



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.638 OF 2017**

**PETER KARANJA.....PLAINTIFF**

**VERSUS**

**MARIAM MAGDALINE KINYURU.....DEFENDANT**

**JUDGEMENT**

By a **Plaint** dated **5<sup>th</sup> July 2017**, the Plaintiff herein filed a claim against the Defendant **Mariam Madgaline Kinyuru** and sought for Judgement against the said Defendant for:-

- i. An injunction restraining the Defendant from encroaching, entering, utilizing, constructing on, charging, selling or in any way interfering with the Plaintiff's parcel of land known as Karai/Gikambura/T.500.***
- ii. An order directed to the Defendant to vacate the land forthwith and remove the caution.***
- iii. Damages for trespass/mesne profit.***
- iv. Costs.***

The Plaintiff averred that he is the registered and beneficial owner of all that parcel of land known as **Karai/Gikambura/T.500** located at **Gikambura, Kikuyu Division of Kiambu County**. He further alleged that the Defendant unlawfully and without permission of the Plaintiff encroached on the said land and that she has erected some structures thereon and thereby denying the Plaintiff the use and enjoyment of the property. He also contended that the Defendant has gone further to caution the land for no apparent reason and this is inconveniencing the Plaintiff. Further that despite demand to vacate the land, the Defendant has refused to do so thus necessitating these proceedings.

The Defendant did not enter appearance nor file Defence despite the Service of Summons to enter Appearance together with the Plaintiff as is evident from the **Affidavit of Service** of **Benson Odhiambo Onuonga**, which was filed on **1<sup>st</sup> August 2017**.

Therefore the matter proceeded *ex parte* for **Formal Proof** on **17<sup>th</sup> May 2018** wherein the Plaintiff herein **Peter Karanja** gave evidence for himself and called no witness.

In his testimony, he alleged that he bought the suit property **Karai/Gikambura/T.500** from **Njaga Karanja** for about **Kshs.2 Million** in the **year 2014**. The Plaintiff produced copies of the Land Certificate for **Njaga Karanja** which was issued to him on **20<sup>th</sup> December 1993**, for **Karai/Gikambura/T.500**, the suit property. He also produced **Consent** to transfer the suit property to him from the **Kikuyu Land Control Board** dated **3<sup>rd</sup> April 2014**. The Plaintiff also produced the Transfer document which was signed by both the said **Vendor Njaga Karanja** and the Plaintiff. Thereafter, the Plaintiff was issued with **Title Deed** dated **16<sup>th</sup> April 2014** in his name for **Karai/Gikambura/T.500**.

The Plaintiff further testified that the Defendant encroached on his

parcel of land in the **year 2016** and has been cultivating since then. Further that she placed a caution on the said parcel of land as is evident from the **Certificate of Official Search** dated **22<sup>nd</sup> March 2017** wherein the Defendant placed a caution on the suit land on **16<sup>th</sup> November 2015**. The Plaintiff urged the Court to allow his claim.

Thereafter, the Plaintiff filed his written submissions on **3<sup>rd</sup> July 2018** and submitted that he cannot utilize his suit property because of the action of the Defendant. He asked the Court to award him **Kshs.1,440,000/=** as general damages.

This court has carefully considered the available evidence and the exhibits produced thereto and makes the following findings;

There is no doubt that the Plaintiff herein is the registered owner of the suit property *Karai/Gikambura/T.500*. He is in possession of a **Title Deed** that was issued to him on **16<sup>th</sup> April 2014**. There is no evidence that the said title has been cancelled or revoked. By dint of **Section 26(1)** of the **Land Registration Act**, then the Plaintiff is deemed to be the **absolute** and **indefeasible** owner of the said suit property. His proprietorship can only be challenged as provided by exceptions in **Section 26(1)(a) & (b)**, which 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.”**

There is no evidence availed to prove that the Plaintiff’s title was acquired **fraudulently, through misrepresentation, illegally** or through **corrupt scheme**. Without any evidence to challenge the Plaintiff’s title, then this Court finds that he is the **absolute** and **indefeasible** owner of the suit property.

Prior to the suit property being transferred to him, the **Land control Board** had given **Consent** for the transfer of this property to the Plaintiff. This is in accordance with **Section 6** of the **Land Control Board Act**. With the said **Consent** from the **Land Control Board**, then the sale of this suit property to the Plaintiff was valid.

It is also evident that the **Vendo, Njaga Karanja** signed the transfer document and further the said **Njaga Karanja** was the registered owner of the suit prior to selling it to the Plaintiff. The Land Certificate in the name of **Njaga Karanja** was produced as exhibit and there was no evidence that the said title for **Njaga Karanja** had been impeached and/or revoked. Therefore, the root of the Plaintiff’s title can be traced.

The Defendant did not appear in court to controvert or challenge the Plaintiff’s evidence.

From the Certificate of Official Search, it is evident that the Defendant did place a caution on the suit property on **16<sup>th</sup> November 2015**. She did not appear in court to demonstrate why the said caution should remain in place given that it was lodged **3 years ago**.

**Section 73(1)** of the **Land Registration Act**, provides that a caution may be withdrawn by the cautioner or removed by the order of the Court. The cautioner who is the Defendant herein has not removed the caution or appeared in court to explain why the said caution should remain in place. Therefore, this Court finds no reason why the said caution should remain in place.

Further, there are restrictions which have been placed on the suit property. Restrictions are placed on a parcel of land for the purpose of prevention of fraud or improper dealing or for any sufficient cause. However, it is evident that the Plaintiff got registered as the proprietor of the suit property in the **year 2014** and the restrictions were placed on **2016, two years after his registration**. There is no evidence of whether the Plaintiff was charged with fraud or not. Without that evidence, this Court finds no reason of sustaining the said restrictions.

As the Court stated earlier, the Plaintiff is the registered proprietor of the suit property. As a registered proprietor, the Plaintiff has his rights protected by **Section 24(a)** and **25(1)** of the **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;**

**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...”*

The Plaintiff cannot enjoy the stated rights if the Defendant has encroached on the said parcel of land and there is in existence presence of a caution and restrictions. The Court finds that for the Plaintiff to enjoy his right as a proprietor of the suit property, then the Defendant should give the Plaintiff vacant possession of the suit property and further the caution and restrictions placed on the title herein should be removed.

However, the Court finds no evidence that the Plaintiff has suffered general damages.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case on the required standard of balance of probability against the Defendant herein.

Consequently, the ***Court enters Judgement for the Plaintiff against the Defendant as prayed in prayers No.(i) and (ii).*** Further the ***Court directs the Land Registrar, Kiambu to remove the caution and***

***restrictions placed on the suit property herein. The Plaintiff is also  
entitled to costs of this suit.***

It is so ordered.

***Dated, Signed and Delivered at Thika this 16<sup>th</sup> day of November 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

The Plaintiff present in person

No appearance for Defendant

Lucy - Court clerk

**L. GACHERU**

**JUDGE**

**Court** - Judgement read in open court in the presence of the Plaintiff and absence of the Defendant.

**L. GACHERU**

**JUDGE**

**16/11/2018**