was released from detention in 1957 he summons Ngechu Chege to give him back the land. Ngechu Chege readily surrendered the land to P.W.1 upon being paid five goats. P.W.1 produced an agreement he executed with Ngechu Chege as an exhibit in evidence. P.W.1 said he took vacant possession of the land after Kamau Kinuthia the person who had been put in occupation by Ngechu Chege was instructed to vacate the land. P.W.1 said that during the land demarcation, Mwangi Kamau claimed that the land belonged to him. P.W.1 stated that the land committee registered the land in the joint names of P.W.1 and Mwangi Kamau pending the production of evidence to enable the committee determine the ownership dispute. P.W.1 said he went back to the committee with his evidence while Mwangi Kamau refused to do so. Mwangi Kamau was married to Wanjiru Mwangi, the defendant herein. P.W.1 said that in 1963 one Danson Mwangi caused the land to be registered in the name of Mwangi Kamau. This prompted P.W.1 to file Thika S.R.M.C.C. No. 408 of 1988 to have the register rectified. P.W.1 produced the proceedings and judgment delivered on 1st October 1993 as exhibits in evidence. The plaintiff stated that on 26th October 1993, the defendant transferred the land to her son, Isaac Kamau Mwangi despite the fact that there was a caution which had been lodged against the title. By an order issued on 18th November 1994, the S.R.M.'s court, Thika cancelled the title issued to Isaac Kamau Mwangi and in its place caused the name of P.W.1 to be registered. The court ordered the production of the title deed to be dispensed with vide a gazette notice. P.W.1 said no appeal has been preferred against the aforesaid decision. The plaintiff prayed to be given the eviction order and mesne profits of Kshs. 96,695/- p.a. since 1962. P.W.1 produced payments slips of farm proceeds he got from his nearby known as plot No. 2535. When Mwangi Kamau died in 1989 his wife, Wanjiru Mwangi was enjoined to this suit as a defendant. Kamau Kinuthia (P.W.2) told this court that he surrendered the land to Philip Kiguta (P.W.1) when he was released from detention. P.W.2 said he did not know who Mwangi Kamau was. Josphat Mwangi Ngure (P.W.3) told this court that P.W.1 had filed a complaint before a panel of elders where he sat as a member in 1986. P.W.3 said that the panel of elders refused to hear the dispute between P.W.1 and Mwangi Kamau when it became apparent to the elders that a similar dispute had been heard and determined in 1951. P.W.3 said the panel of elders advised P.W.1 to file a suit in court instead.

At the end of the evidence, the plaintiff's advocate was granted leave to file and rely on written submissions.

I have considered the evidence and the written submissions filed by the plaintiff's learned counsel plus the authorities cited therein. There is on record the agreed issues filed by the parties. The first issue to determine is whether or not the defendant is a trespasser or a lessee on the parcel of land known as Loc. 18/Gachocho/839. I have carefully considered the evidence tendered by the plaintiff and his witnesses. The plaintiff has given, in detail, the steps he took to acquire the suit land. There is no evidence to show that the defendant is the owner. What is clear, is that the defendant being a widow and the legal representative of the estate of Kamau Mwangi, deceased, is in occupation. At the moment the plaintiff is the registered proprietor of the suit land by virtue of a court order which has not been appealed against. In the absence of any title or overriding interest on the part of the defendant, I am convinced that the defendant is a mere trespasser who should give way to a registered proprietor.

The second issue which came up for my determination is whether or not the plaintiff is liable for the damages suffered by the defendant assessed at Kshs. 217,000/-. It is unfortunate that the defendant and her counsel did not attend the hearing of this suit. I find no evidence in support of the claim. Issue No. 3 is related to issue No. 2 hence the same suffers the same fate. Issue No. 4 relates to the question as to

whether or not the registration of the suit land in favour of the plaintiff was fraudulent. Again there is no evidence on the defendant's part to prove the aforesaid allegations. I find no merit in the allegations.

The last issue put for the determination of this court is whether or not the plaintiff is entitled to any mesne profits in form of loss of use of the land. It is the evidence of the plaintiff that he has not cultivated the land since 1962. The plaintiff was able to show that he owns another piece of land known as Loc.2/Kinyona/2535 measuring 2 acres where he gets Kshs. 96,695/= p.a. from the farm proceeds. The aforesaid land is within the neighbourhood of the land in dispute. The suit land measures 7.8 acres. It is not in dispute that the late Mwangi Kamau, forcefully

occupied the plaintiff's parcel of land in 1962, that is during land demarcation. The plaintiff and the defendant have been disputing for many years. The plaintiff has never utilized the land since then. The plaintiff has shown the annual proceeds he received from his parcel of land known as Loc.2/Kinyona/2535 for the years 2007/2008. It is shown he used to get Kshs. 96,695/= p.a. There is no evidence as to the amount he used to get for the years 2006 upto 1963. Mesne profits in form of loss of use is categorized as special damage which must be specifically pleaded and proved. I am in agreement that the plaintiff pleaded for mesne profits. He did not specify the period he was claiming. Even if he had specified mesne profits from 1962 to the date of judgment, I am afraid that there was no evidence to prove the amount save for the

years 2007, 2008 and 2009. There is no doubt that the plaintiff is entitled to proved mesne profits. I will adopt the figure of Kshs. 96,695/= p.a for 2 acres. I will give the plaintiff mesne profits for 3 years. i.e. 2007 – 2009 calculated as follows:

$$7.8 \times 96,695 = 377,110.50 \times 3 = \underline{\underline{1,131,331/50}}$$

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In the final analysis I enter judgment for the plaintiff and against the defendant as follows:

- (a) The defendant is directed to vacate L.R. No. Loc. 18/Gachochi/839 within 30 days from the date hereof. In default the plaintiff to forcefully evict the defendant at the defendant's cost.**
- (b) The plaintiff is given mesne profits of Kshs. 1,131,331/50.**
- (c) Costs of the suit.**
- (d) The defendant's counter-claim is dismissed for lack of evidence with costs to the plaintiff.**

Dated and delivered this 11TH day of November 2009.

J.K. SERGON

JUDGE