



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 272 OF 2017

PETER MUTURI CHEGE.....PLAINTIFF

VS

GICHUKI NJAGI.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 17.7.2013 seeking orders of eviction in respect to LOC Makuyu/Makuyu/Block III/450 (suit land). He avers that he is the registered owner of the suit land having purchased it from one Ngugi Njuguna for valuable consideration after which he obtained a title. That the Defendant has without his consent or any justifiable cause encroached on the suit land and despite demand to vacate having been given he has refused and hence this suit.

2. The Defendant denied the plaintiffs claim and stated that he has acquired prescriptive rights over the land having been in possession since 1970. He sought to raise a preliminary objection on points of law.

Plaintiff case

3. The plaintiff testified that he acquired through purchase the suit land from one Ngugi Njuguna through purchase for valuable consideration. That the land control board consent was duly obtained. That the Defendant owns a parcel of land bordering his, that is to say, LOC Makuyu/Makuyu/Block III/449. That the Defendant has encroached on the suit land without any color of right and is now occupying both 4 LOC Makuyu/Makuyu/Block III/449 and LOC Makuyu/Makuyu/Block III/450.

The defence case

4. Though the Defendant filed a defence on 15.8.2013, he did not attend Court for the hearing of the case. There is on record an affidavit of service dated 4.12.2017 supporting service of hearing notice on the Defendant. The Court being satisfied that the Defendant was duly served, the case proceeded ex parte with the evidence of the plaintiff being uncontroverted.

5. In addition to claiming prescriptive rights on the suit LOC Makuyu/Makuyu/Block III/450, the Defendant states in his defense that there are suits pending in respect to the suit property to wit; **CMCC No 100 of 1992 at Thika – Ngugi Njuguna Vs Gichuki Njagi; HCCC No. 2418 of 1985 – Makuyu Mihango Self help group Vs Francis Wanjohi & 4 others-** this case relates to the parent title L.R No 1074/4 from which the suit land was allegedly irregularly carved out. That the plaintiff claims to be an innocent purchaser for value without notice of the suit land. He contends that this suit is an abuse of the process of the Court.

6. The plaintiff filed brief written submissions which I have considered.

Determination

7. The issues for determination are; whether the plaintiff is the registered owner of the suit land; whether the plaintiff has proved encroachment on the suit land by the Defendant; whether eviction orders should be granted; who pays the costs of the suit.

8. Blacks Law dictionary, 9th edition defines encroachment as follows;

“To enter by gradual steps or stealth into possession or rights of another; to trespass or intrude. To gain or intrude unlawfully upon another’s land property or authority “.

9. As to whether the plaintiff is the registered owner of the suit property the Court has been presented with a copy of an official search dated the 16.7.2013 which states that the proprietor of the suit land is the Plaintiff. Section 24 (a) of the Land Registration Act stipulates that

'Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Based on the evidence adduced above and relying on section 24(a) and 26 of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it. In the absence of evidence to the contrary the Court holds that the Plaintiff is the registered owner of the suit land.

10. As to whether the plaintiff has proved encroachment on the suit land by the Defendant, the Plaintiff has not led any evidence documentary or by way of oral evidence to prove encroachment on the suit land by the Defendant and the Court is unable to determine with certainty that indeed there is encroachment, trespass and or occupation of the suit land by the Defendant. It is trite law that he who alleges must prove. Even where the case of the plaintiff is not controverted he retains the cardinal duty to discharge the burden of proof. The Plaintiff has not discharged the duty.

11. Going by the Courts holding in Para 10 above the prayer of eviction is therefore unfounded.

12. In the end the plaintiff case fails and is dismissed.

13. Each party to meet their costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH MAY 2018.

J.G. KEMEI

JUDGE