



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 127 OF 2018

SAMUEL NDUNGU GITAU.....PLAINTIFF

VERSUS

GEOFFREY GITARI NJOGU.....DEFENDANT

JUDGMENT

1. By a Plaint dated and filed herein on 11th June 2018, Samuel Ndungu Gitau (the Plaintiff) prays for Judgment as follows: -

i) A mandatory injunction to compel the Defendant by himself, his relatives, agents, servants and/or any other person under (his) instructions to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials falling (therefrom) and/or in the alternative the structure be demolished and removed at his cost;

ii) An order of permanent injunction restraining (the Defendant) from trespassing and encroaching upon and or interfering in any way with the suit property and to remove all materials falling (therefrom) and/or in the alternative the structures be demolished and removed at his cost(sic);

iii) An order of permanent injunction restraining (the Defendant) from trespassing and encroaching upon and/or interfering in any way with the suit property;

iv) Upon issuance of Prayer (i), (ii) and (iii) above the Honourable Court be pleased to issue an eviction order against the Defendant;

v) Eviction of the Defendant from the suit property be done with the assistance of the OCS Witu Police Station; and

vi) Costs of the suit and interest at Court rates.

2. The Prayers arise from the Plaintiff's contention that at all times material, he was the registered proprietor of Title No. Lamu/Witu 6 situated at Lamu and measuring approximately 3.4 Ha. Sometime in 2018, the Plaintiff discovered that the Defendant had encroached on the said property. Despite protestations by the Plaintiff, the Defendant has refused to vacate the land.

3. The Defendant- Geoffrey Gitari Njogu participated in these proceedings in person but did not file any Statement of Defence or any other document.

4. Testifying as the sole witness in his case, the Plaintiff told the Court that he had purchased the suit property before he was issued with a title deed therefor on 5th February 2016. He produced a copy of the Title Deed as Exhibit 1.

5. The Plaintiff further told the Court that when he visited the land in 2018, he found out that someone had encroached on the land. He accordingly instructed a Land Surveyor who went to the land and confirmed that indeed the Defendant had encroached on the suit property. The Surveyor prepared a Report dated 5th June 2018 which contains photos of the Defendant's house and a maize plantation. The Plaintiff produced a Survey Report as Exhibit 2.

6. The Plaintiff told the Court that the Defendant has since burnt some of the houses that were on the land and was in the process of building another one. When the Plaintiff confronted the Defendant, the Defendant told the Plaintiff that the land belonged to him even though he had no title documents.

7. On cross- examination by the Defendant, the Plaintiff told the Court he had purchased the suit property on 13th April 2011 from one Mohamed Aishee. He further told the Court that before purchasing the land, he did a search at the Lands Registry and confirmed that indeed the land belonged to the Vendor.

8. On his part, the Defendant testified that he lives on the suitland and that the Plaintiff does not live therein. The Defendant further told the Court he does not know the Plaintiff although the Plaintiff had been taking to him some documents.

9. The Defendant told the Court he bought the land from Mohamed Isha Shee even though he had no documents to prove that. The documents were at home. He further testified that he bought the land in June 1999 and have planted trees thereon.

10. On cross- examination, the Defendant told the Court he had not brought documents to prove ownership as no one had told him to bring the same. He had also not filed any documents because no one had asked him to file any. The Defendant further told the Court that those who sold the land to himself do not know the Plaintiff and that he was unaware the Plaintiff wanted to evict him.

11. I have perused and considered the pleadings filed herein, the testimonies of the parties as well as the evidence adduced at the trial. I have equally perused and considered the submissions and authorities placed before me by the parties.

12. Despite his failure to file a Statement of Defence and/or any documents in support of his case, the Defendant filed elaborate submissions herein on 25th February 2021. He has also filed an elaborate list and bundle of documents on the same day, a month after he closed his case in Court.

13. From a perusal of the record, the Defendant first appeared in these proceedings on 25th June 2018 when the Plaintiff's Notice of Motion dated 11th June 2018 seeking orders of injunction against himself came up for hearing. When asked if he was ready to proceed with the application which had been served upon himself, the Defendant told the Court he was ready to proceed even though he had not filed anything in response.

14. The Court then on its own motion granted the Defendant 14 days within which to file a response to the application and adjourned the Motion to 26th July 2018 for hearing. On the said date, the Defendant appeared in Court and upon being asked if he had filed a response told the Court as follows: -

“I have not filed a Replying Affidavit because I have no means. I will defend myself verbally.”

15. In the circumstances this Court allowed the Plaintiff's application. The matter was then fixed for pre-trial before the Deputy Registrar of this Court. When the parties appeared before the Deputy Registrar on 4th March 2019, the Defendant was yet to file any pleadings and/or documents herein. On being asked why he had not done so, the Defendant answered as follows: -

“I know I am supposed to answer the Plaintiff but I do not know how to do it.”

16. The Deputy Registrar Honourable D. Wasike then granted the Defendant another 14 days to file his Statement of Defence, List of Witnesses and Witness Statements. But when the matter came up again for further pre-trial on 27th March 2019, the Defendant had not filed anything although he told the Court that he had come with his documents.

17. The matter would come up again some four months later before the same Deputy Registrar on 17th July 2019. Once again, it turned out that the Defendant had not filed any documents. In the circumstances the Honourable Deputy Registrar directed that the matter proceeds as undefended. The matter was then fixed for hearing on 25th January 2021 when the Defendant again told the Court he was ready to proceed with the trial despite his failure to file any pleadings and/or documents herein.

18. Arising from the foregoing, I find it quite mischievous that the Defendant finally found his documents and filed them a month after the closure of his own case. As was stated in ***P.H. Ogola Onyango t/a Pitt Consult Consulting Engineers –vs- Daniel Githegi t/a Auantalyis (2005) e KLR: -***

“Though the Court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after the pleadings have closed.”

19. In the matter before me, the Defendant was guided by the Court numerous times to file his pleadings and documents. He did not do so and indeed did not refer to any documents in his own testimony before this Court. His bundle of documents and the written submissions filed herein are therefore of no value as the parties and the Court are bound by the pleadings on record.

20. As the Supreme Court of Kenya stated in ***Raila Amolo Odinga & Another –vs- IEBC & 2 Others (2017) eKLR: -***

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition

that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them.”

21. The net effect of the foregoing is that this Court cannot afford any value to the Defendant’s testimony herein together with his undated list and bundle of documents.

22. From the material placed before me, there was no doubt that the suit property is registered in the Plaintiff’s name. The Plaintiff produced as exhibits 1, 3 and 4 copies of the Certificate of title, an official search and an extract of the Green Card in proof of his claim to the land.

23. As it were, the fact that the Plaintiff holds the Certificate of title is prima facie evidence that he is the proprietor of the suitland. In that respect, Section 26 of the Land Registration Act provides 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.

(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.

24. In the matter before me, there was no suggestion whatsoever that the Plaintiff’s title was unlawful and or that the same was fraudulently acquired. The Plaintiff’s proprietary rights over the suitland thus deserves protection. In this respect, Section 24 of the Land Registration act provides as follows: -

“24(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).....

25. In the premises, it was clear to me that it is the Plaintiff who is vested with the proprietary rights over the suitland and any occupation or other usage by the Defendant or any other person acting under the Defendant’s instructions is in violation of those rights. The upshot is that the Plaintiff has proved his case on a balance of probabilities.

26. Accordingly, Judgment is hereby entered for the Plaintiff as prayed in the Plaint. The Defendant shall have 45 days from today to hand over vacant possession failure to which he shall forthwith be evicted from the suitland.

27. The Plaintiff shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021.

J.O. OLOLA

JUDGE