



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 2129 OF 2007

CHARLES MUCHIRI WAGURA.....PLAINTIFF

VERSUS

MARY WANJIKU NDUNGU.....DEFENDANT

JUDGMENT

This suit was filed by way of a Plaint dated and filed on 20th September 2007 in which the Plaintiff seeks that Judgment be entered against the Defendant as follows:

- (a) A mandatory injunction to compel the Defendant whether by herself, her servants or agents to remove all unlawful structures erected on the Plaintiff's land known as Noonkopir Trading Centre/188 (hereinafter referred to as the "suit property");
- (b) A permanent injunction prohibiting the Defendant whether by herself, her servants or agents or otherwise howsoever from remaining upon or continuing in occupation of the suit property;
- (c) Damages for illegal trespass;
- (d) Costs of this suit;
- (e) Any other relief that this Honourable Court may deem fit to grant.

The Pleadings:

In the Plaint, the Plaintiff stated that he is and was at all material times the owner of the suit property. He further stated that the Defendant has wrongfully trespassed on the suit property by erecting structures thereon and that, notwithstanding the Plaintiff's repeated demands, has refused to vacate or deliver possession of the suit property to the Plaintiff. The Plaintiff stated that as a result, he has been deprived of the use and enjoyment of the suit property.

The Defendant filed her Statement of Defence dated 31st October 2007 in which she denied having wrongfully trespassed on the suit property and deprived the Plaintiff of its use and enjoyment stating that she owns a distinct parcel of land being Plot No. 463 Business Noonkopir Trading Centre which she stated was allocated to her by the Olkejuado County Council. She added that she has developed that plot

and regularly pays rates for it. It was her statement that the Plaintiff has no cause of action against her.

The Plaintiff filed a Reply to Defence dated and filed on 9th November 2007 stating that the Defendant had, in fact, encroached into the suit property, a fact which has been confirmed by the County Council of Olkejuado which he stated had previously asked the Defendant to vacate the suit property but that the Defendant remained defiant.

The Evidence:

The Plaintiff (PW1) testified that he is the owner of the suit property previously identified as Plot No. 10/Residential Noonkopir Trading Centre, having purchased it from Mukami Enterprises Limited in September 1998. He produced a copy of the Sale Agreement dated 3rd September 1998 between him and the said Mukami Enterprises Limited as proof. In further support of his assertion of ownership of the suit property, he produced a copy of his Certificate of Lease in his name which was issued on 21st March 2007. He also produced further evidence of ownership of the suit property by way of a Certificate of Official Search dated 20th May 2013 which showed that he is indeed the registered lessee of the suit property for a term of 99 years from 1st August 2000. He testified that the suit property is 0.0623 Hectares in size and that its dimensions are 19.73 metres, 29.99 metres, 22.06 metres and 29.91 metres. He said that he has developed the suit property with a residential house and houses for rent. He stated that he knows the Defendant as she has also constructed near the suit property and has encroached into the suit property. It was his assertion that the Defendant has constructed within the boundaries of the suit property. He informed the court that he wrote to the Clerk of the County Council of Kajiado (as it then was) by his letter dated 18th March 2003 complaining of the Defendant's encroachment into the suit property. He produced a copy of that letter. He testified that he received a response to his letter by the County Council of Kajiado in their letter dated 15th April 2004 informing him that they were looking into his complaint. He produced a copy of that letter. He said that upon waiting for some time, and on observing that no steps were being taken to remedy the situation, he wrote another letter dated 26th April 2007 to the same County Council of Kajiado as a reminder which he said was responded to by way of a letter dated 14th May 2007 addressed to the Defendant's husband, Mr. William Ndungu Mwathi confirming that there was indeed encroachment by the Defendant into the suit property and the Kenya Power way leave. He produced a copy of this letter. He further testified that he also received another letter dated 4th July 2007 from Kenya Power addressed to the said husband of the Defendant warning the Defendant that she had constructed a structure under their 11 KV Overhead line and requesting her to demolish it. He further informed the court that those structures erected under the power line were subsequently demolished by Kenya Power. He added that he has since constructed a storey building on the suit property as per approved plans which he produced to the court. He requested the court to remove the Defendant from the encroached part within the suit property and return the same to him. Upon cross-examination, he stated that after buying the suit property, he was shown the boundaries and beacons thereof by the sellers Mukami Enterprises Limited. He also said that the Defendant has not shown him her title to the suit property notwithstanding her encroachment thereof. He clarified that the portion he is alleging the Defendant has encroached is a small parcel measuring 6 metres. He emphasized that his Certificate of Lease produced before this court shows the size of the suit property and the total area. He conceded that the Defendant was the first one to put up structures on the suit property but added that she was not entitled to do so as she was not the owner thereof. He emphasized that he is entitled to claim possession of every portion of the suit property.

The Plaintiff called a second witness, a gentleman by the name Charles Gibuthi Gathogo (PW2) who stated that he is a registered and licensed land surveyor. It was his testimony that the Plaintiff contacted him in January 2010 and requested him to visit the suit property to re-establish the boundary beacons. He said that upon purchasing the survey map of the area being Folio No. 173/86 from the Survey of Kenya (a copy of which he produced as Plaintiff's Exhibit No. 5), he proceeded to Kitengela where the suit property is located for the assignment. He noted that the boundary for the suit property was a fixed boundary and was a mathematical monument. He stated that he established that the suit property is defined by 4 beacons namely K60, K61, K106 and K105 and that they appear on the survey map. He further testified that their coordinates can be accurately determined. He further stated that their

measurements were given in the survey map to the accuracy of a centimeter. He gave the measurements as follows:

- 1) K60 to K61 is 29.99 metres
- 2) K105 to K106 is 29.91 metres
- 3) K106 to K61 is 19.73 metres
- 4) K105 to K60 is 22.06 metres

He gave the total area of the suit property as per the survey map as 0.0623 hectares. He further testified that the suit property borders a power line reserve of 15 metres, also borders parcel no. 189 and that the other two sides are bordering a 6 metre sewer and a road of 12 metres. He further stated that he was able to note an encroachment into the suit property of 4 metres on the eastern side and of 6 metres on the western side of the suit property. He further added that the trespasser is also encroaching on the power line reserve. He produced his Report and Sketch plan of what he saw as Plaintiff's Exhibit No. 16. During cross-examination, he said that he used a tape and a total station, a survey instrument which can measure distance, to carry out the assignment given to him by the Plaintiff. He clarified that at the time of the visit, the entire suit property had been constructed upon both by the Plaintiff and by the encroacher. He clarified that his interest was to establish the position of the beacons which he did. He also said that the survey plan he relied upon was done in 1984. He also added that the land is a leasehold allotted to the Plaintiff by the then Olkejuado County Council after which a survey was done and title issued to the Plaintiff. He further added that once a title deed is issued to a party, the same land is no longer available for allotment to anybody else.

The Plaintiff closed his case.

The Defendant, Mary Wanjiku William Ndungu, was the only witness on the defence side. It was her testimony that though she is a neighbor of the Plaintiff, she has not encroached into the suit property as she is in possession of her own Plot No. 463 which was allotted to her by the then Olkejuado County Council in 1996. She produced a copy of a letter dated 29th January 1997 addressed to her on change of user of Plot No. 463/Residential Noonkopir T. Centre. She then testified that she subsequently requested the then Olkejuado County Council to allot her a business plot upon which the number of the plot was changed to Plot No. 492. In support of that assertion, she produced a copy of her Letter of Allotment referring to Plot No. 492 /Business Noonkopir T. Centre dated 24th February 1997. She further informed the court that she is in occupation of her said plot and developed it with 6 houses and two shops well before the Plaintiff came along to purchase the suit property. It was her testimony that building plans of her said development on Plot No. 492 were submitted to and approved by the Olkejuado County Council. She expressed the view that those building plans would not have been approved if she was encroaching into the suit property. She further stated that it was the officers of the then Olkejuado County Council who showed her the location of Plot No. 492 on the ground and that they have never asked her to vacate the same. She denied encroaching on the suit property, insisting that the Plaintiff developed the suit property while she was still in occupation of her Plot No. 492. During cross-examination, she stated that she has no government map to show the location of her plot on the ground. She further stated that she was shown her plot on the ground by one Mr. Sababi stating that she could call him as a witness. She further conceded that she has not yet processed a title deed of her Plot No. 492. She further disclosed that part of her development on her plot was demolished halfway by Kenya Power as there was a power line overhead. She further stated that her husband is indeed called William Ndungu Mwangi. She rejected the survey map produced by the Plaintiff stating that she was capable of bringing her own map.

Issues for Determination:

- 1) Who owns the suit property?
- 2) What are the dimensions of the suit property?

- 3) Has the Defendant encroached into the suit property, and if so, to what extent?
- 4) If encroachment has been established, what orders should this court issue?
- 5) Who will bear the costs of this suit?

Determination:

1) Who owns the suit property?

The Plaintiff claims to be the registered proprietor of the suit property. In support of his assertion, he produced copies of his Certificate of Lease bearing his name, a Certificate of Official Search also bearing his name and a Sale Agreement between him and Mukami Enterprises Limited. The Defendant did not at any time challenge the Plaintiff's claim of ownership of the suit property. She never challenged this evidence put forward by the Plaintiff to prove that he is the registered proprietor of the suit property. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”

The Plaintiff produced his Certificate of Title showing that he is the registered proprietor of the suit property and the Defendant did not challenge the validity of the same on any grounds whatsoever. My finding is that the Plaintiff has proved to the satisfaction of this court that he is indeed the duly registered proprietor of the suit property.

It is noteworthy that the Defendant lays claim over Plot No. 492 which she insisted lies adjacent to the suit property. She did not produce any title deed to prove her assertion. She instead relied on a Letter of Allotment dated 24th February 2007 allocating to her Plot No. 492/Business Noonkopir Trading Centre. From that letter, it is not possible to decipher where on the ground the stated plot is located. The Defendant was therefore not able to convince this court that the portion of land she occupies is her Plot No. 492.

2) What are the dimensions of the suit property?

In demonstrating to this court the dimensions of the suit property, the Plaintiff produced to the court Survey Map of the area being Folio No. 173/86 from the Survey of Kenya (a copy of which he produced as Plaintiff's Exhibit No. 5) which showed the size of the suit property as 0.0623 Ha and measurements of the four sides of the suit property as follows:

- 1) K60 to K61 is 29.99 metres
- 2) K105 to K106 is 29.91 metres
- 3) K106 to K61 is 19.73 metres
- 4) K105 to K60 is 22.06 metres

From that Survey Map, he was able to demonstrate that the suit property lies adjacent to Plot No. 189 on one side, a 6 metre sewage lane on another side, a road on one side and a 15 metre power line on another side. The Defendant on her part did not produce any Survey Map showing the contrary. She was not able to demonstrate to the court where indeed her Plot No. 492 lies on the ground.

The court finds that the suit property is located in the position shown on Survey Map Folio No. 173/86 produced by the Plaintiff and that the Defendant has not proved to the court the location of her Plot No. 492.

3) Has the Defendant encroached into the suit property, and if so, to what extent?

What the Defendant claims to be Plot No. 492 remains unsupported by any evidence. According to the letter dated 14th May 2007 from the then County Council of Olkejuado address to the Defendant's husband, Mr. William Ndungu Mwathi, the County Council had this to say:

“It has been conclusively established that you have encroached on Plot No. 188 and Kenya Power & Lighting Company way leave.

This is now to request you to immediately vacate the site(s) you are in occupation since no records are in support of your continued occupation of the site(s).

As the Council make arrangements to clear the way leave, the proprietor of the above plot is advised to deal with you in the manner he deems fit.”

This letter was copied to the Plaintiff who was being referred to as the owner of the suit property. Following this, by a letter dated 4th July 2007 addressed to the Defendant's husband, Mr. William Ndungu Mwathi, the Kenya Power informed her that she had constructed a building underneath their 11KV Overhead Line to Kitengela Prisons off Kitengela Namanga Road. In her evidence, the Defendant confirmed that the structures she had built underneath this power line were demolished by Kenya Power. This essentially left her with the remaining structures located in the disputed portion in the suit property which the Plaintiff's claims. From all the evidence given in this suit, it is my finding that there is no Plot No. 492 in the disputed parcel of land. Flowing from my findings above and upon reliance on the Report of PW2 dated 21st January 2010 and produced as Plaintiff's Exhibit No. 16, I find that the Plaintiff has proved on a balance of probabilities demonstrated that the Defendant has encroached into the suit property as shown in that Report to the extent of 4 metres on one side and 6 metres on the opposite side. With this finding, it follows that the Plaintiff has the rights over the entire suit property as set out in **section 24(a)** of the **Land Registration Act** provides as follows:

“Subject to this Act, 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.”

One of the rights belonging to absolute ownership of land is the right to possession of the same to the exclusion of all others. This is precisely the right that the Plaintiff is seeking in this suit. This court has no difficulty in finding that indeed the Plaintiff is entitled to occupy the entire suit property to the exclusion of the Defendant. The Plaintiff is therefore entitled to vacant possession of the suit property by the Defendant.

4) If encroachment has been established, what orders should this court issue?

Arising from the foregoing, Judgment is hereby entered against the Defendant as follows:

- (a) A mandatory injunction be and is hereby issued to compel the Defendant whether by herself, her servants or agents to remove all unlawful structures erected on the suit property;
- (b) A permanent injunction be and is hereby issued prohibiting the Defendant whether by herself,

her servants or agents or otherwise howsoever from remaining upon or continuing in occupation of any part of the suit property;

(c) I will not award any damages for illegal trespass for the reason that the Plaintiff found the Defendant in occupation of the suit property upon purchase of the same.

(d) Costs of this suit shall be borne by the Defendant;

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE