



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION

ELC NO. 1723 OF 1999

BILHA NDUNG’U.....PLAINTIFF

VERSUS

FRANCIS MACHARIA.....DEFENDANT

JUDGEMENT

Background

This suit was originally filed in the lower court but transferred to this court after the lower court upheld a preliminary objection on jurisdiction. The Plaintiff had also filed the suit against the Defendant and his wife (Lucy Macharia, now deceased) but withdraw the claim against her. On their part, the Defendant raised an objection on grounds of limitation of actions which this Court (Mugo J.) ordered that the matter being one of general damages for trespass and special damages for materials allegedly converted for use by the Defendant, evidence ought to be canvassed and therefore Section 7 of Cap 22 may not apply.

The Judge directed that the objection be argued at submission stage.

Plaintiff’s Case

The Plaintiff elected not to make any amendments and asked to proceed on the basis of the Plaint dated 8/7/1994, wherein she averred that she at all material times she was the registered owner of the Residential Plot No. 813 in Ongata Rongai. It was her averment that sometime in 1984, the Defendant without her consent unlawfully trespassed on the Plaintiff’s piece of land erected a permanent residential house and continued to unlawfully occupy the land thus depriving the Plaintiff of the lawful use and occupation of the plot thus foregoing her proprietary rights. The Plaintiff further averred that the Defendant without her consent unlawfully took her building materials which she has put on the site for construction purposes causing the Plaintiff to suffer loss. The Plaintiff outlined the particulars of the special damages as follows:

Building Stones	7,500
Labour	600
Balast, Sand and Transport	640
Cement	400
Land Rates	2,590
Transfer fees	1,000

The Plaintiff averred that despite several demands issued to the Defendant to vacate the premises, he had declined to do so. The Plaintiff thus prayed for Judgment to be entered against the Defendant for general damages; special damages in the sum of Kshs. 12,730; costs of the suit and interest on the award of damages and costs at court rates; and an order that the Defendant does vacate the premises.

In evidence, the Plaintiff testified that she purchased property from one Jeremiah Sankole. She produced a letter (P. Ex.1) from the County Council of Ole Kejuado stating that the plot she purchased is No. 439 which as subsequently changed to 813. The Plaintiff also produced a letter of transfer dated 31/5/1982 and a confirmation by the council of the transfer dated 16/11/1982 (P. Ex. 2 and 3 respectively). It was the Plaintiff's evidence that in 1984 the Defendant's wife started to develop the plot and that she made a report to the council and the District Officer, Ngong'. She stated that she was summoned by a Mr. Njau of the Ministry of Physical Planning Offices at Co-operative House where she was told to give up Plot No. 813 and have another allotted to her, which she declined. The Plaintiff testified that subsequent to her reports, the

council wrote two letters dated 21/9/1987 and 28/9/1987 to the Defendant's wife asking her to stop developing the plot (P. Ex. 4 a and 4b). The Plaintiff testified that the Defendant did not cease construction and therefore the chief wrote to her on 5/2/1988 (P. Ex.5). The Plaintiff testified further that the Defendant as also summoned by the Assistant Chief where he produced a letter claiming ownership of Plot No. 372. It was her evidence that he was given notice to vacate Plot No. 813 within 7 days. The council also wrote to him on 15/2/88 and notifying him that the Council's Survey will show him Plot No. 372 (P. Ex. 6). The Plaintiff also produced letters of demand written by her advocates to the council and the Defendant dated 16/5/1988 and 13/6/2000 respectively (P. Ex. 7a and 7b).

The Plaintiff testified that she was summoned to the Council's office by a letter dated 5/11/1994 (P. Ex. 8) to discuss the plot issue but that the same was not resolved for non-attendance on the part of the Defendant. The Plaintiff produced a bundle of receipts evidencing payment of rates for the plot since 1981 (P. Ex. 9). The Plaintiff reiterated that she purchased plot No. 813 which was vacant at the time of acquisition. She testified that she started to develop the same and brought materials including sand, ballast, and cement but did not finish and produced

receipts ((P. Ex. 10).

On cross-examination the Plaintiff stated that she was aware there is no survey map or physical planning undertaken to show plots in the area and further that there were several disputes in respect to regarding allocations of plots in the area. In respect to the Notice placed on the Daily Nation newspaper on 15/8/1991 by the council, the Plaintiff testified that she did attend the meeting on the 14th and not 15th and that there were more than 100 people who had issues with plot allocation but that she did not see the Defendant. The Plaintiff admitted that she attended a meeting with the Defendant at the Department of Physical Planning and the Council regarding the dispute but that she declined to be offered another plot. The Plaintiff was shown a letter dated 18/10/1984 from the Department of Physical Planning which is to the effect that the dispute would be resolved upon her being allocated a different plot. She testified that she never received this letter and was never shown an alternative plot.

Defendant's Case

In a Defence dated 17/1/1995, the Defendant denied ever trespassing on the Plaintiff's plot and averred that he is the owner of Plot No. 372 and thus denied ever depriving the Plaintiff of her proprietary rights. The Defendant further denied the claim that he converted the

Plaintiff's materials as alleged. It was his averment that he purchased Plot No. 372 from one Letasuna Ole Tolimo in 1982 for Kshs. 17,000/- and constructed thereon a 2 roomed house at Kshs. 50,000. He averred that he has been in possession of the same from the date of purchase. The Defendant also averred that in 1984, the Ministry of Works, Housing and Physical Planning and the Olekejuado County Council made a decision that he occupies the plot that he had erected a house and that the Plaintiff shall be allocated an alternative plot to develop.

On trial, the Defendant reiterated the contents of the Defence. The Defendant produced a an application for transfer made to Ole Kejuado County Council by Letasuna Ole Tolimo dated 21/7/1982 and a transfer dated 21/7/1982 (D.Ex.1 & 2, respectively) as evidence of purchase of Plot No. 372. The Defendant testified that the vendor showed him the physical location of the plot which was vacant and thereafter he commenced construction. The Defendant produced a letter (D. Ex. 3) from the Ministry of Works, Housing and Physical Planning addressed to the County Council of Olekejuado suggesting that the Plaintiff be allocated a different Plot as the Defendant had already constructed on the plot in issue. Subsequently, the Director of Physical Planning, in a letter dated 18/10/1984 addressed to the Parties herein (D. Ex. 4) notified them that of its decision to allocate the Plaintiff an alternative plot and the Defendant to continue occupying Plot No. 372. The Defendant further produced the response dated 5/11/1984 from the County Council of Olekejuado to Director of Physical Planning and copied to both parties summoning them to their offices on 20/11/1984 so as to solve the dispute (D. Ex. 5).

The Defendant produced, a Notice on the Daily Nation newspaper dated 15/8/1991 inviting all the parties with disputes over the plots in Ongata Rongai Trading Center to report to County Chamber Kajiado on 14 and 15th August 1991 from 8:00am – 5:00pm (D. Ex. 5). The Defendant averred that he attended the meeting but did not see the Plaintiff. The Defendant averred that he the records of the council show him as the registered owner of Plot No. 372 and that he has been in occupation and has been paying rates. The Defendant produced a bundle of original receipts (D. Ex. 10) evidencing payment of rates. On cross-examination, the Defendant admitted not having a letter to confirm that where he constructed was actually Plot No. 372. He however averred that the physical location was showed to him by the vendor and an official from the council. On re-examination, the Defendant contended that he occupies Plot No. 372 and has been paying rates. He stated that he does not know the physical location of Plot No. 813 allegedly belonging to the Plaintiff.

The Defendant's witness, Timothy Wanga Mwangi (DW2) testified that he is a Deputy Director Physical Planning Department, Ministry of Lands. It was DW2's evidence that Ongata Rongai did not have approved plans in 1994. DW2 confirmed that the letter dated 18/10/1994 produced by the Defendant as Exhibit 4 originated from their office. On cross-examination DW2 admitted that the letter was a proposal, and not a directive, that the Defendant keeps plot No. 372 and the Plaintiff be allocated an alternative plot.

Plaintiff's Submissions

E. Muigai Advocates, for the Plaintiff filed submissions dated 26/7/2013 wherein counsel submitted that there was no evidence to prove that the Defendant was shown his plot by an official of the council, unlike the Plaintiff who has a letter (P. Ex. 3) to the effect that the plot was identified to her by an official of the council. Counsel submitted that the disputed site is Plot No. 813 belonging to the Plaintiff and not 372 as claimed by the Defendant. Further that all the correspondence addressed to the Defendant and his wife by the Council and the area Chief all giving the Defendant notice to vacate the plot is a clear indication that the Plaintiff is the owner thereof. In respect to the evidence by DW2, counsel submitted that the Department of Physical

Planning was not responsible for allocating residential plots in Ongata Rongai and therefore its view that the Plaintiff be allocated a different plot was a mere recommendation and not a final decision binding upon the Council. As a result, it is not true that the Plaintiff was agreeable to the recommendation by the Department of Physical Planning as alleged by the Defendant.

In respect of general damages, counsel submitted that the Plaintiff had established that the Defendant's action amounted to trespass and in view of the length of time from the date of the cause of action, the Plaintiff is deserving of an amount of Kshs. 1,835,000/-. Counsel submitted the basis of this amount is that the Plaintiff would have been entitled to receive a conservative rental income of at least Ksh. 5,000/- per month for that period being a residential plot which she intended to develop. As regards special damages, counsel submitted that the Plaintiff pleaded the same and specifically proved by annexing receipts evidencing purchase of building materials. On the issue of the limitation, counsel submitted that the cause of action arose in 1984 when the Defendant trespassed on to the Plaintiff's plot and therefore the suit having been instituted in 1994 was filed within time in view of the provisions of Section 7 of Cap 22 Laws of Kenya. Counsel urged the court to find in favour of the Plaintiff and grant the orders sought.

Mwicigi Kinuthia Advocates for the Defendant filed submissions dated 24/7/2013 wherein counsel submitted that the suit is time barred for reasons that the same was instituted 12 years after he purchased and occupied the plot, which was in the year 1982. Therefore the suit is barred by the Limitation of Actions Act. In respect to the letter dated 21/5/1982 relied on by the Plaintiff as proof of ownership of the plot, counsel submitted that the same indicates the plot number as 439 which is cancelled and the number 813 handwritten over it. Counsel submitted that the change was not dated and counter-signed which is a clear indication that it is a forgery. Counsel referred the Court to a copy of an Official Search dated 28/1/2010 conducted on Plot No. 439 which reflects the Plaintiff as the registered owner thereof and this, together with the Notice calling on plot owners in possession of allotment letters but without sites demonstrate the underlying problems of plot allocation by the council. It was counsel's submission that the Plaintiff had failed to sufficiently prove that the plot occupied by the Defendant is plot No. 813 and not Plot No. 372, as she did not call a surveyor from the Council neither did she produce a proper survey map to identify where Plots No. 372 and 813 are situated. In the circumstances, counsel submitted, the prayer for eviction of the Defendant should not be allowed and the entire case should be dismissed.

Determination

Whether the suit is time barred

The action before this court is that of trespass over a plot. The Plaintiff avers that she is the owner of Plot No. 813 previously referred to as 439 on which the Defendant has encroached, built a dwelling house and is currently in occupation. The Defendant on his part avers that he is the owner of Plot No. 372 on which he has been in occupation from the time of purchase in 1982 to date. It is the Defendant's submission that the Plaintiff's suit is time barred having been filed 12 years after he purchased and occupied the plot. The Plaintiff on her part avers that the Defendant trespassed on to her plot in 1984 and therefore filing suit in 1994 was within time. Both counsels rely on the provisions of Section 7 of the Limitations of Actions Act, which provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

This provision, in my view, is in respect to an action of adverse possession, which bars an owner from bring an action against an adverse possessor twelve years after the date of intrusion.

Trespass, the subject matter herein, is an action of tort, which, pursuant to Section 4(2) of the Limitation of Actions Act, has a time limit of 3 years from the date the action accrued. The section reads, in part,

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:”

This suit, having been filed in 1994, irrespective on when the Defendant took possession of the plot, is statute barred. The Plaintiff ought to have filed this suit within 3 years after the date of the cause of action. However, despite arriving at this finding based on the provision of the law, this Court (Mugo J.) thought it wise to have the suit continue as a claim for general damages on grounds of trespass and special damages are matters of evidence. Consequently, it is only just, reasonable and fair that the Court determines this suit on its merit rather than on the technical aspect.

Whether the Plaintiff has proved her case on a balance of probabilities

Both parties claim ownership of a plot, supposedly situated on the same physical location but bearing different plot numbers. The Plaintiff avers that it is known as Plot No. 813 formerly known as Plot No. 439 whereas the Defendant avers that it is known as Plot No. 372.

The Defendant is in occupation and claims to have been since time of purchase in 1982. The Plaintiff on her part claims she purchased the plot in 1982 but that the Defendant trespassed on to it in 1984. It is also common that both parties are second owners having purchased their plots from original allottees. Both parties have displayed letters of transfers in respect of their plots together with receipts evidencing payment of rates to the County Council of Olekejuado.

In regards to the change of plot numbers from 439 to 813, the Defendant referred the Court to a letter of transfer from Jeremiah Sangok to the Plaintiff, stating that the plot number 439 has been cancelled and 813 handwritten over it. The Defendant alleged that this is an indication that the change of plot numbers was not authorized and therefore a forgery. The Defendant further contends that a search conducted on the Council's records reveals that the Plaintiff is the registered owner of Plot No. 439. However, on perusal of the Plaintiff's exhibits, I have taken note of Plaintiff's Exhibit 1 which is a letter addressed to Jeremiah Sangok, from whom the Plaintiff purchased her plot, notifying him of the change of the plot number from 439 to 813. Plaintiff's Exhibit 3 is also a letter to the Council requiring it to confirm and a correction on the citation of the plot be made so that it reflects as

Plot No. 813. It is noteworthy that the County Council of Olekejuado is not a party to these proceedings and efforts by the Plaintiff to call an officer of the Council to give evidence came to nought. The court records reveal that the Court, severally, issued Summons on the request of the Plaintiff for the Surveyor of the Council but the surveyor failed to attend court to give evidence. In the absence of testimony from the council, being the keeper of the records, the court cannot conclusively establish why the Plaintiff still reflects as the owner of Plot No. 439 whereas the Council itself communicated that it had changed the number to Plot. 813. Be as it may, the issue is not whether the Plaintiff's plot number is 439 or 813, the issue is whether the Defendant has trespassed onto it.

The Plaintiff has annexed a series of letters addressed to the Defendant from the Council and from the area chief issuing a notice to the Defendant to stop construction and vacate the Plaintiff's plot. The various authors of the letters issued notice to the Defendant to either stop construction on or vacate Plot No. 813. Some of the letters, the Defendant avers that they did not reach him. I have perused the said letters, all of which make reference to Plot No. 813, whereas the Defendant avers to be the owner of the Plot No. 372. However, there is

an indication that there is confusion on the ground as to the physical location of the plots. There is correspondence dated 18/10/1984 from the Department of Physical Planning and a response from the council dated 5/11/1984 over a discussion on the dispute between the parties over the site of the plot. In the said letter of 18/10/1984, the Department of Physical Planning merely recommends that the Plaintiff be offered an alternative plot because the Defendant has already taken possession and commenced construction. In the response, the Council summons both parties for a meeting to ultimately resolve the dispute. There is no evidence that the matter was ever resolved and on evidence, the Plaintiff testified that she was not issued an alternative plot.

Having established that the confusion is on the ground, the question is whether the same can be visited upon the Defendant, noting that he is a registered owner of a plot No 372. Both parties have annexed

copies of Official Search revealing ownership of their respective plots. There is also bundle of receipts evidencing payment of council rates in respect of their respective plots. This being an issue of physical location and not that of ownership, it is my finding that these documents, without a survey map and in the absence of evidence from the council, are not of much help to solve the issue in dispute. I therefore find that the Plaintiff

has not, on a balance of probabilities, that the plot in which the Defendant is in occupation is Plot No. 813 formerly known as 439 and not Plot No. 372 belonging to the Defendant. In respect to the building materials, the Plaintiff avers that the Defendant trespassed onto her plot and converted her building materials into his own use. The Plaintiff produced a bundle of exhibits evidencing purchase of the building materials. This allegation was denied by the Defendant and also challenged the receipts which are not in the Plaintiff's name. It is my finding that other than the receipts to show the purchase of the building materials, the actual use of the materials by the Defendant was not proved.

The upshot is that the Plaintiff's case is dismissed. On the issue of costs, this being a dispute that has lingered in the Courts for close to 20 years, I make an order that each party shall bear their own costs.

Dated, signed and delivered this 6th day of March 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk

L.N. GACHERU

JUDGE