



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO. 6 OF 2020

KAHUNGA GATHIL.....APPELLANT

VERSUS

RUTH NJERI KARUNGO.....RESPONDENT

JUDGMENT

1. The Appellant instituted a suit against the Respondent vide a plaint dated 28/6/2018 seeking inter alia withdrawal of a caution lodged against LOC. 9/ KANYENYAINI/ 1531 by the Defendant. The Defendant filed her defence putting the Appellant to strict proof of the contents of the plaint save to raise an issue of an existing and ongoing lease agreement between them. The matter was set down for hearing and upon close of both cases submissions were filed and a judgment delivered on 13/2/2020 dismissing the suit with costs to the Defendant. Being dissatisfied with the judgment the Appellant sought to Appeal which is the substratum of the judgment herein. Parties sought to dispense with the Appeal by way of written submissions and at the lapse of timelines for filing the submissions, the Respondent only had filed hers and the Appellant despite being the initiator of the Appeal failed to file his.

2. It was the Appellant's testimony at the hearing of the suit that he is the registered owner of the suit land and had caused a lease agreement to be drawn over the parcel of land between himself and the Respondent and the expiry of the lease, the Respondent failed to vacate the suit property and went ahead to tamper with the boundary. The matter was reported to the police who referred them to the elders. The matter was resolved but there was no compliance with the elder's directions. He also testified that the Respondent had placed a caution on the suit property which he wanted withdrawn as there was no reason advanced for placing the caution. When put to task to explain about a lease which was to take effect from 2019 to 2025 he averred that he never issued a notice to terminate it but it is the Respondent's conduct of interfering with the boundary that caused him to wish to terminate the same.

3. The Defendant confirmed that she was on the parcel of land as a tenant and the plaintiff is the registered owner. It was her testimony that at the expiry of the first lease, she entered into another for a period of six years effective in January, 2019 to 2025. She confirmed placing a caution on the suit property for the reason that she wanted to secure her interest though this was done in 2012 during the subsistence of the 1st lease. Further, she agreed to having interfered with the boundary but was ready to fix it and that all she wanted was to complete the term so that she could at least recoup her investments.

4. The learned magistrate found that there was a valid lease as there was no evidence as to its revocation and thus the Defendant's action of registering a caution was to protect her interest as such the caution could not be withdrawn until January, 2025 when the lease will expire. On issue of boundary, the learned magistrate found that she had no jurisdiction and could therefore not make any orders thereof. Having found that the lease was valid and the Defendant was legally on the parcel of land, the learned Magistrate declined to issue an order of injunction as prayed.

5. The Appellant enumerated six grounds of Appeal all alluding to the learned Magistrate's failure to withdraw the caution. The Appellant avers that the caution ought to have been withdrawn since the Respondent had no need of protection by way of caution.

6. The Respondent admitted the sale agreement between the Appellant and her late husband never went through.

7. That failure to withdraw the caution denied the Appellants the benefits of the exercise his proprietary rights over the suit property which are superior to those of Appellant.

8. The Appellant further grounded the Appeal on failure to consider the Respondent's actions as a waste to the suit property and also that the Respondent was not entitled to cost.

9. It is not in dispute that the Appellant is the registered owner of the suit property and the crux of the matter between the parties emanates from a lease over the suit property and subsequent caution registered on the suit property. I have perused the lease agreement which ends in

2025 and paragraph 3 of the agreement though not expressly provides that the parties to the agreement shall determine reason for interruption of the lease.

10. The issues for determination are; whether there was a valid lease; whether caution ought to be removed; who meets the cost of the Appeal.

11. The power to lease land is expressly provided for under Section 56 of the Land Act and by operation of the said section the Appellant and the Respondent had the statutory entitlement to state such terms and conditions. The lessor, the Appellant herein, has an implied covenant under Section 65 of the Land Act to grant the lessee peaceful and quiet possession of the leased property during the term of the lease without any interruption unless as provided under sub-section 2, the lessor cannot take away this right. The lessee on the other hand, the Respondent herein, has an implied covenant to inter alia use the land sustainably and to keep all boundary marks in repair. Further, the lessee cannot take any such action on the suit property unless with the consent of the lessor.

12. The Respondent had an implied condition not to interfere with the boundaries and if she so wished she needed the consent of the Appellant, that was not sought. Having breached the terms of the lease, the Appellant had the right to terminate or forfeit the lease however, forfeiture would only issue if the Appellant had complied with Section 75 of the Act. The section requires that forfeiture cannot issue unless a notice of not less than thirty days is issued which notice shall specify the particulars of breach complained of. If the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice.

13. The Respondent admits to having tampered with the boundary and the Appellant if aggrieved by the act had the option to issue a notice terminating the lease to the Respondent but failed to do so. Despite not been issued with a notice, the Respondent acknowledged the breach and agreed to restore the boundary honoring part b of the section as if a notice had been issued. Having given up the right of forfeiture and there being an implied compliance with part b by the Respondent and also having gone through the lease and satisfied that it is a valid one, I find there is an ongoing lease between the Appellant and the Respondent. The Respondent cannot therefore be treated as a trespasser as had been suggested by the Appellant. The lease agreement granted her the right of entry and use of the property until when the lease terminates.

14. In the case of **Mohamed Abdalla A Shikely & 8 others v Mohamed Abdalla Salim [2014] Eklr Malindi ELC No. 166 of 2013** the Court when determining whether to grant an injunction where a Defendant had erected a structure on the suit land with the permission of the plaintiff defined trespass as;

“an authorized or unlawful entry upon land. However, where a land owner gives person permission, either by consent or by a license, such an entry cannot amount to trespass”.

15. As long as there is consent to entry it stops being trespass. The Respondent by operation of the lease had the Appellant’s consent to gain ingress into the land.

16. Further, the Respondent was in admission of the breach and agreed to remedy the breach as if a notice was issued and it would be only fair to allow the lease to continue till the end.

17. In the case of **Julius Kamande v Frank Mburu Njoroge & 2 Others [2014] eKLR Nairobi HCC No. 637 of 2012** when faced with an application to restrain a lessor from terminating a lease, the Court in granting orders in favour of the lessee stated that there having a remedied breach it would only be fair to allow the lease to continue.

18. There is no express provision on termination of lease in the lease agreement but by operation of section 65 of the Land Act all leases are subject to the conditions and covenants thereunder, hence need for compliance. To this end the learned magistrate was right not to grant an injunction since the Respondent was not a trespasser as alleged by the Appellant. There was no evidence adduced why the trial Court would interfere with the Respondent’s quiet and peaceful occupation of the property; in the end ground 5 of the Appeal must fail.

19. Section 71 of the Land Registration Act makes provisions for persons who have the statutory right to register a caution relevantly;

“a person who claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registerable under this Act”.

20. The above section gives lessees the right to register a caution over any land they hold under lease which is registered upon satisfaction by the land registrar through evidence in the statutory declaration. The Respondent avers that she registered the caution on 13/11/2012 during the continuance of the 1st lease for the reason that the Plaintiff wanted to sell the suit property.

21. The Land Registrar, the Court or a cautioner can withdraw and/ or remove a caution. The Appellant moved the Court to have the caution removed but the Court found that there being a valid and lawful lease, the Respondent was right to register the caution to protect her interest hence the caution would not be withdrawn.

22. I note that the lease is not registered but this does not take away the interest of the Respondent. I rely in the decision of the Court of Appeal in **Mega Garment Limited v Mistry Jadva Parbat & Co. (Epz) limited [2016] eKLR Malindi Court of Appeal No. 68 of 2015** when looking at an issue on unregistered lease quoted the case of **Bachelor’s Bakery Ltd v Westlands Securities Ltd (1982) KLR 366** where the Court stated as follows

“first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be

enforceable; that such an agreement is valid *inter partes* even in the absence of registration, but gives no protection against the rights of third parties.

23. This Court finds the learned Magistrate was right in not withdrawing the caution and in the end grounds 1, 2, 3 and 4 of the Appeal must fail.

24. Having perused the record of Appeal and the Respondent's submissions in absence of the Appellant's submission, I draw the conclusion that this Appeal must fail and uphold the decision of the Learned Magistrate.

25. The Appellant to bear the cost of Appeal.

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 26^H DAY OF MAY 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Absent

Ndegwa HB for S N Thuku for the Respondent

Kuiyaki/Alex:

Court

Assistants