



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 700 OF 2012

BERNARD MBUGUA WAIRIMU.....PLAINTIFF

VERSUS

CHARLES MWANGI GACHOKI.....DEFENDANT

JUDGMENT

The plaintiff commenced this suit by way of a plaint dated 20th September, 2012. The plaintiff averred that he was the registered owner of the parcel of land known as Ruiru East Block 2/958 (hereinafter referred to as “the suit property”). The plaintiff averred that the suit property was initially owned by his mother, Susan Wairimu Mbugua who died intestate on 23rd July, 2006. He averred that he was issued with a grant of letters of administration in respect of the estate of his said mother by the Chief Magistrate’s Court at Thika in Succession Cause No. 515 of 2009 that was subsequently confirmed by the same court. The plaintiff averred that the suit property is one of the properties that he inherited from his deceased mother. He averred that in February, 2006 the defendant unlawfully invaded the suit property and erected a building thereon and the trespass is continuing.

The plaintiff sought the following orders against the defendant.

- a) An order of eviction to remove the defendant from the suit property together with all the illegal buildings and structures that he has constructed.
- b) General damages for trespass and mesne profits.
- c) Cost of the suit and any other relief the court may deem fit to grant.

The defendant neither entered appearance nor filed a defence. Following a request for judgment that was made by the plaintiff, interlocutory judgment was entered for the plaintiff against the defendant on 18th March, 2014. The suit was thereafter fixed for formal proof on 17th January, 2017. The plaintiff testified that his mother, Susan Wairimu Mbugua who owned the suit property died in 2006. He stated that he had two (2) siblings who are deceased. He stated that he filed a petition for grant of letters of administration in respect of the estate of his deceased mother and was issued with a grant that was later confirmed. He produced in evidence a copy of the said grant of letters of administration together with the certificate of confirmation of the same as P. exhibit 2 and P. exhibit 3 respectively. He told the court that the defendant was known to him and that he entered the suit property in 2006. He stated that when the defendant started putting up a building on the suit property, he was asked to stop but he refused. The plaintiff produced in evidence a copy of his title deed for the suit property dated 21st January, 2011 as P. exhibit 4 and a copy of a demand letter dated 28th May, 2010 that was sent to the defendant as P. exhibit 5. He stated that he tried to resolve the matter amicably through the area chief but the defendant failed to cooperate. He urged the court to grant the orders sought.

In cross examination by the court, the plaintiff stated that the defendant entered the suit property for the first time in 2003 when his mother was still alive but sick. He stated that the defendant started construction on the suit property after the death of his mother. He told court that when the defendant started putting up a building on the suit property, he made complaint against him to the area chief. He stated that the defendant stopped construction but continued after the death of his mother in 2006. He stated that the defendant claims that the suit property was sold to him by a broker.

After the close of evidence, the plaintiff filed written submission on 4th October, 2017. The plaintiff submitted that mesne profit is payable for occupation of land to a person with a right to immediate possession of such land where permission has not been granted to the occupier. In support of his submission, the plaintiff relied on the cases of Kenya Hotel Properties Limited vs. Wilesden investment Ltd. (2009) KLR 126 and Murtahar Ahmed Dahman & Another vs. Athman Sudi(2013) eKLR. The plaintiff submitted that on average, he would be earning Kshs. 5,000/- per month from the use of the suit property. The plaintiff submitted that the current monthly rent for the suit property is in the region of Kshs. 15,000/-The plaintiff urged the court to award him not less than Kshs 5,000/- per month as mesne profits from February 2006up to the date when vacant possession of the suit property shall be delivered to him. The plaintiff prayed also for general damages for trespass.

The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by a person on land in the possession of another without any justifiable cause. What I need to determine is whether the plaintiff has proved that he is the owner of the suit property and as such entitled to possession thereof and whether the defendant has entered and occupied the suit property without any justifiable cause. The plaintiff has demonstrated that he is the registered owner of the suit property by producing in evidence a copy of the title deed for the suit property in his name. The plaintiff also produced in evidence a copy of a certificate of confirmation of grant in respect of the estate of his mother, Susan Wairimu Mbugua which shows that the suit property was allocated to the plaintiff during the distribution of her said mother's estate.

Sections 24 and 25 of the Land Registration Act, 2012, provide that registration of a person as proprietor of land vests upon such person the absolute ownership thereof together with all rights and privileges associated therewith and that such rights and privileges 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. The plaintiff's evidence was therefore not controverted by the defendant. The plaintiff's title to the suit property was not contested. The plaintiff's testimony that the defendant entered onto and occupied the suit property without his consent or authority was also not challenged. The 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 reach is that the defendant had no justifiable cause for entering and occupying the suit property and as such he is a trespasser thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant and that he is entitled to the prayers sought in the plaint.

I therefore enter judgment for the plaintiff against the defendant in terms of prayer (i) of the plaint dated 20th September, 2012. I also award the plaintiff a sum of Kshs. 100,000/- as general damages for trespass together with interest from the date hereof until payment in full. The defendant shall vacate and handover possession of the suit property to the plaintiff within ninety (90) days from the date of service of a copy of the decree extracted from this judgment upon him failure to which the plaintiff shall be at liberty to apply for his forceful eviction.

The plaintiff shall file in court an affidavit of service of the said decree upon the defendant. The filing of the said affidavit of service shall be a condition precedent to any further proceedings herein at the instance of the plaintiff. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 3rd day of May 2018.

S.OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Mengesa holding brief for the Plaintiff

No appearance for the Defendant

Catherine Court Assistant