



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 211 OF 2016

ELIUD MBUTU WANJOHI.....PLAINTIFF

VERSUS

KIPKIMEI ARAP MAINA.....DEFENDANT

JUDGMENT

1. Before me for determination is a matter in which the Plaintiff filed his suit dated the 14th September, 2016 on the 27th September 2016 where upon he had sought for orders that there be ;

- i. A permanent injunction against the Defendant, his servants, agents for (sic) ever interfering, trespassing and or affecting the Plaintiff's quiet possession and title to Laikipia/Daiga Umande Block 4/1003 (Nyarigithu)
- ii. That the Defendant and any other members and persons claiming under him be evicted
- iii. Costs of the suit.

2. The Plaintiff subsequently sought for interlocutory Judgment against the Defendant. Upon perusal of the record, and scrutiny of the affidavits of service, the court found that although the Defendant may have been served severally with the hearing notices through the area chief, yet there was no evidence to show that he had been served with the pleadings that originated this suit as well as the summons to enter appearance and therefore he could not be said to have been made aware of the suit.

3. The court then set aside its proceedings and orders of the 25th October 2017 and 25th February 2019 and directed the Plaintiff to apply, take out Summons to enter Appearance and serve the same together with the pleadings that originated the suit upon the Defendant within 30 days from the 29th April 2019.

4. The Plaintiff herein complied with the court's direction and effected service upon the Defendant who once again failed to either enter appearance or respond to the plaint herein. Consequently, judgment was entered against the Defendant on the 11th July 2019 wherein the Plaintiff proceeded with the hearing of formal proof on the 13th of November 2019.

5. The Plaintiff's case while relying on his statement was that he had bought the suit land through shares of Mwachwiri Two Farmers Company Limited where he had about 100 shares. He however could not remember what each share had cost.

6. At this juncture, the court noted that the Plaintiff was an old man aged 78 years who kept on reading from a script he had written and which script he referred to as his submission (the same had been filed on the 12th November 2019). The court thus informed the Plaintiff to desist from reading the said 'submissions' and to testify orally.

7. The Plaintiff proceeded to testify that he got two acres of land from the shares in the year 1978 but that he did not take possession of the land as he had been settled elsewhere.

8. That after acquiring title to his land being Laikipia/Daiga Umande Block 4/1003 (Nyariginu), he had proceeded to the suit land where he had found that the Defendant had already settled there.

9. He testified that he had got his title in the year 1999 wherein the land had been sub-divided in the year 2000 whereas, that he had paid a visit to the same in the year 2003.

10. That upon finding the Defendant on his land, he had gone to the Company to inform them that the Defendant was on his land, wherein they had asked the Defendant to vacate the same but that he had refused.

11. That during that period, since the Local Administration had power to deal with land, in the month of August 2003, he had reported the matter to the District Commissioner where the parties had been issued with summons to appear in the District Commissioner's officer accompanied with documents of ownership to their respective parcels of land.

12. The Defendant had no documents to prove ownership and therefore it had been resolved that he (Defendant) vacates the land as it was not his. He had been given up to the 15th January, 2004 to vacate but he refused.

13. The District Commissioner then instructed the District Officer Central to ensure that the Defendant vacates the land, but the Defendant had been adamant and refused to leave pursuant to which the Plaintiff had filed a case with the Land Dispute Tribunal.

14. That subsequently, the Land Dispute Tribunal had been dissolved before the matter was concluded and all matters which were pending in the Tribunal relating to land issues had been transferred to the Environment and Land Court.

15. That he had also filed his case before National Land Commission who had directed that he gets a court order for eviction of the Defendant upon which he had filed the present matter in the year 2016. The Plaintiff sought that the court adopts his statement, the list of documents and documents he had filed as his exhibits.

16. He closed his case by testifying that he had served the Defendant on several occasions but he had refused to enter appearance or appear before court.

Determination.

17. I have reviewed and considered the uncontroverted evidence of the Plaintiff in support of his claim and the issue for determination that arises is:

- i. Whether the Plaintiff is entitled to the orders so sought vide his plaint dated the 14th September 2016.

18. I have duly considered the evidence adduced before court by the Plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the Defendant did not appear at the hearing either in person or through counsel.

19. The Plaintiff is seeking for a permanent injunction against the Defendant, his servants, agents from ever interfering, trespassing and or affecting the Plaintiff's quiet possession and title to Laikipia/Daiga Umande Block 4/ 1003 (Nyarigithu) and also for eviction orders against the Defendant herein.

20. It is evident that the Defendant herein was served with the summons to enter appearance but failed to enter appearance or defend the case. The suit is therefore undefended. However, even if the suit is not defended, the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

21. The Plaintiff relied on his list of documents and documents therein filed as his exhibits which documents especially the title deed proved that he had been registered as its proprietor on the 4th February 1999.

22. I find that, the suit land having been registered in the Plaintiff's name therefore made him the registered owner **under the Registered Land Act now repealed and** governed by the Land Act, 2012 and the Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.

23. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of the same. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

24. The import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

25. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

26. The Defendant in this case did not provide any evidence to show that the Plaintiff herein had procured the suit land either illegally, un-procedurally or through a corrupt scheme so as to have his title impeached.

27. In light of the above, this court finds that the Plaintiff has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto.

28. From the evidence on record, the Plaintiff testified that before the year 2003 the Defendant, had trespassed onto his parcel of land wherein, despite the matter having been arbitrated upon by the local administration and the Defendant having been asked to vacate the suit land, he had remained adamant and had refused to vacate.

29. Consequently, the Plaintiff having proved his case on a balance of probabilities, I find that he is entitled to the prayers sought in the plaint. I thus enter judgment for him against the Defendant in the following terms:

i. The Defendant, his family, his servants, agents do forthwith vacate the land parcel Laikipia/Daiga Umande Block 4/ 1003 (Nyarigithu) within 30 days and if they fail to so vacate, an order of eviction be issued against them

ii. A permanent injunction is hereby issued against the Defendant, his servants, agents restraining them from interfering, trespassing and or affecting the Plaintiff's quiet possession and title to Laikipia/Daiga Umande Block 4/1003 (Nyarigithu)

iii. Costs to the Plaintiff at the lower scale since the suit was undefended.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE