



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 12 OF 2018

JOSEPH MUCHINA NJOGU.....PLAINTIFF

VERSUS

FRANCIS MUCACIA SIBASHI.....DEFENDANT

JUDGMENT

1. On the 8/3/18 The Plaintiff sued the Defendant and sought the following orders;
 - a. A declaration that the Plaintiff is the lawful proprietor of title No. MAKUYU/MAKUYU/BLOCK 1/7638.
 - b. An order of eviction do issue against the Defendant, his agents or servants from the suit land.
 - c. A permanent injunction restraining the Defendant from entering or trespassing on title no. MAKUYU/ MAKUYU/ BLOCK 1/7638.
 - d. Costs of the suit.
2. It is the Plaintiff's case that at all material times to this suit he is the registered proprietor of MAKUYU/MAKUYU/BLOCK 1/7638 (suit land). He has accused the Defendant of forcefully entering the suit land without his authority and consent and commenced cultivation thus depriving him of his right to enjoyment of the suit land as a legal owner.
3. According to the record the Defendant failed to enter appearance nor file a defence to the Plaintiff's suit despite being duly served with the summons in this case on the 5/3/18. Thereafter the Plaintiff applied for interlocutory judgment. The matter not being of a liquidated claim, the Plaintiff was directed to set down the case for formal proof hearing in accordance with Order 10 rule 9.
4. At the hearing, the Plaintiff testified and relied on his witness statement dated the 5/2/18. In support of his testimony, he produced in evidence the following documents; original title deed, original agreement of sale, demand letter dated the 4/4/17, all marked as PEX Nos 1-3.
5. He informed the Court that he acquired the suit land by purchase from the previous owner namely Mary Njoki Githuka vide an agreement of sale dated the 12/5/14. That the said agreement was signed by the parties at the offices of Pundamilia Co-operative Society. The Society was in charge of processing the titles for members and in 2016 he was called to collect his title to the suit land which he duly did. Being unable to raise funds to develop his land, he left it vacant as he made arrangements to do so. He testified that in early 2018 he was informed by a neighbour that the Defendant had entered his land and was cultivating it. It is his evidence that upon arrival at the suit land the Defendant became hostile and threatened him as he claimed the suit land belonged to him. He sought help to remove the Defendant from the suit land from the local administration in vain. He informed the Court that the Defendant's continued occupation of his land is trespass and pleaded for an order for eviction.
6. PW2 - Mary Njoki Githuka testified that she sold the suit land to the Plaintiff in the year 2014. She acquired the suit land by way of inheritance from her late husband who was a member of the Pundamillia Society. That the suit land was initially Plot No. 1104 which was later named as title No. MAKUYU/MAKUYU/BLOCK 1/7638 after the title was processed. She confirmed that she and the Plaintiff executed a standard form agreement at the offices of Pundamillia Society and the Society later processed the title to the suit land in favour of the Plaintiff. She contends that she delivered the suit land in vacant possession to the Plaintiff at the time of the sale. That she later learnt that the Defendant had encroached on the suit land. She denies having sold the suit land to any other party other than the Plaintiff.
7. PW3 - Peter Kamau Muiruri testified that the Plaintiff was well known to him and that he had witnessed the sale agreement dated 12/05/2014 between the Plaintiff and PW2. He confirmed that the sale agreement was executed after the purchase price of Kshs. 100,000/- was fully paid at the offices of the Society. That he was aware that the Defendant had later encroached onto the suit land and had remained thereon to date.

8. The Plaintiff filed written submissions which I have read and considered.

9. The Plaintiff's claim is based on his right to proprietorship and ownership of the suit land and entitlement to the rights in respect to ownership of land. He has produced documentary evidence in form of a title deed over the suit land in his name as proof of ownership.

10. Section 26 of the Land Registration Act, 2012 provides;

“26. (1) 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.

11. The Courts in this country are mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in his name. That position was not challenged by the Defendant in fact the Defendant failed to file any pleadings in opposition to the claim despite being duly served. This Court holds and finds that based on the material placed before it which is the original title for the suit land, that the Plaintiff is the registered owner of the suit land.

12. Section 24 and 25 of the Land Registration Act provides that 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 thereto. Further section 25 provides that the rights of such proprietor shall not be liable to be defeated except as provided for in the Act and shall be held by the proprietor subject to such encumbrances as provided for by the Act.

13. Trespass is defined as unlawful act committed against the person or property of another especially wrongful entry of another's land. See Black's Law Dictionary, 10th Edition at Page 1642. Continuing trespass on the other hand is defined by Clerk on Law of Torts, 16th Edition Para 23-01 as;

“Every continuance of a trespass is a fresh trespass of which a new cause of action arise from day to day as long as the trespass continues.”

14. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to land has a right to possession, occupation and use of the suit land. The Plaintiff conducted evidence that shows that the Defendant has illegally taken possession of the suit land and is utilizing it for his own benefit, those actions of the Defendant amount to violation of the Plaintiff's right as guaranteed in the constitution and must be stopped.

15. Having established that the Plaintiff is the rightful legal owner of the suit land, the Defendant's action amount to trespass and he has no legal right to remain thereon without authority from the Plaintiff, the Defendant should therefore vacate the suit land forthwith.

16. The Plaintiff has also prayed for restraining orders against the Defendant in terms of a permanent injunction, to that end this Court is guided by the principles set out in the classic case of **Giella vs. Cassman Brown and Co. Ltd (1973) EA** and is convinced that the Plaintiff herein has established a prima facie case against the Defendant and that the Plaintiff stands to suffer irreparably if the acts if the Defendant go untamed.

17. I find that the Plaintiff herein has proved he is the rightful owner of the suit land on a balance of probability.

18. In a nutshell, the upshot of this judgement is that the Plaintiff's claim against the Defendant herein succeeds and this Court makes the following orders;

a. The Plaintiff herein is declared the lawful proprietor of title No. MAKUYU/MAKUYU/BLOCK 1/7638.

b. The Defendant herein, his agents or servants is hereby ordered to vacate the suit land forthwith. In default the Plaintiff is at liberty to evict him in strict compliance with the law.

c. A permanent injunction order hereby do issue restraining the Defendant from entering or trespassing on title no. MAKUYU/MAKUYU/ BLOCK 1/7638.

d. Costs of the suit are hereby awarded to the Plaintiff.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Opiyo HB for Gatumuta for the Plaintiff

Defendant: N/A

Irene and Njeri, Court Assistants