



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC NO. 97 OF 2014

(FORMERLY KERUGOYA 54 OF 2014)

JOHN NYAGA NTHIGA.....PLAINTIFF

VERSUS

KITHAKA CUVI1ST DEFENDANT

NDERI KITHAKA.....2ND DEFENDANT

NYAGA KANINI.....3RD DEFENDANT

MUTHONI KITHAKA.....4TH DEFENDANT

MWANIKI KITHAKA.....5TH DEFENDANT

J U D G E M E N T

1. By a plaint dated 10 July 2007 and filed on 11 July 2007 the Plaintiff sought the following reliefs against the 1st, 2nd, 3rd, 4th and 5th Defendants:

a. That the 1st, 2nd, 3rd, and 4th defendants do remove themselves, their families, servants, properties and/or any other belongings from land parcel Number Mbeti/Kiamuringa/2325 within 30 days from the date of Judgment and that in default the 1st, 2nd, 3rd, and 4th Defendants be forcefully removed and/or evicted from Land parcel number Mbeti/Kiamuringa/2325.

b. That the 5th Defendant do remove himself, his family members, servants, agents properties and/or belongings from Land Parcel Number Mbeti/Kiamuringa/1451 within 30 days from the date of judgment and in default the 5th Defendant, his family members and properties be forcefully evicted and/or removed form Land parcel Number Mbeti/Kiamuringa/1451.

c. Costs of the suit.

2. The plaintiff averred in the body of the plaint that he was the registered proprietor of **Title No's MBETI/KIAMURINGA/2325 and 1451** (hereinafter called the suit properties) and that the Defendants had in the "late 1990s" wrongfully and unlawfully trespassed upon and occupied the suit properties. It was further pleaded that the Defendants' said actions had interfered with the Plaintiff's exercise of his proprietary rights over the said property.

3. The Defendants entered appearance and filed a joint statement of defence through the firm of Eddie Njiru & Co. Advocates in which they denied that the Plaintiff was the lawful proprietor of the suit properties. They claimed to have taken lawful occupation of the suit properties between 1940 – 1968. The 5th Defendant pleaded to have been in lawful occupation of parcel No. 1451 since 1970. They did not however, plead particulars upon which it could be inferred that they were in lawful occupation. They pleaded in the alternative and without prejudice to the foregoing, that the Plaintiff's right of action had been extinguished by operation of law without providing any particulars.

4. The court has noted from the court file that on 24 July 2008 the Defendant filed a notice of Preliminary Objection stating that the court lacked original jurisdiction to hear the suit and that the Plaintiff's right of action was statute barred by operation of the Limitation of Actions Act (Cap 22). There was no evidence on record to show that the said Preliminary Objection was ever prosecuted. The Defendants did not also file any documents or witness statements under Order 11 of the Civil procedure Rules in preparation for trial.

5. When the suit came up for hearing on 20 June 2017, Mr. Okwaro for the Plaintiff informed the court that the 1st Defendant was deceased and that the 2nd and 3rd Defendants had vacated. The suit was therefore to proceed against the 4th and 5th Defendants only. On that day, the suit was by consent of counsels for both parties stood over to 20 July 2017 for hearing. The Defendants were given 21 days to comply with Order 11 of the Civil Procedure Rules.

6. On 20 July 2017, the Plaintiff's counsel attended court ready to proceed with one witness but neither the Defendants nor their advocate turned up for trial. The court consequently allowed the Plaintiff to proceed *ex parte*. The Plaintiff upon being duly sworn, informed the court that he was a retired Civil Servant and that he was aware that the 1st Defendant was deceased, and that the 2nd and 3rd Defendants had vacated the suit properties. He therefore wished to proceed with the case for the eviction of the 4th and 5th Defendants.

7. The Plaintiff was shown a copy of his witness statement dated 4 February 2015 which he owned and adopted as his sworn testimony. He was also referred to his list of documents dated 13 March 2008 and filed on 22 July 2008. He produced all the documents listed therein as exhibits P1-P6. The Plaintiff reiterated that he was the registered proprietor of the suit properties and that the 4th and 5th Defendants had no claim or legitimate claim thereon. He therefore urged the court to allow his claim and grant him an eviction order against them together with costs.

8. The parties herein do not appear to have framed and filed the issues for determination. The court will therefore frame the issues arising from the pleadings at this juncture. In my opinion, the following are the issues in controversy in this suit.

a. Whether the plaintiff is the registered proprietor of the suit properties.

b. Whether the Defendants were in lawful occupation of the suit properties.

c. Whether the Plaintiff's right of action was extinguished by operation of law under the Limitation of Actions Act (Cap 22).

d. Whether a demand and notice of intention to sue were issued.

e. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

f. Who shall bear the costs of the suit.

9. On the first issue, the court accepts the uncontroverted evidence of the Plaintiff that he is the registered proprietor of the suit properties. He produced as exhibits copies of the title deeds and green card to establish this fact. No evidence to the contrary was offered on behalf of the 4th and 5th Defendants. The

1st issue is therefore answered in the affirmative.

10. The second issue was raised by the Defendants in their statement of defence. They did not attend the trial to offer evidence in support thereof. The court inevitably finds this issue not proved and the same is answered in the negative.

11. The third issue relating to the extinction of the Plaintiffs right of action under the Limitation of Actions Act (Cap 22) was also raised by the Defendants. It was raised vaguely in their statement of defence but more clearly in their notice of Preliminary Objection. However, the said notice of Preliminary Objection was never prosecuted and the 4th and 5th Defendants did not attend the hearing to either argue the point or adduce evidence in support thereof. A plea of that nature must be supported by material evidence especially on the relevant dates of occupation and even on when time started running for purposes of the Limitation of Actions Act. The Defendants did not even file witness statements or affidavits in this matter. The court therefore finds that this defence was not proved by the 4th and 5th defendants. The answer to the 3rd issue is, therefore, in the negative.

12. The 4th issue relates to a demand and notice of intention to sue. The plaintiff had pleaded its issuance in para 8 of the plaint but the Defendants denied the same in their defence. The Plaintiffs produced copies of two demand letters dated 9.01.2007 as exhibit 6 (a) and (b) respectively. The Defendants did not challenge these at the trial since they did not turn up. The court finds that the plaintiff has established issuance of the notice. The 4th issue is, therefore, answered in the affirmative.

13. The 5th issue is whether the plaintiff is entitled to the reliefs sought. The Plaintiff has succeeded in proving the 1st and 4th issues whereas the 4th and 5th Defendants have failed to establish their defences as framed in the 2nd and 3rd issues. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought against the 4th and 5th Defendants.

14. The 6th issue relates to costs. Although costs of an action are always at the discretion of the court, the general rule is that costs follow the event so that a successful party is usually awarded costs against the losing party. In the premises, the Plaintiff shall have the costs of the suit as the successful party.

15. The upshot of the foregoing is that judgment is entered for the Plaintiff against the 4th and 5th Defendants as prayed in the plaint save for the qualification that the Defendants shall not be evicted within 30 days but within the period and in compliance with the procedures provided for under the Land Laws (Amendment Act) 2016. The Plaintiff is hereby awarded the costs of the suit.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF OCTOBER 2017.

In the presence of Ms. Muriuki holding brief for Mr. Muyodi for the plaintiff and in the absence of the defendants. The court entered judgment in favour of the plaintiff against the 4th and 5th defendants with costs.

Court Clerk Njue/Leadys

Y.M. ANGIMA

JUDGE. – 5.10.17.