



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 150 OF 2014

MARTHA MWINGI

FELISIOUS NYAGA MACHIRA

JAMES NJERU NTHIGA.....PLAINTIFFS

KENNEDY MURITHI NYAGA

TRUSTEES FOR TRIUMPH IN CHRIST MINISTRIES INTERNATIONAL

VERSUS

NYAGA KARINJAGA

CLEMENT KIRAGU NJAGI.....DEFENDANTS

BETHA MWARI

THOMAS THAMBURA

JUDGEMENT

1. By an originating summons dated 2nd September 2002 brought under **Order XXXVI of the Civil Procedure Rules, 1948 Revised Edition**, the Plaintiffs sought determination of the following issues;

- a. *If the Respondents should vacate Embu/Municipality/1164 and when.*
- b. *Who should bear the costs of this summons.*

2. The said summons was supported by an affidavit sworn by the 1st Plaintiff on 22nd August 2002 who swore it on her own behalf and on behalf of the rest of the Plaintiffs. It was stated that the Plaintiffs were the registered proprietors of the *Title No. Embu/Municipality/1164* (hereinafter called the *suit property*). It was further stated that the Plaintiffs had sold the suit property to the 3rd and 4th Plaintiffs as trustees of Triumph in Christ Ministries International.

3. It was contended that the 1st and 2nd Plaintiffs were unable to give vacant possession of the suit property to the 3rd and 4th Plaintiffs because the Respondents were in illegal occupation thereof and that all efforts to resolve the matter amicably had failed. The Plaintiffs annexed to their said affidavit a copy of the certificate of title for the suit property, an application for Land Control Board (LCB) consent and a consent letter from the LCB for the intended transfer from the 1st and 2nd Plaintiffs to the 3rd and 4th Defendants.

4. Each of the Respondents filed a separate affidavit in response to the said originating summons defending occupation of their various portions of land. They all denied that they were in occupation of the suit property. The 1st Respondent stated that he was allocated Plot Nos. 39 and 119 at Shauri Yako Estate and that he did not know of the existence of the suit property. The 2nd Respondent stated that he was allocated Plot Nos 95 and 115 at Shauri Yako Estate. The 3rd Respondent stated that her late husband, Njeru Kavuta, was allocated Plot No. 104 in the same estate which she was utilizing. She stated that the suit property was unknown to her.

5. The record shows that whilst the suit was pending the 1st and 2nd Respondents passed on. The record also shows that the Plaintiffs were unable to trace the 4th Respondent for service hence they opted to proceed against the 3rd Respondent only.

6. When the suit was listed for hearing on 13th December 2017, the 2nd Plaintiff testified as PW 1. She adopted her witness statement dated 20th February 2015 as her sworn testimony. Her testimony simply reiterated the contents of the 1st Plaintiff's affidavit sworn on 22nd August 2002 in support of the originating summons. It was her case that upon sale of the suit property to the 3rd and 4th Plaintiffs, the same could not be transferred because there were some squatters on the land who had erected temporary structures thereon.
7. During cross-examination by Mr Andande for the 3rd Defendant, PW 1 stated that the Defendants were in occupation in 1992 when the certificate of title for the suit property was issued. She stated that she did not know when the Defendants entered the suit property. It was her further evidence that she had never taken possession of or developed the suit property. She also conceded that the instant suit was filed after the sale of the suit property to the 3rd and 4th Plaintiffs.
8. The 2nd Plaintiff conceded during cross-examination that not all the squatters or persons in occupation were sued in this suit. She further conceded that new structures had been erected since 2002 and that she did not find it necessary to join the owners of the additional structures as parties to the suit. She also stated that she did not actually know how many people were in occupation of the suit property.
9. The 1st Plaintiff herein testified on 12th April 2018 as PW 2. By this time the 3rd Defendant had changed advocates and appointed Beth Ndorongo & Co Advocates. Her evidence supported the version given by PW 1 on the ownership of the suit property, its sale to the 3rd and 4th Plaintiffs, and its occupation by squatters. During cross-examination by Ms Beth Ndorongo for the 3rd Defendant, PW 2 stated that she did not establish that the 3rd Defendant was actually in possession at the time of filing suit. She also conceded that the surveyor's report which was filed on 15th November 2007 did not indicate that the 3rd Defendant was in occupation of the suit property.
10. The 4th Plaintiff, Kenneth Muriithi Nyaga, testified as PW 3. He stated that he was one of the trustees of the church which purchased the suit property from the 1st and 2nd Plaintiffs. He adopted his witness statement dated 20th February 2015 as his sworn testimony. It was his case that the church could not take possession of the suit property because it was occupied by squatters.
11. PW 3 contended that there were a few workshops on the suit property at the time of purchase but that more structures had been added over the years. He further contended that the occupants were tenants of the 3rd Defendant and that they were paying rent to her. During cross-examination, PW 3 conceded that the Surveyor's report filed in court on 15th November 2007 did not indicate that the 3rd Defendant was in possession or that the occupants were her tenants.
12. The 3rd Defendant testified on her own behalf as DW 1. She relied upon her affidavit sworn on 11th September 2002 in response to the originating summons. She also adopted her witness statement dated 11th April 2018 as her sworn testimony. Her case was that she was the occupant of Plot No. 104 which measured 50 x 45 feet and that it does not fall within the suit property. It was her case that Plot No. 104 was not even adjacent to the suit property since the two were separated by a road and building after the road. She denied having any tenants on the suit property and challenged the Plaintiffs to produce evidence thereof.
13. The 3rd Defendant further stated that she was aware that there are several people who were in occupation of the suit property. She pointed out that the big crowd of people who were present in court on 12th April 2018 were the ones in occupation of the suit property.
14. When the hearing was concluded on 12th April 2018 the Plaintiffs were given 45 days to file and serve their written submissions whereas the 3rd Defendant was given 45 days upon service to file and serve hers. The matter was thereupon fixed for judgement on 15th November 2018. By the time of preparing the judgement, however, only the 3rd Defendant had filed submissions.
15. The court has considered the pleadings on record, the affidavits filed in response to the originating summons, the witness statements, the oral evidence as well as the documents filed on behalf of the parties herein. The court has noted that even though the originating summons dated 2nd September 2002 framed two (2) straightforward issues for determination, the advocates for the parties herein decided to sign and file an agreed statement of issues dated 9th January 2009.
16. The said statement contains the following seven (7) issues for determination;
- a. *Whether the 1st and 2nd Plaintiffs are the proprietors of plot number Embu/Municipality/1112/1164.*
 - b. *Whether the 1st and 2nd Plaintiffs sold the said plot to the 3rd and 4th Plaintiffs.*
 - c. *Whether the Defendants are unlawfully occupying and/or using the said plot.*
 - d. *Whether the Defendants are entitled to occupy and/or use the said plot.*
 - e. *Whether the Defendants should be removed/evicted from the said plot.*
 - f. *Whether the Plaintiffs are entitled to exclusive and peaceful possession and use of the said plot.*
 - g. *What should be the order as to costs in this matter.*

17. The 1st and 2nd issues are really straightforward. There was no contest that the 1st and 2nd Plaintiffs are the registered proprietors of the

suit and that they had sold the suit property to the 3rd and 4th Plaintiffs. There is abundant evidence on record to that effect. The 1st and 2nd issues are, therefore, answered in the affirmative.

18. The 3rd, 4th and 5th issues are intertwined hence they shall be determined together. It must be borne in mind that the Plaintiffs abandoned their claims against the 1st, 2nd and 4th Defendants. The 3rd Defendant is the only Defendant remaining in this suit. The court has considered the entire evidence on record on the question of the 3rd Defendants alleged occupation of the suit property whether directly, or through tenants. The court is far from satisfied that the Plaintiffs have proved their case against the 3rd Defendant. The 3rd Defendant was able to demonstrate that her Plot No. 104 is totally separate from the suit property. The Plaintiffs were unable to demonstrate that she had any tenants on the suit property either.

19. The court has also considered the Surveyor's report dated 14th November 2007 which was filed in court on 15th November 2007 by the Surveyor from the defunct Municipal Council of Embu. The said report was prepared and filed pursuant to a consent order dated 3rd October 2007. The surveyor was required under paragraph (9) of the said order to;

“...visit and identify the position of plot No. Embu/Municipality/1112/1164 on the ground, the extent of the said plot and/or the location of the beacons, the nature of the title of the said plot, the registered proprietor, the current occupants of the said plot and their status.”

20. The court has perused the Surveyor's report carefully. It does not mention the 3rd Defendant as one of the occupants of the suit property. It does not state that the persons who were in occupation then were tenants of the 3rd Defendant. On the contrary, all the nine (9) occupants who were in possession were claiming to have been allocated plots within the suit property by the Municipal Council of Embu. None of them claimed to be a tenant of the 3rd Defendant.

21. It is also on record that some of the Plaintiffs conceded that they did not confirm if the 3rd Defendant was in actual occupation at the time of filing suit. Some of them admitted that there were other “squatters” in occupation other than the Defendants who were sued in this suit. The court is, therefore, not satisfied that the Plaintiffs have proved that the 3rd Defendant is in possession of the suit property.

22. There being no evidence of occupation or possession by the 3rd Defendant, the court finds the 3rd and 4th issues have been resolved. It would, therefore, follow that the 3rd Defendant cannot be removed or evicted from the suit property since she is not in possession. That also disposes of the 5th issue.

23. The 6th issue is really an academic question. Whether or not the Plaintiffs are entitled to exclusive possession and use of the suit property depends on various factors. Whereas the 1st and 2nd Plaintiffs may generally be entitled to exclusive possession and quiet enjoyment of the suit property by virtue of being registered owners, such rights may be subject to various limitations. For instance, their proprietary right may be subject to the law on limitation of actions, overriding interests, the law of trusts or other vitiating factors. The rights may also be subject to the Plaintiffs suing the rightful Defendants. Be that as it may, the bottom line is that the Plaintiffs are not entitled to any orders as against the 3rd Defendant who is the current Defendant.

24. The final issue is on costs of the action. 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)**. A successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the instant suit, there is no good reason why the successful litigant should not be awarded costs of the suit.

25. The upshot of the foregoing is that the court is not satisfied that the Plaintiffs have proved their case against the 3rd Defendant to the required standard. The Plaintiffs are not entitled to the reliefs sought in the suit. The Plaintiffs' originating summons dated 2nd September 2002 is accordingly dismissed with costs to the 3rd Defendant.

26. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **15TH** day of **NOVEMBER, 2018**.

In the presence of Ms Nzekele holding brief for Mr Okwaro for the Plaintiff and Ms Ndorongo for the 3rd Defendant and in the absence of the 1st, 2nd and 4th Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

15.11.18