



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 51 OF 2010

PETER MUTUA NDETO

GEOFFREY KAMAU WANYOIKE

JASON MASIMBA

PETER NJUGUNA (suing on behalf of Ngarariga

Seventh Day Adventist Church).....PLAINTIFF

-VERSUS-

ANTHONY KANG'ETHE KARIUKI.....DEFENDANT

JUDGMENT

The plaintiffs brought this suit through a plaint dated 4th November, 2009 which was filed in court on 11th February 2010. The plaintiffs averred that Ngarariga Seventh day Adventist Church(hereinafter referred to only as “the church”) on whose behalf they brought the suit was the registered owner of all that parcel of land known as Limuru/Bibirioni/2555 (hereinafter referred to as “the suit property”). The plaintiffs averred that the defendant had without any lawful cause trespassed on the suit property and planted trees thereon thereby infringing the church’s right to quiet enjoyment, possession and use of the same. The plaintiffs averred that as a result of the defendant’s interference with the church’s possession and use of the suit property as aforesaid, the church had suffered loss and damage. The plaintiffs sought the following reliefs against the defendant:

- a) A mandatory injunction compelling the defendant to vacate the suit property forthwith.
- b) A mandatory injunction compelling the defendant to remove forthwith from the suit property any trees, fences and/or structures he has unlawfully erected on the property and in default, the same be forfeited to the plaintiff.
- c) A permanent injunction restraining the defendant from invading or trespassing upon the suit property.
- d) Mesne profits at the rate of Kshs. 200,000/- per annum together with interest from 2006 until payment in full.
- e) Costs of the suit and interest thereon until payment in full.
- f) Any other relief the court may deem fit to grant.

The defendant entered appearance and filed a statement of defence on 30th April, 2010 denying the plaintiffs’ claim in its entirety. The defendant averred that the suit property was part of land that was allocated to him by Limuru Urban Council in 1983 and that the church’s title which was denied, could not override his rights over the property. The defendant denied invading and trespassing on the suit property and contended that he had been in uninterrupted possession of the suit property since 18th March, 1983

When the suit came up for hearing on 20th November, 2017, each party called one witness. The plaintiffs’ witness was Simon Muchina Njuguna (PW1). PW1 adopted his witness statement dated 22nd March, 2012 as part of his evidence in chief. He testified that he was a member and official of the church. He stated that the plaintiffs were no longer leaders in the church following elections that were held by the church for various positions. PW1 stated that in 1996, the church applied to Limuru Town Council to be allocated land for putting up a church building and a school which request was granted in 1997. He stated that Limuru Town Council asked them to go to Kiambu and pay

for the title which the church did. The church was thereafter issued with a title for the suit property. PW1 produced in evidence a copy of the title deed for the suit property dated 28th May, 1997 and a copy of a certificate of official search dated 9th November, 2017 as P.exh. 1 and P.exh. 2 respectively.

PW1 told the court that the church was not using the suit property because the defendant entered the property in 2003 and planted trees thereon. He stated that the defendant became violent when he was asked to vacate the suit property. PW1 produced in evidence as P.exh. 3 and P.exh. 4 respectively a copy of a letter dated 23rd July, 2007 that was served upon the defendant by the church's advocates demanding that he vacates the suit property and a copy of a letter that was received from the defendant's advocates dated 30th July, 2009 in response to the demand.

PW1 denied that the suit property was part of Manguo Show Ground which the defendant was allowed to use temporarily for bee keeping by Limuru Urban Council. He stated that the church had no interest in Manguo Show Ground. PW1 stated that the church had been unable to build a church, primary school and a hall on the suit property owing to the defendant's occupation. He stated that the church was suffering loss as it had resorted to hiring halls for meetings and weddings from Ngarariga Catholic church at a cost of Kshs. 5000/- per day and Kshs.10,000/- when they needed catering facilities. PW1 contended that if the church had developed the suit property as it had planned, it would have earned a minimum of Kshs. 200,000/- per year through hiring out the hall at Kshs. 5000/- per week. He produced as P.exh. 5 a receipt for Kshs. 10,000/- dated 9th November, 2017 which he claimed to have been incurred in hiring a hall from Catholic Women Association. He stated that the church was seeking the eviction of the defendant from the suit property and damages of Kshs. 2 million as prayed for in the plaint.

In cross-examination, PW1 stated that according to the constitution of the church, church affairs were run by the church board in which he was a member. He stated that the plaintiffs were the local church pastor and the officials of the local church conference who also doubled up as trustees. He stated that he was the church secretary when the church acquired the suit property. He averred that the suit property was vacant when the church applied to be allocated the same. He admitted that the suit property was situated in an area known as Manguo Show Ground and averred that the trees therein were planted in 2003 after they had acquired the property. He contended that the church pays for the halls hired by its members for functions such as weddings.

In re-examination, PW1 stated that he was the church clerk when the church received the title deed for the suit property and that he was responsible for keeping all the church documents and records. He reiterated that the church viewed the suit property before applying for the same and maintained that the same was vacant.

The defendant (DW1) testified that the plaintiffs who sued him were the officials of Ngarariga SDA church (the church) and that PW1 who gave evidence on behalf of the church was not one of the plaintiffs. He averred that he was given the suit property by Limuru Urban Council in 1983 to use for bee keeping and that he took possession thereof, planted trees and installed bee hives. He denied that the suit property was vacant when it was allocated to the church and averred that the suit property was part of a larger parcel of land known as Limuru/Bibirioni/1016 that was situated in Manguo Show Ground area. He contended that the suit property was a portion of the land that was allocated to him by Limuru Urban Council. He produced a copy of his letter of allotment dated 13th March, 1983 and a copy of the survey map for the area as D.exh. 1 and D.exh. 2 respectively. DW1 stated that Limuru Urban Council had not given him notice to vacate the suit property and denied that he entered the suit property in 2003

In cross-examination, DW1 stated that the parcel of land that was allocated to him on 18th March, 1983 was situated at Manguo Show Ground. He stated that the parcel of land had no reference or plot number. He averred that the land had been allocated to him for temporary use and contended that it was not necessary for him to seek permission to plant trees thereon. DW1 averred that he was still in occupation of the land which was allocated to him and contended that the suit property was a portion of his land.

DW1 reiterated that the suit property was a subdivision of a larger parcel of land known as Limuru/Bibirioni/1016 whose subdivision took place when he was in occupation of the land that had been allocated to him. He stated that he lodged a complaint when the land was being subdivided but did not go to court as he was still using his land. He stated further that he was aware that following the subdivision of the said larger parcel of land, the portions thereof were allocated to third parties and titles issued. DW1 stated that he had no problem with Limuru Urban Council because the said council had never asked him to vacate the land that was allocated to him.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 14th February, 2018 while the defendant filed his submissions on 6th March, 2018. The plaintiffs submitted that there was no sufficient description of the plot that was allegedly allocated to the defendant at Manguo Show Ground which was a very large area. The plaintiffs submitted further that the defendant had not adduced evidence to show that the suit property was part of the land at Manguo Show Ground that was allocated to him.

The plaintiffs submitted that the defendant did not establish his interest in the suit property. The plaintiffs submitted further that an allotment letter does not confer title. For this submission, the plaintiffs cited the cases of Stephen Mburu & 4 others v. Connat Merchants Ltd & another (2012)eKLR and Philma Farm Produce & Suppliers & 4 others v. The attorney General & 6 others, Petition 194 of 2011.

The plaintiffs submitted that the church applied for and was allocated the suit property by Limuru Urban Council and as such the church acquired the suit property legally and procedurally. The plaintiffs submitted further that the defendant had not sought the cancellation of the church's title or made any allegation of fraud against the church. The plaintiffs submitted that the suit property was public land and as such the defendant's adverse possession claim could not be sustained. The plaintiffs submitted that the church had suffered loss and damage as a result of being denied the use of the suit property. The plaintiffs submitted that the church was entitled to mesne profits in the sum of Kshs. 200,000/- per annum since the minimum amount spent annually for hiring halls was not less than 240,000/-.

In his submissions in reply dated 28th February, 2018, the defendant submitted that the plaintiffs' suit must fail since none of the plaintiffs appeared in court to give evidence. The defendant submitted further that PW1 who gave evidence for the plaintiffs was not an official of the

church. The defendant submitted that he had been in peaceful and uninterrupted possession of the suit property since 1983 and had thus acquired title to the same by way of adverse possession. The defendant submitted further that the authorities that were cited by the plaintiff were distinguishable in that no conditions were attached to the defendant's letter of allotment. Finally, the defendant submitted that the claim for damages must fail since the receipts produced in evidence were not issued to the plaintiff.

Determination:

The only issue that arises for determination in this suit is whether the defendant is a trespasser on the on the suit property. I have considered the plaintiffs' case as pleaded and the evidence tendered in proof thereof. I have also considered the defence put forward to the claim and the evidence adduced by the defendant in his defence. The plaintiffs' claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01. What I need to determine is whether the plaintiffs have proved that the church is the owner of the suit property and that the defendant has entered and occupied the same without any justifiable cause. The plaintiffs have demonstrated that the suit property is owned by the church. The plaintiffs produced in evidence a copy of the title deed for the suit property dated 29th May, 1997 in the name of the church and a copy of a certificate of official search dated 9th November, 2017 on the register of the suit property which shows that the church is the absolute proprietor of the suit property having been registered as such on 28th May, 1997.

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the said Act provides as follows:

“27. 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;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The two sections have been reproduced in sections 24 and 25 of the Land Registration Act, 2012 as follows:

“24. 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

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”.

Under sections 27 and 28 of the Registered Land Act (now repealed) and sections 24 and 25 of the Land Registration Act, 2012, the registration of the church as the proprietor of the suit property vested upon the church the absolute ownership thereof together with all rights and privileges associated with such ownership. The rights conferred upon the church under the said provisions of the law are indefeasible except as provided under the said Acts.

In his defence, the defendant alleged that the suit property was allocated to him by Limuru Urban Council in 1983. At the trial, the defendant produced in evidence a letter dated 18th March, 1983 by Limuru Urban Council giving him permission “to practice Bee-keeping farming temporarily” on a plot known as “Manguo Show Ground” that belonged to the said council. Although the defendant claimed that the suit property was a portion of “Manguo Show Ground” that he was authorised to use temporarily, the defendant placed no evidence before the court to prove this claim. The letter dated 18th March, 1983 from Limuru Urban Council that was produced by the defendant as D.exh. 1 did not delineate the land that was comprised in “Manguo Show Ground”. The survey map that was produced by the defendant in evidence as D.exh.2 was of no assistance to the court. Apart from some markings made by hand by the defendant on the said map, there was no indication in the said map as to what land constituted “Manguo Show Ground” before the subdivision. There was no proof therefore that the suit property was part of “Manguo Show Ground” that was temporarily given to the defendant for bee keeping. The defendant had also claimed in his submissions that he had acquired the suit property by adverse possession. This contention was not pleaded neither was any evidence led in proof thereof.

The defendant did not deny that he was in occupation of the suit property which he claimed to be part of “Manguo Show Ground”. The plaintiff having proved his ownership of the suit property and the defendant’s entry and occupation thereof, the onus was upon the defendant to justify his occupation of the property. From my analysis of the defendant’s defence above, I have found no justification for his occupation of the suit property. In the absence of any justifiable cause for entering and occupying the suit property, it is my finding that the defendant is a trespasser on the property. In the circumstances, the plaintiffs are entitled to an order for the defendant’s eviction from the suit property and an injunction to restrain the defendant from interfering with the church’s quiet possession of the property.

Apart from an order for the eviction of the defendant and injunction, the plaintiffs had also sought mesne profits at the rate of Kshs. 200,000/- per annum together with interest from 2006 until payment in full. Mesne profits are a form of special damages which must be specifically pleaded and proved. See, Nakuru Industries Limited v. S S Mehta & Sons [2016] eKLR. The plaintiffs did not prove their mesne profits claim of Kshs. 200,000/- per annum. The plaintiffs did not produce any documentary evidence in support of their claim that they were spending between Kshs. 5000/- and Kshs. 10,000/- weekly to hire a hall for the church’s functions. I am of the view that the church’s statements of accounts would have sufficed for this purpose. A copy of a receipt in the name of Joseph Kabuga that was produced by the plaintiffs in evidence as P.exh. 5 was not sufficient to prove the plaintiffs’ mesne profits claim. It is my finding that the claim for mesne profits was not proved. I would have awarded the plaintiffs general damages for trespass but the same was not prayed for and as such cannot be granted.

In the final analysis and for the foregoing reasons, the plaintiffs’ claim succeeds in part. I hereby enter judgment for the plaintiff against the defendant in terms of prayers (a), (b) and (c) of the plaint dated 4th November, 2009 save that instead of doing so forthwith, the defendant by himself, his servants, agents, representatives or anyone claiming under him shall vacate Land Title No. Limuru/Bibirioni/2555 and remove all his properties lying thereon within thirty (30) days from the date hereof in default of which the plaintiffs shall be at liberty to apply for a warrant for his forceful eviction.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG’O

JUDGE

Judgment read in open court in the presence of:

Mr. Mulako h/b for Mr. Getange for the Plaintiff

N/A for the Defendant

Catherine-Court Assistant