



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 129 OF 2013

“FAST TRACK SUIT”

NELIUS WAIYEGO MBURU.....PLAINTIFF

VERSUS

JOSEPH NDUNG’UDEFENDANT

JUDGMENT

The Plaintiff filed this suit against the Defendant seeking a declaration that L.R. No. Thika Municipality Block 6/790 Kiganjo Thika (“the Suit Property”) belongs to her. She also seeks a permanent injunction to restrain the Defendant from dealing with the Suit Property, an order for the eviction of the Defendant from the Suit Property and demolition by the Defendant of the structures he has erected on the Suit Property.

The Court record shows that the Defendant did enter appearance even though he never filed a defence or participated further in the matter. When the Defendant failed to file his defence, the Plaintiff requested the court to enter interlocutory judgment in her favour but the Court directed that she sets down her suit for hearing. There is an Affidavit of Service in the file confirming the Defendant was served with the hearing notice for the formal proof.

The Plaintiff is a teacher by profession residing in Thika. She last taught at Chania Boys School. The Plaintiff purchased the Suit Property, that is, Thika Municipality/6/790 measuring 0.09 ha from Thika Housing Co-operative Society (“Co-operative Society”) where she was a member. The Co-operative Society comprising of teachers would buy land and subdivide it and sell it to its members according to the shares they held in the Co-operative Society. On 25/09/2002 the Plaintiff was registered as a proprietor to the Suit Property. The Plaintiff tendered in evidence two receipts of Kshs. 10,000/= each issued by the Co-operative Society dated 3rd May 2006 and 10th April 2010 confirming payment of the fees for processing the title and issuance of the certificate of lease respectively. After paying the sums due, the Plaintiff was shown the two plots that she had balloted for and which had been allocated to her by the Co-operative Society. It was her evidence that she took possession of the land and approached an architect to draw plans for a residential house that she planned to construct on her property.

On 1/10/2012 whilst the Plaintiff was visiting the Suit Property she was shocked to discover that a stranger had built on her land. She complained to the Co-operative Society about the encroachment on her land. The Co-operative Society issued a demand letter to the Defendant on 8th October 2012 asking him to vacate the Suit Property in seven days and to demolish the structures he had erected on the land. This went unheeded. On the same date, the Co-operative Society wrote to the Town Clerk, Thika Municipality notifying the Clerk that the Defendant had constructed an unplanned structure on the Plaintiff’s land

while seeking the Town Clerk's assistance in having the structure removed to enable the Plaintiff carry on the development on her plot. The Plaintiff filed this Suit when the Defendant did not respond to the demands that he vacate the Suit Property.

The Plaintiff produced in evidence the share certificate confirming that she was a member of Mwalimu Co-operative Society Limited and that the Co-operative Society allocated plot no. 079 to her on 25/3/2000. She also attached a certificate of lease confirming that she was registered as a proprietor of L.R. Number Thika Municipality/Block 6/790 on 2/10/2002 together with the lease executed by the Commissioner of Lands leasing the land to her for 99 years with effect from 1/2/1998 at an annual rent of Kshs. 2,465/=. The lease over the Suit Property was registered at the Lands Office on 25/9/2002.

Both the Chairman of the Co-operative Society and Treasurer testified on behalf of the Plaintiff. The Chairman confirmed that indeed the Plaintiff was a member of the Co-operative Society. The Chairman gave evidence that the Co-operative Society bought 25 acres of land which it subdivided to create plots which were allocated to its members. The plots created measured an 1/8 acre each. Each member was allowed to purchase not more than 2 plots. He confirmed that the Plaintiff was one of the members who balloted for the plots and was registered as the owner of the Suit Property in 2002. He confirmed that the Co-operative Society processed the certificate of lease and according to their records the suit land belongs to the Plaintiff. The Treasurer of the Co-operative Society testified that the Cooperative Society only allocated plots to its Members who were teachers. The Treasurer stated he kept the record of all the members of the Cooperative Society and that according to their records; the Defendant has never been a member of their Co-operative Society. The witness maintained that the Defendant did not pay for any of the plots created from the land the Cooperative Society bought, subdivided and sold to its members. When the Defendant failed to respond to the notices demanding that he vacates the Suit Property, the officials of the Co-operative Society advised the Plaintiff to file suit.

The issues for determination in this suit are:

- i. Does the Suit Property belong to the Plaintiff?
- ii. Is the Defendant entitled to be on the Suit Property?
- iii. Should the Plaintiff be awarded general damages against the Defendant for trespass to her land and illegal occupation of the Plaintiff's land?
- iv. the Plaintiff be awarded exemplary damages together with interest at court rates?
- v. Should an order for the eviction of the Defendant be issued, and a further order that he demolishes the structure he built on the Suit Property and restores the land to the condition it was in prior to October 2012?

The evidence tendered in court confirms that the Plaintiff is the registered owner of the Suit Property. The Plaintiff was registered as the lessee of the Suit Property on 2nd October 2002. The Treasurer of the Co-operative Society stated in his evidence that the Co-operative Society released the lease and certificate of lease to the Plaintiff after she had cleared the payments due to the Co-operative Society.

Both the Chairman and Treasurer of the Co-operative Society denied that the Defendant was ever a member of their Co-operative Society. They also stated in their evidence that the Defendant neither bought any land from the Co-operative Society nor was he a teacher. They both testified that the Defendant is illegally on the Plaintiff's land. The Court finds that the Plaintiff has proved that she is the registered Lessee of the Suit Property.

Under Section 24 of the Land Registration Act, the registration of a person as a proprietor of lease vests in that person the leasehold interest described in the lease together with all the rights and privileges subject to all implied or expressed agreement and liabilities of the lease. The rights of a proprietor are not liable to be defeated except as provided in that Act and are held by that proprietor free from all other

interests and claims. Once the Plaintiff was registered as proprietor of the Suit Property, she was entitled to enjoy all the rights and privileges under the lease.

The Plaintiff has established a case on a balance of probability for the court to grant some of the reliefs she seeks in her plaint.

This Court declares that L.R. No. Thika Municipality Block 6/790 Kiganjo, Thika belongs to the Plaintiff. The Defendant is to be evicted from the Suit Property. The Defendant is ordered to demolish and remove all the structures, erections, debris, building materials and any other material from the Suit Property at his own cost. A permanent injunction is issued to restrain the Defendant, his servants or agents from entering the Suit Property and from interfering with the Plaintiff's quiet enjoyment of L.R. No. Thika Municipality Block 6/790 Kiganjo, Thika.

The Plaintiff's claim for exemplary and general damages against the Defendant must fail since these were not proved at the hearing. The Plaintiff is awarded the costs of the suit. Orders accordingly.

Dated and delivered at Nairobi this 6th day of April 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Gaturu for the Plaintiff

No appearance for the Defendant

Mr. V. Owuor- Court Assistant