



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 120 OF 2018

JAMES THENDU GITAU.....PLAINTIFF

VERSUS

WACAROL INVESTMENTS.....DEFENDANT

AND

KARANJA MUGUNYU.....1ST INTERESTED PARTY

DAVID WANAINA MAINA.....2ND INTERESTED PARTY

JOSEPH NJOROGI NYAMWEA.....3RD INTERESTED PARTY

BENARD KAMAU GITAU.....4TH INTERESTED PARTY

BENARD KAMAU GITAU.....5TH INTERESTED PARTY

MWANGI.....6TH INTERESTED PARTY

KARIUKI.....7TH INTERESTED PARTY

WA DENIS.....8TH INTERESTED PARTY

BABA KARIUKI.....9TH INTERESTED PARTY

GITAU.....10TH INTERESTED PARTY

JUDGMENT

By a Plaintiff dated 16th April 2018, the Plaintiff herein filed this suit against the Defendant and sought for orders that;

a) A declaration that the Ruiru/Kiu/Block 2(Githunguri) 4344 and the subsequent subdivisions 2/17358, Ruiru/Kiu/ Block 2/17359, Ruiru/Kiu/ Block 2/17360, Ruiru/Kiu/ Block 2/17361, Ruiru/Kiu/ Block 2/17362, Ruiru/Kiu/ Block 2/17363, Ruiru/Kiu/ Block 2/17364, Ruiru/Kiu/ Block 2/17365, Ruiru/Kiu/ Block 2/17366, Ruiru/Kiu/ Block 2/17367, Ruiru/Kiu/ Block 2/17368, Ruiru/Kiu/ Block 2/17369 belong to the Plaintiff absolutely.

b) Permanent Injunction against the Defendants, his servants, agents, employees and all those claiming through or under the Defendants restraining it/them from occupying, erecting structures or interfering with the suit property namely Ruiru/ Kiu/ Block 2(Githunguri) 4344 and the subsequent subdivisions Ruiru/kiu Block 2/17358, Ruiru/Kiu/ Block 2/17359, Ruiru/Kiu/ Block 2/17360, Ruiru/Kiu/ Block 2/17361, Ruiru/Kiu/ Block 2/17362, Ruiru/Kiu/ Block 2/17363, Ruiru/Kiu/ Block 2/17364, Ruiru/Kiu/ Block 2/17365, Ruiru/Kiu/ Block 2/17366, Ruiru/Kiu/ Block 2/17367, Ruiru/Kiu/ Block 2/17368, Ruiru/Kiu/ Block 2/17369 in any manner whatsoever.

c) An eviction directed against the Defendant and all those claiming title over the suit property under or through them to vacate the suit property namely Ruiru/ Kiu/ Block 2(Githunguri) 4344 and the subsequent subdivisions Ruiru/kiu Block 2/17358, Ruiru/Kiu/ Block 2/17359, Ruiru/Kiu/ Block 2/17360, Ruiru/Kiu/ Block 2/17361, Ruiru/Kiu/ Block 2/17362, Ruiru/Kiu/

Block 2/17363, Ruiru/Kiu/ Block 2/17364, Ruiru/Kiu/ Block 2/17365, Ruiru/Kiu/ Block 2/17366, Ruiru/Kiu/ Block 2/17367, Ruiru/Kiu/ Block 2/17368, Ruiru/Kiu/ Block 2/17369.

d) A declaration that the Defendants and all those claiming over the suit property Ruiru/ Kiu/ Block 2(Githunguri) 4344 and the subsequent subdivisions Ruiru/Kiu Block 2/17358, Ruiru/Kiu/ Block 2/17359, Ruiru/Kiu/ Block 2/17360, Ruiru/Kiu/ Block 2/17361, Ruiru/Kiu/ Block 2/17362, Ruiru/Kiu/ Block 2/17363, Ruiru/Kiu/ Block 2/17364, Ruiru/Kiu/ Block 2/17365, Ruiru/Kiu/ Block 2/17366, Ruiru/Kiu/ Block 2/17367, Ruiru/Kiu/ Block 2/17368, Ruiru/Kiu/ Block 2/17369 under or through the Defendant are trespassers and their continued occupation and activities on the suit land is illegal and/ or unlawful and amounts to trespass and subsequently the court do issue and order for demolition of all illegal structures forthwith.

e) Damage for trespass to land mesne profits, costs of this suit and interest.

In his statement of claim, the Plaintiff averred that he is the registered owner of the suit property having purchased the same from **Peter Karanja Kuria** on **29th November 2013**, and the same transferred to him on **31st March 2014** whence he was issued with a title deed. It was further averred that on **14th October 2015**, the Plaintiff subdivided the land into twelve parcel each with a separate title deed. Further that on diverse dates, the Defendant also purported to subdivide the suit property into **16 plots** and allocated them to the interested parties who are persons that are unknown to the Plaintiff with 2 plots going to persons yet to be identified. It was the Plaintiff's contention that the Defendant's actions are **mala fides** and are done without any colour of right as the Defendant does not have any interest in the suit property.

Despite being served with the suit papers, the Defendant did not enter appearance and the matter proceeded for formal proof by way of viva voce evidence where the Plaintiff testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 James Thendu Gitau the Plaintiff herein adopted his witness statement dated **16th April 2018** as his evidence. He further produced his list of documents as Exhibit 1. It was his testimony that he subdivided the land into twelve portions and some people invaded his land. He urged the Court to issue eviction orders and prayers as sought in the Paint.

On **22nd January 2020**, the Court directed the Plaintiff to file written submissions and in compliance with the said directive the Plaintiff through the Law Firm of **Prof. Kiama Wangai & Company Advocates** filed his written submissions dated **8th May 2020** which the Court has carefully read and considered and finds that the issue for determination is whether the **Plaintiff is entitled to the orders sought**.

The Defendant failed to enter appearance, file a Defence and hence failed to defend the suit. However, the Plaintiff is the one who has alleged and he has a duty to prove his case. As provided by **Section 107** of the **Evidence Act**, the Plaintiff has a duty to call evidence and prove his case on the required standard. 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.

Further the Court also has a duty to interrogate the evidence produced before it in order to arrive at as just determination as exparte evidence is not automatic. 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 prove his case however much the opponent has not made a presence in the contest.”

It is not in doubt that the registration of a person as the owner of the land and Certificate of title held by such a person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by **Section 26(1)** of the **Land Registration Act**, which states as follows;

“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.”

It is not in doubt that the Plaintiff is the registered owner of L.R Ruiru/Kiu Block 2 Githunguri 4344 and the subsequent subdivisions. To this effect the Plaintiff has produced title deeds to confirm the same. The Plaintiff has further produced documentations to show the root of his title. The Court has seen a sale agreement dated **29th November 2013**. The Court has also

seen various documentation from Githunguri Constituency Ranching Company Limited, which evidences that Peter Karanja Kuria, being the vendor in the said sale agreement was the owner of the suit property. Therefore, the Court satisfied that the Plaintiff has proved that he is the owner of the suit property and subsequent subdivisions as evidenced by the mutation form.

As already noted above, the evidence by the Plaintiff has not been challenged or controverted and therefore he is the absolute and indefeasible owner of the suit property. **From the said registration, it means that without the said registration and proprietorship of the Plaintiff being impeached, he remains the legal owner of the suit property with all the rights and privileges that appertains to it as provided by Section 24(a) of the Land Registration Act, which states as follows:-**

(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.

Further, it is clear that the right of such proprietor shall not be defeated except as provided by the law. See **Section 25** of the **Land Registration Act** which 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.”

The Plaintiff has alleged that the Defendant has fraudulently sought to subdivide the suit property and given it to other third parties. As already held by the Court, the Plaintiff being the absolute and indefeasible owner of the suit property should enjoy all the rights and privileges. The Defendant had no right of subdividing the suit property and allocating the said plots to the interested parties. To this end, the Court finds that any such subdivision was illegal and the same must therefore be quashed. Further no party ought to be in either possession or occupation of the suit property without the Plaintiff's consent and any intrusion of the Plaintiff's property without his consent amounts to trespass.

The Court finds and holds that the Plaintiff is entitled to enjoy his rights as a proprietor of the suit property and these rights include exclusive use, possession and enjoyment of the same without interference by any third party. The Plaintiff cannot enjoy such rights and privileges if the Defendant and interested parties are in the suit property and therefore there is need for eviction and a permanent injunction. See the case of Simon Njage Njoka ...Vs...Simon Gatimu Kanyi (2007) eKLR, the Court of Appeal in Nyeri, in allowing the Appeal, the court had the following to say:

“The appellant having provided a valid title to the piece of land and the respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should then have proceeded to evict the respondent.”

The Plaintiff has also sought for Damages for trespass. Trespass has been defined by *Clerk and Lindsel on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

From the above analysis, it is not in doubt that the Defendant without any right subdivided the land and allocated it to third parties who are in possession without the Plaintiff's consent and therefore their intrusion amounts to trespass. In the case of Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

Further In the case of Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR, the Court held as follows:-

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less”

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

Having not provided the value of the suit property before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.300,000/=** as general damages for trespass.

The Plaintiff has also sought for mesne profits. However the same must be specifically pleaded and proved. Further once a Court grants General Damages for trespass, the party is not entitled to mesne profit.

Having now carefully evaluated the available evidence, and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, this Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendant and all interested parties, jointly and severally as prayed in the Plaint in terms of prayers no. **(a) (b) (c) and (d)**.

On General damages as prayed in prayer no. (e), the Plaintiff is awarded **Kshs.300,000/=** and he is also entitled to costs of the suit.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of October 2020

L. GACHERU

JUDGE

15/10/2020

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 **Judgment** 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

No appearance for the Defendant

L. GACHERU

JUDGE

15/10/2020