



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 248 OF 2015

PETER MUNYI WAWERU.....PLAINTIFF

VERSUS

KARIAMBURI KANJA KATHENDU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd September 2004 and amended on 26th May 2016, the Plaintiff sought the following reliefs against the Defendant;
 - a. *That the Defendant's family members, properties, servants or anybody claiming through the Defendant be evicted from plot number Ngandori/Kathangariri/T.83 and thereafter the Defendant and his family members be permanently restrained from entering upon, occupying or utilizing the said plot.*
 - b. *Mesne profits at the rate of Kshs 5,000/- per month as from 19th July 2000 until the Defendant vacates the said plot.*
 - c. *Cost of the suit.*
 - d. *Interest on a and b above at the rate of 18% from 19th July, 2000 till the same is paid in full.*
2. The basis of the suit was that the Plaintiff had bought the *Title No. Ngandori/Kathangariri/T.83* (hereinafter called the *suit property*) from the Defendant's brother in consequence of which the Plaintiff was registered as proprietor. It was further pleaded that the Defendant had since July 2000 refused to vacate the suit property and instead had prevented the Plaintiff from accessing and utilizing the suit property. It was further pleaded that the Defendant had erected some structures thereon and was generally committing acts of waste and degradation.
3. The Defendant filed a written statement of defence on 8th August 2006 in which he denied the Plaintiff's claim in its entirety. It was pleaded that the Defendant had been openly in occupation of the suit property as of right since 1962 hence he was entitled to the suit property under the **Limitation of Actions Act (Cap 22)**. It was further pleaded that the suit property had been registered in the name of his eldest brother Kobe Kanja Kathendu (herein called *Kobe*) in trust for the rest of his siblings including the Defendant.
4. The Defendant's further defence was that there was a pending appeal No. 56 of 2004 arising from the Eastern Provincial Land Disputes Appeals Tribunal between the parties. It was, therefore, contended that the instant suit was *res judicata*.
5. When the suit was listed for hearing on 21st March 2018, the Defendant did not attend court hence the suit proceeded *ex-parte* upon the court being satisfied as to service.
6. The Plaintiff was the sole witness in this suit. He adopted his witness statement dated 26th April 2014 as his sworn testimony. He stated in his testimony that he was the registered proprietor of the suit property having bought it from the Defendant's brother, Kobe. He stated that due process was followed and that the consent of the Land Control Board was obtained prior to the suit property being transferred into his name. It was his case that although KOBE vacated the suit property upon sale, the Defendant adamantly refused to leave, hence the suit.
7. The court has considered the evidence and the pleadings in this suit. The court is of the opinion that the following issues arise for determination;
 - a. Whether the Plaintiff is the registered proprietor of the suit property.
 - b. Whether the Plaintiff acquired the suit property through purchase from the Defendant's brother, Kobe.

c. Whether the Defendant is entitled to the suit property under the **Limitation of Actions Act**.

d. Whether the suit property was initially registered in the name of Kobe on his own behalf and in trust for the Defendant and his siblings.

e. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

f. Who shall bear the costs of the suit.

8. The court finds that there is sufficient evidence on record to demonstrate that the Plaintiff is the current registered proprietor of the suit property. He produced a copy of the land register (green card) for the suit property which indicated that he was registered on 25th July 2000. He also produced a copy of the title deed for the suit property. Those documents were not challenged at the trial. The 1st issue is, therefore, answered in favour of the Plaintiff.

9. The 2nd issue relates to the purchase of the suit property. The court finds that there is adequate oral and documentary evidence that the Plaintiff acquired the suit property from the Defendant's brother, Kobe, for valuable consideration. The copy of the green card indicates as much. There was also a copy of an affidavit sworn by Kobe on 23rd August 2007 which confirmed the sale of the suit property to the Plaintiff. The copy of the application for the consent of the Land Control Board for the transfer of the suit property also confirms the existence of the sale. This issue is also answered in favour of the Plaintiff.

10. The 3rd issue is whether the Defendant has acquired an interest in the suit property by virtue of the **Limitation of Actions Act**. This issue was raised by the Defendant in his defence. He did not, however, turn up at the trial to prove or demonstrate his defence. In the circumstances, the court finds and holds that the Defendant has failed to demonstrate his defence under the **Limitation of Actions Act**. Even if the Defendant intended to raise the issue of adverse possession, he failed to adduce any evidence in support thereof.

11. The 4th issue was similarly raised by the Defendant in his defence. Just like in the previous issue, the Defendant did not attend court to demonstrate the existence of the alleged trust and its consequence, if any, on the transfer of the suit property to the Plaintiff. The court, therefore, finds and holds that the Defendant has failed to demonstrate the existence of such trust.

12. The 5th issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. Since the Plaintiff has demonstrated his proprietorship of the suit property, he is entitled to enjoy all the rights and privileges which go with such proprietorship. The court finds and holds that he is entitled to the reliefs sought in the amended plaint against the Defendant.

13. The court has noted that the Plaintiff has asked for *mesne* profits of Ksh 5000/- per month in the amended plaint. The Plaintiff contended in his evidence that if he had not been kept out of the suit property by the Defendant he would have earned a monthly income of Kshs 5000/- by growing food crops such as maize and beans. That would translate to Kshs 60,000/- annually. The court is not satisfied that he would have earned such an amount from a plot measuring 0.05 ha. The court considers that amount to be exaggerated. The court considers an annual amount of Kshs 30,000 to be more realistic and reasonable. Accordingly, the Plaintiff shall be awarded *mesne* profits at that rate.

14. The 6th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See section 27 of the Civil Procedure Act (Cap 21). As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs in this suit. Accordingly, the Plaintiff shall be awarded the costs of the suit.

15. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case on a balance of probabilities as required by law. There shall be judgement for the Plaintiff against the Defendant in the following terms.

a. The Defendant by himself, his family members and servants or anybody claiming through him shall be evicted from *Title No Ngandori/Kathangariri/T.83*.

b. The Defendant shall similarly be permanently restrained from entering upon or utilizing the suit property.

c. The Defendant shall pay *mesne* profits at the rate of Kshs 2,500/- per month with effect from 19th July 2000 and interest thereon at court rates until the date of eviction or vacation.

d. The Defendant shall bear the costs of the suit.

e. The Defendant shall have a grace period of 60 days within which to vacate the suit property voluntarily after which any eviction shall be carried out strictly in accordance with all the applicable laws.

16. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **OCTOBER, 2018**.

In the presence of Mr Okwaro for the Plaintiff and in the absence of the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18