



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 94 OF 2017

INYASIO MWANGI MBURU.....PLAINTIFF

VS

JANE NYAGUTHIE.....DEFENDANT

JUDGMENT

1. The Plaintiff is the legal representative of Alex Nyaga Njeru, his late brother. He avers that his late brother purchased land MAKUYU/KAMBITI/BLOCK11/402 (suit land) from one Wilbert Mwangi Muriuki before his demise. He pleads that the Defendant has trespassed onto the suit land and seeks interalia the following orders;

- a. Permanent injunction against the Defendant restraining them from entering or trespassing or dealing with land Parcel No. LOC 3 /MAKUYU KAMBITI BLOCK 11/402
- b. Vacant possession of the land in default eviction orders do issue.
- c. Costs of the suit.

2. That upon purchase the deceased Njeru took possession and developed the suit land. The Plaintiff avers that the property is vested in him as a trustee of the estate of the late Alex Nyaga but the Defendants entered the land and caused wanton acts of waste and destruction .Particulars of trespass are said to be cutting trees, entering and remaining on the land, cultivating and crop husbandry without a grant lease or license and unlawfully detaining the land.

3. The Defendant contested the claim and averred that the land belonged to their father who shared it in his lifetime to the Defendant (0.9) acres, her late brother Wilbert Mwangi Muriuki (1) acre and Richmond Muriuki (1) acre. It is her case that the Plaintiff's brother purchased a portion of the late Wilbert Mwangi Muriuki's portion of 1 acre. She contested that the Plaintiff has not been in possession of the whole land and puts the Plaintiff into strictest proof. She accused the Plaintiff of attempting to take possession of the whole land and has tried to evict her from her portion and in the process caused damage to crops and trees on the said land. She denied trespass and contested that she and her family have been living on the suit land.

4. At the hearing the Plaintiff reiterated the averments as stated in the Plaintiff and added that his brother purchased the whole suit land. He produced a copy of the grant of letters of administration together with the death certificate of the late Njeru. He admitted that the suit land is registered in the name of Wilbert Muriuki. He conceded that he did not produce any agreement of sale to evidence the sale or purchase of the suit land by his late brother. He informed the Court that his mother as well as the Defendant reside on the suit land.

5. The Defendant testified and added that she has settled on the portion allocated to her and her two brothers (part of Muriuki) as the other portion was sold to the Plaintiffs brother. That in 2010 the Plaintiff entered the land and threatened to take possession of the whole land and damaged crops and trees in the process. He stated that the Plaintiffs claim is a portion out of the share of the late Wilbert Muriuki's land and not the whole suit land. She stated that she does not know the size of the land purchased by the Plaintiff brother as he was not present during the transaction.

6. The parties filed Written Submissions which I have read and considered.

7. The issues for determination;

- a. Whether permanent injunction can be granted.
- b. Whether trespass has been proved

c. Who meets the costs of the suit

8. The Plaintiff has brought the suit as legal representative of the alleged purchaser of the suit land. He did not lead evidence to show that indeed there was a sale agreement between the deceased purchaser and seller. Section 3(3) of the Law of contract states that No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

In this case the Plaintiff has not tendered any evidence to show that there was indeed a contract of sale of land, that it was in writing and that it was signed by both parties and that it was witnessed. The wording of the above section is mandatory and it therefore follows that this suit having been brought contrary to the section is incompetent.

9. I have perused the certificate of official search dated the 2/11/18 which indicates that the suit land was registered in the name of Wilbert Mwangi Muriuki on the 1/12/88 and title issued on even date. On the 2/9/1994 a prohibitory order was registered on the title in the following terms;

“ Prohibitory order civil suit No 123 of 1991 Thika. No dealings with the land until a raising order is issued from the same Court.”

The above orders were registered in the lifetime of the deceased registered owner. The Plaintiff has not led evidence to show that the said prohibitory orders have been raised. This suit land is encumbered with a self-explanatory Court order.

10. As to whether the Plaintiff has established a prima facie case as set out in the case of **Giella vs Cassman Brown Co. Ltd 1973] EA 358**, the Plaintiff must show that the deceased owned the suit property, or had a valid claim over the land which would be capable of defeating a third party claim in respect of the same property.

11. Section of 108 and 109 Evidence Act provides that the duty to prove remains in that party who relies on a set of facts even if the other party were to remain silent his burden remains to prove that the facts exist. In the case of **Koinange and 13 Others – Vs - Koinange [1986] KLR 23** the Court restated the cardinal precept of the law of evidence that he who alleges must prove it.

12. In this case there was no evidence to fortify the fact that there was a sale between the deceased and the Defendant's late brother. The alleged portion is also not known, described or determined by parties.

13. Sections 23-26 of the Land Registration Act No. 3 of 2012 imports the provisions of the Registered Land Act on this issue. Section 25 (1) of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

14. Section 26 of Land Registration Act provides that 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 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 grounds of fraud, or misrepresentation to which 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.

15. The Plaintiff has not led any evidence at all to dislodge the title registered in the deceased name. It is not in dispute that the Defendant and her children are in occupation of the suit land and on the balance of convenience the Court must find against the Plaintiff. The Plaintiff has not established a prima facie case at all to warrant the grant of a Permanent Injunction.

16. Having found that the Plaintiff has not proved any ownership of the suit land the issue as to whether the Defendant is a trespasser is moot and the same fails. To claim for trespass, one must show that they are the valid owners of the land and or they occupy the land with the authority and consent of the valid owner.

17. In the end the Plaintiff case is dismissed with costs to the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 9TH DAY OF MAY 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Kilonzo for the Plaintiff

Defendant is present in person. Advocate is absent.

Irene/Njeri, Court Assistants.