



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 63 OF 2016

DAVID KIPKURUI MUTAI.....PLAINTIFF

VERSUS

JOSEPH RUGUT ALIAS SOSI.....DEFENDANT

JUDGMENT.

Introduction

1. By a Plaint dated 24th August, 2016 the Plaintiff instituted a suit against the Defendant seeking an order of eviction and a permanent injunction to restrain the defendant from trespassing upon the Plaintiff's parcel of land known as L.R Number KERICHO/SILBWET/2238.

2. Despite being served with Summons to enter Appearance, the Defendant neither entered Appearance nor filed a Defence. The case therefore proceeded ex-parte.

3. At the hearing of the case the Plaintiff testified that he was the registered proprietor of land parcel number KERICHO/SILIBWET/2238 measuring 0.03 hectares having purchased it from one Bornes Chemutai Ruto in December 2014. He produced the title deed in respect of the property in his name. He stated that at the time he purchased the said property, the said Bornes Ruto informed him that there was a squatter on the land whom he had informed about the change of ownership of the land. He further testified that the defendant had been told to vacate the suit property but he refused to leave thereby depriving the plaintiff of his right to occupy, use and enjoy his property. The Plaintiff called one witness, Bornes Chemutai who confirmed that he sold the suit property to the plaintiff. He stated that he had allowed the defendant to stay in one of his structures on the suit land before he sold it as the defendant had been evicted from another parcel of land. He further testified that after he sold the land to the Plaintiff he notified the Defendant about the change of ownership of the land and told him to vacate but he refused to do so. He clarified that the Defendant is not his relative and he had only allowed him to stay on the land temporarily as he looked for alternative accommodation.

Issues for Determination

4. The following issues arise for determination:

- i. Whether the plaintiff is the registered proprietor of land parcel number KERICHO/SILIBWET/2238
- ii. Whether the defendant is unlawfully occupying the suit premises
- iii. Whether the plaintiff is entitled to the reliefs sought

iv. Who should bear the costs of this suit?

Analysis and Determination

5. With regard to the first issue, it is the plaintiff's uncontroverted evidence that he is the registered proprietor of land parcel number KERICHO/SILIBWET/2238. He produced the title deed in respect of the suit property as an exhibit. He also produced photographs showing the temporary structure occupied by the defendant

6. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

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

7. Section 25 (1) of the said Act further 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.

8. Section 26 of the same 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.

9. Since the plaintiff's evidence was not challenged at the hearing, it is my finding the plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012. Furthermore, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

10. The second issue is whether the defendant is in lawful occupation of the suit land. The Plaintiff testified that they had notified the defendant to vacate the suit land but he refused. In the circumstances, it is my finding that the defendant has no right over the suit land and he is therefore occupying the same unlawfully. This amounts to trespass to land.

11. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; an order of eviction and a permanent injunction against the defendant.

12. The principles that guide the court in granting an injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

13. The first test that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) defined a *prima facie* case as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

14. From the Plaintiff’s evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order against the Defendant.

15. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a) A permanent injunction do and is hereby issued restraining the Defendant by himself, his family members, agents or anyone acting on his behalf from trespassing upon land parcel number KERICHO/SILIBWET/2238.
- b) The Defendant is hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c) The costs of this suit shall be borne by the Defendant.

Dated, signed and delivered at Kericho this 9th day of February, 2018.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for Mr. Koech for the Plaintiff
2. No appearance for the Defendant
3. Court assistant – Rotich