



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 88 OF 2020

(FORMERLY NRB ELC CASE NO. 809 OF 2016)

PETER NGIGI KIGIRA.....PLAINTIFF

VERSUS

FREDRICK NGANGA KIGIRA.....DEFENDANT

JUDGMENT

By an Amended Plaint dated **16th August 2017**, the Plaintiff sought for the following orders against the Defendant:-

- a. An order for the immediate eviction of the Defendant from the parcel of land Komothai/Kiratina/853.***
- b. An Order for Permanent Injunction restraining the Defendant, his employees, servants and or agent from entering, trespassing, occupying, destroying and or in any manner doing other acts of waste or possession on the Plaintiff's land parcel Number Komothai/Kiratina/853.***
- c. Costs of this suit with interest.***
- d. Any other relief this Court may deem fit and just to grant.***

In his statement of Claim, the Plaintiff averred that he was the registered owner of the suit property having inherited the same from his late father **Joseph Njoroge Karoko**. That the suit property is adjacent to the Defendant's land and they share a common boundary. That while the Plaintiff was outside the Country, the Defendant trespassed onto the suit property and commenced cultivation and other acts of waste on the suit property. That the Plaintiff has returned home and he is desirous of developing the suit property and the Defendant has refused him entry onto the suit property and threatened him with undisclosed consequences.

It was contended that the Defendant's acts are unlawful and unjustified and manipulated by ill motive, calculated to disinherit the Plaintiff using fraudulent means. That as a result of the Defendant's unlawful actions, the Plaintiff has suffered loss and damages.

The suit is Contested and the Defendant filed his Statement of Defence on **8th November 2017**, and denied all the allegations made in the Plaint. It was averred that the purported ownership of the suit property is fraudulent by virtue of the transfer entered on **16th August 2008**, way after demise of their father. That a Deceased person cannot transfer interest in land. The Defendant averred that he has always been in occupation of the suit property during his father lifetime and has been utilizing the same for both subsistence and cash crop farming. That if there was any fraud, the same is occasioned by the Plaintiff as he acquired the land fraudulently without the proper administration of the estate of the Late **Joseph Njoroge Karogo**, and hence intermeddling with the Estate.

After Close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff testified for himself and closed his case.

Despite being aware of the Hearing date as he was represented by his Advocate on **15th October 2020**, when the hearing date was given, the Defendant nor his Advocate did not attend Court and the matter proceeded in his absence.

PLAINTIFF'S CASE

PW1 Peter Ngigi Kigira adopted his witness statement dated **11th July 2019**, as his evidence in Court. He produced his list of documents as Exhibit 1 and further testified that the Defendant is his younger brother and is illegally occupying his land .

The Plaintiff later filed written submissions which the Court has now carefully read and considered, The Court has also considered the pleadings by the parties, the evidence adduced and the written submission, and finds and that the issue for determination is whether the **plaintiff is entitled to the orders sought.**

Though the Defendant Entered Appearance and further filed his Statement of Defence, he did not call any witness and therefore failed to substantiate the allegations made in his Defence and produce any exhibits that would have countered the Plaintiffs testimony. Therefore, the Defense on record remain mere allegations and the Plaintiff's evidence remains uncontroverted. See the case of **Kenya Power & Lighting Co Ltd ...Vs... Rassul Nzembe Mwadzaya [2020] eKLR** where the Court held that:-

It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-

“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 1st 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 by way of evidence”.

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of John Wainaina Kagwe..Vs..Hussein Dairy Ltd[2013]eKLR, the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no fresh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

However, uncontroverted evidence is not automatic evidence as the Plaintiff still has an obligation to prove his case on the required standard. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, 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 proof his case however much the opponent has not made a presence in the contest.”

The plaintiff has testified that he is the registered owner of the suit property having received the same as a gift from his father. To prove his claim, he has produced in evidence a title deed dated 24th December 2008. It is trite that the registration of a person as the owner of the land and Certificate of title held by such a person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by **Section 26(1)** of the **Land Registration Act**, which states as follows;

“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.

This Court has seen the title deed that confirms that the Plaintiff is the registered owner of the suit property. From the said

registration, it means that without the said registration and proprietorship of the Plaintiff being impeached, he remains the legal owner of the suit property with all the rights and privileges that appertain to it as provided by Section 24(a) of the Land Registration Act, which states 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, it is clear that the right of such proprietor shall not be defeated except as provided by the law. See Section 25 of the Land Registration Act which provides;

“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.”

The Court has already held and found that the Defendant having failed to call any witness failed to substantiate any claim he had. Given that there is no evidence availed in Court to show that the Plaintiff’s registration has been revoked as per the exceptions in **Section 26(1)(a) and (b) of the Land Registration Act**, the Court finds and holds that the Plaintiff herein is the absolute and indefeasible owner of the suit property.

Having found that the Plaintiff is the absolute and indefeasible owner, it follows that he ought to enjoy all the rights and privileges that appertain to the suit property including the right to use and occupy the suit property and the right to a quiet and peaceful possession of the said property. The same can only be achieved by granting him the Permanent Injunction and also eviction of the Defendant from the suit property as the Defendant has not denied occupying the suit property. Consequently, the Court finds and holds that the Plaintiff is entitled to the orders sought as the Defendant has no right to be in his property without his permission.

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, this Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and accordingly the Court **enters Judgment for the Plaintiff against the Defendant as prayed in Plaint in terms of prayer No. (a) of the claim herein**. The Plaintiff is also entitled to **costs** of this suit and vacant possession of the suit property herein.

The Plaintiff is at liberty to seek for eviction of the Defendant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF JUNE 2021

L. GACHERU

JUDGE

24/6/2021

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 **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

No appearance for the Plaintiff

No appearance for the Defendant

L. GACHERU

JUDGE

24/6/2021