



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 54 OF 2018

JUDITH JULIA WANJIRO NJOROGE.....PLAINTIFF

VERSUS

SAMUEL NGERU MWANGI.....DEFENDANT

JUDGMENT

1. On the 19/6/18 The Plaintiff sued the Defendant and sought the following orders;
 - a. A declaration that the Plaintiff is the bonafide and registered owner of land known as MURANGA/ITHANGA/PHASE II/244 (suit land).
 - b. A declaration that the Defendant is a trespasser on land reference no. MURANGA/ITHANGA/PHASE II/244.
 - c. A declaration that the Plaintiff is the lawful proprietor of title No. MURANGA/ITHANGA/PHASE II/244.
 - d. A permanent injunction be issued restraining the Defendant, his employees, agents and or servants from trespassing and or interfering whatsoever with land reference number MURANGA/ITHANGA/PHASE II/244.
 - e. An order of eviction, evicting the Defendant from the land reference number MURANGA/ITHANGA/PHASE II/244.
 - f. Costs.
 - g. Any other relief that this Court will deem fit to grant.
 - h. Interest thereon.
2. It is the Plaintiff's case that at all material times to this suit she is the bonafide and registered owner of the suit land measuring 2.0 ha having purchased it from the representatives of Smart Hope in 2015. The Plaintiff's claim is that the Defendant unlawfully entered the land, destroyed growing trees and erected a structure on the suit land without her consent and authority, this causing her loss and damage.
3. It is on record that the Defendant was served with the summons to enter appearance together with the plaint on the 28/6/18 but he did not enter appearance nor file a statement of defence within the prescribed time or at all. The record too shows that a hearing notice was served on him on the 27/10/18 which did not elicit any attendance at the hearing that took place ex parte on the 8/11/18.
4. At the hearing of the suit the Plaintiff testified solely and relied on her pleadings and her Witness Statement on record. She stated that they bought the suit land from Smart Hope Self Help Group. She commenced due diligence and a search at the land's office confirmed that the title indeed belonged to the group and was registered in the names of its officials/Trustees namely Joseph Nganga Kiarie, Beatrice Murechi Muiruri and Joseph Ndungu Wainaina. That the vendors availed to her the minutes of their meeting dated the 28/4/15 resolving to dispose of the land to a willing buyer. She entered into an agreement of sale dated the 12/5/15 for the purchase of the suit land at the consideration of Kshs 2.0 million. Application for Land Control Board consent was done upon which a Land Control Board consent dated the 19/5/15 was issued. Subsequently the suit land was transferred to the Plaintiff and title in her name issued on the 31/7/15. She annexed an official search dated the 11/8/15 to confirm the registration of the suit land in her name. It is her evidence that she thereupon took possession of the suit land enjoying quiet possession and making frequent visits until April 2018 when she was alerted by her uncle that the Defendant had encroached on the suit land claiming to be the owner. She at once visited the suit land and found that the Defendant indeed had encroached her land and was tilling the land, cutting down trees, grass and was preparing to erect a house. Swiftly, she reported the matter to Ithanga Police station and the Defendant was arraigned in Court at Kandara and charged with causing malicious damage to property and an alternative charge of unlawfully entering into private property belonging to the Plaintiff. She produced a charge sheet to that effect dated the 9/5/18. She produced in Court photographs that showed the wanton destruction of the suit land by the Defendant. She informed the Court

that despite being charged in Court, the Defendant has continued to trespass onto the suit land undeterred hence this suit.

5. Further she informed the Court that the damages to trees, grass and fence were assessed by the agricultural officer at Kshs 38,800/-.
6. The Plaintiff filed Written Submissions which I have read and considered.
7. The issues that fall for determination are; whether the Plaintiff is the registered owner of the suit land; whether the Defendant has trespassed on the suit land; whether the Defendant should be permanently restrained and evicted from the suit land; who meets the costs of the suit.
8. 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.

9. In the present case the title produced by the Plaintiff shows that the suit land is registered in her name. According to the record she followed due process in acquiring the land such as carrying out due diligence, obtained the resolution by the vendor to sell, executed an agreement for sale, obtained Land Control Board consent, paid the purchase price, took possession and commenced developments on the land such as fencing the suit land and tending grass and trees. This position was not challenged by the Defendant who in fact failed to file any pleadings in opposition to the claim despite being duly served.

10. 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.

11. In the case of **Ahmed Ibrahim Suleiman & Anor Vs Noor Khamisi Suru (2013) ECLR** the judge stated;

“the Plaintiff having been registered as proprietor and having been issued with the certificate of lease over title No Nairobi/Block/61/69 are in terms of section 26(1) of the Land Registration Act entitled to protection of the law.”

12. I find that the Plaintiff is indeed entitled to be protected by the law from the Defendant who is interfering with her rights and privileges over the suit land. 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.

13. On the issue whether the Defendant is a trespasser, Trespass is defined as an 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. In the case of **La Nyavu Gardens Limited Vs Wilson Munguti Mbithi alias Kavuti & 2 Others, (2012) ECLR**, the Court stated that any unauthorized entry into another person's land constitutes trespass. Trespass to land occurs when a person directly enters upon another's land without permission and remains upon such land or projects any object upon such land.

15. 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 unlawfully taken possession of the suit land and is damaging trees, grass, tilling the land and erecting a house; those actions of the Defendant amount to violation of the Plaintiff's right to property as guaranteed in Article 40 of the Constitution and must be stopped.

16. 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 is a trespasser and he must be evicted.

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

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

- a. A declaration that the Plaintiff is the bonafide and registered owner of land known as MURANGA/ITHANGA/PHASE II/244

(suit land).

b. A declaration that the Defendant is a trespasser on land reference No. MURANGA/ITHANGA/PHASE II/244

c. A permanent injunction be issued restraining the Defendant, his employees, agents and or servants from trespassing and or interfering whatsoever with land reference No.MURANGA/ITHANGA/PHASE II/244.

d. The Defendant is ordered to vacate the suit land within 15 days from the date of this judgment in default the Plaintiff to apply for eviction of the Defendant in strict compliance with the law.

e. The Plaintiff shall have the costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimakia HB for Lokorito for the Plaintiff

Defendant: Absent but served.

Njeri and Irene, Court Assistants