



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 517 OF 2013

FRED KIIO KAVILA.....PLAINTIFF

=VERSUS=

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....1ST DEFENDANT

HIRAM BERE KINUTHIA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff has filed this suit against the defendants jointly and severally seeking:-

(a) A permanent injunction restraining the 1st and 2nd defendants whether by themselves, their agents and or servants from trespassing onto, selling, disposing and transferring or in any manner whatsoever interfering with the property known as LR NO. NBI/BLK 21190/00/92 Tassia Estate, Nairobi pending the hearing and determination of the suit.

(b) A declaration that the plaintiff is the owner of property known as LR NO. NBI/BLK 21190/00/92 Tassia Estate, Nairobi.

(c) An order directing the 1st defendant to rectify its register by cancelling all the entries indicating the second defendant as owner of LR NO. NBI/BLK 21190/00/92 Tassia Estate, Nairobi.

(d) Damages for trespassing onto, selling and transferring LR NO. NBI/BLK 21190/00/92 Tassia Estate, Nairobi.

(e) Costs of the suit plus interest.

2. Upon being served with summons to enter appearance and copies of plaint, the 1st defendant entered appearance on 15th May 2013. It also filed a statement of defence filed on 12th July 2013.

3. The 2nd defendant filed a replying affidavit in response to the plaintiff's notice of motion dated 2nd May 2013. He however neglected and/or failed to file a defence within the prescribed period.

4. It is the plaintiff's case that he was allocated Plot No. Nairobi/Block 21190/90/00/92 Tassia Estate (hereinafter referred to as the "suit property") by the 1st defendant in June 2007. This was under the tenant purchase scheme. He produced a letter confirming the allocation as exhibit P1. He then made payments. He produced a statement showing the schedule of payments as exhibit P2. He was then allowed into the plot. He was however surprised to find someone had erected a perimeter wall. He went to inquire from the 1st defendant who confirmed he was the allottee of the suit property. He came to learn that it is the 2nd defendant who had put up the wall. He instructed his advocates who wrote a demand letter. He produced it as exhibit P3. He prays that he be declared the legitimate owner of the suit property and the 2nd defendant restrained from trespassing on the suit property.

5. The 1st defendant called one witness. DW2 Pius Musa Sila an Investment Officer with the 1st defendant confirmed that the suit property is in Tassia estate within Nairobi. He told the court that the plaintiff is the registered purchaser of the suit property. In support of the 1st defendant's case he produced a letter dated 22nd June 2009 offering the plaintiff the suit property as Exhibit D1, a letter by the plaintiff dated 24th June 2009 accepting the offer exhibit D2, a letter dated 8th April 2009 confirming the plaintiff as a purchaser exhibit D3, two letters to the 2nd defendant dated 11th May 2009 and 24th August 2009 as exhibit D4 and D5 respectively. A letter dated 10th December 2012 to Mbichi Mboroki & Co. Advocates exhibit D6.

6. At the end of the trial the parties tendered written submissions.

7. I have considered the pleadings, the evidence on record, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether the plaintiff is the rightful owner of Plot No. Nairobi/Block 21190/00/92 Tassia Estate having purchased the same from the 1st defendant on 8th April 2010.

(ii) Whether the 2nd defendant has illegally encroached on the plaintiff's Plot No. Nairobi/Block 21190/00/92 Tassia Estate, Nairobi.

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs?

8. It is not in doubt that the plaintiff bought the suit property from the 1st defendant. He made the necessary payments as shown in exhibit P2. The 1st defendant has confirmed that he is the registered purchaser of the suit property. The 2nd defendant did not file any statement of defence. He did not participate in these proceedings. I find that the plaintiff's case is uncontroverted.

9. It is the plaintiff's case that the 2nd defendant has encroached on to the suit property and put up a permanent wall. This has not been controverted. The 1st defendant maintains that the plaintiff is the registered purchaser of the suit property. He is the registered owner of the suit property. The 2nd defendant is therefore a trespasser. It is also the 1st defendant's contention that it has in no way interfere with the suit property and has no intention to trespass on it. That it has informed the plaintiff in writing that he was the owner before he instituted this suit. In my view it was unnecessary to drag the 1st defendant to court to state the obvious. The plaintiff had no reason to sue the 1st defendant, the 1st defendant has incurred costs. It is entitled to costs. I rely on the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya |& Another [2016] eKLR**.

10. As earlier observed the 2nd defendant has trespassed onto the suit property and put up a wall. He has no legal claim to the suit property. In the case of **Eliud Njoroge Gachiri vs Stephen Kamau Ng'ang'a [2018] eKLR** the court in ordering the defendant to vacate the suit land, demolish and remove all the building structures therein relied on the plaintiff's evidence which vouched for his good title in the land as opposed to the defendant's absence of any title documents or evidence whatsoever of his claim in the land.

11. I find that the plaintiff has suffered loss as a result of the trespass. The court was not guided as to the amount the plaintiff seeks. He told the court that he is unable to access the suit property. I award Kshs.300,000/- which I think will suffice. I find that the plaintiff has proved his case on a balance of probabilities as against the defendants. I enter judgment in his favour as follows:-

(a) A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their agents and/or servants from trespassing onto, selling, disposing and transferring or in any manner whatsoever interfering with the property known as LR NO. Nairobi/Block 21190/00/92 Tassia Estate Nairobi.

(b) A declaration be and is hereby issued that the plaintiff is the owner of the property known as LR No. Nairobi/Block 21190/00/92 Tassia Estate Nairobi.

(c) Damages for trespass to be paid by the 2nd defendant at Kshs.300,000.

(d) The 1st defendant shall have costs of the suit (as it was wrongly sued).

(e) The plaintiff shall have costs as against the 2nd defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of July 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd Defendant

.....Court Assistant