



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 95 OF 2018

NELLY WANJIRU NJENGA.....PLAINTIFF

VERSUS

ROBINSON MAINA.....1ST DEFENDANT

JOYCE WANJIRU.....2ND DEFENDANT

MR. NJENGA.....3RD DEFENDANT

JAMES MUNGAI.....4TH DEFENDANT

JUDGMENT

By a **Plaint** dated **20th March 2018**, the Plaintiff filed this suit against the Defendants seeking for orders that;

(a) A mandatory injunction be issued restraining the Defendants either by themselves, their servants, agents or otherwise howsoever from entering upon, crossing, erecting structure upon or in any manner howsoever from interfering with the Plaintiff's possession, ownership and quiet enjoyment of the parcel of land known as Kabete/ Kibichiko/3736.

(b) Costs of this suit and interest thereof.

(c) Such other relief as the Court may deem fit and just to grant.

In her statement of claim, the Plaintiff averred that she is the bonafide registered owner of the suit property. She further averred that the Defendants have set up illegal temporary structures at the front of the suit property without her consent. She averred that by the Defendants' continued illegal occupation, she has been unable to quietly enjoy her possession and develop it and thereby suffering loss and damage and therefore she is seeking for their immediate removal.

Despite service, the Defendants did not enter appearance or file any

defence and the matter proceeded for formal proof hearing wherein the Plaintiff testified and closed her case.

PLAINTIFF'S CASE

PW1 - Nelly Wanjiru Njenga, the Plaintiff herein adopted her witness statement and testified that the Defendants are her children. She further produced a **title deed** over the suit land as **exhibit 1**, and **photographs** of the building as **exhibit 2**, and the **Mutation Form** as **exhibit 3**, **Court Order** as **exhibit 4**. It was her testimony that she came to court seeking to be allowed to remain on the suit property.

After the close of the Plaintiff's case, the Court directed the Plaintiff to file written submissions to which the Court has now carefully read and considered and renders itself as follows;

The Plaintiff's evidence remain uncontroverted and unchallenged. Though the Defendants were duly served with the court papers, they failed to enter appearance and thereby defend the suit. The suit has not been contested and therefore the Plaintiff's evidence remains uncontroverted and unchallenged. However the Plaintiff is still required to prove her case on the required standard of balance of probability. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where it was held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant’s and or their Counsel to cross examine her on her evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as *ex parte* evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

From the available evidence, the Court finds the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

It is trite that the registration of a person as the owner of the land and Certificate of title held by such a person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by **Section 26(1)** of the **Land Registration Act**, which states as follows;

“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.

This Court has seen the title deed that confirms that the Plaintiff is the registered owner of the suit property. From the said registration, it therefore means that without the said registration and proprietorship of the Plaintiff being impeached, she remains the legal owner of the suit property with all the rights and privileges that appertain to it as provided by **Section 24(a)** of the **Land Registration Act**, which states as follows ;

(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.

Further, it is clear that the right of such proprietor shall not be defeated except as provided by the law. See **Section 25** of the **Land Registration Act** which provides;

“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.”

The Plaintiff has alleged that the Defendants have encroached on her parcel of land thus infringing on her right to ownership of the suit property as provided by the above **Sections 24** and **25** of the **Land Registration Act**.

There is no evidence availed in Court to show that the Plaintiff’s registration has been revoked or challenged as per the exceptions in **Section 26(1)(a)** and **(b)** of the **Land Registration Act**. Thus the Plaintiff herein is the absolute and indefeasible owner of the suit property. See the case of **Salim Seif Ambunya Andanje & Another ...Vs... Alex Jepkoech Yano & Another [2019]eKLR**, where the Court held that;

“The Respondents provided titles and proof that the proprietary rights legally vest in the Respondents. The correct legal position in the absence of the Judgment in the Eldoret Environment and Land Court Case No.608 of 2012 being overturned or appealed is that the Respondents have the right to the property and the same should be protected as per Article 40 of the Constitution.”

From the above provisions of law, it is clear that the registration of a

person affords him/her all the rights and privileges that appertain to the suit property. In this instant case, the Court finds that the evidence of the Plaintiff has not been rebutted and she is therefore entitled to have her suit property dealt with as per her wishes. Consequently, the Court finds and holds that the Plaintiff is entitled to the orders sought as the Defendants have no right to be in her property without her permission.

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, this Court finds that the Plaintiff has proved her case on a balance of probabilities and accordingly the Court allows the Plaintiff's claim entirely with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of February 2020.

L. GACHERU

JUDGE

27/2/2020

In the presence of

Mr. Ngure Mbugua holding brief for Mr. Gitau for Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

No appearance for 3rd Defendant

No appearance for 4th Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE