



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 353 OF 2017**

SUSAN WAMBUI GITONGA.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES P.C.E.A

CHURCH BIBILIONI LIMURU.....1<sup>ST</sup> DEFENDANT

THE CHAIRMAN P.C.E.A CHURCH

BIBILIONI LIMURU.....2<sup>ND</sup> DEFENDANT

THE SECRETARY GENERAL P.C.E.A

CHURCH BIBILIONI LIMURU.....3<sup>RD</sup> DEFENDANT

THE TREASURER P.C.E.A

CHURCH BIBILIONI LIMURU.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

By a Plaintiff dated 17<sup>th</sup> March 2017, the Plaintiff brought this suit against the Defendants seeking for orders against them jointly and severally for:-

- a) A Declaration that the Plaintiff is the rightful owner of all that property known as RUIRU/KIU BLOCK 7/161.
- b) A Declaration that the actions of the Defendants of encroaching onto the Plaintiff's property amounts to trespass to land.
- c) An order for the evictions of the Defendants from the Plaintiff's property known as RUIRU/KIU BLOCK 7/161.
- d) A Permanent Injunction restraining the Defendants and/or their agents and/or servants from entering, trespassing or in any manner interfering with the Plaintiff's parcel of land and/or peaceful enjoyment for all that property known as RUIRU/KIU BLOCK 7/161 or any portions thereof.
- e) An order that the Defendants to pay the Plaintiff mesne profits for use and occupation of the Plaintiff's property.
- f) An order directing the Defendants and/or their agents and/or servants to demolish any illegal structures erected on the suit property.
- g) In the alternative, this Honorable court be pleased to issue an order allowing the Plaintiff to demolish any illegal structures erected on the suit property and the costs of such demolition be borne by the defendants.
- h) This Honorable court be pleased to issue an order directing the Officer Commanding Station (OCS), Mwhoko Police Station and/or Officers acting under his orders and/or directions to enforce the orders of the Honorable Court.
- i) An order that the Defendants do pay to the plaintiff damages for encroachment and illegal use of the plaintiff's property.

*j) Interest on mesne profits at court rate from the date the cause of action arose, to the date of full payment.*

*k) Interest at commercial rates on General Damages above from the date of judgement to the date of full payment.*

*l) Costs of this suit and interest on costs at court rate.*

*m) Any further orders and relief(s) as this Honorable court may deem fit and just to grant.*

In her Statement of Claim, the Plaintiff averred that on or about the **25<sup>th</sup> November 2005**, she entered into an Agreement with **Edward Gicheri Gitau** (Deceased) who was the registered owner of the suit property for purchase of Ruiru/Kiu Block 7/161, at a consideration of Kshs.150,000/= and the same was transferred to her on 25<sup>th</sup> September 2010, and on 8<sup>th</sup> October 2010, the Plaintiff was registered as the owner.

That in the year 2016, the Defendants illegally entered onto the suit property and commenced construction of structures. Though she severally requested the Defendants to vacate the suit property, the requests were unheeded. That the Defendants encroachment without her authority amounts to trespass.

The Plaintiff particularized trespass by the Defendants, their agents and/or servants as; entering the suit property without reasonable excuse or express authority from the Plaintiff; remaining in the said property and constructing illegal structures without Plaintiff's authority, despite several requests and demands to vacate the suit property. The Plaintiff therefore averred that she has suffered loss and has been denied her right of peaceful enjoyment of her property.

The suit is Contested and the Defendants entered appearance and filed a Statement of Defence dated 4<sup>th</sup> September 2017, and denied all the allegations made in the Plaintiff. They admitted that the suit premises was transferred to the Plaintiff on 8<sup>th</sup> October 2010, and further averred that on 28<sup>th</sup> June 2002, the vendor Edward Gicheru Gitau alias Juha Kalulu offered to sell to the Presbyterian Foundation his parcels of land namely Ruiru/Kiu Block 7/160 and Ruiru/Kiu Block 7/161 at a consideration of Kshs.130,000/= per parcel and the purchaser bought RUIRU/KIU BLOCK 7/161, at the agreed price of Kshs.130,000/=.

That upon payment of the full Purchase Price, they took immediate actual and physical possession of both plots which they initially cultivated but have also made numerous developments. That the Vendor executed the relevant deeds for transfer, but in breach of the agreement, the vendor transferred property number Ruiru/Kiu Block 7/160, but failed to transfer Ruiru/Kiu Block 7/161. That, despite the said Presbyterian Foundation performing the contract as stipulated, the Vendor failed and/or refused any obligations relating to parcel No. 161. That Presbyterian Foundation, through the said P.C.E.A Church Bibirioni has been in Continuous, open, exclusive and uninterrupted occupation without permission from 2002, and the Foundation is entitled to the said land by prescriptive rights as the Plaintiff held the same in its trust. They contended that they erected a house on the suit premises and the said trust had since June 2002, been in possession of the suit premises and not from the year 2016 as alleged by the Plaintiff.

After Close of pleadings, the matter proceeded by way of viva voce evidence On 10<sup>th</sup> March 2020. Despite being duly served, with the hearing date, the Defendants did not attend Court and therefore the matter proceeded ex Parte.

#### **PLAINTIFF'S CASE**

**PW1- JANE WANJIKU KAMAU adopted her witness statement as her evidence in Court and produced her list of documents as Exhibits 1-10 She testified that she had a Power of Attorney by her mother and she also relied on it. She urged the Court to consider the pleadings, her witness statement, her exhibits and allow the prayers in the Plaintiff.**

**Thereafter**, the Plaintiff filed written submissions dated **18<sup>th</sup> September 2020**, through the Law Firm of **Gumbo & Associates**, while the Defendants filed their submissions on **4<sup>th</sup> December 2020**, through the Law Firm of **Mwangi Kiai & Co. Advocates**.

This Court has now carefully considered the Pleadings in general, the available evidence, the written submissions and relevant provisions of law and renders itself as follows:-

Though the Defendants filed a Statement of Defence, they did not adduce any evidence in support of their claim and therefore all the averments in their Defence remains just mere allegations as averments in pleadings are not evidence. Therefore, the Plaintiff's evidence remained uncontroverted. See the case of ***Shaneebal Limited... Vs... County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007***, where the Court had held that:-

***“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”***

However, it is trite that he who alleges must prove and the Plaintiff being the one who alleged, had the onus of proving her case as uncontroverted evidence, is not automatic evidence, as the law places on the Plaintiff the obligation of proving her case.. See the **Section 107 of the Evidence Act which states:-**

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Having considered the pleadings herein and the available evidence, the court finds that the issues for determination are;

*a) Who between the Plaintiff and the Defendants is the Lawful owner of RUIRU/KIU BLOCK 7/161.*

*b) Whether the plaintiff is entitled to the orders sought.*

*a) Who between the Plaintiff and the Defendants is the Lawful owner of RUIRU/KIU BLOCK 7/161*

It is the Plaintiff's contention that on 25<sup>th</sup> November 2005, she entered into an Agreement with Edward Gicheri Gitau, for the purchase of the suit property. That upon payment of the full purchase price, the suit property was transferred to her and she became the registered owner.

The Plaintiff produced Certificate of Lease, a Copy of Agreement for sale between herself and Edward Gicheri Gitau dated 25<sup>th</sup> November 2005, certificate of official search that confirms that she is the registered owner of the suit property.

**Section 26 of the Land Registration Act** provides that the registration of a person as a proprietor confers in such a person the absolute and indefeasible right over the same, unless it is proved that the said registration was acquired through **fraud, misrepresentations** of facts or was **unprocedurally** done.

It is not in doubt that the Plaintiff's evidence has not been controverted. No evidence has been brought forth to impugn the Lease held by the Plaintiff and therefore in the absence of any evidence to impeach the Plaintiff's title as she has produced evidence to show that she duly bought the suit property, the Court finds that the same is indefeasible and absolute. Therefore, this Court finds that the Plaintiff herein is the lawful owner of the suit property known as **RUIRU/KIU BLOCK 7/161**.

**Though the Defendants did not adduce evidence, the Court has considered their pleadings.** The Defendants averred on paragraph (g) of their Statement of Defence that the Vendor who sold to them **RUIRU/KIU BLOCK 7/161, failed to perform part of his obligations on the agreement between themselves and him. This typically placed obligation on the Defendants to claim Specific Performance against the seller, but they failed to do so. Since the said contract is a privity document between themselves and the vendor, they ought to have sued the said vendor.**

**b) Whether the Plaintiff is entitled to the prayers sought**

Having found that the Plaintiff is the absolute and indefeasible owner of the suit property, It follows then that she is entitled to enjoy her rights and privileges as a proprietor as provided by **Section 24(a)** of the said **Land Registration Act** which provides as follows:-

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

Further, her rights are protected by **Section 25(1)** of the same Act which rights can only be defeated as per the law. **Section 25(1)** of the **Land Registration Act** provides:-

*25(1)The rights of a proprietor, whether acquired on first registration or 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..."*

Therefore, the Court finds and holds that the Plaintiff herein is entitled to enjoy her rights as a proprietor of the suit property and these rights include exclusive use, possession and enjoyment of the same without interference by any third party. The Plaintiff cannot enjoy such rights and privileges without vacant possession and while the property has been cautioned or restricted. See case of **Simon Njage Njoka ...Vs... Simon Gatimu Kanyi (2007) eKLR, the Court of Appeal in Nyeri**, in allowing the Appeal, the court had the following to say:

*"The appellant having provided a valid title to the piece of land and the respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should then have proceeded to evict the respondent."*

The Plaintiff has sought for **General and Exemplary Damages** for trespass. The court is satisfied that on the material placed before it, the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the Defendants of encroaching upon her land and putting illegal structures. The said allegations were confirmed by the Defendants in their pleadings and the photographs produced in evidence.

The Defendants having entered onto the Plaintiff's suit land without any lawful or justifiable cause while the Plaintiff was in possession, the Defendants are therefore trespassers.

As to whether the Plaintiff is entitled to General Damages for trespass, the Court has considered the case of Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR, where the Court held that:-

*“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”*

In the case of Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR, the Court held as follows:-

*“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less .....*”

*The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”*

Having not provided the value of the land before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.200, 000/=** as General damages for trespass.

The Plaintiff on her submissions submitted that she cultivated crops and vegetables which she uses as food. She proposed an amount of **Kshs 20,000/=** monthly for a period of **19 Months** totaling to **Kshs.380,000/=**. However, she has not placed evidence on specials for this Court to award her, therefore, the same is denied as **Special Damages** must be specifically pleaded and proved

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

For the above reasons, the Court finds the Plaintiff’s claim as contained in the Plaint dated **17<sup>th</sup> March 2017**, is merited and the same is allowed. Consequently, the Court enters Judgment for the Plaintiff against all the Defendants jointly and severally in terms of **prayers No. (a), (b), (c), (d), (f), (g), ((i) and (l)** of the Plaint herein. In terms of **prayer No.(i)**, the Court awards the **Plaintiff General and Exemplary Damages** for trespass of **Kshs.200,000/=** .

It is so ordered

**DATED, SIGNED AND DELIVERED AT THIKA THIS 27<sup>TH</sup> DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

**27/5/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kiprotich holding brief for Mr. Mwangi for the Plaintiff**

**No appearance for the Defendant**

**L. GACHERU**

**JUDGE**

**27/5/2021**