



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 424 OF 2013

SAMUEL KAMAU NJUGUNA PLAINTIFF

VERSUS

HANNAH NJERI NYAGA DEFENDANT

JUDGMENT

By his plaint filed here on 19th August 2013, the plaintiff suing as the registered owner of a parcel of land known as No. LOC 8/KIONJOINI/264 measuring some 1.8 acres or thereabout sought orders that the defendant, her servants and/or agents do quit and vacate the same forthwith or be evicted therefrom. He also sought mesne profits from the defendant for the un-lawful use of his land plus costs.

The plaintiff's claim was that he bought the said land (hereinafter the suit land) in or about 1998 and obtained title in the year 2000 but the defendant who has no claim to the same has entered it and refused to vacate.

However, in her defence, the defendant denied that the plaintiff is owner of the suit land adding that the same is subject of a pending suit being Nyeri High Court Civil Case No. 189 of 2000 and that she is in occupation of the same as beneficial owner and therefore the plaintiff has no right to evict her. She also added that she would raise a Preliminary Objection on the ground that the plaint does not comply with the law and ought to be struck out and further that it is res-judicata as there are other suits either pending or concluded dealing with the same subject matter.

That Preliminary Objection was indeed raised but was dismissed in a ruling delivered on 16th September, 2013.

This trial therefore commenced on 28th January 2014 with the plaintiff testifying that he bought the suit land in 1998 from one Gatikwa Gathenga and obtained the title to it (plaintiff's Exhibit 1) in 2000 after he had completed paying for the same. He added that the defendant moved into the suit land in 2005 and put up a timber house for herself and another for her son and so he reported to the chief and she was ordered to vacate but did not. The plaintiff filed cases both in Muranga and Nyeri Courts but they were not heard.

In her defence, the defendant told the Court that she has lived on the suit land for 40 years. She added that she used to live with her late husband on the said land and he was buried there. She said she knew Gatikwa Gathenga was a step brother to her late husband and when he died in 2010, he was buried in Thogoto. She denied that she moved into the suit land in 2005 and added that although the land was in the names of Gatikwa Gathenga, he was to share it with her late husband Stanley equally but that had not been done by the time he died. She said that if Gatikwa Gathenga sold the land, he should only have sold

half of it and left half to her.

Submissions have been filed by both parties which I have considered together with the evidence on record.

It is common ground that the suit land is registered in the names of the plaintiff who has a title issued to him in December, 2000 under the now repealed **Registered Land Act** – (Exhibit 1). As the registered owner of the suit land, the plaintiff is therefore entitled to all the rights and benefits that go with such registration as provided under **Sections 27 and 28** of the repealed **Registered Land Act**. That title is indefeasible and is only subject to the overriding interests stipulated in **Section 30** of the repealed **Registered Land Act**. It can also be annulled if proved that it was obtained through fraudulent means or by mistake. A registered owner is also subject to any duties as a trustee if there is evidence that his registration was in trust for other parties.

The plaintiff said he bought the land from Gatikwa Gathenga. There is no suggestion that the said Gatikwa Gathenga had no proper title to pass to the plaintiff. Indeed the defendant conceded during cross-examination that the land did belong to the said Gatikwa Gathenga. On being cross-examined by Mr. Kimani counsel for the plaintiff, she said:-

“I know the plaintiff. I know the land subject of this suit belongs to Gatikwa Gathenga. I am not aware that the plaintiff is the registered owner of the land subject of this suit”.

That being the position, the said Gatikwa Gathenga was perfectly at liberty to sell the land to plaintiff and pass to him a proper title.

In her evidence in chief, the defendant said that Gatikwa Gathenga was a step brother to her late husband and the suit land was to be shared equally between Gatikwa Gathenga and her late husband called Stanley. However, this sharing had not been done by the time her late husband died. The defendant is therefore alluding to a trust in her late husband’s favour and ultimately to her and that therefore she was entitled to a half share in the suit land.

In her pleadings in defence, the defendant did not make any counter claim over the suit land on the basis of any trust. When this was put to her in cross-examination, she laid the blame at the door of her advocate. That notwithstanding, her evidence on the issue of trust was rather sketchy. Whether or not a trust exists is a matter of evidence. In **MBOTHU & 8 OTHERS VS WAITIMU & 11 OTHERS 1980 (K.L.R) 171** the Court of Appeal had this to say on that issue:-

“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

As stated above, there was really no evidence led to prove that either Gatikwa Gathenga or the plaintiff holds the suit land in trust for the defendant and while there is evidence that indeed the defendant has been living on the suit land, that in itself is not sufficient to establish a trust. And even if that evidence had been adduced, it would have been difficult for this Court to make a finding on what had not been pleaded.

Therefore, having considered all the evidence in this case, I find that the plaintiff has proved his case that he is the rightful owner of the suit land and is entitled to eject the defendant therefrom.

On the claim of mesne profits, no evidence was led to justify the granting of the same and that claim is rejected. On the issue of costs, I find that in the circumstances of this case, I should make no order as to costs.

Ultimately therefore, judgment is entered for the plaintiff against the defendant in terms of prayer (a) only of the plaint that is to say, the defendant or her servants and/or agents do vacate the suit land. As the

defendant has been living on the same, she be given three months to do so from the time of service upon her of the decree. Thereafter she may be evicted.

Orders accordingly.

B.N. OLAO

JUDGE

3RD DECEMBER, 2014

3/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Ms Kiragu for Kimani for Plaintiff – present

Defendant – absent

COURT: Judgment delivered in open Court this 3rd day of December, 2014.

Ms Kiragu for Mr. Kimani for Plaintiff present

No appearance for Defendant.

Right of appeal explained.

B.N. OLAO

JUDGE

3RD DECEMBER, 2014