



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 82 OF 2017

ISAAC MWANGI KANYORO.....PLAINTIFF

VERSUS

STEPHEN WAGITA KIBOL.....DEFENDANT

JUDGEMENT

By a plaint dated the 31st July 2012 the plaintiff herein instituted this suit against the defendant seeking the following orders;

- a) Permanent injunction restraining the defendant either by himself, his agents, remaining, interfering or in any way however from dealing with the title No. Nyandarua/Ol'kalou Central /5115 and No. Nyandarua/Ol'kalou Central /5116 owned by the plaintiff.
- b) Costs of the suit plus interest.
- c) Any other or further relief that the Honorable Court may deem fit and just to grant.

Filed together with the plaint was an application by way of Notice of Motion dated the 31st July 2012 wherein the plaintiff had sought for interim orders restraining the defendant either by himself, his agents, remaining, interfering or in any way however from dealing with the title No. Nyandarua/Ol'kalou Central /5115 and No. Nyandarua/Ol'kalou Central /5116 pending the hearing and determination of the application inter-partes.

The application together with then summons to enter appearance as well as all documents were served upon the Defendant on the 3rd August 2012 and an affidavit of service filed to that effect on the 15th August 2012. There was no response from the Defendant and the court proceeded to hear the application ex-parte and vide a ruling dated the 9th November 2012, granted the orders as prayed for.

That on the 14th November 2013, when the matter came up in court for hearing, the court was informed that there were new developments on the suit land wherein the plaintiff sought leave to amend the plaint which leave was granted and the plaintiff filed their amended plaint dated 5th November 2013 on the 6th December 2013.

Prayers sought in the amended plaint were:

- a) Permanent injunction restraining the defendant either by himself, his agents, remaining, interfering or in any way however from dealing with the title No. Nyandarua/Ol'kalou Central/5115 and No. Nyandarua/Ol'kalou Central /5116 owned by the plaintiff.
- b) An order that the Defendant does deliver vacant possession of the suit land and in default this honorable court do order for his eviction therefrom.
- c) Costs of the suit plus interest.
- d) Any other or further relief that the Honorable Court may deem fit and just to grant.

The Defendant was served with the amended plaint on the 14th January 2014 and an affidavit of service was filed on 25th February 2014. Since service was effected but the Defendant declined to enter appearance or file any defence in the suit, the Plaintiff requested for interlocutory judgment on 1st July 2014 and a date for formal proof date was taken for the 23rd October 2014.

On that day however the trial court informed parties that it was not ready to commence fresh hearings and that parties were to take dates in the registry.

Later after the establishment of the Environment and Land Court in Nyahururu, this matter was transferred therein where the same was fixed for formal proof on the 20th June 2017.

On the 20th June 2017, the plaintiff testified to the effect that the Defendant herein had sold him a ½ half acre of his land. Upon payment of the purchase price, an agreement dated the 20th May 2011 was executed between the parties and a copy of the same (after the court having seen the original copy) was produced as exhibit 1.

Later there was another transaction again between the same parties wherein the Plaintiff bought another ½ acre of land and paid a consideration of Ksh 320,000/= to the defendant. Payment vouchers dated the 20th May 2011 and 20th August 2011 were produced and marked as exhibit 2 (a) and (b) respectively.

The parties went to the Land board where the plaintiff was issued with two consents dated the 22nd September 2011 which were produced and marked as exhibit 3(a) and (b) to transfer the suit land.

The minutes of the land control board dated the 22nd September 2011 were also produced as exhibit 5.

Thereafter, parties engaged a surveyor who prepared a mutation dated the 3rd September 2011 showing the position of both pieces of land. This mutation was produced and marked as exhibit 4.

The plaintiff's case was that following the mutation, the Defendant's land No. Nyandarua/Ol'kalou Central/1502 was divided into three creating parcel No. 5115, 5116, and 5117.

The plaintiff had therefore purchased parcel numbers 5115, and 5116, the suit lands herein.

That after the purchase of the land, the Defendant's wife had placed a caution on the whole land but which caution was later removed after she failed to appear before the Registrar.

After the removal of the caution, transfer was effected and the plaintiff was issued with the title deeds to his pieces of land copies which were produced in court as exhibits 8(a) and (b).

The plaintiff's effort to take possession of the land was thwarted by the defendant who refused to move out of the land.

A report was made to the police wherein the Defendant was charged with the offence of **Forceful detainer** wherein he pleaded guilty and was sentenced to serve a custodial term of one year. The proceedings in the Nyahururu SPMC No. 1094 of 2012 were tendered in as exhibit 10.

During his absence, the Defendant's sons entered onto the suit land and put up structures. The defendant joined them upon his release from the prison and they have since refused to give vacant possession of the suit lands to the plaintiff.

ISSUES FOR DETERMINATION.

- i. Whether the plaintiff is the registered proprietor of the suit land, Nyandarua/Ol'kalou Central/5115 and Nyandarua/Ol'kalou Central/5115
- ii. Whether the Defendant should deliver vacant possession of the suit land

I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the defendant did not appear at the hearing either in person or through counsel.

The Plaintiff proved, through evidence of affidavits of service that the hearing notices and the pleadings had been served on the Defendant personally but he had declined to sign them in acknowledgment.

The defendant, having failed to file any documents, the matter was set down for formal proof.

From the documentary evidence, including copies of the Title deed of Land parcel Nyandarua/Ol'kalou Central/5115 and Nyandarua/Ol'kalou Central/5115 Exh 8(a) and (b) the plaintiff herein proved that he was the registered proprietor of the said parcel of land. His registration as owner of the suit lands is a first registration.

The Plaintiff in addition, demonstrated ownership of the suit property by producing the sale agreement (Exh 1) payment vouchers (Exh 2(a) and (b) , consents (Exh 3 (a) and (b) mutation form (Exh 4) Minutes of the Land Control Board (5) as well as the Nyahururu Cr. Case proceedings (Exh 10)

I also had the advantage of seeing and hearing the witness/ plaintiff testify and found that he was a credible witness confirming that he was

indeed the duly registered proprietor of the suit property

The provision of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

25. Rights of a proprietor

(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—

The law is very clear on the position of a holder of a title deed in respect of land.

Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

This fact was uncontroverted by the Defendant who did not file his defence.

In light of the above, this court finds that the Plaintiff has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto.

It had been demonstrated that despite service, the Respondent failed to file his papers and/or defend the suit, and further that the continued illegal stay of the defendant on the Plaintiff's land has led to loss to the Plaintiff.

On whether the Defendant should deliver vacant possession of the suit land, the court finds that there is no justification for the Defendant to continue occupying the Plaintiff's property without his consent. The Defendant is a trespasser and has to vacate the subject suit properties being No. Nyandarua/Ol'kalou Central /5115 and No. Nyandarua/Ol'kalou Central /5116 respectively or he be forcefully evicted.

The court thus makes the following orders:

1. Permanent injunction is hereby issued restraining the defendant either by himself, his agents, remaining, interfering or in any way however from dealing with the title No. Nyandarua/Ol'kalou Central/5115 and No. Nyandarua/Ol'kalou Central /5116 owned by the plaintiff.
2. The Defendant shall deliver vacant possession of the suit land and in default this honorable court will order for his eviction therefrom. In essence prayers (a) and (b) of the amended plaint are hereby granted.
3. The Defendant shall vacate the suit property forthwith or he be evicted forcefully.
4. Costs to the Plaintiff at the lower scale since the suit was undefended.

Dated and delivered at Nyahururu this 5th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE