



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.425 OF 2017

(FORMERLY ELC.372 OF 2015 – NAIROBI)

DERRICK KAMAU WAMATU.....PLAINTIFF

-VERSUS-

FELISTUS NUNGARI NJOROGE.....DEFENDANT

JUDGMENT

By way of *Plaint* dated **7th May, 2015**, originally as *ELC 372 of 2015* the Plaintiff has come to Court seeking for various orders. The Plaintiff has sought for the following:-

a) The removal of a caution registered by the Defendant's dependant against the parcel of land known as land parcel No.Ngenda/ Githunguchu/T. 401.

b) An eviction order of the Defendant, her agents, servants, dependents, anybody residing with her and or her tenants from the said land parcel No.Ngenda/ Githunguchu/

T.401.

c) Costs of this suit.

d) Any other relief this court may deem fit.

The Plaintiff pleaded that he is one of the beneficial owners of the estate of the late *Martin Wamatu Njoroge*. That in a Will dated **20th May 2005**, the deceased had bequeathed the Plaintiff the parcel of land known as *Ngenda/ Githunguchu/T.401 (hereinafter the "suit property")*. The Plaintiff averred that on **14th September 2005** the executors of the Will filed an application for probate of the will and that the grant of probate was issued on **13th October 2006**. He avers that after confirmation of the grant on **28th November 2007**, the Plaintiff was registered as the legal owner of the said suit property.

The Plaintiff further avers that the Defendant's son, *Raymond Njoroge Wamatu*, registered a caution against the title of the suit property. He states that in or about the **year 2006**, the Defendant trespassed on the suit property and took occupation of the same. Despite demands and notices being issued to the Defendant, she refuses to leave the suit property. The Plaintiff asked the court to allow the suit.

The Defendant did not enter appearance and nor did she file a Statement of Defence. The Defendant did not participate in the proceedings.

In support of his claim, the Plaintiff called two witnesses.

PW1 - Margaret Njoki adopted her witness statement dated **7th May 2015**. She testified that the parcel of land was bequeathed to her son, the Plaintiff herein. She produced the Grant of Probate and the letters of Confirmation as exhibits. She reiterated the averments in the *Plaint*.

PW2 - Derrick Kamau Wamatu the Plaintiff adopted his witness statement. He further testified that he is currently not in possession of the suit property. He further testified that the Defendant was once married to his father, but they divorced. He also testified that the alleged trespasser has refused to vacate the suit property.

At the close of the Plaintiff's case, written submissions were filed. The Plaintiff submitted that the suit was undefended. He relied on **Order**

2 Rule 11 which stipulates that any allegation of fact made by a party shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it. The Plaintiff further relied on Section 24 to 29 of the Land Registration Act on the effect of registration of a person as the proprietor of land.

The Plaintiff further avers that the Succession matter upheld his rights and that the **Judgment** of Justice Muchelule dated **11th July 2017** has not been appealed against, upset and/or vacated.

The Plaintiff also submitted that as the registered proprietor of the property known as **Ngenda/Githunguchu/T.401** in terms of **Section 26(1)** of the **Land Registration Act** is entitled to the protection of the law. The Plaintiff relied on the case of **Wamwea..Vs...Catholic Dioces of Muranga Registered Trustees (2003) KLR 389**, where it was held that

“once a party acquires legal title over a parcel of land, such a party is not only entitled to possession but also to the occupation of that land...a party who refuses to give vacant possession becomes a trespasser notwithstanding that the party refused to take any compensation given if such refusal of compensation does not confer a legal interest in that land.”

He also relied on the case of **Paul Audi Ochuodho...Vs...Joshia Ombura Orwa (2014) eKLR** ,where Justice Okongo held that

“I am satisfied that the plaintiff is the registered owner...the defendant in this suit did not defend this suit. The title over the suit property is therefore not challenged. In the absence of such challenge the plaintiff is the absolute and indefeasible owner of the suit property. He is entitled to exclusive possession.”

The Plaintiff urged the court to grant the orders sought.

Having now carefully considered the pleadings, oral evidence and submissions by the parties the Court finds that the issues for determination are as follows:-

1. Whether the Plaintiff is the registered proprietor of the suit property and the rights thereto.

There is no doubt that the Plaintiff herein is the registered proprietor of the suit property herein having been registered so on **7th May 2008** after the Grant of Probate. **Section 26(1)** of the **Land Registration Act** provides:-

“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.”

Having found that the Plaintiff is the registered proprietor of the suit property, then he is entitled to enjoy his rights and privileges as a proprietor as provided by **Section 24(a)** of the said **Land Registration Act** which provides as follows:-

24(a) Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Further, his rights are protected by **Section 25(1)** of the same Act which rights can only be defeated as per the law. **Section 25(1)** of the **Land Registration Act** provides:-

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...”

Therefore the Court finds that the Plaintiff herein is entitled to enjoy his rights as a proprietor of the suit property and these rights include exclusive use, possession and enjoyment of the same without interference by any third party. The Plaintiff cannot enjoy such rights and privileges without vacant possession and while the property has been cautioned or restricted.

In the case of **Simon Njage Njoka ...Vs...Simon Gatimu Kanyi (2007) eKLR, the Court of Appeal in Nyeri**, in allowing the Appeal, the court had the following to say:

“The appellant having provided a valid title to the piece of land and the respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should then have proceeded to evict the respondent.”

It would appear that the suit property does not have an issued title deed. However, the Plaintiff has produced a copy of the green card as well as an official search which shows an entry in the register that the Plaintiff is registered as the proprietor of the land.

On the issue of the caution placed by the Defendant’s son, the Land Registration Act under Section 71 gives directions on the persons entitled to place a caution as follows:

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,”

The Defendant’s son had placed a caution pending the hearing of the Succession matter wherein the said cautioner had sought for revocation of Grant. However the said application was dismissed and the Plaintiff entitlement as the beneficiary of the suit property was not upset. Therefore the caution in place serves no purpose.

Under Section 73 (1) of the Land Registration Act, a caution may be removed by the cautioner or by the Registrar or by the Court. Neither the cautioner herein nor the Registrar have removed the caution. In the case Milkah Muthoni Wagoco...Vs...County Council of Kirinyaga & 2 Others [2017] eKLR, the court held inter alia that:

“Further, a caution can only be lodged and maintained on a parcel of land by a party who can demonstrate a right or interest in the land, lease or charge. The 1st Respondent has not advanced any interest in the suit property or any reason why the caution lodged thereon should remain on the register. I would therefore make a finding that the 1st and 2nd Respondents have violated the Petitioner’s rights under Article 47 of the Constitution and further order the removal of the caution lodged on the suit property.”

Since the Defendant has not appeared in court to support the existence of the caution, then the Court finds that it has no option but to direct its removal.

This Court has carefully considered the available evidence and the relevant provisions of law and it finds that the Plaintiff herein as a proprietor has his rights protected by law and he should be allowed to enjoy such rights.

Since the averments by the Plaintiff have not been controverted, the Court finds that the said averments have been admitted by the Defendant as provided by Order 2 Rule 11. Therefore, the Court finds that the Plaintiff herein is entitled to all the prayers sought in the claim.

The upshot of the foregoing is that the Plaintiff has been able to prove his case on the required standard of balance of probabilities. Consequently, the ***Court enters Judgment for the Plaintiff against the Defendant in terms of prayer No.(a), (b), & (c) of the Plaint.***

Further on ***prayer No.(b)***, the ***Plaintiff to give the Defendant a Notice of 45 days from the date hereof for vacant possession, in default eviction to issue.***

It is so ordered.

Dated, Signed and Delivered at Thika this 26th day of November 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for the Plaintiff

No appearance for the Defendant

Lucy - Court clerk

L. GACHERU

JUDGE

26/11/2018

Court – Judgment read in open court in the absence of the parties though Plaintiff representative was present in court when this date was given.

L. GACHERU

JUDGE

26/11/2018