



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO. 228 OF 2018

EDWARD WAINAINA GATHIGI.....PLAINTIFF

VS

VIRGINIA GATHONI KIBARU1ST DEFENDANT

GEORGE MUINGAI t/a

GREEN RING INVESTMENT LTD2ND DEFENDANT

ELIUD MUCHIRI GATHINGIRA.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff's case is that he was at all material times the registered owner of THIKA/MUN/BLOCK11/818 (the suit land). That in 2013 The Defendants trespassed on to the suit land destroyed damaged and wasted the suit land occasioning him loss and deprived him of the use of the suit land. Loss and damage are particularized under para 11 of the plaint.
2. The Plaintiff has urged the Court for the following orders;
 - a. Declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit land.
 - b. Permanent injunction restraining the Defendants either by themselves or through their servants and or agents or anyone claiming under the Defendants from further building or interfering with and or in any manner dealing with all that piece of land situate in Nairobi and known as THIKA/MU N/BLOCK11/818(suit land).
 - c. Vacant possession of the suit property.
 - d. Costs of the suit.
3. Despite substituted service, the 1st and 3rd Defendants failed to file any response to the suit. Judgement in default of appearance and defense was entered in favour of the Plaintiff.
4. The 2nd Defendant did not enter appearance nor filed a statement of defence.
5. The suit therefore proceeded on formal proof.
6. At the hearing the Plaintiff led evidence and stated that he was granted a lease by the Government of Kenya on the 31/7/97 and became registered as owner of the suit land on the 21/8/1997. He produced both the lease and the certificate of title. That the Defendants trespassed onto the suit land in 2013 and despite demand to vacate they have remained thereon adamantly.
7. The Plaintiff filed written submissions which I have read and considered. In the main the Plaintiff regurgitated the evidence and the Pleadings on record.
8. The issue before me is a simple one of trespass on land. In **Black's Law Dictionary 8th Edition**, a continuing trespass is defined as: -

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

9. In **Clerk & Lindsel on Torts 16th Edition**, paragraph 23 - 01, it is stated that: -

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

10. Section 26 of the Land Registration Act No 3 of 2012 states that such person named as proprietor is the absolute and indefeasible owner but subject to encumbrances restrictions easements and conditions contained or endorsed in the certificate of title.

11. In the instant case the Plaintiff has persuaded the Court that he is the registered proprietor of the suit land and is entitled to quiet possession among other rights. The copy of the title was produced in evidence. The Court is persuaded that the trespass is in the nature of a continuing trespass that arises from day to day.

12. The law is that the proprietor’s rights are absolute, exclusive and indefeasible and are only subject to encumbrances restrictions easements and conditions permitted by law. The right to property is also part of our Constitution and has been affirmed under Article 40 as a fundamental principle to ensure that property is not just owned by people but their property rights are protected.

13. The Defendants have not established their claim against the suit parcel and their rights, if any, do not form part of encumbrances or restrictions that would limit the proprietor’s privileges. Their presence and right over the land and caution purportedly lodged have not been premised on any legal basis.

14. In the absence of any contrary evidence, the Court holds that the Plaintiff is the duly registered owner of the land.

15. In the upshot I enter judgement in favour of the Plaintiff as follows;

- a. It is hereby declared the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit land.
- b. It is hereby ordered that a permanent injunction restraining the Defendants either by themselves or through their servants and or agents or anyone claiming under the Defendants from further building or interfering with and or in any manner dealing with all that piece of land known as THIKA/MUN/BLOCK11/818(suit land).
- c. The Defendants be and hereby are ordered to hand over vacant possession of the suit land to the Plaintiff within 30 days from the date hereof and in default eviction to ensue.
- d. I make no orders as to costs.

16. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANG’A ONLINE THIS 26th DAY OF JANUARY 2021.

J G KEMEI

JUDGE

Delivered online in the presence of;

Okello for the Plaintiff

1st – 3rd Defendants: Absent

Court Assistant: Kuyiyaki