



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO 688 OF 2011

SAHIHI HOUSING LTD.....PLAINTIFF

VERSUS

HON. FERDINAND NDUNGU WAITITU.....1ST DEFENDANT

JOSEPH ONG'ETE.....2ND DEFENDANT

PETER OCHIENG.....3RD DEFENDANT

PHILEMON OLOO.....4TH DEFENDANT

NAFTALI OGOLLA.....5TH DEFENDANT

JUDGMENT

This suit relates to a parcel of land known as L.R No 11531/13(original No.11531/4/10) Grant No. 71206/1 situated in Nairobi (hereinafter referred to as “the suit property”). The plaintiff’s claim against the defendants is set out in the plaint dated 5th December, 2011 filed in court on the same date.

The plaintiff’s case:

The plaintiff’s case as set out in the plaint is that, at material times to this suit, it was and still is the registered owner of the suit property having purchased the same at Kshs. 30,000,000/= from Alpha Fine Foods Limited. The plaintiff averred that on or about 27th November 2011, the defendants without any lawful justification entered into the suit property and commenced construction of structures thereon. The plaintiff averred that despite being the registered owner of the suit property, it had been denied access to the property by the defendants who had subjected it to harassment, intimidation and threats thereby rendering the filing of this suit necessary. The plaintiff sought judgement against the defendants for;

- a. A permanent injunction restraining the defendants jointly and severally either by themselves or through their agents from entering, encroaching, disposing off, selling, alienating, charging, leasing or in any other manner whatsoever dealing with the suit property.
- b. A permanent injunction restraining the defendants jointly and severally either by themselves or through their agents from interfering with the plaintiff’s possession and quiet enjoyment of the suit property.
- c. A mandatory order compelling the demolition of the structure erected by the defendants or their agents on the suit property.
- d. General damages for trespass.
- e. Cost of the suit and interest.

Defendants Case:

The 1st, 2nd, 3rd and 4th defendants appointed advocates who filed notices of appointments but never filed statements of defence on their behalf. Only the 5th defendant filed a statement of defence on 17th April, 2014 in which he denied the plaintiff’s claim in its entirety and urged the court to strike out the same as disclosing no reasonable cause of action.

The suit was fixed for hearing on 7th February, 2019 when only the plaintiff's and the 5th defendant's advocates attended court. After satisfying itself that the advocates for 1st, 2nd, 3rd and 4th defendants were duly served with a hearing notice dated 26th January, 2018, the court allowed the plaintiff to proceed with the hearing of the case. The 5th defendant's advocate left the court room after the court declined to adjourn the matter to allow him argue an application to cease acting. The plaintiff called one witness, Azim Virjee (PW1). PW1 adopted his witness statement filed in court on 5th December, 2011 as part of his evidence in chief. He testified that he was the chairman and managing director of the plaintiff. He stated that the plaintiff was the owner of the suit property having purchased the same from Alpha Fine Foods Limited. He produced as exhibits a copy of the instrument of transfer dated 12th October, 2010 through which the suit property was transferred to the plaintiff and a copy of a search on the title of the suit property which showed that the property was registered in the name of the plaintiff on 16th December, 2010. PW1 stated that the defendants invaded the suit property and put up structures thereon. PW1 stated that the plaintiff had not enjoyed quiet possession of the property. He stated that the plaintiff entered into negotiations with the 1st defendant to find a way through which the defendants could vacate the property willingly but the 1st defendant became uncooperative. He testified that the plaintiff purchased the suit property at Kshs. 30,000,000/= and had planned to put up thereon low cost houses for sale. PW1 stated that the plaintiff spent between Kshs. 10,000,000/= to Kshs. 12,000,000/= in consultation fees and intended to spend a further sum of about Kshs. 100,000,000/= in carrying out construction. He urged the court to grant the reliefs sought in the plaint. He stated that the plaintiff had lost use of the property for 9 years and prayed for an award of damages.

Determination:

After the close of the plaintiff's case, the plaintiff's advocate Mr. Mboya informed the court that he did not wish to make any closing submissions. He informed the court that he wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiff against the defendants as prayed in the plaint. The plaintiff's claim against the defendants is based on trespass. Trespass is any intrusion by a person on the land in the possession of another without any justifiable cause. As I have stated earlier in this judgment, the 1st, 2nd, 3rd and 4th defendants did not defend the suit. The suit was only defended by the 5th defendant who filed a defence but did not appear in court to give evidence in his defence. The 1st, 2nd, 3rd and 4th defendants did not therefore contest the plaintiff's ownership of the suit property. Even the 5th defendant who filed a defence to the plaintiff's claim did not claim to own the suit property or to have any interest in the same. I am satisfied from the evidence before the court that the plaintiff has established its title to the suit property. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya. Section 23(1) of the said Act provides as follows:

“ The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

As the owner of the suit property, the plaintiff was entitled to possession, use and enjoyment thereof. The plaintiff could only be denied possession of the suit property for lawful cause. The plaintiff's evidence that the defendants unlawfully invaded and entered the suit property on 27th November, 2011 and had since then occupied the same without its consent was not controverted by the defendants. The plaintiff having proved its title to the suit property and the defendants' entry and occupation thereof, the onus was upon the defendants to justify their occupation of the property.

In the absence of any evidence from the defendants, the only conclusion this court can reach is that the defendants had no justifiable cause for entering and occupying the suit property and as such they are trespassers thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved its claim against the defendants and that it is entitled to the prayers sought in the plaint.

I therefore enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a), (b) and (c) of the plaint dated 5th December, 2011. I also award the plaintiff general damages for trespass in the sum of Kshs. 1,000,000/= together with interest at court rates from the date hereof. The defendants shall vacate and handover possession of L.R No. 11531/13(original No.11531/4/10) Grant No. 71206/1 to the plaintiff within ninety (90) days from the date of service of a copy of the decree extracted from this judgment upon them failure to which the plaintiff shall be at liberty to apply for warrants for their forceful eviction. The plaintiff shall file in court an affidavit of service of the said decree upon the defendants which shall be a condition precedent to any further proceedings herein at the instance of the plaintiff. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 25th Day of July, 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Litoro h/b for Mr. Mboya for the Plaintiff

N/A for the 1st, 2nd, 3rd and 4th Defendants

N/A for the 5th Defendant

