



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA ELC CASE NO. 283 OF 2017

(FORMERLY NAIROBI ELC 120 OF 2011)

**RACHAEL NJANGO MWANGI (Suing as the personal representative of the
Estate of Mwangi Kabaiku (Deceased)).....PLAINTIFF**

VERSUS

HANNAH WANJIRU KINITI.....1ST DEFENDANT

MWANGI KABAIKU.....2ND DEFENDANT

JUDGMENT

By a Plaint dated **18th March 2011**, the Plaintiff has sought for the following orders against the Defendants:-

1. An order for eviction of the Defendants from L.R No. Limuru/Bibirioni/T.355

2. Costs of this suit.

In her statement of Claim, the Plaintiff averred that **Mwangi Kabaiku (deceased)**, is the registered owner of the suit property. She further averred that the deceased died on **28th October 2009**, and that the Defendants are trespassers/squatters on the suit property as they neither have the legal nor the equitable claim over the said property.

The suit is contested and the Defendants filed a Defence dated **11th August 2011**, and denied all the allegations made in the Plaint. They denied that the Plaintiff's husband bought the suit property from one **Kiniti Ndura**, who was the 1st Defendant's father and the 2nd Defendant's grandfather or from any member of the family. It was their contention that Plaintiff's late husband filed the Succession Cause No. **148 of 1999**, at Kiambu Law Courts and fraudulently registered himself as the owner of the suit property without informing the family of the late **Kiniti Ndura**, who was the registered owner of the suit property . It was averred that a Succession Cause was pending challenging the registration of the Plaintiff's late husband on the title. They further denied that the Plaintiff ever took possession.

The matter proceeded for viva voce hearing wherein the Plaintiff called two witnesses. The Defendants though duly served did not attend Court and did not avail any evidence as the matter proceeded without the Defendant's participation.

PLAINTIFF'S CASE

PW1 Rachel Njango Mwangi, adopted her witness statement and testified that she had the title deed registered in her name. It was her further testimony that she had asked the Defendants severally to move out of her land to no avail. She produced the Copy of letters of Administration as Exhibit 1, Copy of Title deed as exhibit 2, Copy of the official search as exhibit 3, .She urged the Court to allow her claim.

PW2 John Ngugi Mwangi, testified that PW1 is his mother and that **Mwangi Kabaiku** was his father. It was his testimony that they live on the suit land and that the Defendants are also on the suit land. Further that they have tried to evict the Defendants to no avail as the defendants have built a house on the suit land. It was his further testimony that his father bought the suit land from the 1st defendant's father in **1969**. He produced the sale agreement as exhibit 4 (a) and the translation as Exhibit 4 (b).

The Plaintiff filed written submissions which the Court has now carefully read and considered. The issue for determination is **whether the**

Plaintiff is entitled to the orders sought.

Though the Defendants filed a defence, they did not adduce any evidence to support their claim and therefore all the averments in their Defence remain mere allegations. It is evident that averments in pleadings are not evidence. Therefore, the Plaintiff's evidence remains uncontroverted. This was held so in the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano...Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007, where it was held that:-

“In this matter apart from filing its statement of Defence, the defendant did not adduce any evidence in support of assertions made therein . The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

Even though the Defendants did not appear in court to adduce evidence, the plaintiff still had an obligation to call sufficient evidence to prove her case. It is crystal clear that uncontroverted evidence is not automatic prove of any case.

The Plaintiff has sought for the eviction of the Defendants from the suit property. It is not in doubt that the Plaintiff was registered as the owner of the suit property on **18th July 2012**, under **Cap 300** (now repealed). **Section 27** of the said **Cap 300** (repealed) states that such registered owner has all the rights and privileges appurtenant to such parcel of land.

“27. Subject to this Act –

(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;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

Further, **Section 26(1) of the Land Registration Act** provides that the holder of a title over property is the **absolute** and **indefeasible** owner unless the same is impugned as envisaged under the said **section**. **Section 26(1) 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, 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.

The Plaintiff has produced a title deed which confirms that she is the **absolute** and **indefeasible** owner and thus holds all the rights and privileges over the suit property as provided for under **Section 24 and 25 of the Land Registration Act**. Therefore, the Plaintiff herein has all the rights and privileges to enjoy the suit property.

Section 24 provides;

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

Section 25 (1) 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, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

As already held above, the Defendants did not controvert the Plaintiff's evidence and for that reason, the court finds and holds that the Defendants do not have any interest over the suit property. Therefore, the Defendants ought not to be in the suit property and the prayers sought by the Plaintiff are found merited. The plaintiff being the indefeasible owner has all the rights and privileges to enjoy her property. Consequently, the Plaintiff is entitled to the prayers sought.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant

provisions of law, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendants entirely as per the Plaint dated **18th March 2011** with costs.

*The Plaintiff to give the Defendants the requisite **Notice** before evictions as provided by the law.*

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of June 2020.

L. GACHERU

JUDGE

16/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

No consent for the Plaintiff

No consent for the Defendants

L. GACHERU

JUDGE

16/6/2020