



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 167 OF 2015

PETER GITHINJI KAMAU.....PLAINTIFF

VERSUS

WILLIAM CHERUIYOT ROTICH.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking orders to have the defendant restrained from suit land; plaintiff having purchased the land from a person who had in turn purchased land from the registered proprietor and having the land transferred to him; defendant claiming to also have purchased the land from the registered proprietor and filing counterclaim for the same land; defendant not attending the hearing of the case; plaintiff's evidence not controverted; defendant thus not proving any right over the suit land; judgment entered for the plaintiff)

1. This suit was commenced through a plaint which was filed on 11 June 2015. In his plaint, the plaintiff pleaded that through a sale agreement dated 11 October 2013, he purchased the land parcel Miti Mingi/Mbaruk Block /53 (Barut) (the suit land) from one Shem Osiago Murumbwa who had a beneficial interest in the same. He is now the registered proprietor of the suit land. He has sued the defendant on the complaint that the defendant has encroached into the suit land and cultivated it. In the suit, the plaintiff seeks orders of mandatory injunction to have the defendant vacate the suit land, a declaration that he is the sole and absolute owner of the suit land, general damages for trespass, mesne profits, and costs of this suit.

2. The defendant entered appearance and filed defence and counterclaim. In his statement of defence, he has pleaded inter alia that he purchased the suit land from one Evans Ondieki the then registered owner through a sale agreement dated 21 April 2009. He avers that he then took possession of the land and has been in occupation of it. He has pleaded that he paid the seller but the balance of the purchase price was payable upon issuance of title deed to him which is still pending. He has pleaded that in the beginning of the year 2015, the plaintiff trespassed into the suit land and owing to the said interference, he registered a restriction on the title. It is his position that the restriction was unlawfully removed without notice to him and title issued to M/s Kebeya Auto Works. In his counterclaim he wishes to have orders of permanent injunction against the plaintiff, a declaration that he is the owner of the suit land, cancellation of the title of the plaintiff, and costs of the suit.

3. On 22 October 2018, counsel for the plaintiff and counsel for the defendant appeared before me for pretrial compliance and both affirmed that a hearing date could be given. I then gave the date of 4 April 2019 for hearing. On the said date, only counsel for the plaintiff appeared. The defendant and his counsel were both absent. Since the date was taken in the presence of counsel for the defendant, I directed that the case do proceed and the plaintiff testified as the sole witness.

4. In his evidence, the plaintiff produced the sale agreement that he had with the said Shem Osiago Murumbwa dated 11 October 2013. He stated that at this time, the registered owner of the land was one Evans ONdieki, and that the said Mr. Ondieki had sold the land to Mr. Murumbwa and their transaction was complete save for transfer of the title. He stated that the title was transferred to Mr. Murumbwa in January 2014. The transfer was actually in the name of Kebeya Autoworks which the plaintiff stated was the business name of Mr. Murumbwa. He paid the full purchase price and Mr. Murumbwa then transferred the title to him. He got title on 19 September 2014. In February 2015, he went to the ground and was informed that the defendant was ploughing the land. He wrote him a demand letter dated 13 March 2015. In April 2015, he went to cultivate the land when the defendant emerged with a panga and claimed to have purchased the same land. He produced his title deed and an extract of the register showing that he is now the current proprietor of the suit land.

5. Ms. Cheloti, learned counsel for the plaintiff relied on the above evidence and opted not to make any submissions.

6. As noted, despite the defendant having filed a defence and counterclaim, he did not attend the hearing of the matter and the evidence that I have is only that of the plaintiff.

7. I take note that the plaintiff is the current registered proprietor of the suit land. Being so registered, the law presumes that his title is a good

title. This is brought out by Section 26 of the Land Registration Act, which provides as follows :-

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

8. It will be seen from the above, that the law requires the courts to consider a Certificate of title as prima facie proof that the person named therein is the absolute and indefeasible owner. It follows that the burden of proving that the title of a registered owner is a bad title is upon the person who wishes to have that title cancelled. Such person must demonstrate that the title was acquired through fraud or misrepresentation to which the title holder is proved to be a party, or show that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. The defendant has not come here to prove any of the above and has not presented any evidence to prove his counterclaim that the plaintiff's title was acquired fraudulently. His assertions in the defence and counterclaim are thus not proved and he cannot sustain his prayers for cancellation of the title of the plaintiff.

9. Given that position, and following the requirement of the law that title be taken as prima facie proof of ownership, I have no reason to deny the plaintiff the prayers that he has sought. He is the current registered proprietor and he is thus entitled to exclusive use and possession of the suit land as provided for in section 24 of the Land Registration Act, which provides as follows :-

24. Interest conferred by registration

Subject to this Act—

(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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

10. From the above it will be seen that the rights and privileges of ownership are now with the plaintiff. These rights include the right to exclusive use and possession of the suit land. The defendant has failed to demonstrate that he has any rights over the suit land and that being the position, he has no right to occupy and use the suit land. His counterclaim is hereby dismissed.

11. In addition to the prayer that he be entitled as owner, the plaintiff has also sought general damages for trespass and mesne profits. I was not given any particulars of loss that the plaintiff may have suffered for not using the land. It is therefore my view that the claim for mesne profits is unsupported and the same fails. I however acknowledge that the defendant had no right to use the suit land and thus the plaintiff is entitled to general damages for trespass. Considering all circumstances, I do award the plaintiff the sum of Kshs. 250,000/= as general damages for trespass. The plaintiff shall also have the costs of this suit and of the counterclaim. I further order the defendant to vacate the land forthwith and no later than 30 days after service upon him of this judgment and/or decree.

12. I now issue the following final orders :-

(i) That as between the plaintiff and the defendant, it is hereby declared that it is the plaintiff who is entitled to ownership of the land parcel Miti Mingi/Mbaruk Block 3/53 (Barut).

(ii) That the defendant is hereby barred by an order of permanent injunction from entering, being upon, cultivating, using, or in any way, interfering with the plaintiff's use and possession of the land parcel Miti Mingi/Mbaruk Block 3/53 (Barut).

(iii) That the defendant is hereby ordered to vacate the land parcel Miti Mingi/Mbaruk Block 3/53 (Barut) forthwith and no later

than 30 days of service upon him of this judgment and/or decree or else he be evicted.

(iv) That the defendant shall pay to the plaintiff general damages for trespass of Kshs. 250,000/=.

(v) That no award is made in respect of mesne profits.

(vi) That the plaintiff shall have the costs of this suit and of the counter claim as against the defendant.

13. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 3RD day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mrs. Murande holding for Ms. Cheloti for the plaintiff.

No appearance on the part of M/s Mwangi Mukira & Company Advocates for the defendant.

Court Assistants: Nelima Janepher /Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU