



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1031 OF 2013

JANE WAMBUI NGERU.....1ST PLAINTIFF

SCHOLASTICA WAITHERA KAMAU.....2ND PLAINTIFF

VERSUS

DENNIS NJAGI.....1ST DEFENDANT

KIBASUI NDONGA.....2ND DEFENDANT

DANIEL MAINGI.....3RD DEFENDANT

(All sued as residents of BuruBuru Phase V on their own behalf and on behalf of all other residents)

NAIROBI CITY COUNTY..... INTERESTED PARTY

JUDGMENT

The plaintiffs commenced this suit by way of a plaint dated 27th August, 2013 filed in court on the same date. The plaint was amended on 20th January, 2015. In the amended plaint dated 9th January, 2015, the plaintiffs averred that at all material times they were and still were the proprietors as tenants in common in equal shares of the leasehold interest in all that parcel of land known as Nairobi/Block 79/787 situated at Buruburu (hereinafter referred to as the "suit property"). The plaintiffs averred that as proprietors of the suit property, they had a right to exclusive possession of the said property which right included the power to control entry to the same.

The plaintiffs averred that they acquired the suit property with vacant possession from Olerai Investment Limited on or about 3rd March, 2008 at a consideration of Kshs. 4,200,000/- for the construction of a church and a nursery school. The plaintiffs averred that when they purchased the suit property, they found a lot of soil dumped on it. The plaintiffs averred that in April 2010, they engaged one, Francis Kihara Gichana to remove the said soil. The plaintiffs averred further that following his engagement as a foresaid, Mr. Gichana brought to the suit property a tractor and lorries to commence the exercise of removing the said soil. The plaintiffs averred when Mr. Gichana arrived at the suit property, the defendants and their supporters came to the suit property and threatened to burn the tractor and lorries that had been brought to the site by Mr. Gichana if he commenced the removal of the soil that had been dumped on the suit property.

The plaintiffs averred that the defendants claimed that the suit property belonged to them and that due to their obstruction, the plaintiffs had to halt the exercise of removing the soil dumped on the suit property. The plaintiffs averred that in or about May, 2010, they obtained approval from the City Council of Nairobi to construct a perimeter wall around the suit property and a guard house. The plaintiffs averred that in the week starting 19th August, 2013, the defendants and their agents entered the suit property and started levelling the ground with a view to turning the suit property into a playground. The plaintiffs averred that the entry by the defendants and their agents on the suit property and their acts of levelling the ground amounted to trespass on the suit property.

The plaintiffs sought judgement against the defendants for;

- a) A declaration that the plaintiffs have the right to exclusive possession of the suit property.
- b) A declaration that the presence of the defendants, their supporters and agents on the suit property constitutes trespass to land.
- c) A permanent injunction restraining the defendants, their supporters, servants and/ or agents from entering into or remaining on or being on the suit property.

- d) A permanent injunction restraining the defendants, their supporters, servants and or agents from interfering with the plaintiffs' quiet enjoyment of the suit property.
- e) An order that the defendants do give to the plaintiff's vacant possession of the suit property.
- f) An order that the police at Buruburu Police Station do protect the suit property against trespassers.
- g) General damages.
- h) Mesne profits.
- i) Cost of the suit.
- j) Any other relief the court deems fit to grant.

The Nairobi City County was joined in the suit as interested party by the court on its own motion through an order made on 17th October, 2016. The defendants and the interested party did not file defences or any response to the claim by the plaintiffs although they were both represented in the suit by advocates. The suit came up for hearing on 24th September, 2019. Although the defendants were served with a hearing notice, neither the defendants nor their advocates appeared in court for the hearing. The 1st plaintiff, Jane Wambui Ngeru (PW1) testified on her own behalf and on behalf of her co-plaintiff. PW1 adopted her witness statement filed in court on 27th August, 2018 as her evidence in chief and produced the documents in the plaintiffs' list of documents dated 27th August, 2013 as exhibits.

In her witness statement, PW1 stated as follows: PW1 and the 2nd plaintiff were church ministers. Their church was known as Faith With Works Fellowship. The church operated from leased premises situated along Jogoo Road near Buruburu Estate, Phase V. They always wanted to run the church in their own premises. In order to fulfil that desire, they purchased the suit property from a company known as Olerai Investments Limited at Kshs 4,200,000/-. Before purchasing the suit property, they conducted a search which confirmed that Olerai Investments Limited was the registered proprietor of the suit property and that it had been paying land rent. Since 2010 they had been trying to develop the suit property but had not succeeded due to the many obstacles that had been placed on their way by the defendants and their supporters.

She stated that in April, 2010, they decided to prepare the suit property for development. Towards that end, they engaged a contractor by the name Francis Kihara Gichana to remove the soil that had been dumped on the suit property. The exercise was frustrated by the defendants and their supporters who threatened to burn the tractor and lorries that were to be used by Mr. Gichana in the removal of the said soil. On 18th May, 2010, the City Council of Nairobi approved their plan to build a boundary wall and a guard house on the suit property. As a result of the defendants' obstruction, they halted all activities on the suit property. On 19th August, 2013, the defendants in the company of about 20 other people entered the suit property and started levelling it. By the end of that week, they had turned the property into a playground. PW1 stated that due to the actions by the defendants aforesaid, they had been deprived of possession of the suit property. She urged the court to grant the reliefs sought in the plaint.

After the close of the plaintiffs' case, the defendants and the interested party did not tender evidence. The court directed the parties to make closing submissions in writing. The plaintiffs filed their submissions on 25th November, 2019 while the defendants and the interested party did not file submissions despite being served with the plaintiffs' submissions. The plaintiffs submitted that they had adduced uncontroverted evidence that they were the registered proprietors of the suit property. The plaintiffs submitted that their title to the suit property was indefeasible. The plaintiffs cited **Wamwea v Catholic Diocese of Muranga Registered Trustees [2003] KLR 389** and submitted that once a person has acquired legal title to land, he is not only entitled to possession but also to occupation of that land and a person who refuses to give vacant possession becomes a trespasser. The plaintiffs submitted that the defendants had entered into the suit property without the plaintiffs' permission or lawful justification and as such they were trespassers on the property. The plaintiffs submitted that the defendants were liable to them in general damages for trespass and also for mesne profits. The plaintiffs cited **Kenya Hotel Properties Ltd. v Willesden Investments Ltd., Civil Appeal No. 146 of 2007**, and submitted that the measure of damages or mesne profits payable for trespass is the reasonable rent that a property the subject of trespass could have fetched. The plaintiffs submitted that since the defendants neither filed a defence nor adduced evidence, the plaintiffs' claim stood unchallenged and as such the plaintiffs had met the standard of proof in civil cases which is on the balance of probabilities.

The plaintiffs submitted that an award of damages in the sum of Kshs. 500,000/- would be sufficient compensation to the plaintiffs for the defendants' acts of trespass. The plaintiffs submitted that they were also entitled to the other prayers sought in the plaint. On the issue of costs, the plaintiffs submitted that the same are awarded at the discretion of the court. The plaintiffs submitted that since it was the defendants' acts of trespass that forced the plaintiffs to come to court, the defendants should bear the plaintiffs' costs of the suit. In support of their submissions on costs, the plaintiffs cited **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2014] eKLR** and **Republic v Communication Authority of Kenya & another ex-parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** where the court laid the principles to be considered in awarding costs.

I have considered the evidence tendered by the plaintiffs and the submissions by the plaintiffs' advocates. From the pleadings the following in my view are the issues arising for determination in this suit:

1. Whether the plaintiff is the owner of all that parcel of land known as Nairobi/Block79/787(the suit property).
2. Whether the defendants are trespassers on the suit property.

3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

4. Who is liable for the costs of the suit?

Whether the plaintiff is the owner of all that parcel of land known as Nairobi/Block79/787(the suit property).

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the said Act provides as follows:

“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.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The two sections have been reproduced in sections 24 and 25 of the Land Registration Act, 2012 as follows:

“24. 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; and

(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 or expressed agreements, liabilities or incidents of the lease.

25. (1) 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.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

The plaintiffs adduced evidence showing that they acquired the suit property from Olerai Investments Limited at a consideration of Kshs. 4,200,000/-. The Plaintiffs produced as exhibits; a copy of a certificate of lease dated 31st July, 2009 bearing their names as the proprietors of the suit property and a certificate of official search on the title of the suit property dated 4th September, 2012 showing that as at that date the plaintiffs were the registered proprietors of the suit property having been registered as such on 31st July, 2009. The plaintiffs led evidence that when the defendants entered the suit property and disrupted the activities that the plaintiffs were undertaking thereon, they had claimed that the property belonged to them. As I have mentioned earlier, the defendants neither filed a defence nor adduced evidence to prove their interest if any in the suit property. The evidence that was adduced by the plaintiffs concerning their ownership of the suit property was uncontroverted. I am satisfied on the evidence before the court that the plaintiffs are the registered owners of the leasehold interest in the suit property.

Whether the defendants are trespassers on the suit property.

The plaintiffs' claim against the defendants is based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, **Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01**. In **Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR**, it was held that title to land carries with it legal possession. As I have stated above, the plaintiffs are the registered owners of the suit property. It follows therefore that although the plaintiffs are not in possession of the suit property, they are entitled to possession. The question that the court needs to answer is whether the defendants who are said to be in possession of the suit property have any justifiable cause for being in possession of the property. As I have stated above, the plaintiffs' title to the suit land was not challenged by the defendants who neither filed a defence nor tendered evidence at the trial. The plaintiffs' evidence that the defendants entered the suit property and disrupted the removal of the soil that had been dumped on the suit property was not controverted. The plaintiffs' further evidence that the defendants frustrated the construction of a perimeter wall around the property and a guard house on the suit property when they entered the property and converted it into a playground was also not controverted. The plaintiffs' having proved their ownership of the suit property and the defendants' entry and use thereof, the onus was upon the defendants to justify their entry into the property. In the absence of any evidence from the defendants, the only conclusion this court can arrive at is that the defendants had no justifiable cause for their entry and use of the suit property. The defendants are in the circumstances, trespassers on the suit property.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.

I am satisfied that the plaintiffs have proved their case against the defendants to the required standard and as such are entitled to most of the reliefs sought in the plaint. The plaintiffs have established that they are entitled to the declaratory and injunctive reliefs sought in the amended plaint. The plaintiffs have also established their claim for vacant possession of the suit property. The plaintiffs had also sought an order that the Police at Buruburu Police Station do protect the suit property against trespassers. This order cannot be granted. The court cannot direct the National Police Service to guard private property. The police can only be called in to maintain law and order. There is no evidence before me that following this judgment there is a likelihood of chaos breaking out on the suit property to warrant the granting of an order for police protection sought by the plaintiffs. The plaintiffs had also sought general damages and mesne profits. I am of the view that the plaintiffs are not entitled to both general damages for trespass and mesne profits. In their submissions, the plaintiffs claimed general damages in the sum of Kshs. 500,000/-. The plaintiffs did not however address the court on mesne profits. The plaintiffs argued that if the defendants had not trespassed on the suit property, they would have moved their church from rented premises to the suit property. The plaintiffs did not however place any evidence before the court of the rent that they were paying for the church premises that they would have saved if they had moved to the suit property. There was also no evidence placed before the court showing that the suit property could be used as a church. Due to the foregoing, I find no basis for the claim of Kshs. 500,000/-. I will award the plaintiffs nominal damages in the sum of Kshs. 50,000/-.

Who is liable for the costs of the suit?

As correctly submitted by the plaintiffs, cost is at the discretion of the court. As a general rule, costs follow the event. In this case, the plaintiffs have succeeded in their claim against the defendants. No reason has been advanced that would justify denying the plaintiffs the costs of the suit. The plaintiffs will therefore have the costs of the suit as against the defendants.

Conclusion.

In conclusion, I hereby enter judgment for the plaintiffs against the defendants jointly and severally as follows;

- a) I declare that the plaintiffs have the right to exclusive possession of all that parcel of land known as Nairobi/Block79/787(the suit property).
- b) I declare that the presence of the defendants, their supporters and agents on Nairobi/Block79/787 constitutes trespass to land.
- c) A permanent injunction is issued restraining the defendants, their supporters, servants and/ or agents from entering into or remaining and or being on Nairobi/Block79/787.
- d) A permanent injunction is issued restraining the defendants, their supporters, servants and or agents from interfering with the plaintiffs' quiet enjoyment of Nairobi/Block79/787.
- e) The defendants shall forthwith vacate and hand over to the plaintiff's vacant possession of Nairobi/Block79/787 if they are still in possession of the property.
- f) Kshs. 50,000/- as general damages for trespass.
- g) Interest on (f) above at court rates from the date hereof until payment in full.
- h) Cost of the suit.

Delivered and Dated at Nairobi this 24th day of September 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Nduta Kamau for the Plaintiffs

Mr. Kandie h/b for Nduta J. for the Interested Party

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant