



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 780 OF 2013

AGNES WAMBUI KIRITU..... 1ST PLAINTIFF

ESTHER NJERI KAROGO.....2ND PLAINTIFF

VERSUS

NICASIO MURITHI.....1ST DEFENDANT

FARROWSON MURITHI GICHOVI.....2ND DEFENDANT

SAMUEL MWANGI THUO.....3RD DEFENDANT

JOHN NGUGI WANJA.....4TH DEFENDANT

JUDGMENT

This suit was brought by way of a plaint dated 28th June, 2013 filed in court on 2nd July, 2013. The Plaintiffs sought the following reliefs;

- a) A declaration that the Plaintiffs are the bona fide proprietors of all that property known as Title No. Nairobi/Block 126/83 (hereinafter referred to only as “the suit property”).
- b) An order that the Defendants do jointly and severally demolish the permanent houses they have erected on the suit property.
- c) An order that the O.C.S Ruai Police Station do ensure compliance with order (b) above.
- d) General damages for trespass and unlawful occupation of the suit property.
- e) Costs of the suit together with interest at court rates.

The Plaintiffs’ case:

The Plaintiffs’ case as set out in the plaint is as follows: The Plaintiffs are the registered proprietors of the suit property which is situated at Kamulu, Nairobi. The Plaintiffs purchased the suit property from Ndunda Musungu on 21st March, 1993 at a consideration of Kshs. 130,000/-. After paying the full purchase price, the suit property was registered in the names of the Plaintiffs. The Plaintiffs have averred that the Defendants entered and occupied the suit property without their consent. The Plaintiffs have averred further that the Defendants have not only occupied the suit property but have also constructed permanent structures thereon. The Plaintiffs have averred that the said structures were put up without their consent or authority. The Plaintiffs have averred that by reason of the Defendants’ said illegal acts, they have suffered loss and damage. The Plaintiffs have averred that they have lost income that they would have earned from the suit property. The Plaintiffs have averred further that they have been unable to develop the property as they have been denied possession thereof. The Plaintiffs have averred that the Defendants continued occupation of the suit property amounts to trespass.

The Defendants’ case:

The Defendants entered appearance and filed a statement of defence on 16th August, 2013. The Defendants denied being in illegal occupation of the suit property. The Defendants averred that they each purchased portions of the suit property from one, John Ng’ang’a Kibe through his estate agency, Jogi Waki Real Estate Agencies on various dates between March and August 2011. The Defendants averred that

they were in the process of acquiring titles for their individual portions of the suit property after obtaining possession thereof through a valid sale. The Defendants averred that their developments on the suit property were carried out with the full knowledge and consent of the Plaintiffs and as such the same were not illegal as claimed by the Plaintiffs. The Defendants urged the court to dismiss the Plaintiffs' suit with costs.

Reply to defence:

The Plaintiffs filed a reply to defence on 28th August, 2013. The Plaintiffs averred that they did not know John Ng'ang'a Kibe who allegedly sold the suit property to the Defendants. The Plaintiffs averred that the title to the suit property that was alleged to have been issued to the said John Ng'ang'a Kibe on 14th March, 2011 was suspect. The Plaintiffs averred that the said title was obtained through illegal means since the Plaintiffs had been the registered owners of the suit property since 8th March, 1994. The Plaintiffs averred that since the Defendants had nothing to show that they were occupying the suit property lawfully, the Defendants were trespassers on the suit property.

The evidence tendered by the parties:

At the trial, the 1st Plaintiff gave evidence on her own behalf and on behalf of the 2nd Plaintiff. The 1st Plaintiff adopted their witness statement dated 7th June, 2013 and produced the documents attached to their list of documents dated 28th June, 2013 as exhibits. In the said witness statement that was filed on 2nd July, 2013, the Plaintiffs stated as follows: The Plaintiffs bought the suit property which was previously known as Plot No. 93 from one, Ndunda Musungu who had acquired it from Ngundu Farmers Co-operative Society Limited where he was a shareholder. They paid Kshs. 130,000/- for the property. Mr. Musungu thereafter gave them all the relevant documents of ownership. They presented the said documents to the Lands Office in Nairobi, paid the requisite charges and were issued with a lease and certificate of lease dated 8th March, 1994. In September, 2012, they visited the suit property and found that the Defendants had occupied the same and had put up permanent structures thereon. The Defendants who had no documents of ownership refused to vacate the suit property even after being issued with a demand letter.

In her oral testimony in court, the 1st Plaintiff stated as follows: The suit property was registered in her name and that of the 2nd Plaintiff as tenants in common. They were issued with a lease and a certificate of lease for the suit property on 8th March, 1994. They carried out an official search on the suit property on 12th September, 2012 which showed that they were still the owners of the suit property.

The 1st Plaintiff stated further that she neither knew the Defendants nor John Ng'ang'a Kibe who was alleged to have sold the suit property to the Defendants. She asserted that the Plaintiffs had never sold the suit property to anybody and were not aware that the Defendants were carrying out construction on the suit property. The 1st Plaintiff reiterated that the Defendants were trespassers on the suit property and that they had refused to vacate the property even after being issued with a demand letter before this suit was filed.

The Defendants never appeared at the trial. The Defendants' advocate who was present when the suit came up for hearing asked to be excused from participating in the hearing on behalf of the Defendants. The 1st Plaintiff was therefore not cross examined. The Defendants did not also tender evidence in their defence.

The submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiffs filed their submissions dated 21st April, 2021 on 22nd April, 2021 while the Defendants did not file submissions. The Plaintiffs submitted that they had proved their case against the Defendants to the required standard. The Plaintiffs submitted that the evidence that they tendered at the trial regarding their ownership of the suit property was not controverted. The Plaintiffs submitted that their title to the suit property was indefeasible. The Plaintiffs submitted that the Defendants had not proved that the Plaintiffs' title to the suit property was acquired through fraud or misrepresentation. The Plaintiffs submitted that they were entitled to all the prayers sought in the plaint.

On the issue of general damages for trespass, the Plaintiffs argued that they had intended to put up 50 two-bedroom flats on the suit property. They submitted that each two-bedroom flat would have been rented out at Kshs. 15,000/- per month. They submitted that their expected income over nine years that the Defendants remained in occupation of the suit property would have been Kshs. 81,000,000/-. The Plaintiffs urged the court to award the said amount as general damages for trespass.

Analysis of the issues arising and determination thereof:

The issues arising for determination in this suit are; whether the Defendants are trespassers on the suit property and whether the Plaintiffs are entitled to the reliefs sought. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I am satisfied from the evidence before me that the Plaintiffs are the lawful proprietors of the suit property. I am convinced that the Plaintiffs acquired the suit property lawfully from Ndunda Musungu and that the same was procedurally and lawfully registered in their names as tenants in common. Although the Defendants had claimed that the suit property belonged to one, John Ng'ang'a Kibe who sold the same to them, the Defendants did not place any evidence before the court in proof of this allegation. As the lawful owners of the suit property, the Plaintiffs were entitled to possession thereof. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the said Act provides as follows:

“27. 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;

(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 and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The two sections have been reproduced in sections 24 and 25 of the Land Registration Act, 2012 as follows:

“24. 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.

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, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

The Plaintiffs placed evidence before the court showing that the Defendants had constructed permanent houses on the suit property. The Defendants admitted that they were the ones who constructed the said buildings and that they were in occupation of the suit property. The Plaintiffs having established that they were the lawful proprietors of the suit property and that the Defendants had entered and put up structures thereon without their permission, the burden shifted to the Defendants to establish that they had justifiable cause for being in occupation of the suit property. As I have stated earlier, the Defendants did not tender any evidence at the trial in their defence. The evidence tendered by the Plaintiffs that the Defendants entered and occupied the suit property illegally was not controverted. In the absence of evidence that the Defendants had justifiable cause for occupying the suit property, it is this court’s finding that the Defendants entered and occupied the suit property illegally and as such, they are trespassers on the property.

On whether the Plaintiffs are entitled to the reliefs sought in the plaint, I am satisfied that the Plaintiffs have proved their case against the Defendants on a balance of probabilities and as such they are entitled to the reliefs sought. The Plaintiffs are entitled to a declaration that they are the bona fide proprietors of the suit property. The Plaintiffs are also entitled to an order for vacant possession of the suit property. Since the Plaintiffs have proved that the Defendants are trespassers on the suit property, the Plaintiffs are entitled to general damages for trespass. In Halsbury’s Laws of England 4th Edition Volume 45 para. 26 1503 the authors have stated as follows on computation of damages in an action for trespass:

a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.

b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.

d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

The Plaintiffs claimed Kshs. 81,000,000/- as general damages for trespass. The Plaintiffs claimed that they intended to put up residential apartments for renting on the suit property from which they would have earned the said amount for the duration of the Defendants occupation of the suit property. The Plaintiffs did not tender any evidence showing that they were in a position to put up apartments on the suit property and that they were prevented from doing so by the Defendants' occupation of the property. The Plaintiffs did not place before the court architectural or building plans for such apartments. There was also no evidence of availability of funds for such project. It is also not clear how the Plaintiffs came up with the 50 two-bedroom apartments and the monthly rent of Kshs. 15,000/-. In the circumstances, I find the Plaintiffs' Kshs. 81,000,000/- general damages claim speculative. Due to the foregoing, it is my finding that the Plaintiffs have not proved that they suffered actual damage as a result of the Defendants' acts of trespass. The Plaintiffs are therefore entitled only reasonable damages as compensation for the use of their land by the Defendants.

Conclusion:

In conclusion, I hereby enter judgment for the Plaintiffs against the Defendants jointly and severally as follows:

1. I declare that the Plaintiffs are the bona fide proprietors of all that parcel of land known as Title No. Nairobi/ Block 126/83(the suit property).
2. The Defendants shall demolish the houses and other structures that each of them has erected on the suit property and shall vacate the suit property within ninety (90) from the date of this judgment in default of which the Plaintiffs shall be at liberty to apply for warrants for their forceful eviction and demolition of the said houses and other structures at their costs.
3. The Plaintiffs shall serve a copy of the decree extracted from this judgment upon each of the Defendants within thirty (30) days from the date of this judgment and shall file an affidavit of service in court.
4. In the event that any of the Defendants cannot be traced for the purposes of personal service, a copy of the decree shall be affixed in a conspicuous place on the house or structure that such Defendant has put up on the suit property.
5. Such service shall be a condition precedent to the Plaintiffs taking any steps towards the execution of this judgment by eviction or demolition of the Defendants' houses and other structures on the suit property.
6. Each of the Defendants shall pay to the Plaintiffs Kshs. 250,000/- as general damages for trespass together with interest at court rates from the date hereof until payment in full.
7. The Plaintiffs shall have the costs of the suit.

Dated and Delivered at Nairobi this 22nd day of July 2021.

OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. C.K.Chege for the Plaintiffs

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant