



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 128 OF 2017

DUNCAN MWANGI NDOORE.....PLAINTIFF

-VERSUS-

ELIZABETH WANGARI KIRAGU.....DEFENDANT

JUDGMENT

1. By a plaint dated 27th July, 2017 and filed on 28th July 2018, the plaintiff herein instituted this suit seeking judgment against the defendant herein for:

(a) An order directing the defendant to vacate the parcel of land known as Chinga/ Gikigie/646 (the suit property) failing which she be forcibly evicted therefrom;

(b) A permanent injunction to restrain the defendant, her agents, servants or assigns from trespassing upon the suit property or acting in any manner whatsoever inconsistent with his right to the suit property;

(c) Mesne profits at the rate of Kshs. 20,000/= from 27th September 2016 until the time the defendant vacates the suit property;

(d) Costs of the suit.

2. The plaintiff who is the registered proprietor of the suit property, accuses the defendant of having illegally/unlawfully encroached into the suit property thus interfering with his rights to the suit property.

3. Terming the defendant a habitual trespasser, the plaintiff explains that pursuant to orders issued in Nyeri HCCA No. 154 of 2002, the defendant was evicted from the suit property by his predecessors in entitlement to the suit property namely Mary Murugi Kiragu and Jenericah Mwihaki Kiragu.

4. The plaintiff laments that despite having been issued with notice to vacate the suit property and notice of intention to sue, the defendant refused to vacate the suit property rendering this suit necessary.

5. Despite having been served with summons to enter appearance, the defendant failed to enter appearance and to file a defence within the time stipulated in law for filing a defence and at all.

6. Being satisfied that the defendant was served with summons to enter appearance, in accordance with the provisions of **Order 10 Rule 9** of the Civil Procedure Rules, this court set down the plaintiff's suit for hearing.

7. When the suit came up for hearing, the plaintiff relied on his filed statement and list of documents. He also produced the documents listed in his list of documents filed on 28th July, 2017 as **Pexbt 1 - 9** and urged the court to order that the defendant be evicted from the suit property.

8. At close of his case, the plaintiff filed submissions which I have read and considered.

Analysis and determination

9. From the pleadings and the submissions filed, I find the sole issue for the court's determination to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

10. Concerning that issue, from the documents produced by the plaintiff, in particular a copy of title deed and certificate of official search, it is clear that the plaintiff is the registered owner of the suit property having been so registered on 27th September, 2016.

11. By dint of the provisions of **Section 24** of the Land Registration Act, 2012 (hereinafter referred to as the Act), the registration of the plaintiff as the proprietor of the suit property vested in him the absolute ownership of the suit property together with all rights and privileges belonging or appurtenant thereto.

12. Under **Section 25** of the Act, the rights of the plaintiff to the suit property referred to in paragraph 11 above, whether acquired on first registration or subsequently for valuable consideration or by an order of court, are not liable to be defeated except as provided in the Act, and are to be held by the plaintiff, together with all privileges and appurtenances belonging thereto, free from all other interests 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;

(c) duties or obligations imposed on him as a trustee, if that be the case.”

13. By dint of the provisions of **Section 26 (1)** of the Act, this court is under a legal obligation to take the plaintiff who is the registered proprietor of the suit property as the absolute and indefeasible owner of the suit property, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the title.

14. It is noteworthy that under the same section of the law (Section 26(1)), the title held by the plaintiff cannot be challenged except: -

“(a) on ground of fraud or misrepresentation to which the registered proprietor is proved to be party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

15. In the circumstances of this case, where the plaintiff has produced a certificate of title issued by the registrar showing that he is the absolute proprietor of the suit property and where no evidence has been led to establish any of the above cited grounds upon which the title may be challenged, I find the defendant's encroachment into the suit property, for whatever reason the defendant might be having, to be inconsistent with the plaintiff's right as the absolute proprietor of the suit property.

16. For the foregoing reason, I find and hold that the plaintiff has made up a case for issuance of prayer (a), (b) and (d) of his plaint which I hereby grant him.

17. Concerning the prayer for mesne profits, from the pleadings and the submissions, I gather that the prayer is in the nature of a claim for specific damages which by law ought not only to be specifically pleaded but also to be strictly proved.

In this regard see the case of **Capital Fish Limited v. The Kenya Power & Lighting Company Limited (2016) e KLR** where the Court of Appeal stated: -

“It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit...”

18. Upon review of the pleadings filed in this case and the evidence presented in support of that prayer, I find them to be incapable of forming the basis of granting that prayer.

19. The upshot of the foregoing is that the plaintiff's suit succeeds to the extent contemplated in this judgment.

20. In effecting the order for eviction, the plaintiff is directed to ensure strict compliance with the law regarding evictions.

21. Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 25th day of September, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Macharia h/b for Muchiri Wa Gathoni for the plaintiff

N/A for the defendant

Court assistant - Esther