



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 853 OF 2013

1. MICHAEL MUGI MUYA

2. HILDA NJOKI MUGO

3. UTHIRU HAKA AGE GROUP 1948 Suing through

LEONARD NJENGA MACHARIA-CHAIRMAN

GLADWEL WANJIRU KIBARA-SECRETARY

SOLOMON NGURE MUTHUO-TREASURER.....PLAINTIFFS

VERSUS

KENEDY KOIKAI.....DEFENDANT

JUDGMENT

The plaintiffs were at all material times the registered proprietors of all those parcels of land known as L.R No. Kajiado/Kisaju/1523, L.R No. Kajiado/Kisaju/1524 and L.R No. Kajiado/Kisaju/1525 respectively (hereinafter jointly referred to as “the suit properties”). The suit properties were subdivisions of the hitherto larger parcel of land known as L.R No. Kajiado/Kisaju/1172(hereinafter referred to as “Plot No.1172”). The defendant was at all material times the owner of a parcel of land known as L.R No. Kajiado/Kisaju/1171(hereinafter referred to as “Plot No.1171”) which was situated adjacent to the suit properties. The plaintiffs brought this suit against the defendant on 15th July 2013. The plaint was amended on 30th April 2015.

In the amended plaint, the plaintiffs sought the following reliefs against the defendant:-

- a) A declaration that the plaintiffs are the proprietors of the suit properties.
- b) A declaration that the defendant is a trespasser on the suit properties.
- c) An order of eviction against the defendant from the suit properties.
- d) A permanent injunction restraining the defendant by himself and/or his agents or employees from entering or remaining on the suit properties.
- e) Damages for loss of use.

f) An order for the officer in charge of Isinya Police Station to enforce the eviction order against the defendant.

g) Costs of the suit together with interest thereon.

In their amended plaint dated 13th March 2015, the plaintiffs averred that they are the registered proprietors of the suit properties while the defendant was the owner of Plot No. 1171 which was adjoining the suit properties. In the year 2006 or thereabouts, the defendant encroached on the suit properties without any lawful cause. The plaintiffs lodged a complaint with the Registrar of Lands at Kajiado over this encroachment. The Registrar of Lands, Kajiado treated the complaint as a boundary dispute, heard the parties and made a decision on 12th March 2013. The Land Registrar made a finding that the defendant had trespassed on the suit properties. Even after this finding, the defendant refused to vacate the suit properties and has remained in occupation thereof as a trespasser.

The defendant entered appearance on 5th August 2013 but did not file a statement of defence. The suit was fixed for formal proof on 7th June 2016. The defendant did not attend court for the hearing although he was duly served with a hearing notice. The 3rd plaintiff's chairman, Leonard Njenga Macharia (PW1) gave evidence on behalf of the 3rd plaintiff and closed the 3rd plaintiff's case. In his evidence, PW1 stated as follows. One, Moiyae Ole Pertet sold to the 3rd plaintiff land at Kisaju. Those who purchased land from Moiyae Ole Pertet were eight in number and they purchased a large parcel of land. After subdivision, each purchaser was issued with individual title. The 3rd plaintiff was issued with a title for L.R No. Kajiado/Kisaju/1525. The purchasers did not develop their parcels of land immediately. When the 3rd plaintiff visited its parcel of land after some time, it found the defendant in occupation of the same. The dispute was referred to the Land Registrar, Kajiado. The Land Registrar ruled that the defendant was in occupation of the 3rd plaintiff's land and asked him to vacate the same. The defendant refused to vacate the 3rd plaintiff's land despite that ruling by the Land Registrar, Kajiado. The 3rd plaintiff was offered alternative land but declined the offer. The defendant is still in occupation of L.R No. Kajiado/Kisaju/1525 owned by the 3rd plaintiff.

PW1 urged the court to issue an order for the eviction of the defendant from L.R No. Kajiado/Kisaju/1525. He also prayed for damages for trespass. PW1 produced in evidence as exhibits a copy of the title deed for L.R No. Kajiado/Kisaju/1525 and an extract of the register for the property as P.EXH. 1 and P.EXH. 2 respectively. The 1st and 2nd plaintiffs did not give evidence in proof of their respective claims even after an adjournment was granted on 7th June 2016 to enable them do so.

After the close of the plaintiffs' case, the plaintiffs' advocate Ms. Muigai informed the court that she did not wish to make any closing submissions. She informed the court that she wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiffs against the defendant as prayed in the amended plaint. The plaintiffs' claim against the defendant is based on the tort of trespass. Trespass is 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 is whether the plaintiffs have proved that they are the proprietors of the suit properties and that the defendant has entered and occupied the same without any justifiable cause. The 3rd plaintiff has demonstrated that it is the registered owner of L.R No. Kajiado/Kisaju/1525 (hereinafter referred to as "Plot No. 1525"). PW1 who gave evidence for the 3rd plaintiff produced a copy of the title deed for Plot No. 1525 in the name of the 3rd plaintiff and a copy of an extract of the register for Plot No. 1525 which also showed that the said parcel of land was registered in the name of the 3rd plaintiff as at the time of filing of this suit.

Under section 24 of the Land Registration Act, 2012, the registration of the 3rd plaintiff as the proprietor of Plot No. 1525 vests upon the 3rd plaintiff absolute ownership thereof together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the 3rd plaintiff's rights over

Plot No. 1525 are indefeasible except as provided under the said Act. Section 25 (1) of the said provides as follows:-

(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 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.

The suit was not defended by the defendant. The defendant did not place any evidence or material before the court to justify his continued occupation of Plot No. 1525. PW1's evidence was not controverted by the defendant. The 3rd plaintiff's title to the suit property was not contested. PW1's testimony that the defendant had entered onto and occupied Plot No. 1525 without the 3rd plaintiff's consent or authority was also not challenged. The 3rd plaintiff having proved its ownership of Plot No. 1525 and the defendant's entry and occupation thereof, the onus was upon the defendant to justify his occupation of the property.

In the absence of any evidence from the defendant, the only conclusion this court can make is that the defendant had no justifiable cause for entering and occupying Plot No. 1525 and as such he is a trespasser thereon. For the foregoing reasons, I am satisfied that the 3rd plaintiff has proved its claim against the defendant. The 3rd plaintiff is therefore entitled to the prayers sought in the amended plaint as relates to Plot No. 1525 save for prayer (f). As I have stated earlier, the 1st and 2nd plaintiffs did not give evidence in proof of their claims. I therefore find their claims not proved.

In conclusion, I hereby enter judgment for the 3rd plaintiff against the defendant as follows:

1. I declare that the 3rd plaintiff is the lawful proprietor of L.R No. Kajiado/Kisaju/1525 and that the defendant is a trespasser on the said property.
2. The defendant shall vacate and handover to the 3rd plaintiff L.R No. Kajiado/Kisaju/1525 within 90 days from the date hereof failure to which the 3rd plaintiff shall be at liberty to apply to court for warrant for his forceful eviction from the property.
3. Subject to (2) above, a permanent injunction is issued restraining the defendant his agents or employees from entering or remaining on L.R No. Kajiado/Kisaju/1525.
4. Kshs. 100,000/- as damages for trespass.
5. The costs of the suit.

A copy of this judgment and the decree extracted therefrom shall be served upon the defendant by the 3rd plaintiff. The 3rd plaintiff shall file in court an affidavit of service of the said documents upon the defendant. The filing of the said affidavit of service shall be a condition precedent to any further proceedings herein at the instance of the 3rd plaintiff.

Delivered and Signed at Nairobi this 15th day of September, 2017

S.OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Wachira h/b for Muigai for the Plaintiffs

No appearance for the Defendant

Catherine Court Assistant