



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 1223 OF 2016

(FORMERLY H.C.C.C NO. 296 OF 1994)

ISDORA SIOCHA NYANSERA.....PLAINTIFF

VERSUS

UHURU GEORGE.....1ST DEFENDANT

KENATIKO GEORGE.....2ND DEFENDANT

NYANGWESO GEORGE.....3RD DEFENDANT

CHARLES OCHWANGI.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this suit against the Defendants on 25th May 1994. At all material times the Plaintiff was and still is the registered proprietor of the land parcel known as WANJARE/BOGITAA/1726 and 1727 which shall herein after be referred to as the suit property. The Plaintiff's claim against the Defendants is that the 1st, 2nd and 3rd Defendants unlawfully leased the suit property to the 4th Defendant thus denying the Plaintiff of the use and enjoyment thereof. The Plaintiff therefore prays for an eviction order and a permanent injunction to restrain the Defendants from interfering with the suit property.

2. The Defendants entered appearance and filed a defence dated 22nd July 1994 denying the Plaintiff's claim.

3. After an unsuccessful attempt to have this matter resolved by the Land Registrar, this case which has been in court for over 25 years was finally set down for hearing on 5.10.2020. Despite being served with a hearing notice, the Defendants did not attend court on the hearing date and the case proceeded by way of formal proof.

4. The Plaintiff testified as the sole witness in his case. He adopted his witness statement dated 15.5.2017 as his evidence in chief. In the said statement he states that he initially bought land parcel number WANJARE/BOGITAA/1726 which was a portion of land parcel No. WANJARE/BOGITAA/490 from George Ongeru –deceased in 1985. After sub-division of land parcel No. 490 the deceased transferred land parcel No. 1726 to the Plaintiff and remained with land parcel No. 1727. Later in 1990 the Plaintiff bought land parcel No. 1727 from the deceased. Both parcels were registered in the Plaintiff's name and he took possession thereof.

5. Sometime in 1994 after the vendor had died the 1st, 2nd and 3rd Defendants who are his sons, leased the suit properties to the 4th Defendant without the Plaintiff's knowledge or consent thus necessitating the filing of this suit.

6. The Plaintiff produced the Certificates of official Search in respect of the land parcels No. WANJARE/BOGITAA/1726 and 1727 as Plaintiff's exhibits 1 and 2. He prayed that judgment entered in his favour as prayed in the Plaintiff.

7. This being a fairly straight forward matter, counsel for the Plaintiff opted not to file any submissions.

ISSUES FOR DETERMINATION

From the pleading and evidence placed before the court the following issues arise for determination:

- i. Whether the Plaintiff is the registered proprietor of land parcels number WANJARE/BOGITAA/1726 and 1727
- ii. Whether the Defendants are unlawfully occupying the suit properties.
- iii. Whether the Plaintiff is entitled to the reliefs sought
- iv. Who should bear the costs of this suit?

ANALYSIS AND DETERMINATION the Certificates of Official Search as Plaintiff's exhibits 1 and 2 in support of his case.

9. Section 24 of the Land Registration Act No. 3 of 2012 provides as follows:

“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.”

10. Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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, but subject to any lawful encumbrances, set out in this section.

11. Section 26 of the same 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 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 grounds of fraud, or misrepresentation to which 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.

12. Since the Plaintiff's evidence was not challenged at the hearing, it is my finding the Plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012. Furthermore, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

13. The second issue is whether the Defendants are in lawful occupation of the suit land. The Plaintiff testified that the 1st, 2nd and 3rd Defendants have unlawfully leased the suit properties to the 4th Defendant and they have refused to hand over vacant possession of the same to the Plaintiff. In the circumstances, it is my finding that the Defendants have no right over the suit land they are therefore occupying the same unlawfully. This amounts to trespass to land.

14. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; an order of eviction and a permanent injunction against the Defendants.

15. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

16. The first test that the court must determine is whether the Plaintiff has established a prima facie case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) defined a prima facie case as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

17. From the Plaintiff's evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order against the Defendant.

18. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a. A permanent injunction do and is hereby issued restraining the Defendants by themselves, their family members, agents or anyone acting on their behalf from trespassing upon land parcels number WANJARE/BOGITAA/1726 and 1727.

b. The Defendants are hereby ordered to vacate the suit property within 30 days from the date hereof failing which the Plaintiff may apply for an eviction order.

c. The costs of this suit shall be borne by the Defendants jointly and severally.

Dated, signed and delivered at KISII this 4th day of November 2020.

J.M ONYANGO

JUDGE