



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 96 of 2004

JOEL KIPRONO KOSKEIPLAINTIFF

VERSUS

JANE KOSKEI DEFENDNT

JUDGMENT

The plaintiff filed suit against the defendant seeking an eviction order against the defendant from parcel No. Nakuru/Likia/1067(*hereinafter referred to as the suit land*). The plaintiff averred that he was the registered owner of the suit land. He stated that without any colour of right, consent and or authority, the defendant had unlawfully entered and trespassed into the suit land, constructed a house thereon and cultivated the same. The plaintiff pleaded that as a result of the defendant's unlawful occupation and use of the suit land, the plaintiff had been denied its use and had therefore suffered loss and damage. He averred that despite notifying the defendant and seeking her peaceful exit from the suit land, the defendant had refused to abide by the demand, hence present suit. The plaintiff prayed for an order evicting the defendant from the suit land. He further prayed for costs of the suit.

When the defendant was served with the plaint, she duly entered an appearance and filed a defence and counterclaim. She denied that she was an unlawful occupant of the suit land and put the plaintiff to strict proof thereof. She averred that she was the lawful occupant of the suit land having been allocated the same by the government. She stated that the plaintiff had fraudulently obtained the title in respect of the suit land by giving false information to the Land Registrar. She set out the particulars of fraud. She set averred that the plaintiff had presented fake documents to the Land Registrar Nakuru, who on the basis of the said fake documents, issued the disputed title in respect of the suit land. The defendant counterclaimed against the plaintiff seeking a declaration of the court that she is the sole and legal proprietor of the suit land. She further prayed for an order of the court directing the Nakuru Land Registrar to cancel the title issued to the plaintiff and in its place a new title of the suit property is issued to the defendant. She urged the court to dismiss the plaintiff's suit and enter judgment in her favour as prayed in her counterclaim. She further prayed to be awarded costs of the suit.

At the hearing of the suit, the plaintiff called two witnesses. He testified as PW1. He called one witness, PW2 Joseph Kibet Sigira. The defendant on her part testified as DW1. She called one witness, DW2 Joel Kiplangat Cheruiyot. According to the evidence adduced by the both plaintiff and the defendant, the settlement scheme where the suit land is situated was set up by the government to settle landless people. According to the plaintiff, the suit land was allocated to his son, Richard Kipkurui Langat who died in 1999. The plaintiff testified that before his death, his deceased son gave him the suit land in 1998. He recalled that upon being given the land, he took possession of the same. He testified that he obtained title in respect of the suit land on the 19th January 2000. He produced the title together with the Green Card as Plaintiff's exhibits No. 1 and 2 respectively. He recalled that on the 30th April 2000, the defendant unlawfully and without any colour of right trespassed and took occupation of the suit land. He testified that the plaintiff constructed a house on the suit land and refused to vacate the same even after he had given her notice to do so. He testified that the defendant used to reside in parcel No. Nakuru/Likia/1064 before she moved into his parcel of land.

The plaintiff testified that he had filed several criminal cases against the defendant in a bid to secure her eviction but had been unsuccessful. He produced the proceedings in respect of **Nakuru CMC CRC No. 1946 of 2000** in which the defendant had been charged with offence of forcible detainer of suit land. He denied the suggestion by the defendant that he had manipulated the system in order to obtain title in respect of the suit land by bypassing the village allocation committee other than the suit land. He denied that he had been allocated a separate parcel of land. He insisted that the

suit land was allocated to his son, who in turn gave it to him the land. He denied that he had presented forged documents to the District Land Registrar Nakuru to obtain the title in respect of the suit land. He reiterated that he had obtained the title in respect of the suit land after he had properly followed the correct and established procedure for allocation of the land, including being issued with the allocation card and having an officer of the government execute the transfer of land forms in his favour. PW2 testified that at the material time, he was a member of the village committee at Mauche which had been set up to resolve minor dispute involving land. He testified that he did not at the material time have the occasion to hear a dispute involving the suit land, and particularly involving the plaintiff and the defendant.

On her part, the plaintiff testified that her late husband was allocated the suit parcel of land in 1997. She recalled that after the death of her husband, she was shown the suit land by one Kimkung. She testified that at the time she used to reside at her father in law's parcel of land. She testified that she took possession of the suit land in 1998 and constructed therein a residential house. She recalled that when the plaintiff began claiming ownership of the suit land, the dispute was referred to the local elders for arbitration. She testified that the elders decided the dispute in her favour. She insisted that the title which the plaintiff obtained in respect of the suit land was fraudulently procured since the plaintiff had circumvented the allocation process. She insisted that her late husband was allocated the land in 1996 by the District Commissioner's office, Nakuru. The defendant did not however produce any document in support of her testimony that her late husband had been so allocated the suit land. All exhibits that the defendant produced relate to the event that took place subsequent to the plaintiff obtaining title in respect of the suit land, and further, after the plaintiff had sought the eviction of the defendant from the suit land.

DW2 testified that he was one of the elders who arbitrated the land dispute involving the plaintiff and the defendant. He recalled that it was the defendant who lodged complaint in respect of the suit land with the local District Officer and the area Chief. He testified that in all the dispute resolution forums which were convened by the said elders, the plaintiff did not attend, hence the decision by the elders to award the suit parcel of land to the defendant. DW2 insisted that the suit parcel of land was allocated to the late husband of the defendant in 1997. He recalled that the defendant took occupation of the suit land in 2000 after area District Officer had confirmed from the register that the suit parcel of land was vacant. The defendant reiterated that she was the lawful allottee of the suit land and prayed for the plaintiff's suit to be dismissed with costs and judgment be entered in her favour as prayed in the counterclaim.

After the close of both the plaintiff's case and the defendant's case, the parties agreed by the consent to file written closing submissions. It is only the plaintiff who filed such submissions. I have carefully considered the pleadings and the evidence adduced by the parties to this suit in support of their respective cases. I have considered the closing submissions filed by the plaintiff. The question to be determined by this court is who the legal owner of the suit parcel of land is. Upon determining this issue, the court shall consider whether to grant the plaintiff's prayer seeking the eviction of the defendant from the suit land, or on the other hand, grant the defendant's prayer as sought in the counterclaim by making an order of the cancellation of the title issued to the plaintiff and directing a new title in respect of the suit land to be issued to the defendant.

It is not disputed that the suit parcel of land is registered under the **Registered Land Act**. The title in respect of the suit land was issued to the plaintiff on 19th January 2000. According to the green card which was produced in evidence by the plaintiff, the plaintiff is the first registered owner of the suit land. In accordance with **section 28** of the **Registered Land Act**, the rights of a proprietor who has acquired first registration shall not liable to be defeated except as provided by the Act. **Section 143** of the **Registered Land Act** gives jurisdiction to a court to rectify and cancel a registration if it is established that the registration, other than the first, was obtained, made or omitted by fraud or mistake. In **Kanyi -vs- Muthiora [1984] KLR 712**, the Court of Appeal held that a title of a registered owner under the **Registered Land Act** is free from all interests and claims except those shown in the register with such overriding interests as provided under **section 30 (g)** of the **Act** that exist and are not required to be noted in the register.

In the present case, it is not disputed that the plaintiff is the registered owner of the suit land. What is in dispute is the manner in which the plaintiff obtained the right to be so registered. It is common ground that the suit parcel of land is among the parcels of land that were allocated to residents of the Likia area by the government. According to the plaintiff, the suit land was allocated to his late son, who in turn transferred the same to him. He testified that he obtained all the allotment documents which enabled him to be registered as the owner of the suit land. The plaintiff produced the allocation card, and the transfer which was signed on behalf of the government transferring the suit land to him. What is of significance is that the register in respect of the suit land kept by the Land Registrar, Nakuru indicates that the plaintiff is the first registered owner of the suit land. On her part, it was the defendant's case that the suit land was in fact allocated to her late husband in 1996. The husband of the defendant died in 1998. The defendant testified that she was shown the suit parcel of land by a government official upon which she took occupation of the same. She insisted that her ownership of the suit land was validated by subsequent proceedings which were conducted by the village elders upon her lodging a complaint with the said elders.

It is evident from the above facts that the plaintiff has established to the required standard of proof on a balance of probabilities that he is the legal owner of the suit land. He is the registered owner. The defendant has not adduced any

evidence or produced any document in support of her assertion that the plaintiff obtained title in respect of the suit land by fraud. The defendant did not produce any evidence to support her insistence that the suit land was allocated by the government to her late husband. There is no single document that was produced by the defendant that established or alluded to the fact that the suit property was allocated by the government to her late husband. On the other hand, the plaintiff produced documentary evidence which clearly established that he was the lawful allottee of the suit land.

What emerges from the evidence adduced in court is that the defendant took occupation of the suit parcel of land upon seeing that the same was unoccupied. Although the defendant stated that she took occupation of the suit land in 1998, it was clear from the evidence adduced by the plaintiff and DW2 (the defendant's own witness) that the defendant actually moved into the suit land in 2000. This was after the plaintiff had already obtained title to the suit land. I therefore hold that the defendant has not disclosed any right over the suit land that overrides the legal ownership of the same by the plaintiff.

In the premises therefore, I do hold that the plaintiff has established his case to the required standard of proof. As the registered owner, the plaintiff is entitled to enjoy all the rights appurtenant to the said parcel of land, including taking physical possession of the same. The defendant is a trespasser on the suit land. An eviction order is hereby issued against the defendant. The defendant is ordered to give vacant possession of the suit land to the plaintiff within sixty (60) days of today's date or in default thereof, the plaintiff shall be at liberty to secure her forceful eviction. Since the defendant did not establish her counterclaim, the same is hereby dismissed. The plaintiff shall have the costs of the suit and that of the counterclaim.

It is so ordered.

DATED at NAKURU this 19th day of SEPTEMBER 2008

L. KIMARU

JUDGE