



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 21 OF 2018

JOSPHAT KURIA GATHONI.....PLAINTIFF

VERSUS

JAMES MAINA NJOROGE.....1ST DEFENDANT

JULIUS TANGUS.....2ND DEFENDANT

STANLEY K. SITIENEL.....3RD DEFENDANT

EVANSON NJENGA.....4TH DEFENDANT

JUDGMENT

(Suit seeking orders of eviction, permanent injunction, general damages and mesne profits against the defendants; plaintiff having title to the suit land; no evidence that the plaintiff's title was acquired irregularly; judgment entered for the plaintiff; defendants given 30 days to vacate or be evicted)

1. This suit was commenced by way of a plaint which was filed on 4 June 2007. In the plaint, the plaintiff pleaded that he is the registered owner of the land parcel Nakuru/Kapsita/1096 having been issued with a title deed on 16 July 1997. He averred that sometimes in the year 2006, the defendants without any right trespassed into his land and started cultivating the same, and that the 2nd and 3rd defendants, built semi-permanent structures. In the suit, he has asked for orders for a declaration that the land parcel Nakuru/Kapsita/1096 belongs to him; an order of eviction; a permanent injunction against the defendants; general damages for trespass and mesne profits; and costs.

2. The defendants filed a joint statement of defence vide which they inter alia pleaded that they were allotted the suit land in the year 1994 and that they have been occupying and working the said land for the last 13 years. They stated that they have houses on the land which they have occupied since the year 1994. They asked that the plaintiff's suit be dismissed with costs.

3. In the course of time, the 1st defendant died and his case abated.

4. In his evidence the plaintiff testified that the suit land was allotted to him by the Government and he was issued with a title deed in the year 1997. He got the land through the assistance of the Chief of that area. He testified that he was a civil servant in Nairobi running a busy office and did not come to see the land although he sent his son to it. He went to the land in the year 2000 and saw it vacant and he left his son to take care of it. In the year 2006, his son informed him that 4 people were in the land doing farming and had put up some semi-permanent structures. He reported to the Chief and eventually came to court.

5. DW-1 was Evanson Njenga Nderi, the 4th defendant. He testified that he was born in the forest at Elburgon where the suit land is located and that when trees were felled they were allowed to cultivate. In the year 1997, surveyors came to the land and found them on it. The land was demarcated and allocated to about 700 people who had fled from tribal clashes. He himself was given 5 acres and was to be issued with an allotment card but he was not issued with any because a case was filed by the Ogiek community over the said parcels of land. He claimed to have been living in this parcel of land for over 20 years and has never seen the plaintiff on the land. He testified that the Chief of the area used to chase them away from this land. Cross-examined, he testified that the 700 persons who were to be settled on the land were from the Kikuyu community although he himself was not among those 700 persons who were to be settled. He stated that some members of the Ogiek community used to live on this land therefore but he himself is not from this community. When he moved into the land, he found the other defendants occupying it.

6. DW-2 was Julius Kipyegon Tangus the 2nd defendant. He testified that his parents used to live in the forest and that he came to be in possession of the land after it was assigned to him by a Committee of the Ogiek. He himself is from the Ogiek community. He was however not given an allotment card or any document. He testified that he started occupying the land in the year 1994. It was in the year 2006 that the plaintiff came to the land and claimed to own it.

7. With the above evidence the defendants closed their case.

8. I invited both Mr. Ikuu, learned counsel for the plaintiff, and Mr. Machafu, learned counsel for the defendants, to file written submissions which they did. I have gone through these submissions and taken note of them before arriving at my decision. In brief, Mr. Ikuu asserted that his client has title which must be protected whereas on the other hand, Mr. Machafu thought that the plaintiff was a beneficiary of land that was meant for persons such as the victims of tribal clashes and the Ogiek, and therefore the title of the plaintiff was illegally acquired and ought not to be protected.

9. I have considered the matter and I take the following view.

10. There is no question that the plaintiff has the title deed to this land and that he is the registered proprietor of it. The title was issued under the Registered Land Act, Cap 300 (repealed in the year 2012 by the Land Registration Act, Act No. 3 of 2012). This suit was commenced in the year 2007, and therefore it is the provisions of the Registered Land Act which are operative. The said statute protected the holder of title under Section 27 which was drawn as follows :-

27 Subject to this Act-

(a) the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

11. Title which was improperly acquired could however be revoked pursuant to the provisions of Section 143 which provided as follows :-

S.143 (1) Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor has knowledge of the omission, fraud, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

12. The plaintiff has already demonstrated that he has title and pursuant to the provisions of Section 27, which I have set out above, such title ought to be protected unless the defendants prove that the plaintiff's title was acquired through fraud or mistake.

13. The defendants have tried to claim that this land was set aside to settle some members of the Kikuyu community who had fled tribal clashes, or alternatively, members of the Ogiek community, and therefore the plaintiff ought not to have gotten title. There is nothing to suggest that this was the position as the defendants did not produce any document which would support this claim. The defendants themselves acknowledge that this land was allocated to people and they were not among the allottees. I therefore do not see why they insist on being on this land when they know very well that this land was allotted to somebody else. It does not help the defendants to allege that the plaintiff is not a rightful allottee for what is important is that the land was never allotted to the defendants. If it is not this particular plaintiff who was allotted the land, but somebody else, that person would still be in court seeking to have the defendants evicted and the result would still be the same. What would have helped the defendants is if they had demonstrated that they have been allotted the land or that they have a right to it through the doctrine of adverse possession. They have no title and no allotment letter and they have not attempted to claim the land by way of adverse possession. I doubt anyway if they would have succeeded in such claim, for the plaintiff got title from the Government in the year 1997 and this suit was filed in the year 2006, and the defendants therefore could not have accumulated the 12 years required to sustain a suit for adverse possession outside the period that the Government held title.

14. Whichever way I look at it, I do not see how the plaintiff can fail in his suit. He is the title holder and the defendants have not demonstrated any right over the suit land. As title holder it is the plaintiff who is vested with all rights over the suit land including the right of ingress, egress, and exclusive use. The defendants have no right to be on the land without the permission of the plaintiff. They were trespassers all along and thus the plaintiff is entitled to compensation in the form of damages for trespass. I will award the plaintiff KShs. 250,000/= as general damages for trespass jointly and severally against the defendants. The plaintiff sued for mesne profits but no evidence was led as to the loss that he may have incurred arising out of the occupation of the land by the defendants. I will therefore make no award for mesne profits. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as he has prayed for in the plaint against the defendants. I will give the defendants 30 days to vacate the land and if they do not do so, the plaintiff is at liberty to apply for their eviction. The plaintiff will also get costs and interest at court rates.

15. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of : -

Mr. Machafu for the defendants.

No appearance on the part of M/s Ikua Mwangi & Co. Advocates for the plaintiff.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU