



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 81 OF 2018

PETER NJUGUNA GITAU T/A NJUPE ENTERPRISES.....PLAINTIFF

VERSUS

PETER NDUNGU MUNGAI.....DEFENDANT

JUDGMENT

(Suit by plaintiff for recovery of possession of land; plaintiff being the registered proprietor; defendant not filing any defence to demonstrate any right over the suit property; judgement entered for the plaintiff; defendant permanently restrained from the suit land)

1. This suit was commenced through a plaint that was filed on 19 February 2018. In the plaint, the plaintiff pleaded that he is the registered owner of the land parcel Nakuru/Municipality Block 10/328. He averred that he purchased the said land together with one Elijah Kimosop in the year 2002. In the year 2008, the said Elijah Kimosop sold his interest to the plaintiff and the plaintiff thus became the sole proprietor and was issued with a lease certificate. He pleaded that on 25 August 2017, he was issued with a licence by the County Government of Nakuru, to operate a car wash on the suit property, but when he sent his personnel to the site, they were repulsed by some rowdy youth. This compelled him to file a suit before the Chief Magistrate vide Miscellaneous Application No. 155 of 2017, for police protection, which was granted. After issuance of these orders, the defendant emerged and claimed ownership of the suit land which prompted the plaintiff to file this suit. In the plaint, the plaintiff has sought a declaration that he is the absolute owner of the suit land, a permanent injunction to restrain the defendant from the suit property, costs and interest.

2. Despite being duly served with summons, the defendant did not enter appearance nor file defence. Neither did he appear at the hearing of the suit despite being served with a hearing notice. The only pleadings and evidence that I have are therefore those supplied to me by the plaintiff.

In his evidence, the plaintiff repeated what he has pleaded in his plaint, and produced the Certificate of Lease, to demonstrate ownership of the suit property. He also exhibited a copy of the trade licence issued by the County Government of Nakuru, allowing him to use the suit land as a carwash. He stated that the defendant fenced off his property and employed goons to stop him from entering it. He averred that he is still apprehensive using the suit land hence his need to have an order permanently restraining the defendant and a further order to remove the fence.

3. Mr. Robert Ndubi, learned counsel for the plaintiff, filed submissions to support his client's case, which submissions I have considered.

4. As I stated earlier, the suit is not defended and the only material that I have is that supplied by the plaintiff. From the evidence tabled, I have seen that the plaintiff is the duly registered proprietor of the leasehold title comprised in the suit land. There is proof enough of this from the Certificate of Lease that he produced and I have no reason to doubt it. In fact, the law requires that I take this to be prima facie evidence of ownership. This is under Section 26 of the Land Registration Act, which provides as follows :-

Certificate of title to be held as conclusive evidence of proprietorship.

26. (1) 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 and 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 the ground of fraud or misrepresentation 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

5. The defendant has not demonstrated to me that the plaintiff acquired this title through any fraud, misrepresentation or through any corrupt scheme. In essence, I have no reason to doubt the title of the plaintiff.

As proprietor, it is only the plaintiff who is entitled to use and possession of the suit land. These rights are enshrined in Section 25 of the Land Registration Act, which provides as follows :-

Rights of a proprietor.

25. (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.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

6. The defendant has not demonstrated to me that he has any right to use the suit land or that he has any other recognizable rights over the suit property. He must therefore stay away from the property and remove any developments that he has made on the suit property. If he does not do so within 14 days, the plaintiff is at liberty to remove the same or keep them as he may so wish. The plaintiff will also have the costs of this case.

7. I now make the following final orders :-

(i) That as between the plaintiff and the defendant, it is hereby declared that it is the plaintiff who is recognized as the rightful proprietor of the land parcel Nakuru/Municipality Block 10/328.

(ii) That it is hereby declared that the defendant has no right to enter, be upon, or use in any way, the land parcel Nakuru/Municipality Block 10/328.

(iii) That the defendant is hereby ordered to vacate the land parcel Nakuru Municipality Block 10/328, forthwith, and no later than 14 days from the date of service of this judgment or decree, remove the fence, or any other structure that he may have erected or caused to be erected in the land parcel Nakuru/Municipality Block 10/328, and in default of doing so, he be forcefully evicted, and the plaintiff be at liberty to remove any structures that may have been erected by the plaintiff and such costs be shouldered by the defendant.

(iv) That the defendant is hereby permanently restrained from entering, being upon, or in any other way use the land parcel Nakuru Municipality Block 10/328.

(v) That the plaintiff will have the costs of this suit and interest.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

No appearance on the part of M/s Robert Ndubi & Co. for the plaintiff.

No appearance entered for the defendant.

Court Assistant: Nelima.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU