



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 82 OF 2019

SARAH WAMBUI GATHIGA.....PLAINTIFF

VERSUS

JOHN KARANJA KAMAU.....DEFENDANT

JUDGEMENT

By a Plaint dated **6th May 2019**, the Plaintiff herein brought this suit and sought for Judgement against the defendant for orders that:-

- a) *The Defendant, his agents or servants and those who claim under him be evicted from title Number Kakuzi/Kirimiri/Block 7/102.*
- b) *Costs of the suit*
- c) *Any other or further relief which this Honourable Court may deem fit and proper to grant*

In her statement of claim, the Plaintiff averred that she is the registered owner of the suit property. That the Defendant unlawfully occupies the suit property and the Plaintiff is therefore seeking that he be evicted. The Plaintiff further averred that there is no other suit and there has been no suit pending in any Court between the parties over the subject matter.

Despite being served with the suit papers, the Defendant did not enter appearance and thus failed to defend the suit. The matter proceeded by way of formal proof wherein the Plaintiff testified and closed her case.

PLAINTIFF'S CASE

PW1 Sarah Wambui Gathiga, adopted her witness statement dated **6th May 2019**, as her evidence in Court. She also produced her list of documents as Exhibit 1 and urged the Court to enter Judgment in her favour.

On **15th July 2020**, the Court directed the Plaintiff to file written submissions and in compliance with the said directive, the Plaintiff filed her written submissions on **12th August 2020**, through the **Law Firm of Karuga Wandai & Company Advocates** and submitted that since the Plaintiff produced a title deed to prove that she is the registered owner of the suit property, then the Court should allow her claim.

The Court finds the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

Though the Defendant failed to defend the suit, the Plaintiff is the one who has alleged and she had a duty to prove her case on the required standard. As provided by **Section 107** of the **Evidence Act**, the Plaintiff has a duty to call evidence and prove her case in order for the court to enter Judgment in her favour. The said Section states:-

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

Even with uncontroverted evidence, the Court still has a duty to interrogate the evidence produced before it in order to arrive at a just determination as exparte evidence is not automatic prove of a case. See the case of **Gichinga Kibutha..Vs..Caroline Nduku (2018) eKLR**, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The Plaintiff has sought for the eviction of the Defendant from the suit property. It is not in doubt that the Plaintiff is registered as the owner of the suit property having being registered so and issued with a title deed dated **19th June 1989**. The provisions of **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. See **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 Defendant did not controvert the Plaintiff's evidence and for that reason, the court finds and holds that the Defendant does not have any interest over the suit property. Therefore, the Defendant **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, 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 Defendant in terms of prayers **no. (a) and (b)** of the Plaint dated **6th May 2019**.

As sought in prayer (c), the Defendant is directed to move or vacate the Plaintiff's suit property within a period of 45 days from the date hereof. Failure to do so, the Plaintiff to give the necessary or requisite Notice before eviction.

It is so ordered.

Dated, signed and Delivered at Thika this 22nd day of October 2020

L. GACHERU

JUDGE

22/10/2020

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 – Microsoft Teams Platform

No appearance for the Plaintiff Though aware of the Judgement date

No appearance for the Defendant

L. GACHERU

JUDGE

22/10/2020