



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 93 OF 2011

1. NAFTALI WAIGWA KIMARU

2. JUDY WANJIKU KIMARU

3. DAMARIS WAMBUI KIMARU

(Suing as legal representatives of

the estate of Mary Wangui Kimaru(deceased)....PLAINTIFFS

VERSUS

1. AGNES KAJUJU PHANES

2. PAUL MUTHOKA NDIVO

3. BENJAMIN WANJOHI.....DEFENDANTS

JUDGMENT

The plaintiffs are the legal representatives of one, Mary Wangui Kimaru, deceased (hereinafter referred to as “the deceased”). The deceased was at all material times the owner of all those parcels of land known as Plot No. 17 Embakasi/Njiru Self Help Group (hereinafter referred to as “Plot No.17”) and Plot No.34 Embakasi/Njiru Self Help Group (hereinafter referred to as “Plot No.34”). The two parcels of land are hereinafter referred to jointly as “the suit properties”. The plaintiffs brought this suit against the defendants on 4th March 2011 seeking the following reliefs:-

- a) A declaration that the estate of the deceased is the legal owner of the suit properties.
- b) An order of eviction against the defendants, their servants and/or agents from the suit properties.
- c) A declaration that the titles if any held by the defendants over the suit properties are fraudulent, illegal, null and void.
- d) A declaration that the defendants are trespassers on the suit properties.
- e) A permanent injunction restraining the defendants by themselves, their agents, servants, employees and/or whosoever from selling, transferring, alienating, charging, trespassing on, erecting or continuing to erect any structures, fencing, constructing and/or continuing with any further construction, dealings or interference in any manner whatsoever with the suit properties.

f) Costs of the suit together with interest thereon.

g) Any further or other alternative relief as the court may deem fit to grant.

In their plaint dated 3rd March 2011, the Plaintiffs stated as follows. The deceased was at all material times the proprietor of the suit properties. The suit properties were vested in the administrators of the estate of the deceased upon her demise. The deceased did not sell the suit properties during her lifetime to any of the defendants. In the year 2007, the plaintiffs learnt that the 1st and 2nd defendants had encroached on Plot No. 34 and Plot No. 17 respectively and commenced construction of structures thereon. Despite warnings given to the 1st and 2nd defendants by the plaintiffs and the police to desist from the said activities, they declined to comply and continued with the said acts of trespass on the suit properties. The plaintiffs learnt later that the 2nd defendant had transferred Plot No. 17 to the 3rd defendant.

The defendants were served with summons to enter appearance. They neither entered appearance nor filed a statement of defence. When the suit came up for hearing on 20th March 2017, the 3rd plaintiff gave evidence on behalf of the plaintiffs. The 3rd plaintiff (PW1) testified that the plaintiffs were the administrators of the estate of the deceased. The 1st plaintiff and the 2nd plaintiff were her father and sister respectively. PW1 stated that the suit properties were purchased by the deceased in July 2002 before she died in November 2002. The deceased purchased Plot No. 17 from one, Njoroge Ngugi and Plot No. 34 from Charles Mwaura. The deceased had put up a building foundation on the suit properties. She intended to put up buildings thereon. When the plaintiffs visited the suit properties in the year 2007, they found out that the 2nd defendant had put up a floor slab on the foundation that the deceased had put up on Plot No. 17. On Plot No. 34, they found the 1st defendant digging trenches around the same. The plaintiffs reported the two incidents to the police at Kayole Police Station. All the parties were summoned by the District Criminal Investigation Officer for a meeting. After reviewing the documents that were presented by the plaintiffs, the District Criminal Investigation Officer concluded that the 1st and 2nd defendants had trespassed on the suit properties. After the said meeting, the 2nd defendant who had been asked by the District Criminal Investigation Officer to vacate Plot No. 17 purported to sell the same to the 3rd defendant. On the other hand, the 1st defendant continued to dig trenches on Plot No. 34. They decided to come to court when the 1st and 2nd defendants defied the order from District Criminal Investigation Officer to vacate the suit properties. PW1 produced as exhibits among others, copies of, Certificate of Confirmation of Grant dated 5th May 2004 which was issued to the plaintiffs in respect of the estate of the deceased, Certificate of Ownership of Plot No. 17 issued to the deceased by Embakasi/Njiru United Self Help Group and Certificate of Ownership of Plot No. 34 also issued to the deceased by Embakasi/Njiru United Self Help Group. PW1 also produced as exhibits, receipts issued by Embakasi/Njiru United Self Help Group showing that the previous owners of the suit properties were allocated the said properties by the said group and that they paid for the same.

After the close of the plaintiffs' case, the plaintiff's advocate Mr. Olao informed the court that he did not wish to make closing submissions. He informed the court that he wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiffs against the defendants as prayed in the plaint. The plaintiffs' claim against the defendants is based on the tort of trespass. Trespass is 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 in this suit is whether the deceased was the owner of the suit properties and whether the defendants entered and occupied the same without any justifiable cause. The plaintiffs have demonstrated that the deceased was the owner of the suit properties by producing in evidence copies of certificates of ownership which were issued to the deceased by Embakasi/Njiru United Self Help Group upon purchase of the said properties by the deceased from the previous owners who were the original allottees. This suit was not defended by the defendants. The evidence that was tendered in court by the plaintiffs was not controverted by the defendants. The deceased's title to the suit properties was therefore not contested. PW1's testimony that the defendants had entered onto and commenced construction works

on the suit properties without the plaintiffs' consent or authority was also not challenged. The purported sale of Plot No. 17 by the 2nd defendant to the 3rd defendant was similarly not denied. The plaintiffs having proved the deceased's ownership of the suit properties and the defendants' entry and occupation thereof, the burden shifted to the defendants to justify their occupation of the properties. In the absence of any defence or evidence from the defendants, the only conclusion this court can make is that the defendants had no justifiable cause for entering and occupying the suit properties and as such they are trespassers thereon. For the foregoing reasons, I am satisfied that the plaintiffs have proved their claim against the defendants and that they are entitled to the prayers sought in the plaint.

In conclusion, I enter judgment for the plaintiffs against the defendants jointly and severally in terms of prayers (a), (b), (c), (d), and (e) in the plaint dated 3rd March 2011. The plaintiff shall also have the costs of the suit.

Delivered and Signed at Nairobi this 29th day of September 2017.

S.OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Olao for the Plaintiffs

No appearance for the Defendants

Kajuju Court Assistant