



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 93 OF 2013

BERNARD OMONDI OCHIENG1ST PLAINTIFF

TELPOSTA PENSION SCHEME TRUSTEES REGISTERED....2ND PLAINTIFF

VERSUS

ISAAC KIPKIRUI KORIR.....DEFENDANT

JUDGMENT

The plaintiffs filed this suit against the defendant on 18th January, 2013 seeking an order compelling the defendant to deliver up to the 1st plaintiff possession of all that parcel of land known as L.R No. Nairobi/Block 55/202, Unit No. 42 (hereinafter referred to as “the suit property”) and mesne profits at the rate of Kshs.20,000/= per month with effect from 1st August 2010. The Plaintiffs averred that the 2nd plaintiff was at all material times the registered proprietor of the suit property which it sold to the 1st plaintiff at a consideration of Kshs.2,600,000/=. Following that sale, the suit property was transferred to the 1st plaintiff who is now the registered owner thereof. As at the time of the sale of the suit property by the 2nd plaintiff to the 1st plaintiff, the defendant was a sitting tenant of the 2nd plaintiff on the suit property.

The plaintiffs averred that the defendant was advised of the sale and change in the ownership of the suit property and requested to vacate the property so that the 1st plaintiff could obtain vacant possession in accordance with the terms of the agreement for sale that he entered into with the 2nd plaintiff but the defendant ignored the request and refused to vacate the suit property. The plaintiffs averred that the defendant has continued to be in possession of the suit property despite demands made upon him to vacate the same thereby rendering the filing of this suit necessary.

The defendant was served with summons to enter appearance. He failed to enter appearance and following a request for judgment that was made by the plaintiffs on 19th March, 2013, interlocutory judgment was entered for the plaintiffs against him on 23rd March, 2013. On 27th January 2014, the defendant purported to enter appearance and file a statement of defence the interlocutory judgment that was on record notwithstanding. On realizing that interlocutory judgment had already been entered against him, the defendant filed an application by way of Notice of Motion dated 11th May, 2015 seeking the setting aside of the said judgment and leave to defend the suit. The application was heard and allowed conditionally on 11th December, 2015.

The defendant was granted leave to defend the suit on condition that he paid to the plaintiffs a sum of Kshs. 25,000/- as thrown away costs within 30 days of the order failure to which the interlocutory judgment was to be reinstated automatically and his statement of defence dated 27th January, 2014 was to stand struck out. The defendant failed to comply with the condition that was imposed by the court for defending the suit with the effect that his statement of defence stood struck out and the interlocutory judgement that had been entered against him reinstated. The suit was thereafter fixed for formal proof on 25th July, 2017 when the 1st plaintiff gave evidence on behalf of the plaintiffs and closed their case.

The 1st plaintiff told the court that he purchased the suit property from the 2nd plaintiff on 30th January, 2010 and finished paying the purchase price on 23rd July, 2010. He stated that after paying the purchase price in full, the suit property was transferred to him and he was issued with a title deed in respect thereof. He produced copies of the agreement for sale between him and the 2nd plaintiff and the title deed for the suit property in his name as exhibits. He stated that, after the suit property was registered in his name, he did not get vacant possession thereof because the defendant who was in occupation of the property refused to vacate the same even after several letters were sent to him demanding that he vacates.

The 1st plaintiff told the court that he had purchased the suit property for investment purposes which he was unable to undertake due to the defendant’s refusal to deliver vacant possession. He told the court that he had suffered loss of income he would have earned from the suit property. He stated that he was staying in rented premises. He urged the court to enter judgment in his favour as prayed in the plaint.

On examination by the court, he stated that the suit property is situated on Jogoo Road and that it is comprised of a two bedroomed flat. He stated that the market rent in the neighbourhood for similar premises was approximately Kshs. 20,000/- per month. After the close of evidence, the plaintiffs' advocate informed the court that she wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiffs as prayed in the plaint.

I have considered the plaintiffs' claim as pleaded and the evidence that was tendered in proof thereof. The plaintiffs' claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause.

What I need to determine is whether the 1st plaintiff has proved that he is the owner of the suit property and that the defendant has entered and occupied the same without any justifiable cause. The 1st plaintiff has demonstrated that he is the registered owner of the suit property. He produced evidence showing that he purchased the suit property from the 2nd plaintiff and that the property was transferred and registered in his name. He also produced evidence showing that he had been issued with a title deed in respect of the property. Under section 24 of the Land Registration Act, 2012, the registration of the 1st plaintiff as the proprietor of the suit property vested upon him absolute ownership thereof together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the 1st plaintiff's rights over the suit property are indefeasible except as provided under the said Act.

Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

1. "The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of 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:

- a. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and
- b. To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register."

The suit was not defended and as such, the defendant did not tender evidence in his defence. The evidence that was tendered by the 1st plaintiff regarding his ownership of the suit property and the defendant's entry, occupation and refusal to vacate the property even after being called upon to do so was not controverted. The 1st plaintiff's title over the suit property was also not contested. The 1st plaintiff's contention that the defendant's occupation of the suit property was without his consent or authority was also not challenged. The 1st plaintiff having proved his ownership of the suit property and the defendant's entry and occupation thereof, the onus was upon the defendant to justify his occupation of the property.

In the absence of any evidence from the defendant, the only conclusion this court can make is that, the defendant has no justifiable cause for occupying the suit property and as such he is a trespasser thereon. For the foregoing reasons, I am satisfied that the 1st plaintiff has proved his claim against the defendant and that he is entitled an order for vacant possession of the suit property. The 1st plaintiff is also entitled to mesne profits.

I therefore enter judgment for the 1st plaintiff against the defendant in terms of prayer (a) of the plaint dated 20th April, 2012. I also award the 1st plaintiff mesne profits at the rate of Kshs. 20,000/- per month with effect from 1st January, 2013 until payment in full together with interest at court rates. The plaintiffs shall also have the costs of the suit.

Delivered and Dated at Nairobi this 8th day of March, 2018

S. OKONG'O

JUDGE

Judgment read in open court in presence of:

Mr. Bundotich for the Plaintiff

No appearance for Defendant

Catherine Court Assistant