



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 431 OF 2017

(FORMERLY NAIROBI 991 OF 2016)

SORBONNE INVESTMENTS LTD.....PLAINTIFF

VERSUS

ANGELA MWONGELI KITHANZE.....1ST DEFENDANT

ERIC KAWA.....2ND DEFENDANT

CALEB OKEMWA.....3RD DEFENDANT

ESTHER WANGARE WAITHERA.....4TH DEFENDANT

NAHASHON KAIRO.....5TH DEFENDANT

FRANCIS NJUKI MUNYAO.....6TH DEFENDANT

WILFRED NGUMBAO.....7TH DEFENDANT

ALICE NJERI MUTHONI.....8TH DEFENDANT

PETER KUNGU.....9TH DEFENDANT

EUNICE WAITHERA KURIA.....10TH DEFENDANT

PAUL KYALO.....11TH DEFENDANT

AND

DAVID NDERI KAMAU.....INTERESTED PARTY

JUDGMENT

By a Plaintiff dated 16th August 2016, the Plaintiff sought for Judgment against the Defendants jointly and severally for the following prayers:-

a) An order be issued declaring that the Plaintiff as the sole registered owner of the suit property comprised in title No. THIKA/MUNICIPALITY BLOCK 29/370.

b) An order be issued declaring that the Defendants are trespassing upon the plaintiff's property comprised in title no. THIKA/MUNICIPALITY BLOCK 29/370.

c) An order be issued Declaring that the Defendants whether by themselves their servants/workmen/ assigns/agents persons claiming under their authority or any other person(s) are not entitled to enter, erect or construct upon the Plaintiff's suit property comprised in title no. THIKA/MUNICIPALITY BLOCK 29/370 belonging to the plaintiff.

d) *An order be issued to compel the Defendants to give vacant possession of all that parcel of land comprised in title No. THIKA/MUNICIPALITY BLOCK 29/370 to the plaintiff.*

e) *An order be issued to allow the Plaintiff to demolish all the illegal structures erected on the suit property comprised in title no. THIKA/MUNICIPALITY BLOCK 29/370 at the expense of the defendants.*

f) *A Permanent Injunction be issued by this honorable Court restraining the defendants whether by themselves their servants/workmen/ assigns/agents persons claiming under their authority or any other person(s) from interfering, encroaching, erecting or causing to be erected thereon any structures, or dealing with the suit property comprised in title no. THIKA/MUNICIPALITY BLOCK 29/370 registered in the name of the plaintiff.*

g) *An order be issued that Defendants to pay General Damages for trespass including aggravated damages to the Plaintiff amounting to the current market value of the suit property comprised in title no. THIKA/MUNICIPALITY BLOCK 29/370.*

h) *Costs of the suit.*

i) *Interest on (7) above at such rate and for such period as the court shall deem fit.*

j) *Any other relief that this Honorable court deems fit to grant.*

In its Plaint, the Plaintiff averred that it is the bonafide registered lessee of **title no. Thika/Municipality Block 29/370**. **That without any colour of right, the Defendants have trespassed and remained in occupation of suit property and have erected illegal structures thereon, without the Plaintiff's consent thereby depriving it of its rightful use and enjoyment. It further averred that the Defendants have previously been notified vide demand notices to pull down the illegal structures and to vacate the suit land, but have failed to do so. That the Plaintiff being the registered and lawful owner, the Defendants have no right to interfere with its enjoyment.**

Though the Defendants entered Appearance on 27th September 2016 through the Law Firm of Messer's Wakahu Mbugua & Company Advocates, they did not file any Defence nor did they participate on the viva voce hearing despite being duly served with the hearing Notice

The matter proceeded ex parte by way of viva voce evidence, and the Plaintiff called one witness on **16th November 2020**.

PLAINTIFF'S CASE

PW1- Judy Rebecca Momanyi, testified that she was the Plaintiff's Legal Officer and adopted her witness statement dated 16th August 2016 as her evidence. She also produced the Plaintiff's list of documents as exhibit. That title no. Thika/Municipality Block 29/370, is owned by the Plaintiff and the Defendants have trespassed on it and erected illegal structures. Further that though they have issued Notices, the Defendants have failed to move out. She produced the Certificate of incorporation as Exhibit 2 and urged the Court to allow their prayer as sought.

The Court directed the Plaintiff to file written submissions and in compliance with the said directive, the Plaintiff filed its written submissions on **18th December 2020**.

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

Neither the Defendants herein nor the interested party filed any Defence. The suit therefore proceeded as an undefended suit. Though the Defendants' did not participate in the proceedings, the onus of proof is still on the Plaintiff as uncontroverted evidence is not automatic evidence. See the case of *Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR*, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

The Court therefore finds that the issues for determination are;

1. Whether the Plaintiff is registered proprietor of the suit property known as THIKA/MUNICIPALITY BLOCK 29/370.

2. Whether the plaintiff is entitled to the prayers sought

1. Whether the plaintiff is registered proprietor of the suit property known as THIKA/MUNICIPALITY BLOCK 29/370

It is trite that he who asserts or alleges must prove. See **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.

The Plaintiff has produced in evidence documents and the unchallenged evidence to show a lease in its name dated 29th November 2012, official search, rates clearances and official receipts to prove that it was the one paying rates. **Section 26 of the Land registration Act** provides that;

(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.

From the above provision of law, it is not in doubt that a Certificate of title is conclusive proof that the registered person is the **absolute and indefeasible** owner of the property. In this instant, the Plaintiff has produced in evidence a Certificate of Lease and without any evidence to controvert its genuineness and or in the absence of any evidence indicating that the same was unprocedurally acquired, the Court finds and holds that the Plaintiff has proved that it is the absolute and indefeasible owner of the suit property. Therefore, the Court finds that the Plaintiff herein is the registered proprietor of the suit property known as **THIKA/MUNICIPALITY BLOCK 29/370**.

2. Whether the plaintiff is entitled to the prayers sought

Having held that the Plaintiff is the registered proprietor of the suit property, then it is entitled to enjoy its 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, its 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 that the Plaintiff herein is entitled to enjoy its

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.

In the 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 its land and putting illegal structures. The Plaintiff has produced in evidence photographs evidencing that the Defendants had encroached onto its property. As this evidence has not been rebutted there is no reason as to why the Court should not believe the Plaintiff's evidence.

The Plaintiff has also sought for **General Damages for Trespass**. Trespass has been defined by **Clerk and Lindsell on Torts, 18th edition at Pg.23** as;

"any unjustifiable intrusion by one person upon the land in possession."

The Defendants having entered onto the Plaintiff's suit land without any lawful or justifiable cause, the Defendants were therefore trespassers. As to whether the Plaintiff is entitled to General Damages for trespass. In 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.500, 000/=** as General Damages for trespass.

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 its case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against all the Defendants jointly and severally in terms of **prayer No.(a), (b), (c), (d), (e), (f), (h), (i)**.

In terms of **prayer No.(g)**, the Court awards the Plaintiff General Damages for trespass at **Kshs.500,000/=**

It is so ordered

Dated, signed and Delivered at Thika this 6th day of May 2021.

L. GACHERU

JUDGE

6/5/2021

Court Assistant – Phyllis

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 **15th 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

M/s Momanyi for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant

No appearance for the 6th Defendant

No appearance for the 7th Defendant

No appearance for the 8th Defendant

No appearance for the 9th Defendant

No appearance for the 10th Defendant

No appearance for the 11th Defendant

No appearance for the Interested Party

L. GACHERU

JUDGE

6/5/2021