



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 226 OF 2016

SIGNON CO-OPERATIVE SAVINGS AND CREDIT

SOCIETY LIMITED.....PLAINTIFF

VERSUS

KIRIGA..... 1ST DEFENDANT

KANJA.....2ND DEFENDANT

CHENGO.....3RD DEFENDANT

MUMBA.....4TH DEFENDANT

RULING

1. The Plaintiff moved this court by way of plaint dated 17th August 2016 seeking judgment against the defendants in the following terms:

a. An order for eviction from the suit property.

b. Vacant possession of the suit property.

c. A permanent injunction restraining the Defendants whether by themselves, servants, agents, employees, relatives or any other person from remaining on or continuing in occupation of the suit properties.

d. Costs of the suit.

2. The Plaintiff's case is that it is and was at all material times the duly registered owner entitled to exclusive and quiet possession of all the property known as **SUBDIVISION NUMBER 12914 (ORIGINAL NO.405/3) SECTION 11 MAINLAND NORTH** (hereinafter known as the "suit property"). The Plaintiff avers that vide an agreement for sale dated 21st April 2011, it purchased the suit property from one William Kamiti Gathinji. To facilitate the purchase, the plaintiff applied for and was granted a financial facility from Bank of Africa Limited and a Legal charge was created against the suit property in favour of Bank of Africa Limited. The Plaintiff states that after registration of the charge and perfection of the security, it was granted vacant possession and immediately thereafter fenced the suit property for the purposes of making their boundaries as they waited for the discharge of the same and have it subdivided to its members. The Plaintiff further states that since then they have been enjoying quiet possession of the suit property.

3. The Plaintiffs states that in or about late May or early June 2016, the defendants herein who are only known by their first names at the time of filing suit, among other squatters whose names are not known without any justifiable reasons or any colour of right invaded the suit property gaining unlawful entry and occupation by maliciously damaging the fence which had hitherto been erected thereon. That the number of squatters/invasers continues to increase since then and there is depletion of the property by illegal sand harvesting and quarrying which have been commenced by the defendants and the other land grabbers. It is the Plaintiff's contention that the defendants are very combative in nature and are illegally subdividing and selling, erecting illegal structures thereon and occupying the suit property yet they have no proprietary interest and rights thereon. The plaintiff avers that by the defendants' illegal actions of trespass on the suit property, the plaintiff has been deprived of its proprietary rights yet it is servicing a loan that it took towards the purchase of the suit property. The plaintiff states that through its official it has tried all reasonable means to evict the defendants including using the chief's office and has even reported the issue of the trespass and malicious destruction of its fence to Kiambeni Police Station but the defendants are defiant and very violent. That despite demand and notice of intention to sue having been issued, the defendants have refused, neglected and/or otherwise failed to vacate the suit property.

4. The defendants filed a defence dated 8th March 2017 in which they deny the plaintiff's claim. The defendants deny that the suit property was fenced at any one time and state that they have been in possession of it for over 12 years.

5. The defendants were duly served with a hearing notice for 3rd October 2018 but neither the defendants nor their advocate attended court. The Plaintiff called one witness, Boniface Edward Mwakesi (PW1) who is a director of the Plaintiff Company. He relied on his witness statement dated and filed on 29th September, 2017. He stated that on 21st April 2011 the Plaintiff entered into a sale agreement for the purchase of the parcel of land known as **SUBDIVISION NUMBER 12914 (ORIG. NO.405/3) OF SECTION 11 MAINLAND NORTH** as delineated on Land Survey Plan Number 333195. He produced the agreement for sale dated 21st April 2011 as P.Exhibit 1. PW1 stated that they had to obtain a loan from Bank of Africa Kenya Limited to raise the full purchase price and charged the suit property as security. He produced the Letter of Offer from Bank of African Kenya Limited dated 2nd May 2012 (P.exhibit 2) and the Transfer dated 23rd November 2012 (P.exhibit 3). PW1 testified that they visited the suit property before the purchase and found that the same was vacant. That later, the suit property was invaded by squatters who included the defendants.

6. PW1 stated that the Plaintiff managed to discharge the title from Bank of African Kenya Limited. He produced the certificate of title as P.exhibit 4.

7. The Plaintiff did not call any other witness and therefore closed their case. The defendants' case was also marked as closed as they did not attend court during the hearing. The plaintiff's counsel filed written submissions in which it was submitted that the plaintiff has proved its case on a balance of probabilities by demonstrating that it is the rightful owner of the suit property and that the defendants' invasion is illegal and without any claim whatsoever and therefore the Plaintiff is entitled to the orders sought.

8. I have carefully considered the plaintiff's case as pleaded and the evidence tendered in support as well as the submissions made. The main issues for determination are whether the Plaintiff is the rightful owner of the suit property; whether the defendants trespassed on it; whether the orders for vacant possession and eviction and for permanent injunction should issue as claimed.

9. From the material placed before me, there is no dispute that the Plaintiff is the registered owner of the suit property having purchased it from one William Kamiti Gathinji vide the Agreement for sale dated 21st April, 2011 which was produced as P.exhibit 1. The Plaintiff produced the certificate of title of the suit property in its name (P.exhibit 3).

10. Section 24 (a) of the Land Registration Act, 2012 provides that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.”

11. Section 26 (1) of the said Act provides as follows:

“The certificate of title issued by the registrar 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, easement, restrictions and conditions contained or endorsed in the certificate, and the title of the 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.”

12. There was no evidence challenging the Plaintiff's title to the suit land. In their defence, the defendants admit that they are in occupation of the suit land. They claim that they have been in possession for over 12 years. The defendants did not adduce any evidence to support their claim. The Plaintiff avers that the defendants invaded the suit land in about May or June 2016.

13. The defendants have not sought or obtained consent or authority from the Plaintiff. As absolute and indefeasible owner of the suit property, the Plaintiff is entitled to enjoy the rights and privileges associated with ownership which includes exclusive use and possession thereof without interference from any other person except with their consent.

14. The Plaintiff has accused the defendants of entering the suit land without their consent and maliciously damaging the fence and carrying out illegal activities thereon. The defendants did not adduce any evidence to justify their actions and therefore the plaintiff's evidence on these actions have not been controverted. In the circumstances, I am satisfied that the Plaintiff has proved that the Defendants entered the suit property without the plaintiff's consent, took possession of it and undertook the acts complained of. I therefore find that the Plaintiff has proved its case against the defendants on a balance of probabilities.

15. In conclusion therefore, I enter judgment for the plaintiff as against the defendants jointly and severally as follows:

a. The defendants are directed to give vacant possession and vacate from the Plaintiff's land known as subdivision Number 12914 (Orig. 405/3) of Section 11 Mainland North as delineated on land survey plan Number 333195 in default they be evicted therefrom.

b. A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees, relatives or any other person from remaining in occupation of the suit property.

c. Costs of this suit to be paid by the defendants.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mwanyale for Plaintiff

No appearance for defendants

Yumna Court Assistant

C.K. YANO

JUDGE