



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 144 OF 2017

KENYA INDUSTRIAL ESTATES.....PLAINTIFF

VERSUS

JAMONYA INVESTMENTS.....1ST DEFENDANT

COUNTY GOVERNMENT OF KISII.....2ND DEFENDANT

DISTRICT LAND REGISTRAR KISII.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this suit against the Defendants seeking the following reliefs:

- a) A permanent injunction restraining the Defendants, their servants, agents, and assigns from trespassing and interfering in any way with the property and the Plaintiff's right to quiet possession of all that parcel of land known as KISII MUNICIPALITY/BLOCK11/237.
- b) An order of eviction of the Defendants, their servants, agents and/or assigns from all that parcel of land known as KISII MUNICIPALITY/BLOCK11/237.
- c) A declaration that the issuance of title to JAMONYA INVESTMENTS is null and void *ab initio*
- d) An order directing the 3rd Defendant to recall, revoke, cancel and/or rectify the records or register at the Lands Registry, Kisii to read or reflect the Plaintiff as the registered owner of land title no. KISII MUNICIPALITY/BLOCK11/237.
- e) Damages for loss of user.
- f) General damages against the Defendants for encroachment, trespass and destruction of the Plaintiff's property.

2. Despite being served with Summons to enter Appearance, the 1st, 3rd and 4th Defendants neither entered appearance nor filed any Defence. The 2nd Defendant merely entered appearance but did not file any Defence. They also did not attend court when the suit came up for hearing on 5th November 2020. The case therefore proceeded ex-parte.

3. The Plaintiff called one witness Renson Mecha Ongaki who adopted his witness statement dated 10th July 2017 and produced the documents in the Plaintiff's List and bundle of documents filed on 12th July 2017 which were marked as Plaintiff's exhibits 1-10.

4. The Plaintiff gave a brief history on how they acquired the suit property. He told the court that the Plaintiff applied to be allotted a plot in Milimani area of Kisii Town in 2010. The Plaintiff was subsequently issued with an allotment letter in respect of land parcel number KISII/MUNICIPALITY/BLOCK11/237. The Plaintiff then paid the sum of Kshs. 109, 280/= being the requisite fees in accordance with the Letter of allotment. Thereafter the lease was processed and a Certificate of Lease was issued in the name of the Plaintiff.

5. He testified that the 1st Defendant erected some structures on the suit property and rented them out to tenants. It was his evidence that the

Plaintiff has two permanent structures on the suit property which are occupied by tenants who pay rent of Kshs.22,000 each.

6. He stated that the Defendants had encroached on the suit property and prayed that they be evicted therefrom. He testified that when the 1st Defendant was served with a demand letter by the Plaintiff's advocate, he claimed that he had a title in respect of the suit property.

7. With that evidence, the Plaintiff closed its case and they were given time to file their written submissions. The Plaintiff filed their submission dated 27th November 2020 in which they urged that that Plaintiff had proved their case and prayed that judgment be entered for the Plaintiff in terms of the prayers in the Plaint.

ISSUES FOR DETERMINATION.

8. Having considered the pleadings, evidence on record and the Plaintiff's written submissions, the issues that arise for determination are as follows:

- a) Whether the Plaintiffs are the registered owners of land parcel number KISII/MUNICIPALITY/BLOCK11/237.
- b) Whether the 1st Defendant has any valid claim over the suit property.
- c) Whether the 1st Defendant has trespassed on the suit property.
- d) Whether the Plaintiff is entitled to the reliefs sought.

9. It was the PW1's uncontroverted evidence that the Plaintiff is the registered owner of the suit property. In support of the Plaintiff's case he produced exhibits 1-10 which include the Certificate of Lease (PEX 10, allotment letter (PEX 1) among other documents to show how the Plaintiff acquired the suit property.

10. In his submissions, counsel for the Plaintiff relied on section 24 of the Land Registration Act No 3 of 2012 which provides as follows:

“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”.

Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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, but subject to any lawful encumbrances, set out in this section.

Section 26 of the same Act provides that 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 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 grounds of fraud, or misrepresentation to which 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.*

11. Since the Plaintiff's evidence was not challenged at the hearing, it is my finding the Plaintiff is the absolute proprietor of the suit property. She is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

12. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

13. The second issue is whether the Plaintiff has proved that the Defendants trespassed onto his land. The Plaintiff testified that the 1st Defendant has erected structures on the suit property. He added that the Plaintiff issued a demand notice to the 1st Defendant demanding that the Defendant vacates the suit land but the Defendant has refused to do so.

14. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

15. From the evidence on record, it is my finding that the 1st Defendant is unlawfully occupying the suit property. This amounts to trespass to land.

16. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks various remedies; a permanent injunction against the Defendants and in default thereof an order of eviction against them.

17. The principles that guide the court in granting an order of injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

18. From the Plaintiff’s evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.

19. The upshot is that the Plaintiff has proved its case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

a) A permanent injunction is hereby issued restraining the Defendants, their servants, agents, and assigns from trespassing and interfering in any way with the property and the Plaintiff’s right to quiet possession of all that parcel of land known as KISII MUNICIPALITY/BLOCK11/237.

b) The Defendants, their servants, agents and/or assigns are hereby ordered to vacate all that parcel of land known as KISII MUNICIPALITY/BLOCK11/237 within 60 days failing which the Plaintiff shall be at liberty to apply for an eviction order.

c) A declaration is hereby issued that the title issued to JAMONYA INVESTMENTS is null and void *ab initio*

d) An order is hereby issued directing the Land Registrar Kisii to recall, revoke, cancel and/or rectify the records or register at the Lands Registry, Kisii to read and reflect the Plaintiff as the registered owner of land title no. KISII MUNICIPALITY/BLOCK11/237.

e) The Plaintiff is awarded the sum of Kshs. 150,000 as General Damages for trespass.

f) The costs of this suit shall be borne by the Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF JUNE 2021.

J.M ONYANGO

JUDGE