



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.24 OF 2017

VERONICA WANGARI KABOGO.....PLAINTIFF

-VERSUS-

JULIUS GITHOME.....1ST DEFENDANT

ABEDNEGO GACHOMO.....2ND DEFENDANT

GEDION WAMBUA.....3RD DEFENDANT

SHADRACK NYONGESA T/A PRAYER RIVIVAL RIRE MINISTRY.....4TH DEFENDANT

JUDGEMENT

By a *Plaint* dated **4th February 2013**, the Plaintiff herein **Veronica Wangari Kabogo** has sought for various reliefs against the Defendants. The Orders sought are:-

- a) An order of eviction against the Defendants, their family members, heirs, servants or agents from land parcel nos. Thika Municipality Block 2/1030 and 1031 with all structures thereon.***
- b) An order of permanent injunction against the Defendants, their family members, heirs, servants or agents barring them from entering, and/or interfering in any manner with land parcel no. Thika Municipality Block 2/1030 and 1031.***
- c) Costs of this suit.***
- d) Any other relief as the Court deems just under the circumstances.***

In her statement of claim, the Plaintiff alleged that she is the registered owner of **Thika Municipality Block 2/1030 and 1031** (herein referred to as the suit land). She averred that she applied to be allotted this suit land on **14th April 2005**, after utilizing it for **20 years**. Her application was to the Commissioner of Lands. However on **14th August 2007**, the Defendants entered into the said suit property and claimed ownership. Further, that the said dispute was arbitrated by the District Commissioner, Thika and the same was resolved in favour of the Plaintiff.

Further on **11th July 2008**, yet another person emerged claiming to hold titles to the said parcels of land and upon investigations, it was found that the said titles were not genuine. It was her further averments

that on or about **26th November 2009**, the department of lands allotted the suit properties to the Plaintiff and consequently on or about **5th July 2012**, the Ministry of Lands issued the Plaintiff with the certificates of lease for **Thika Municipality Block 2/1030 and 1031** respectively. She further contended that despite being issued with certificates of lease for both parcels the Defendants have unlawfully, wrongfully and illegally continued to remain on the suit lands. She therefore urged the Court to issue an order of eviction and permanent injunction barring the Defendants from entering or in any manner whatsoever interfering with the suit properties.

Simultaneous to the Complaint, the Plaintiff filed a Notice of Motion application even dated and sought for injunctive orders. Subsequent

thereto, the Defendants entered Appearance through the **Law Firm of Ng'ang'a Munene & Co. Advocates** on **20th February 2013**. The Defendants later filed a Notice of **Change of Advocates** to **Mutuli & Associates** and subsequently they filed a Replying Affidavit in opposition to the Notice of Motion dated **4th February 2013**.

The Replying Affidavit was sworn by **Julius Githome**, one of the Defendants herein who alleged that they leased the suit property from **Elizabeth Wambui Kamichar**, who was represented by **Nicholas Muhoho Kariuki**. Later, the Defendants sought to purchase the suit property from the said **Elizabeth Wambui Kamichar**, but upon carrying investigations they noted that the Plaintiff herein had applied to be allotted the suit properties but she was informed the same was not available for allocation.

The said application was canvassed by way of written submissions and on **23rd May 2014**, the Court issued an order of *status quo* to the effect that there would be no development carried out on the suit premises. The parties were urged to comply with Order 11 of the Civil Procedure Rules within a period of 30 days from the date thereof. However, even with the above order of compliance with Order 11, the Defendants failed to file their Defence. The suit was therefore set down for hearing in default of filing defence by the Defendants.

This matter proceeded for hearing *ex parte* on **25th May 2017**, wherein the Plaintiff gave evidence for herself and called no witness. The Plaintiff reiterated the contents of her Complaint and averred that she is the registered owner of **Thika Municipality Block 2/1030 and 1013**, which are adjacent to each other. She also testified that she has occupied, utilized and used the suit land since **1985** and that she has put up a temporary structure. She alleged that the Defendants have invaded the said parcels of land and thus this case. She urged the Court to allow her claim. She produced copies of the title deeds for the two parcels of land and also her bundle of documents as exhibit no.1. She reiterated her allegations that she was allotted these parcels of land by the Government. The Plaintiff further produced her approved building plans as exhibit no.2. She urged the Court to allow her claim.

After the close of the Plaintiff's case, the **Law Firm of Kamiro R.N. & Co. Advocates** for the Plaintiff filed the written submissions and submitted that the Plaintiff has proved her case on the required standard. He urged the Court to enter Judgement in favour of the Plaintiff as prayed in the Complaint.

This Court has now carefully considered the available evidence and the exhibits produced in Court. The Court has also considered the written submissions and the relevant provisions of law and the Court will render itself as follows:-

Though the Defendants herein did not file their Defence and even participate in prosecution of this suit, the Plaintiff herein had the onus of proving her case on the required standard of balance of probabilities. It is trite law that he/she who alleges must prove. See Section 107 of the Evidence Act.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact,

(3) It is said that the burden of proof lies on that person.

The Plaintiff herein therefore had that onerous task of calling sufficient evidence to prove her case on the required standard.

It is not in doubt that the Plaintiff herein is in possession of certificate of lease for **Thika Municipality Block 2/1030 and 1031**, which were issued to her on **5th July 2012**, under the regime of Registered Land Act Cap 300. Under the above stated regime of registration, Section 27(b) provides that:-

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

The Plaintiff alleged that she had been using the suit properties since the **year 1985** and in the **year 2005**, she applied to the Commissioner of Lands for allocation of the suit properties. She attached the said application letter dated **14th April 2005**.

Further she produced several other letters showing that there was a dispute between herself and the Defendants over the suit properties which dispute was arbitrated by the District Commissioner, Thika on several Occasions. The dispute was resolved in her favour and vide a letter dated **11th July 2008**, the District Land Registrar, Thika stated that the documents that were being relied upon by the Defendants were questionable. It is evident that the Plaintiff was issued with letters of allotment for these suit properties on **7th July 2010**. Thereafter she was issued with the certificates of lease.

Having been issued with the letter of allotment and later certificates of lease, the Plaintiff's root of her titles can be traced. It is therefore sufficient for her to wave her certificates of title and claim ownership became the root of the said certificates of lease can be traced.

Though the Defendants have alleged that this suit property was issued to **Nelas Wanjiru Maina** as at **22nd September 2010**, the said Defendants did not file their Defence or adduce their evidence in Court. The Defendants did not appear in Court to challenge the Plaintiff's evidence and averments. Further by a letter dated **11th July 2008**, by **P. M. Kihiu**, District Land Registrar, the Defendants documents were challenged and found not genuine. The Defendants also did not avail themselves in Court to defend the said documents.

The Plaintiff has produced evidence to show that she was first issued with letters of allotment and after payment of the stand premiums, she was later issued with certificates of lease. In the case of **Dr. Joseph M. K. Ngok..Vs..Mojjo Ole Keiuwa & 4 Others**, the Court held that:-

“Titles to the leased property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter an actual issuance thereafter of a title document in accordance with the law”.

The Plaintiff has shown that the above process was followed. Further the Plaintiff had averred that she has been utilizing the land since **1985** and was entitled to being allocated the same by the Government. The Court of Appeal in the case of **Mwangi & Another..Vs...Mwangi (1986) KLR 328** held that:-

“The right of a person in possession or occupation of land has a equitable right which are binding on the land”.

Equally, the Plaintiff herein who has been in possession and occupation of this suit properties since **1985** has an equitable right which is binding on the suit land. The Plaintiff alleged that the Defendants have encroached on the suit properties. However, the Court having found that the Plaintiff has shown how she acquired the certificates of lease, then this Court has no reason to doubt her ownership of the said suit

properties.

Being the holder of the leaseholds, then the Plaintiff has her rights protected under Section 25 of the Land Registration Act and can only be defeated by provision of the stated Act. The said Section provides:-

“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.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved her case on a balance of probabilities. Consequently, the Court ***allows the Plaintiff's claim in terms of prayers no.(a),(b) and (c).***

- Further on ***prayers no.(d)*** the Court finds that the Defendants documents were challenged by the District Land Registrar, Thika. As provided by Section 80(1) of the Land Registration Act, the ***Court finds and direct that the title documents held by the Defendants herein be cancelled forthwith and the Register to reflect the Plaintiff herein as the sole proprietor of the suit property.***
- Therefore the ***Court directs and orders the Defendants herein to voluntarily move out of the suit properties within a period of 30 days from the date hereof. Failure to do so, eviction order to issue.***
- Further the ***Plaintiff to serve the Defendants with a Notice of***

entry of Judgement and the orders granted herein.

It is so ordered.

Dated, Signed and Delivered at Thika this **13th** day of **October 2017**.

L. GACHERU

JUDGE

In the presence of

M/S Mwangi holding brief for Mr. Kamiro for Plaintiff

No appearance for Defendants

Timothy - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open Court in the presence of M/S Mwangi holding brief for M/S kamiro and absence of the Defendants.

L. GACHERU

JUDGE

13/10/2017