



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 385 OF 2017

(FORMERLY NRB 1144 OF 2016)

HOTENGA NJERI MUNGAI.....PLAINTIFF

VERSUS

CELINA WAIRIMU.....1ST DEFENDANT

WANGUI JOSEPH.....2ND DEFENDANT

GEORGE NDOTONO.....3RD DEFENDANT

JUDGEMENT

By a Plaint dated 20th September 2016, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

- a. Permanent injunction be issued restraining the Defendants, their Servants and or employees or anyone claiming under them from trespassing, transferring, leasing or in any way whatsoever alienating land title Number Ruiru/Ruiru East Block 2/703.**
- b. An order that the Defendants give vacant possession of the suit premises and in default the Plaintiff be allowed to forcefully eject the Defendants with the help of the OCS, Ruiru Police Station.**
- c. Damages for trespass.**
- d. Cost of this suit.**

In her statement of Claim, the Plaintiff averred that she is the registered owner of the suit property. It was her contention that around **February 2016**, while on a routine check to her parcel of land, she noticed that some structures had been erected on the suit property by the Defendants without her consent. It was further averred that the Defendants became violent and threatened the Plaintiff and her son with unspecified action when the Plaintiff confronted them about the structures necessitating the Plaintiff to make a report to the Police vide **OB No. 28/316 and OB 35/21/3/2016**, where the Defendants were summoned to bring their title documents but could not provide any.

It was further averred that the Plaintiff has requested the Defendants to vacate the suit property on several occasions but that the Defendants have denied her, her rights of use, occupation and access of her property without any justification and are trespassing upon the suit property without any quantum of rights.

The suit is contested and the 1st and 2nd Defendants filed statement of Defence dated **31st October 2016**, and denied all the allegations made in the Plaint. They further averred that they have been the legitimate owners of their individual parcels of land having bought them in **2003**, and that they have been in occupation and have put up permanent structures. They further averred that they are bonafide purchasers and not trespassers and they therefore have all the rights.

The Defendants sought that the Plaintiff suit be dismissed and a Declaration be entered that to the effect that:-

- a. The Defendants are the bonafide owners of their individual plots out of land parcel No. Ruiru/ Ruiru East Block 2/703.**

b. The revocation of the title issued to the Plaintiff.

c. A permanent Injunction restraining the Plaintiff either by herself, agents employees and any other person acting under their instructions from trespassing, disposing or dealing with parcel Ruiru/Ruiru East Block 2/703.

After close of pleadings the matter proceeded for hearing by way of **viva voce evidence** wherein the Plaintiff testified and closed her case. Despite being served with the hearing Notice, The Defendants did not appear in Court and the matter proceeded without their participation.

PLAINTIFF'S CASE

PW1 Hotenga Njeri Mungai, adopted her witness statement filed on **20th September 2016**, as her evidence in Court. It was her testimony that she is the owner of **Ruiru/ Ruiru East Block 2/703**, and that she had a title which she produced as exhibit 1. She further testified that when she conducted a search at the Land Office, it confirmed that she was the owner of the suit land. It was her further evidence that the Defendants had encroached onto her land and that she did not know them and that she did not have any documents to show that the land belonged to the Defendants.

She told the Court that the Defendants approached her in an aggressive way and further that the Defendants have not vacated the suit property to date.

The Court directed the Plaintiff to file written submissions and in compliance with the said directives, the Plaintiff filed the said written submissions through the Law Firm of **Muturi S. K. & Co Advocates** on **14th February 2020**, and submitted that she has proven her case by adducing concrete evidence indicating ownership. Further that being the legal owner, she has a legal right to sue for trespass on the suit property. It was her further submissions that having been deprived of her enjoyment and use of the suit property by the Defendants, it was only fair and just that she is put back in a position as if the trespass had not occurred and she is therefore entitled to general damages.

Further the Plaintiff relied on various decided cases and urged the Court to grant the prayers sought in the Plaintiff.

The Court has now carefully read and considered the pleadings, the evidence adduced and the written submissions. It is the Court's considered view that the issue for determination is **whether the Plaintiff is entitled to the orders sought.**

The 1st and 2nd Defendants filed their statement of Defence, However they did not adduce any evidence in support of their claim and therefore all the averments in their Defence remain mere allegations as averments in pleadings are not evidence. Therefore, the Plaintiff's evidence remains uncontroverted. See the Case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007,** and 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.”

Though the Defendants did not appear in court to give evidence and challenge the plaintiff's evidence, the plaintiff still has a duty to prove her case on the required standard. The Plaintiff has sought for a permanent injunction against the Defendants, an order of vacant possession and General Damages for trespass.

Though the Defendants had laid claim to the suit property in their Defence, they did not produce any evidence to support their claim, as already noted above. It is not in doubt that the Plaintiff is the registered owner of the suit property. To this effect, the Plaintiff produced a Certificate of title and an official search confirming that she is indeed the registered owner of the suit property. Therefore, this court has no doubt that the Plaintiff is the registered owner of the suit Property and therefore the **absolute** and **indefeasible** proprietor as provided by the provisions of **Section 26(1)** of the **Land Registration Act** which provides:-

“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.”

See the case of **Paul Audi Ochuodho...Vs...Joshia Ombura Orwa (2014) eKLR**, where Justice Okongo held that

“I am satisfied that the plaintiff is the registered owner...the defendant in this suit did not defend this suit. The title over the suit property is therefore not challenged. In the absence of such challenge the plaintiff is the absolute and indefeasible owner of the suit property. He is entitled to exclusive possession.”

Having found that the Plaintiff is the registered proprietor of the suit property, then she is entitled to enjoy the rights and privileges of such a proprietor as provided by **Section 24(a)** of the said **Land Registration Act** which 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;”

Further, her rights are protected by Section 25(1) of the same Act which rights can only be defeated as per the law. *It 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...”

Having found and held that the Plaintiff is entitled to enjoy her rights as a proprietor of the suit property and that these rights include exclusive use, possession and enjoyment of the same without interference by any third party, then the court finds that the Defendants should pave way to allow such enjoyment. The Plaintiff cannot enjoy such rights and privileges if the Defendants are in the suit property and therefore there is need for vacant possession and a permanent injunction restraining them from any dealings with the suit property. In the case of Simon Njage Njoka ...Vs...Simon Gatimu Kanyi (2007) eKLR, the Court of Appeal in Nyeri, in allowing the Appeal, the court had the following to say:

“The appellant having provided a valid title to the piece of land and the respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should then have proceeded to evict the respondent.”

The Plaintiff has also sought for a permanent injunction against the Defendants restraining them from trespassing on the suit property and damages for the said trespass. Trespass has been defined by *Clerk and Lindsel on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

As already held above, the Plaintiff is the registered owner of the suit property. The Plaintiff has accused the defendants of encroaching upon her land and erected permanent structures. From the Defendants Defence that was filed in Court, the Defendants acknowledged that they had erected permanent structures on the suit property. It is not in doubt that this was done without the Plaintiff's consent and therefore it was an intrusion upon her land which intrusion was unjustifiable. The Defendants having entered onto the Plaintiff's suit land without any lawful or justifiable cause then their actions amounted to trespass upon the Plaintiff's suit property and the Defendants must be restrained from continuing with the same trespass.

As to whether the Plaintiff is entitled to General Damages for trespass, in the case of Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR, the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

In the case of Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR, the Court held as follows:-

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less”

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

Having not provided the value of the suit property before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.300,000/=** as general damages for trespass.

Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.

e) If the trespass is accompanied by aggravating circumstances.

On costs of the suit, since the Plaintiff is the successful litigant, she is entitled to the costs of the suit as provided by **Section 27** of the **Civil Procedure Act**.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, the 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 jointly and severally entirely as prayed in the Plaint dated **20th September 2016**. Further the Court awards the Plaintiff **General Damages** for trespass to the tune of **Kshs.300,000/= with costs**.

It is so ordered.

Dated, signed and Delivered at Thika this 24th day of September, 2020

L. GACHERU

JUDGE

24/9/2020

Court Assistant – Lucy

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 **Judgement** 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.

With Consent of and virtual appearance via video conference

M/s Reshman for the Plaintiff

Mr. Kimani Kahete for the 1st, 2nd and 3rd Defendants

L. GACHERU

JUDGE

24/9/2020