



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND LAW

AT MOMBASA

ELC CASE NO. 23 OF 2019

PUNGU OCEANIC & CONSTRUCTION LTD.....PLAINTIFF

-VERSUS-

JUMA TSALA & 13 OTHERS.....DEFENDANTS

JUDGMENT

(Suit by plaintiff to have defendants evicted from suit land; defendants not entering appearance and not filing defence; plaintiff evidencing title to the land; judgment entered for plaintiff.)

A. Introduction and pleadings

1. This suit was commenced through a plaint filed on 13 February 2019. It is the case of the plaintiff that she legally purchased the plot no. Mombasa/MS/Block III/640 (the suit property) from the previous proprietors at a consideration of Kshs. 30,000,000/= on 12 January 2018. The plaintiff has pleaded that she could not however take possession because the defendants invaded the land. In the suit, the plaintiff seeks the following orders (slightly paraphrased) :-

- a) A declaration that the plaintiff is the rightful owner of the suit property.
- b) A declaration that the defendants are trespassers and are in illegal occupation of the suit property.
- c) An eviction order against the defendants.
- d) Mesne profits.
- e) Costs and interest of this suit.

2. The defendants did not enter appearance nor file defence despite being duly served with summons. They also did not appear in court during the hearing of the case despite being served with hearing notices. At the hearing, the plaintiff called one witness, Adan Maalim Hussein, who is her director. He produced the title deed and the search to demonstrate ownership of the suit property. He stated that he is unable to access the property owing to the squatters on it thus the need for an order of eviction. Mr. Ngure, learned counsel for the plaintiff, did file submissions and I have taken note of these. Counsel basically urged that being the title holder, it is the plaintiff who is entitled to exclusive possession of the land. He supported his submissions with various authorities which I have looked at. He also submitted that his client deserves mesne profits, as pleaded, though he did not give any indication of how much this would entail.

3. I have considered the pleadings, evidence tendered and the submissions of counsel. I have no reason to doubt the plaintiff's evidence. The plaintiff produced an original certificate of lease, and the official search, to demonstrate ownership of the suit land. I can see that the plaintiff became registered as proprietor on 23 February 2018. The fact that the plaintiff holds title is *prima facie* evidence that she is the proprietor of the suit property as provided for under Section 26 of the Land Registration Act, which is drawn as follows :-

“26. (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.

c) 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.”

4. Section 24 of the same Act provides as follows:-

“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.”

5. Nothing has been presented by the defendant to prove that the plaintiff's title is unlawful or that it was fraudulently acquired, and following Section 24 above, it is the plaintiff who is entitled to enjoy all proprietary rights including the right of possession, ingress and egress. The defendants have not come to court to demonstrate that they have any recognizable interest over the suit land. The defendants have therefore no right to be in possession and occupation of the suit property. Their continued occupation of the suit land is a violation of the plaintiff's right to property.

6. I am thus persuaded that the plaintiff has made out a case for a declaration that as between herself and the defendants, it is the plaintiff who is the rightful owner of the suit property. The plaintiff has also made out a case for the eviction of the defendants and also to have the defendants permanently restrained from the suit land. I will only give the defendants 30 days to vacate upon being served with the judgment as required by law.

7. On the claim for mesne profits, the only evidence tendered is that due to the defendants' occupation and use of the suit property, the plaintiff has not been able to access it thus being deprived of the use, possession and occupation. The plaintiff has not demonstrated the actual monetary loss that she has suffered to enable me make a quantification of it. The court in the case of Richard Njoroge Nyanjui v Kimanthi Muya & 2 others [2015] eKLR cited with approval the Court of Appeal decision in Peter Mwangi Mbuthia & Another -Vs- Samon Edin Osman Civil Appeal No.26/2004 Nairobi where the Court of Appeal held that It is incumbent upon a claimant to place material before the court demonstrating the amount claimed and how the same is arrived at.

8. I am not persuaded that the plaintiff has proved mesne profits and I am unable to make any award under that head.

9. I now make the following final orders :-

a) That as between the plaintiff and defendants, it is hereby declared that it is the plaintiff who is the rightful proprietor of the suit property known as Plot No. Mombasa/MS/Block III/640, and the defendants have no right to be upon the said land or to utilize it in any way.

b) That the defendants are hereby ordered to remove themselves, their servants or agents, from the land parcel Plot No. Mombasa/MS/Block III/640, and give vacant possession, and to do so no later than 30 days from the date of service of this judgment and/or decree.

c) That in default of the defendants removing themselves from the suit land as ordered above, an eviction order to issue and the defendants to bear any costs of such eviction.

d) In the event of an eviction, the OCPD of Likoni Division to provide adequate security to the court bailiff.

e) That the plaintiff shall have the costs of this suit.

10. Judgment accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA