



REPUBLIC OF KENYA

THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 32 OF 2017

KATHINA MUTISYA.....1ST PLAINTIFF

NZAMBI MUTISYA.....2ND PLAINTIFF

MWIKALI MUTISYA.....3RD PLAINTIFF

VERSUS

MULANDI MUTISYA.....1ST DEFENDANT

MWANZIA MULANDI.....2ND DEFENDANT

JUDGEMENT

The plaintiffs' claim against the defendants is a permanent injunction vacant possession and general damages in respect of land parcel No. Mwingi/Tyaa Kamuthale/1278. In a plaint dated 12th May, 2017, the plaintiffs aver that at all material times they were registered owners of the said parcel of land until their parents passed away on or about 1984 and 1988 respectively. Upon their parents passing away the 1st defendant purported to chase away the plaintiffs from the suit land.

Sometime in January 2016, the 2nd defendant unlawfully and illegally entered into a portion of the plaintiff's suit land and purported to put up a permanent structure to which the plaintiffs protested to the local administration who ordered him out and also warned him to desist from such acts. The plaintiffs further aver that despite the intervention by the local administration the defendants have confirmed to threaten them with dire consequence if they continued complaining against them.

Despite having been duly served with summons and copies of the suit papers, the defendants failed to Enter Appearance or file defence. The matter was then fixed for hearing and the defendant were again served with a hearing Notice but failed to attend court wherefore the matter proceeded ex-parte.

The first plaintiff gave a sworn testimony and stated that he is the registered owner of the suit property with his sisters Mary Nzambi, Mwikali Mutisya and the late Mute Mutisya. He stated that the suit land is an inheritance from their late father one Noah Mutisya. They have been occupying and utilizing the land in question for many years even before the demise of their parents.

Upon the demise of their father in 1984, the 1st defendant chased their late mother away from the suit land. In 1988 her mother passed on and in 1998, the 1st defendant trespassed into the suit land and started

constructing a house.

PW2 was Maluki Karanza who knows both the plaintiffs and the defendants very well. He testified that on or about 1978 the plaintiff's father one Noah Mutisya bought the suit land from One Mwenga Mwikya. Upon purchasing the land, he settled with his family. In 1984 or whereabouts, the plaintiff's father passed on leaving his widow and the plaintiffs on the suit land. In 1998 or thereabouts the plaintiff's mother passed on and the 1st defendant trespassed into the suit land and constructed a house alleging that he wanted to take care of his late brother's land. The 1st defendant demolished the house of his late brother Noah Mutisya where his widow and the plaintiffs were living. In 2006, the plaintiffs went back and repaired the demolished house and continued living on the suit land while cultivating and planting food crops.

In January 2016 or thereabouts, the 2nd defendant trespassed into the plaintiffs land and started constructing a permanent structure illegally.

I have considered the testimony of the first plaintiff and the single witness called by the plaintiffs. I have also perused the documents tendered in the plaintiffs list of documents dated 12th May, 2017.

In a claim for a permanent injunction, the parameters within which the court must determine whether to grant the order is clearly set out in the Giella Vs Cassman Brown case (1973) EA 358. In that classic case, the court must be satisfied that the plaintiff has a prima facie case and that he would suffer irreparable injury, which is uncompensable in damages. However where the court is in doubt, then it has to consider the balance of convenience.

In his evidence the 1st plaintiff has produced a title deed Reference No. Mwingi/TYAA KAMUTHALE/1278 in respect of the suit land. The land is registered in the names of the plaintiffs. A certificate of search was also produced in evidence confirming the ownership of the suit land in the names of the plaintiffs. Under Section 26 of the Land Registration Act the law provides as follows:

“26 (1) 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 and 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 the grounds 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.....”

The certificate of title issued to the plaintiffs in this case has not been challenged in a court of law. The defendants have not even Entered Appearance or filed defence to the plaintiffs claim. There is no challenge to the plaintiff's proprietorship of the suit property on grounds of fraud misrepresentation or any illegality. Having produced a certificate of title and a search showing that they are proprietors of the suit property, I am satisfied that the plaintiff's case entitled to a permanent injunction to protect the sanctity of a title which I hereby issue in the following terms:

1. A permanent injunction be and is hereby issued against the defendants by themselves or their servants, agents, employees from entering, remaining, occupying, subdividing, fencing, utilizing, constructing, alienating, trespassing into and/or in any other way whatsoever interfering with the plaintiffs quiet enjoyment and use of all that parcel of land known as Mwingi/Tyaa Kamuthale/1278.

2. The defendant either by themselves or through their agents, servants and/or employees be and are hereby evicted from the suit property Registration No. Mwingi/Tyaa/1278 and hand over, vacate possession of the portion of land measuring approximately 3 acres or thereabouts to the plaintiffs.

3. The defendants to bear the costs of this suit.

Read and signed in the Open Court this 17th day of January, 2018.

E. C Cherono (Mr.)

ELC Judge

In the presence of:

1. Ijabo – Court Clerk
2. Plaintiff/Advocate (absent)
3. Defendant/Advocate (absent)