



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT GARISSA**

**ELC NO. 11 OF 2018**

**MARIAN RASHE YAFAR.....PLAINTIFF**

**VERSUS**

**OMAR SHURIE.....DEFENDANT**

**JUDGMENT**

**A : INTRODUCTION AND PLEADINGS**

1. This suit was commenced through a plaint that was filed on 9<sup>th</sup> April, 2010. The plaintiff has averred that she is the registered proprietor of the land comprised in the leasehold title known as **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253** situated at Garissa town. The Plaintiff avers that on or about the 7<sup>th</sup> July, 2008 the Defendant wrongfully, unlawfully and without any color of right trespassed into the suit premises and unlawfully constructed a permanent residential house and also erected a perimeter wall. In the suit, the plaintiff wishes to have the following substantive orders: -

- a) A declaration that the defendant has no lawful claim to or interest in the suit premises
- b) An eviction order, such order to be enforced by the Officer-in-Charge of Garissa Police Station
- c) An order directing the defendant to demolish the house and fence and restore the suit premises to its original conditions within a period of time to be set by the court and in default of the defendant complying with this order then the court do issue further order permitting the Plaintiff to demolish the house and fence, the costs of such demolition to be a debt due by the defendant to the plaintiff recoverable by summary action.
- d) Mesne profits calculated at the rate of Kshs. 5000 per month with effect from 7<sup>th</sup> July, 2008 to the date when the defendant will vacate the suit premises and demolish the house and fence and remove all construction materials therefrom or the date the Plaintiff will complete the demolition of the house, whichever event is later.
- e) A Permanent Injunction restraining the defendant, his servants and agents from entering, re-entering, remaining on, renting out, fencing or doing any other act or thing whatsoever adverse to the Plaintiff right to and interest in the suit premises.
- f) A temporary injunction restraining the defendant his servants and agents from entering, re-entering, remaining on, renting, fencing or doing any other act or thing whatsoever adverse to the Plaintiff's right to and interest in the suit premises until the hearing and final determination of the suit.
- g) General damages for trespass
- h) Costs of this suit with interest thereon at court rates
- i) Any Other relief the court may deem just and fit to grants.

2. The defendant in response to the Plaintiff suit filed his defence on 24<sup>th</sup> May, 2010, where he averred that he is the registered proprietor land **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253** having purchased the same from one ISINO AHMED NOOR. He denied the Plaintiff claim on the property stating that he owns the property.

**B : EVIDENCE OF THE PARTIES**

3. The Plaintiff testified as the sole witness in support of her case. It was her testimony that Garissa County Council in the year 1987 invited members of public to apply for plots, and in response to the application she made an application upon paying Kshs. 35/= and a deposit of Kshs. 1000/= for which she was issued a receipt No. J436731 dated 12<sup>th</sup> March, 1987 and No. J436825 DATED 13<sup>TH</sup> March 1987 respectively. Her application for a Plot was successful and she was issued with an allotment letter dated 25<sup>th</sup> January, 1991 for **UNS.RESID PLOT NO. 84, GARISSA TOWNSHIP**, where she paid the sum of Kshs 8,060/= as the allotment fee.

4. She told the court that subsequent to the allotment she made an application to the Commissioner of Lands to issue her with a lease for her Plot No. 84 above, and upon registration it was given **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253**, and a certificate of lease of the same was issued **dated 25<sup>th</sup> October, 1999**. She applied for a certificate of search dated 24<sup>th</sup> October, 2008 and a **Beacon Certificate dated 17<sup>th</sup> June, 2009** was also issued.

5. Additionally, she told the court that between the year 1987 and 2004 she owned the property peacefully; however in February, 2004 she went for a trip outside Garissa and on getting back in June, 2004 she found that one **DIRIYE IBRAHIM MAALIM** had trespassed on the property, this led to her filing Garissa RMCC NO. 15 OF 2004 where judgment was entered in her favour in April, 2007, and she retook possession of the property.

6. Further, she testified that she remained in peaceful possession of the property until the year 2008 when the defendant without any right trespassed on the property and constructed a permanent house and fence. This led to the filing of PMCC NO. 39 OF 2008 which was dismissed on the grounds of jurisdiction, and she subsequently filed the instant suit at Embu High Court, which was later transferred to this court.

7. On cross-examination, she confirmed that she is also known as Maryan Mache Ahmed Karume and that she had sworn an affidavit for change of name to Marian Yahse Rafa, and that the late Ahmed Karume was her husband who played a role in the acquisition of the subject plot, reiterating that all the names refer to her. She also stated that she was issued the beacons to the property on 30/9/1998, 17/6/2009 and on 12/7/2012. Moreover, she stated that she had been paying rates until 2004 when Diriye entered into the property, and even after winning a suit against him, she never resumed the payment of rates. It is her case that **Plot No. 84** which she was allotted refers to **Plot No. TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253**. She urged the court to allow the plaint as prayed.

8. The Defendant on his part called two witnesses. He testified as DW1(Omar Shurie) where he told the court that he bought the subject property from one Isino Ahmed Sambul, and in support of this he produced the sale agreement dated 2<sup>nd</sup> May, 1998 at a consideration of Kshs. 30,000/=, He paid the money and that the agreement was witnessed by the area chief Haret Khalifa. He stated that he subsequently applied for transfer on 30/6/1998 and subsequently began paying rent to the Council.

9. Additionally, he told the court that his plot is Number 1775, and that he wrote to Graissa Municipal Council and vide a letter they confirmed that he indeed owns the said plot. It is his evidence that he took ownership and made developments thereof. And that he knows one Diriye Ibrahim Mahalim as his relative and that he occupies the next plot.

10. On cross-examination, he confirmed that the sale agreement dated 2/5/1998 does not indicate the plot number and so does the transfer and receipts. He also stated that his **Plot is GSA/1775** but has not provided documents on how it transitioned to **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253**. He stated that Isinino Ahmed Sambul was allotted the plot temporarily by Garissa County Council vide a letter dated 20/9/1984, however he has failed to follow up and secure a title.

11. Additionally, he confirmed that the correspondence produced by the Plaintiff over the plot is between County Council of GARISSA and Marian Rashe Yafar, and that the Certificate of search presented confirms that the Plot **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253** is owned by Marian Yashe Rafar.

12. Further, he confirmed that the proceedings in Civil suit No. 30 of 2008 was in respect to the subject plot was between the plaintiff and one Diriye Ibrahim Maalim, who is his relative. He insisted that the subject plot belongs to him and urged the court to dismiss the suit.

13. **DW2 Harret Khalifa Maalim**, testified that he is a chief working with the ministry of interior and that he knows Isinino Ahmed Sambul and Omar Shurie, it was his testimony that he witnessed the sale agreement produced by DW1 and that he was not privy to the negotiations thereof.

### **C. SUBMISSIONS**

14. The court on 31<sup>st</sup> January, 2020 directed parties to file their respective submissions. However, only the Plaintiff filed their submissions dated 30<sup>th</sup> January, 2020 and filed on 31<sup>st</sup> January, 2020. They submitted that the sale agreement produced by the defendant does not have the plot number, that nothing was tendered to show that the said seller Isinino Ahmed Sambul was allotted the said plot and no evidence was produced to show how the said Plot bearing No. GSA 1775 was changed to **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253** and ownership given to the defendant. And all the documents produced by the defendant bear Plot No. 1775 and not **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253**, therefore they claim has no basis.

15. In terms of the law, they submitted that the Plaintiff certificate of lease produced is prima facie evidence of her ownership, and that the same can only be impeached within the provisions of section 26 of the Land Registration Act, 2012 the predecessor of section 143 of the Registered Land Act(repealed), which basically provides that such first registration can be challenged upon the basis among others fraud, and in this case they submitted that the defendant in his testimony clarified that no allegation of fraud has been made against the Plaintiff.

16. In sum they urged the court to allow their suit and enter judgment in favour of the plaintiff, and in regard to mesne profit consider the defendant evidence that he collects rent of Kshs. 10,000/= monthly.

## **ANALYSIS AND DETERMINATION**

17. I have considered the parties pleadings, evidence tendered and submissions and authorities cited and in my view the main issue for determination is whether the suit land belongs to the plaintiff or the defendant.

18. The plaintiff in her case gave evidence and produced exhibits in support of her case, the genesis being that she acquired the subject plot pursuant to an invitation by the defunct Garissa County Council in the year 1987 to the members of public to apply for plots, where she was successful and was issued with an allotment letter dated 25<sup>th</sup> January, 1991 for **PLOT NO. 84, Garissa Township**, and she subsequently applied for a certificate of lease which she was issued dated 25<sup>th</sup> October, 1999. It is her case that the defendant without any color of right trespassed on her plot. In support of her case she produced the Certificate of lease, allotment letter and the beacon certificate among other documents.

19. The defendant on the other hand also claimed ownership of the subject Plot, alleging that he acquired the same vide purchase from one Isino Ahmed Sambul, who had been allotted a Temporary Plot by the defunct Garissa County Council. It is his case that his Plot is GSA No. 1775, which is the subject Plot No. **Title No. GARISSA MUNICIPALITY/BLOCK III/253**. In support of his case he produced the said sale agreement dated 2<sup>nd</sup> May, 1998 and correspondences from Garissa County Council. He claimed that he has developed the property and earning Kshs. 10,000/=.

20. The Plaintiff produced a copy of a title deed registered in her name. This is prima facie evidence that the suit land registered in her name and belongs to her.

21. Section 26 of the Land Registration 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 and indefeasible owner. It also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

22. There was no evidence that the title was procured fraudulently or through misrepresentation or corrupt schemes. In fact the defendant in his testimony told the court that he does not make any allegation of fraud against the Plaintiff in regard to her claim. Indeed if the plaintiff was not the rightful owner of the suit land then why was she registered as an owner? The plaintiff in my view proved that she is the indefeasible absolute owner of the suit land having produced a title deed in her name and the process of acquisition through allotment.

23. The defendant on the other hand has failed to clearly explain how he acquired the property. I have looked at the sale agreement dated 2<sup>nd</sup> May, 1998 and the same does not indicate the number or description of the land being sold and therefore the same cannot be said to be referring to the subject parcel of land. Additionally, no explanation as to how the said seller acquired the subject parcel land before selling it to the defendant. He was not called to testify. In the circumstances and after considering all the documents produced by the defendant, it is clear to this court that this is an apparent case of land grabbing.

24. On burden of proof, **Section 107 of the Evidence Act (Cap 80) Laws of Kenya** provides:

**(1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.**

**(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person."**

25. In addition, **Section 109** of the same **Act** also provides:

**"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

26. It is trite that in civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. See **Kirugi & Another v Kabiya & 3 Others [1987] KLR 347** .

27. Considering the circumstance of this case, it is my finding that the plaintiff has proved her case on a balance of probabilities and this court therefore allows her claim. In the premises, the plaintiff is perfectly entitled to have the defendant evicted from the suit land. She is also entitled to a permanent injunction to have the defendant permanently restrained by himself or his servants/agents from the suit land.

28. It is notable that Mesne profits is a special damage which must be specifically pleaded and proved. In the case of **Njeri Kimani vs Joseph Njoroge Murigi and others HCCC. 819 of 2009**. It was held that ;

**“A claim for mesne profits is in the nature of special damages, which require to be pleaded and strictly proved”.**

29. In my view no evidence was led to support the claim for mesne profits, although the defendant noted that he collects rent of Kshs. 10,000/= monthly, it was not stated when it began. Be that as it may, I recognize that the Defendant entered the Plaintiff Plot without any colour of right, and In lieu of an order for mesne profits, since no evidence was led to prove the claim, in my own discretion, I award the plaintiff a sum of Kshs. 100,000/= as general damages for trespass, for the defendant must bear some consequences for his illegal occupation of the suit land plus costs of this suit and interest at court rates from the date of this judgment.

## **CONCLUSION**

20. I therefore make the following orders:

a) A declaration that the defendant is a trespasser on the plaintiff's parcel of land known as parcel **TITLE NUMBER GARISSA MUNICIPALITY/BLOCK III/253**.

b) A permanent order of injunction is hereby issued against the defendant his servants and / or agents from interfering with the smooth occupation by the plaintiff of his parcel of land.

c) The defendant to give vacate possession of the suit land, demolish house and fence and restore the suit premises to its original condition within 45 days failure of which an eviction order to issue and demolition undertaken by the Plaintiff with costs recoverable from the defendant as summary debt and the orders herein be enforced by the Officer-in-Charge of Garissa Police Station.

d) In lieu of an order for mesne profits, I award the plaintiff, against the defendant, a sum of Kshs. 100,000/= as general damages for trespass, which sum shall accrue interest at court rates from the date hereof until settlement in full.

f) Defendant to pay costs of the suit.

**Read, delivered and signed in the Open Court this 28<sup>th</sup> day of February, 2020.**

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**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Plaintiff: Present
2. Son to Defendant: present
3. Court Assistant: Fardowsa