



REPUBLIC OF KENYA
IN THE HIGH COURT IF KENYA

AT NAIROBI

CIVIL CASE NO 425 OF 2012

SAMMY KANGAU KARUNGO.....1ST PLAINTIFF

LAWRENCE MACHARIA.....2ND PLAINTIFF

MARGARET AKUMU.....3RD PLAINTIFF

=VERSUS=

.JOSEPH GIKURUMI NDOTONO.....DEFENDANT

JUDGEMENT

By a plaint dated 11th June 2012 the plaintiff filed his claim seeking for an order of injunction restraining the defendant by himself, servants, tenants or any person claiming under him from alienating, wasting, constructing, occupying, cultivating or in any way interfering with parcel of land known as Nairobi/Block 126/217 or any part thereof and that the defendant, his servants, tenant agent or any other person claiming under him be evicted forthwith. The plaintiff is also seeking costs of this suit.

The plaintiffs claim that they are the trustees of Huruma Ngei IISelf Help Group of Nairobi and the owners of the parcel of land known as LR No Nairobi/Block 126/217 situated in Kamulu, Nairobi .They allege that the defendant trespassed onto the suit property and unlawfully occupied it by constructing a two roomed stoned house and started cultivating it and continues to cultivate the same to date without any right. They claim that the defendant was arrested and charged in **Makadara Criminal Case No 446 of 2008 Republic –vs- Joseph Gikurumi Ndotono** and found guilty of the offence of false detainer and sentenced to one year probation. It is the plaintiffs averments that the defendant has no interest in the suit land therefore they will suffer loss and damages unless the defendant is restrained from continuing to occupy, cultivate, trespass, construct ,dispose, waste or dealing with the suit property to the detriment of the plaintiffs. They also allege that an award of damages shall not be sufficient to compensate them for the loss/damage that will accrue to them if the remedies sought are not granted given that the defendant is a man of straw and will not be able to compensate the plaintiffs.

The defendant entered appearance on 27th August 2012 but did not file any defence. The Deputy Registrar of this court, on application by the plaintiff, entered a default judgment against the defendant on 4th October 2012 and referred the matter to this court for formal proof. The defendant was served with a hearing notice of the case as per the affidavit of Michael Nganga a process server of this court, and formal proof of the matter proceeded against the defendant.

During the hearing of this suit on 19th December 2013,**PW1 Samuel Kangau Karungo** testified that

he was the chairman of Huruma Ngei II Self Help Group which deal with the welfare of the members and a group of 150 members. He testified that he knew the defendant as he invaded the plaintiffs land .He further testified that he bought the land in 1994 and have title to the land .He also stated that they paid Ksh 4 Million and that the land was 46 acres .He also testified that they wanted to buy half an acre of land butt they were convinced by the vendors to buy the whole land. He stated that the defendant invaded the land and put up structures which forced the plaintiffs to meet as a committee visited the defendant and asked him to join the self-help group which he ignored. The defendant put up permanent structures. They later reported the matter to Kayole Police station where the defendant was arrested and charged in Makadara Law Court where he was found guilty of forcible detainer and jailed for one year. The plaintiff produced in court the sale agreement, a discharge form from the vendor ,allotment letter receipts for payment of land rent and rates and title deed. On cross examination by the defendant the plaintiff replied that he did not know the defendant neither did the defendants father buy the suit land in 1964 the defendant invaded the land. He also stated that he wanted the defendant to join their self-help group and that they have come to court to evict him from the suit land.

PW2; Lawrence Macharia Mwangi testified that he was the secretary to the self-help group and that they bought the land from *Ambui a Mbari ya Ngoru* in 1994 free from all encumbrances measuring 46 acres and made all payments. He further testified that in 2004 the defendant invaded the suit land and constructed a structure on the land. They later reported the matter in the police station and the defendant was charged and convicted thereafter the plaintiffs filed this suit and seek that the court allows the prayers in this case.

PW3; Margaret Akumu testified that the defendant invaded their land when they were still paying the vendor the purchase price. That they sent a committee member to tell the defendant that he was trespassing on their land but he ignored him and when the chairman asked him to join the group he refused that was when he was reported to the police station, Kayole and was later charged convicted and sentenced to one year probation at the Makadara Law Court. She testified that the defendant still lives on the land therefore they have come to court seeking for an eviction order

The plaintiffs filed their submissions on 5th February 2014 stating that the defendant encroached onto the suit property in 2004 and built a shanty and when he was asked to withdraw, he hurriedly put up a stone block as a counter to the plaintiffs efforts to evict him. They further submitted that the defendant had admitted in court that he had forcefully retained a private property without consent ,authority and knowledge of the owners. They also submitted that the defendant had not produced any document to warrant his legality on the plaintiffs' property or use neither are there records to show that he is in possession by way of a gift, sale or lease. The plaintiffs also submit that they stand to suffer irreparable damage after the purchase and acquisition of the subject suit premises and later in return they are denied their right through dubious deals.

I have considered the evidence before me and the pleadings filed on record. Though this suit was for formal proof, the law is that whether a suit proceeds ex parte or not, the burden of the plaintiff to prove his/her case on the balance of probabilities remains noting that Order **10 rules 10** of the Civil Procedure Rules provides that where the defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence.

The Plaintiffs attached a copy of Certificate of Title to their pleadings as "EXB 2", which shows that they got registered on 13th March 1997 .The names on the title are:- "*Samuel Kangau Karungo, Ben Mbuchi Mbatia and Margaret Akumu* of P.O. Box 68784, Nairobi who happen to be the Plaintiffs herein. By adducing the certificate of title in court, the Plaintiffs have conclusively proved that they are the lawful registered proprietors of the suit land in accordance with provisions of Section 26 of the Land Registration Act 2012 states 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The Plaintiffs in the instant case adduced in evidence a certificate of title showing that they are the registered proprietors of the suit land. There is no evidence to the contrary that they not the registered proprietors of the suit land, or that they obtained the registration through fraud. Accordingly, the first issue would be answered in the affirmative

In the premises, I am satisfied that the plaintiffs have formally proved their claim against the defendant on a balance of probabilities. I enter judgment against the defendant for the following orders:-

1. *An order of eviction of the defendant, his servants, tenant agent or any other person claiming under him from LR No Nairobi Block 126/217 situated at Kamulu, Nairobi within 30 days from this judgment.*
2. *A permanent injunction restraining the defendant by himself, servants, tenants or any person claiming under him from alienating , wasting, constructing, occupying, cultivating or in any way interfering with parcel of land known as LR No Nairobi Block 126/217.*
3. *The plaintiffs shall have costs of the suit.*

It is so ordered.

Dated, Signed and Delivered this 28th day of **March, 2014**

L. GACHERU

JUDGE

In the Presence of:-

..... For the Plaintiff

.....For the Defendant

Lukas: Court Clerk

L. GACHERU

JUDGE