



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC CIVIL SUIT NO. 520 OF 2013

BETA ENGINEERING CO. LTD.....1ST PLAINTIFF

AMSCO CHEMICALS LIMITED.....2ND PLAINTIFF

VERSUS

JOSEPH MBITHI NZAU & 40 OTHERS.....DEFENDANT

JUDGEMENT

By a Plaint dated **2nd May, 2013**, the Plaintiffs came to court seeking for orders of eviction against the Defendants and vacant possession of **L.R No. 209/10309**(*hereinafter referred to as “the suit property”*), a declaration that that the continued occupation of the suit property by the Defendants be declared unlawful and amounting to trespass, general damages for trespass plus costs and interest of this suit.

The Plaintiffs averred that they are the registered proprietors in common of the Suit property having acquired the same on leasehold tenure from the Government of Kenya for a term of **99 years** from **1st February 1994**. That in or around **2006**, the Defendants at various times entered the suit property and commenced construction of illegal temporary structures thereupon comprising amongst others, residential houses, shops and stalls which they have let out to third parties who pay rent on monthly basis upon dishonestly misrepresenting that they are the owners of the suit property.

On **13th October 2011**, the Plaintiffs served the Defendants with Notices and Demand requiring vacant possession of the suit property and the demolition of the illegal structures erected therein. On receiving the notices the Defendants acknowledged and consequently set up a committee which held its meeting on **29th December 2011**. They resolved that the District Officers, Embakasi Division, convenes a meeting together with the representatives of the Plaintiffs and the Defendants for the purposes of the Defendants making a proposal for the purchase of the suit property. The parties convened a meeting on **10th July 2012**, wherein it was agreed by the Defendants that they were trespassers on the suit property, and the Defendants were to later convene a meeting among themselves and come up with a price offer for the Plaintiffs. By a letter dated **26th January 2012**, the Defendants offered **Kshs.10,000,000/=** which offer was deemed low by the Plaintiffs and subsequently the Plaintiffs wrote to the Defendants through their advocates on record on **1st February 2012**, and demanded Vacant Possession of the suit property. It is on this premise that the Plaintiffs demand the orders outlined hereinabove.

From the record, it is also clear that the Defendants through their representatives, the 1st- 4th Defendants filed **HC ELC 246 of 2012**, **Joseph Mbithi Nzau & Others...Vs....Beta Engineering Co. Ltd**, claiming

the land by way of adverse possession which the Plaintiffs claim is untenable given their acknowledgement of their title to the suit property.

Despite being served with Summons, the Defendants did not enter appearance and the Court directed that the matter proceed for formal proof.

Plaintiff's Evidence

The Plaintiff's Managing Director Engineer, **Samuel Ngatia Kabari** filed his witness statement on **3rd May 2016**, and testified in court on **2nd June 2016**. His evidence was as follows. He testified that he was the **Managing Director** of the 1st Plaintiff and he also represented the 2nd Plaintiff by virtue of a **Power of Attorney** which was registered as **IP/58661/1**, for purposes of prosecuting this suit. He testified that the suit property which is situated on **Falcon Road, Industrial area** was allotted to the Plaintiffs back in the **year 1994**, by the **Government of Kenya** as a **Lease** for a period of **99 years**. Subsequent thereto, the Plaintiffs embarked on seeking subdivision approvals from the Commissioner of Lands and in the **year 2003**, they obtained building plans for construction of engineering workshops/warehouses. He further testified that their plans to develop the suit property were constrained by poor access roads resultant of poor drainage facilities within the area. He produced the Grant **No.63717** in respect of the suit property and the development plans and approval as set out in the Architectural drawings. It was his testimony that they continued to meet their obligations to government agencies to wit, the land rates and rents payments.

In or around the **year 2006**, the Plaintiffs noticed illegal structures being erected on the suit property. Further, that after investigating the same, they came to find out that it was the Defendants who had encroached on their parcel of land without authority from the Plaintiffs. The said erected structures had being let out to tenants. Consequent thereto, vide a letter dated **13th December 2011**, the Plaintiffs served the Defendants with Notice to Vacate the suit property. Immediately thereafter, the Defendants requested for a meeting with the Plaintiffs through the District Officer, Embakasi Division at which meeting they expressed the intention to purchase the suit property from the Plaintiffs. This was followed up by the meeting held on **10th January 2012**, wherein the Defendants were represented by some of their members in particular the 1st Defendant who took minutes for the said meeting. The Defendants in this meeting acknowledged that the suit property was owned by the Plaintiffs but expressed desire to purchase the same. The outcome of the meeting was that the Defendants would sit amongst themselves and come up with a considerable consideration which they would then offer to the Plaintiffs as purchase price. This was done and the Defendants vide their letter addressed to the Plaintiffs dated **26th January 2012**, made an offer of

Kshs.10,000,000/=. This offer was rejected by the Plaintiffs on the grounds that it fell way below the market value of the property. Thereafter, the Plaintiffs made a counter offer of **Kshs.80,000,000/=** vide their letter dated **1st February 2012**, which the Defendants rejected. It was a result of that rejection that the Defendants filed Nairobi **HC ELC Case No.246 of 2012**, seeking injunctive orders. That application and numerous applications made in that case were dismissed by this Court and currently the suit remains unprosecuted till todate. He invited the Court to look into that file.

The Plaintiffs filed their **Written Submissions** on **15th July 2016**. This Court has carefully read them and summarizes them as follows; The Plaintiffs framed 3 issues for determination by this Honourable Court.

- 1. Whether the Plaintiffs were the registered owners of the suit property?**
- 2. Whether the Defendants have illegally occupied the Suit property?**
- 3. Whether the Plaintiffs are entitled to the Orders sought?**

The Plaintiffs submitted that by virtue of possessing the Original Grant issued by the Government in respect of the suit property, effectively exhibited that they were the registered owners of the parcel of land. Secondly, by virtue that they discharged their obligations in terms of payment of rates and rent in

respect of the suit property and buttressed by the minutes of the meeting held between themselves and the Defendants representatives who(the Defendants) acknowledged that the suit property was registered and owned by the Plaintiffs. The Plaintiffs are rightfully the registered proprietors of the suit property. The Plaintiffs submitted that their ownership was perfected by dint of Sections 24 to 26 of the Land Registration Act 2012, which deals with the effect of registration and quoted the case of **Njuwangu Holdings Ltd... Vs.. Langata KPA Nairobi & 5 others (2014) eKLR** wherein **Justice Mutungi** in two separate passages held:-

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

“Thus, it is patently clear that in the instant case, unless it is established the plaintiff’s title is challengeable under section 26(1) (a) (b) of the Land Registration Act or is found to fall within the exemption of protection under Article 40(6) of the Constitution, the title is indefeasible. As I have held no fraud has been proved and/or established to which the plaintiff can be said to have been a party, I find that the plaintiff would be entitled to have his property rights protected since prima facie he holds an indefeasible title”

On the second limb the Plaintiffs submitted on the illegal occupation of the suit property by the Defendants. The Plaintiffs submitted that the Defendants were illegally trespassing on the property. This was supported by the fact that all the parties herein held a meeting on **10th January 2012**,

wherein the Defendants including the District Officer, Embakasi held a meeting and it was affirmed in the minutes and in particular agenda on page 16 which captured the unlawful occupation over the suit property by the Defendants. In that meeting it was acknowledged that the Defendants were illegal occupants of the suit property and they also proposed their desire to purchase the suit property from the Plaintiffs as the registered owners which affirmed that they illegally occupied the suit land. Further thereto, the Plaintiffs submitted that the Defendants had erected structures on the suit land illegally and were renting them out to unsuspecting tenants. This was contrary to the fact that they were not the proprietors of the land as they did not pay any rent or rates and it goes against the Zoning laws of the neighborhood, which is an industrial property zone and not supposed to be used for residential purposes.

The Plaintiffs further submitted on the case **Milimani HC ELC No. 246 of 2012, Joseph Mbithi Nzau & Others..Vs..Beta Engineering Co. Ltd.**, wherein the Defendants had sued the Plaintiffs claiming adverse possession over the suit property. It was their submission that the suit had sought an interlocutory application which was denied by Justice Kimondo as shown in the Ruling dated **25th July 2012**, and which was produced as evidence in this case. The suit was never prosecuted and numerous applications for stay were all denied and this court is invited to cross check the said facts from the file. It was the Plaintiffs submission that the ground of adverse possession was not maintainable as the Defendants were not in the land for the requisite period of **12 years** for a claim of adverse possession to succeed.

Counsel cited the case of **Edginton..Vs...Calrk (1963) 3 ALL ER 468**, wherein it was held that the question of whether by offering to purchase some land of which the Plaintiff therein had been in possession amounted to acknowledgement of the title of the person who was the true owner so as to prevent himself from acquiring a title by adverse possession. The Plaintiffs invited this Court to take into consideration the said authority bearing in mind that the Defendants also made an offer to purchase the suit property and therefore any claim over the land by adverse possession was unmaintainable. Counsel quoted Section 23(1) (b) of the Law of Limitations Act in support of this contention. In conclusion the Plaintiffs submitted that they were entitled to the orders sought and sought to rely on the cases of **Cornelius Warutere ...Vs...Justus Kibuchi Gaturuhu(2009)eKLR**, and **James Nguru Kathuri...Vs...Duncan Runji Kathuri (2010) eKLR**.

On the issue of damages pursuant to the trespass, the Plaintiffs submitted that the Defendants were enjoying rent from their tenants at the behest of the Plaintiffs as consequently they should be held accountable for general damages for such amounts as this Court deems fit.

The Court has carefully considered the pleadings, the evidence, exhibits, the submissions and the cases relied on. The Court finds that the issues for determination are:

- 1. Whether the Plaintiffs have an indefeasible title over the suit property L.R No. L.R No. 209/10309?**
- 2. Whether the Defendants are trespassers and/or illegal occupants on the suit?**
- 3. Whether the Plaintiffs have proved their case and what orders are they entitled to.**

1. Whether the Plaintiffs have an indefeasible Title over the suit property L.R No.209/10309?

This Court is convinced that the Plaintiffs are the registered owners of the suit property by virtue of the Certificate of Grant and meeting the obligations in terms of rent and rates payable to the Government. Further thereto, having not rebuttal evidence from the Defendants to exhibit an overriding interest, the suit property is lawfully owned by the Plaintiffs as provided by Section 26(1) of the Land Registration Act:-

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 leased, 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 and to require noting on the register, unless the contrary is expressed in the register.**

2. Whether the Defendants are trespassers and/or illegal occupants on the suit?

The Defendants entered the suit property in or around the **year 2006**, and erected illegal structures which they let out to tenants. Vide a meeting held on **10th January 2012**, wherein the Defendants were represented by some of their members in particular the 1st Defendant who took minutes for the said meeting. The Defendants in this meeting acknowledged that the suit property was owned by the Plaintiffs but expressed desire to purchase the same. The Defendants clearly knew they had no right to the suit property and when they were requested to vacate they declined to do so.

In **Jamila Ebrahim Attarwalla & Another VS...Hussein Abdulaziz & Another [2014] eKLR**, Justice **Mary Kasango**, in holding the Defendants as squatters held that:-

“I do make a finding that the Defendants are trespassers on the suit property. Being trespassers they cannot assert any right on that property. In that regard a case in point is Sophie Wanjiku John... Vs.. Jane Mwihaki Kimani [2013]eKLR, where it was stated-

“In the case of Mbira ...V.. Gachuhi 2002 1 EA Page 138 Kuloba J. held that; ‘Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser.’”

She cited a second pertinent passage from the Case of **Cecilia Wanjiku Nganga...Vs...Francis Gitau Mungai [2014]eKLR**, where the Court considered the decision on the rights of registered owner of land as follows:-

In the case of *Mombasa Technical & Training Institute... Vs... Agnes Nyevu Charo and Others, Mombasa Civil Appeal No. 282 of 2010, the Court of Appeal stated as follows:*

‘Regardless of the length of time the Respondents remained on the suit property, their status remained that of illegal squatters.’

This Court is also persuaded by the authorities cited by the Plaintiffs ***Cornelius Warutere...Vs..Justus Kibuch Gaturuhu (2009) eKLR*** and ***James Nguru Kathuri ...Vs... Duncan Runji Kathuri (2010)***. Therefore the Court makes a finding that the Defendants are trespassers to the suit property.

3. Whether the Plaintiffs have proved their case and what orders are they entitled to?

The Plaintiffs have adduced evidence that they are the *bonafide* registered proprietors of the suit property. Their rights to the said property are protected under Sections 24 and 26 of the Land Registration Act 2012. The two Sections vest in a person/entities who have absolute proprietorship together all rights and privileges and the certificate of Grant issued to them shall be taken by all courts as prima facie evidence that the entity named is the absolute owner. The Plaintiffs are therefore entitled to the Order of Vacant Possession of ***L.R No. L.R No. 209/10309***. The Court will therefore enter judgement as prayed for in the Plaint and specifically an Order of Eviction and Vacant Possession of ***L.R No. 209/10309***.

With regard to damages for trespass, It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of ***Park Towers Ltd ...Vs... John Mithamo Njika & 7 others (2014) eKLR*** where ***J.M Mutungi J.***, stated:-

“I agree with the learned Judges that, where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”

In issue number (1) above, the Court finds that the evidence adduced by the plaintiffs is sufficient to prove that Defendants have been accruing rent to the detriment of the Plaintiffs. In my view the Plaintiffs are entitled to raise a claim in respect of those infractions.

For the foregoing reasons, the Court finds and holds that the Plaintiffs suffered loss and damage to wit, unwarranted interference of their property and the rights which accrue to a property owner.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities. For the above reasons, the Court ***enters Judgement for the Plaintiffs against the Defendants*** as prayed in the Plaint ***in terms of prayers No.(a) (b)***.

For ***prayer No.(d), general damages*** in the tune of ***Kshs.2,000,000/= plus interest*** thereon. ***Cost of the suit and interest*** thereon.

For ***Prayer No.(c)***, the ***Defendants are ordered to vacate the suit property within a period of 45 days*** from the date of this Judgement. ***Failure to do so, eviction order to issue.***

It is so ordered.

Dated, Signed and Delivered at Nairobi this 7th day of September, 2017.

L. GACHERU

JUDGE

7/9/2017

In the presence of

Mr. Njoroge for 1st Plaintiff and 2nd Plaintiff

No appearance for Defendant

Philis - Court clerk.

L. GACHERU

JUDGE

7/9/2017