



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 641 OF 2014

MARGARET WANJIRU NGACHA PLAINTIFF

VERSUS

MIRIAM ABDI & ANOTHER DEFENDANTS

JUDGMENT

1. This is a case of alleged encroachment to **L.R No. Nyeri/ Municipality/Block II/89** (hereinafter referred to as the suit property) by the defendants.
2. The plaintiff who is the registered proprietor of the suit property, claims that the defendants encroached onto the suit property on or about November, 2007 and despite having been issued with a notice to vacate, refused to vacate rendering this suit necessary.
3. The plaintiff prays for an order of eviction and demolition of the structures the defendants erected on the suit property.
4. In their statement of defence, the defendants have given a detailed account of the history of the suit property and contended that registration of the plaintiff's husband (Ngacha Ndeiya-deceased) as the proprietor of the suit property was effected by fraud and/or was irregular.
5. Explaining that they have lived in the suit property for a long period of time (since 1962), the defendants contend that they have a right to continue living therein.

EVIDENCE

The plaintiffs case

6. The plaintiff who testified as PW1, informed the court that her husband purchased plot No. Block 11/89 in 1997 from Fatuma Ali and was issued with a certificate of lease in 1997. After he had obtained the necessary approvals, he visited the suit property intending to develop the plot but on arrival, he found the defendants had encroached the suit property and erected some structures. Despite being issued with several notices to vacate, the defendants have refused to comply.
7. Upon being cross examined, she denied knowing Muslim Housing Society or the history of the plot in dispute and also the existence of a similar matter between herself, the defendants and Muslim Housing Society.

The Defence Case

8. On their part, the defendants informed the court that they have preferred a suit against Muslim Society and the plaintiff in connection with the impugned transfer of the suit property to the plaintiff's husband.

9. Upon being cross examined, the 1st defendant, who testified as **DW-1**, admitted that her father preferred a case to the Kadhi concerning the suit property and that the Kadhi held that the suit property belonged to the society. **DW-1** also acknowledged that:

(i) They did not sue the person who sold the suit property to the plaintiff's husband, Fatuma Ali, who passed on in 2008;

(ii) The seller of the suit property, Fatuma Ali, was not related to them in any way;

(iii) Their interest in the suit property was not registered;

(iv) They did not file a counter-claim claiming their right to the suit property.

10. Arguing that the plaintiff's husband should have conducted a physical search before buying the suit property, **DW-1** contended that had the plaintiff's husband conducted the said search, he would have discovered their interest in the suit property.

Submissions

11. On behalf of the plaintiff it is, *inter alia*, submitted that the evidence of the defendants is neither supported by their pleading (statement of defence) nor the documents produced in support thereof; that the alleged fraud in transfer of the suit property is not pleaded and that ownership of the suit property has been proved.

12. On behalf of the defendants, it is submitted that the defendants' possession and occupation of the suit property is an overriding interest to the plaintiff's interest in the suit property; that the plaintiff's claim is statute barred and that trespass has not been proved.

Analysis and Determination

13. From the pleadings and the submissions made in respect thereof, I find the issues for determination to be:

(i) Whether the plaintiff's claim is statute barred?

(ii) Whether the defendants' occupation of the suit property is an overriding interest to the plaintiff's interest to the suit property?

(iii) Whether the plaintiff has made up a case for being granted the orders sought?

(iv) What orders should the court make?

14. On whether the plaintiff's claim is statute barred, it is noteworthy that the alleged time bar is not pleaded as by law required. In this regard see **Order 2 Rule 4** of the Civil Procedure Rules which, *inter alia*, requires a party who intends to rely on the defence of time bar to plead it.

15. By raising the issue of time bar when they had not pleaded it, the defendants deviated from their pleading which they are not allowed to do. In this regard see **Order 2 Rule 4** as read with **Rule 6** of the Civil Procedure Rules which provide as follows:

16. It is clear from the foregoing provisions of the law, that the defendants were by law estopped from

relying on the alleged time bar against the defendant. Be that as it may, from the pleadings filed in this suit the defendant encroached the suit property in November, 2007. The suit was filed in February 2010, a period that is less than the period of time within which a claim for recovery of land can be brought under either **Section 4** or **7** of the Limitation of Actions Act, Cap 22 Laws of Kenya.

17. On whether the defendants' occupation of the suit property is an overriding interest to the plaintiff's proprietary rights, from the evidence led in this case in particular, the evidence that the defendants' predecessor in claim had lodged a claim before the Kadhi claiming interest in the suit property which was dismissed, the fact that the defendants have not raised a counter-claim against the plaintiff's interest in the suit property and in the absence of any evidence capable of showing that the defendants' claim to the suit property is genuine or the defendants have a legal basis for continued occupation of the suit property, I return a negative verdict to this issue.

18. On whether the plaintiff has made up a case for being granted the orders sought, from the evidence adduced in this case to wit, certificate of lease issued to the plaintiff's deceased husband, the notices issued to the defendants to vacate the suit property; photographs showing the activities of the defendants on the suit property and the D.W.1's acknowledgement that they received notices to vacate the suit property which notice they refused to heed, I have no doubt that the plaintiff has made up a case for being granted the orders sought. In this regard see **Section 25** of the Land Registration Act, 2012 which provides:

“The rights of a registered proprietor of land 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.

19. The interests that may affect registered land under **Section 28** of the Act are:-

“(a) spousal rights over matrimonial property;

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the

limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

20. In the circumstances of this case, the defendants have not demonstrated that the title held by the plaintiff is subject of any of the limitations contemplated by **Sections 25 and 28** of the Land Registration Act to warrant their continued occupation of the suit property.

21. That being the case, I find the defendants' occupation of the suit property to be unlawful and order them to demolish the structures they have erected on the suit property and vacate the suit property within 90 days of delivery of this judgment, failing which eviction orders shall issue without further recourse to the court. In addition, I award the plaintiff damages for trespass at Kshs.100,000 with interest, to be calculated at court rates from November, 2007 and also costs for the suit.

22. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 23rd day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ombongi h/b for Lucy Mwai for the plaintiff

Margaret Wanjiru Ngacha – plaintiff

N/A for the defendant

Court clerk - Esther