



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2446 Of 1998

CHRISPINE MAINA GATURU..... PLAINTIFF

VERSUS

MUYA MACHARIA..... DEFENDANT

JUDGMENT

This suit involves a parcel of land known as Title No. KIINE/KIBINGOTI/NGUNGUINE/1953 to which the Plaintiff claims absolute ownership under a Title Deed issued in his name on 15th July 1996 and in respect of which he seeks reliefs against the Defendant as follows:

- a) A declaration that the Defendant is not entitled to enter the Plaintiffs parcel No. KIINE/KIBINGOTI/NGUNGUINE/1953 and should therefore be compelled to move out**
- b) Damages and mesne profits for trespassing on the Plaintiffs land**
- c) Costs and interest**
- d) Any other or further this Honourable Court may deem fit and just to grant.**

In his defence, the Defendant denies the Plaintiffs claim of ownership or that the Plaintiff is the registered owner of the plot, claiming that he himself is entitled to be registered as the owner of the parcel of land having purchased the same from the original owner prior to the Plaintiff being registered as owner. His Defence filed on 1st February contains a Counterclaim that the plaintiff's registration be cancelled and his name be registered instead. The is denied in the Plaintiffs Reply to Defence and Defence to Counterclaim filed on 15th February 1999 in which he reiterates the averments in his Plaint.

At the close of the proceedings parties agreed to exchange and file written submissions on or before 8th December 2005 and to have the matter mentioned on that date to take a date for the judgment. Only the Plaintiff's advocate attended the mention and confirmed having filed his submissions. He further informed the Court that Mr. Mariaria, for the Defendant had intimated to him that he was ready to take any date the Court would allocate for the judgment and that he would ensure that the Defendant's submissions would be on file before then. This Court ordered that judgment would be delivered on the 17th of February 2006 and gave the Defendant upto 16th January 2006 to file his submissions with an order that the same would not be considered if filed later than that date. Without seeking this Court's leave to file the submissions outside the limit set by the Court the Defendant's submission were filed on 30th January 2006. The same have therefore not been considered in this judgment.

In his testimony, the Plaintiff told this Court that the Defendant was a friend to the Plaintiff's father and

that he is the one who introduced the Plaintiff's father to the original owner of the suit land, one Benson Mwangi Elijah. The Plaintiff also gave evidence to the effect that he entered into a formal Sale Agreement with the vendor, obtained the necessary Land Control Board consent to transfer, executed a Transfer and had the same duly registered after which he was issued with a Title Deed to the property on 15th July 1996. He told the Court that infact the purchase price was paid to the vendor through the Defendant a fact which has not been denied by the Defendant. The Plaintiff produced before this Court certified copies of the documents to prove the sale transaction the originals of which are said to have been used in a Criminal Case against the Defendant herein in relation to the same parcel of land and that the same have not been released.

The Plaintiff also testified that his father cultivated on the suit land initially on hire from the vendor and continued to do so after the Plaintiff purchased the same until the year 1997 when the Defendant entered the land, destroyed the fence the Plaintiff had erected on the land and proceeded to plant bananas in the land. It is common ground that the Defendant is the owner of an adjacent plot KIINE/KIBINGOTI/NGUNGUINE/1954 which he bought from the same Benson Mwangi Elijah and that he destroyed the Plaintiff's fence to have the two plots consolidated as one on the ground. He admits having removed the fence and that the two plots do bear separate titles. The Defendant claims to have bought parcel No. KIINE/KIBINGOTI/NGUNGUINE/1953 for Shs.180,000/= but the only documents he has produced to prove the sale was a copy of a Sale Agreement dated 13th January 1996 and a copy of the original Title Deed in the name of Benson Mwangi Elijah. Asked why he did not have any other documents to prove his alleged purchase of the suit land from the said Benson Mwangi Elijah the Defendant told the Court that the same were with the Subordinate Court and that he had not sought the Court's permission to avail the same not being aware that a Court could issue such orders. This piece of evidence begs many questions and cannot be believed. The Plaintiff has testified that as far as he knows, the Original Title Deed was given by the vendor to the Defendant for onward transmission to the Plaintiff. The Defendant having not denied that he acted as an agent in the Plaintiff's purchase of the suit premises and that the purchase price was paid through him, then in all probabilities, the Plaintiff's contention ought to be taken as the truth, particularly since the Defendant has not proved his purchase. I say he has failed to do so since the provisions of Sections 85 (1) 108 (1), and 109 of the Registered Land Act have not been shown to have been complied with in the alleged sale of the suit premises from the original owner to the Defendant. The said provisions require that every disposition of land be effected and completed by the execution and registration of an instrument in the prescribed form or in such form as the Registrar may in any particular case approve. The prescribed form no. R.L 1 is contained in the 3rd Schedule of The Registered Land Act (Cap 300). The Plaintiff produced one to support his case and had the same marked "Ex. P.3". The same is shown to have been executed by himself and Benson Mwangi Elijah before an advocate called G.N. Wakahu and was duly registered on 15th July 1996.

It is common ground also that the Defendant herein was prosecuted and convicted in Criminal Case No. 1539 of 2000 wherein he was charged with the offences of forgery, uttering false documents and attempting to obtain land through fraud. The proceedings before that Court and the Judgment were produced in evidence herein. The Defendant's attempt to water down the evidential value of said proceedings and judgment on the ground that the same were quashed in appeal cannot hold since the appeal was merely on the ground that the proceedings were conducted by an unqualified person. The merits of the case, and the evidence therein is material to these proceedings. It has been shown that the vendor of the suit premises, in his evidence before the Criminal Court denied having sold the suit land to the Defendant herein and confirming that he had sold it to the Plaintiff. He denied the Sale Agreement produced herein by the Defendant and any other document purported to have been signed by him in favour of the Defendant in the purported sale of KIINE/KIBINGOTI/NGUNGUINE/1953. It is worthy of note that upon being convicted by the Criminal Court, the only request made to the Court in mitigation for the Defendant was for the Court to exercise leniency and to render a non-custodial sentence, subsequent to which the Defendant was placed on probation for two years.

I have considered the submission made herein by Counsel for the Plaintiff and do accept his submission that the Defendant has not made out any case to defeat the Plaintiff's entitlement to the suit land under Section 27(a) and 28 of the Registered Land Act which provide that:

“S.27 Subject to this Act –

(a) the registration of a person as the proprietor of land shall vest in that person absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

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 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.”

The Defendant has admitted being in occupation of the suit land for 10 years and making use of the same. He has failed in his attempts to prove ownership and lawful possession thereof. He has admitted to having removed the Plaintiffs fence and planting bananas on the parcel of land. That being the case I find that he is a trespasser in the said land and is liable to compensate the Plaintiff for that trespass, the Plaintiff having, on the other hand proven ownership of the suit land as against the Defendant. The Plaintiff is entitled to damages for trespass and mesne profits which are defined in Osborn’s “Consis Law Dictionary” (5th Edition) as

“The profits lost to the owner of land by reason of his having been wrongfully dispossessed of his land.”

I have considered the authorities submitted by the Counsel for the Plaintiff and do find that the same do support the Plaintiff’s case.

Considering both the oral and documentary evidence adduced herein, and submissions by Counsel for the Plaintiff and applying the relevant law I am satisfied that the Plaintiff has, on the balance of probabilities proved his case against the Defendant and do hold that he is entitled to the reliefs sought in his plaint. I am also persuaded, in respect of his claim for mesne profits that a sum of Shs.1000/= per month is reasonable and that a sum of Shs.300,000/= in respect of general damages for trespass for 10 years is also appropriate.

Although the Defendant admits having been in possession of the suit land for 10 years, the Plaintiff in his evidence said that the Defendant moved into the land in 1997. I am of the view that since the Plaintiff ought to have had immediate and rightful possession and use of the land upon the registration of the same in his name, mesne profits ought to be calculated from the date of registration, that is the 14th of July 1996. I therefore award him Kshs.1,088,500/= being Shs.5,500/= for 5½ months in the year 1996, Shs.1,080,000/= for 9 years from 1997 to 2005 and Kshs.3000/= for the three months of 2006.

In the premises judgment is hereby entered for the Plaintiff as follows:

a) The Plaintiff is hereby declared the rightful registered owner of Title No. KIINE/KIBINGOTI/NGUNGUINE/1953

b) The Defendant do vacate forthwith and deliver immediate possession of the suit land to the Plaintiff

c) The Defendant do pay to the Plaintiff a sum of Kshs.1,088,500/= as mesne profits

d) The Defendant do pay to the Plaintiff a sum of Kshs.300,000/= being damages for trespass.

e) The Plaintiff will have costs of the suit.

f) The sums awarded in (c) (d) and (e) above will attract interest at Court rates until payment in full.

Dated and delivered at Nairobi this 31st day of March, 2006

M.G. Mugo

Judge

In the presence of:

Mr. Mwangi for the Plaintiff

N/A for the Defendant