



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 18 OF 2011

CORAL PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JAMES WAWERU NJOROGE..... 1ST DEFENDANT

DAN KAMAU.....2ND DEFENDANT

BONIFACE MUTISYA.....3RD DEFENDANT

ALFOLUCE KITEMBE.....4TH DEFENDANT

DORIS KAMENE NGAU.....5TH DEFENDANT

FELISTUS MWENDWA.....6TH DEFENDANT

JOHN ONYANGO.....7TH DEFENDANT

ZACHARIA KIPYEGON.....8TH DEFENDANT

DAVID OMOSI.....9TH DEFENDANT

GEORGE WAWERU.....10TH DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff filed suit vide his Complaint dated 26th January 2011 in which he sought that judgment be entered against the Defendants for:

- a. An order of injunction restraining the Defendants, their agents, servants and/or employees or whosoever from wasting, selling, trespassing, entering, destroying or in any other way interfering with the Plaintiff’s property known as L.R. No. 209/9810 (hereinafter referred to as the “Suit Property”).
- b. An eviction order to remove the Defendants from the Suit Property.
- c. Costs and interest of this suit.

The Plaintiff, the registered proprietor of the Suit Property, sued the Defendants for trespassing onto the Suit Property and constructing structures thereon, thereby making it impossible for the Plaintiff to develop and use its property.

Having failed to enter appearance and file a defense, interlocutory judgment was entered against the Defendants and the matter proceeded for formal proof.

In his evidence, PW1, a director of the Plaintiff testified that they acquired the Suit Property in the year 1988 when the same was vacant. He further confirmed that they have been paying the required land rents and rates in respect of the Suit Property over the years. He further testified that he has charged the Suit Property to Diamond Trust Bank and later with Kenya Commercial Bank but cleared the loan in 2006 but has not filed a discharge due to the encroachment thereon. He further stated that his efforts to regain possession of the Suit Property were met with resistance by the Defendants, who are some of the people who have invaded the Suit Property. PW2, a private investigator, testified that he was hired by PW1 to find out the identity of the persons who had invaded the Suit Property. He confirmed that he first went to Survey of Kenya where he was given a Cartographical Map. He then proceeded to industrial area where he was able to locate the Suit Property. Upon arrival, he was able to get the names of the people who had occupied the Suit Property but was unable to locate the beacons thereof because the area was built up with temporary structures. He also confirmed having delivered demand letters to the Defendants written by the Plaintiff's advocates.

Arising from the above, the issues for determination are as follows:

1. Whether the Plaintiff is the duly registered proprietor of the Suit Property;
2. Whether the Defendants have trespassed onto the Suit Property;
3. Whether the Plaintiff is entitled to the reliefs sought; and,
4. Who is to pay the costs and interest in this suit?

Issue 1: Whether the Plaintiff is the duly registered proprietor of the Suit Property

Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except

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- 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, through its director PW1, produced the original and a certified copy of its Certificate of Title in respect of the Suit Property to this court. As the above cited legal provisions dictate, this court is duty bound to find that, in the absence of challenge of the title on the ground of fraud, misrepresentation or corruption, indeed the Plaintiff is the absolute and indefeasible owner of the Suit Property.

Issue 2: Whether the Defendants have trespassed upon the Suit Property

Both witnesses have testified to the fact that the Defendants have encroached upon the Suit Property and erected temporary structures thereon. PW1 disclosed that he was unable to remove the Defendants from the Suit Property. PW2 also testified to having obtained the identity of the Defendants through his investigations of the occupants of the Suit Property and further confirmed having been sent to distribute demand letters written by the Plaintiff's Advocates to the Defendants. Photos taken at the Suit Property and produced in evidence also reveal that there are indeed people conducting various activities on the Suit

Property. On that basis, I find that the Defendants have trespassed on the Suit Property.

Issue 3: Whether the Plaintiff is entitled to the reliefs sought

Having established that the Plaintiff is the duly registered proprietor of the Suit Property, this court is duty bound to take the necessary measures to ensure that the Plaintiff enjoys **all rights and privileges belonging or appurtenant thereto**, as set out in the legal provisions cited above. The most fundamental right and privilege belonging to the Suit Property is the right to quiet possession. The Plaintiff is also entitled to the right to develop the Suit Property as it wishes. The Plaintiff has been unlawfully denied these rights and privileges due to the trespass of the Defendants. Accordingly, I find that the Plaintiff is indeed entitled to the reliefs sought.

Issue 4: Who is to pay the costs of this suit?

Section 27 of the Civil Procedure Act is instructive on this point. It gives the Judge discretion to determine who will pay the costs but sets out as a general rule that costs shall follow the event unless the Judge for good reason otherwise order.

In this particular case, I have no good reason to deviate from the general rule which is that costs shall follow the event.

Conclusion

In conclusion, I find that the Plaintiff has proved its case and do enter judgment as prayed in the Plaint. Costs are awarded to the Plaintiff.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER 2013

MARY M. GITUMBI

JUDGE