



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.207 OF 2017
(FORMERLY MILIMANI ELC NO.337 OF 2013)

JAMES MUCHIRI MUNGAI.....PLAINTIFF

-VERSUS-

DAVID GATHOGO.....1ST DEFENDANT

HARON NJOROGE KIARIE.....2ND DEFENDANT

JUDGEMENT

In an *Amended Plaintiff* dated **14th June 2016**, the Plaintiff herein *James Muchiri Mungai* has sought for various declarations against the Defendants herein *David Gathogo* and *Haron Njoroge Kiarie*. The orders sought against the Defendants are:-

- a) A declaration that the Defendants and all those claiming under or through them are trespassers and their continued occupation on the suit land is illegal and/or unlawful.***
- b) A permanent injunction restraining David Gathogo and Haron Njoroge Kiarie, their servants, employees, agents and those claiming through or under them from dealing in any manner whatsoever with all that property known as Ruiru/Ruiru East Block 2/2222.***
- c) An eviction order directed against the Defendants and all those claiming under or through them directing the Defendants to vacate the subject property forthwith.***
- d) General damages for loss of user.***
- e) Costs and interest of the suit.***

In his claim, the Plaintiff alleged that at all material times, the land parcel **No.Ruiru/Ruiru East Block 7/2222**, measuring approximately **0.400 Hectares** was registered in the name of his late mother *Mary Muthoni Mungai*, who had acquired the same from *Nyakinyua Investment Ltd* on **8th May 1992**.

He further averred that he became the registered proprietor of the suit land upon successful registration and after filing *Succession Cause No.42 of 2012* at *Gatundu*. It was his contention that on diverse dates and period unknown to the Plaintiff, the Defendant illegally and without the Plaintiff's consent or authority encroached onto the suit property and took possession and constructed thereon several

structures. It was his further contention that the Defendants' actions are *mala fides* and are done arbitrarily without any colour of right whatsoever over the suit property and that the Defendant do not hold any interest in the suit property either legally or equitably. He also contended that the Defendants continued illegal occupation and activities on the suit property have continued to expose the property to risk of dissipation and wastage. Further that the illegal occupation has and continue to expose the Plaintiff and others claiming under or through him to substantial loss as they are desirous of utilizing the aforesaid property but cannot do so due to illegal occupation by the Defendants. He also contended that despite his several efforts to have the Defendants vacate the suit land, the Defendants have neglected, declined and refused to vacate the suit property and/or cause the removal of the structures illegally erected thereon.

The Defendants entered appearance through the **Law Firm of Charles Goi & Co. Advocates** on **10th April 2013**. However, despite that appearance, they failed to file their Defence. Consequently interlocutory Judgement was entered against them on **27th June 2013**. The parties on several occasions informed the court that they were attempting an out of court settlement. However, no settlement was reached and the matter proceeded for formal proof on **28th June 2017**, wherein the Plaintiff gave evidence for himself and called one more witness.

PW1 – Peter Njoroge Mungai from **Gatundu** relied on his witness statement which was filed in court on **11th March 2013**. In his said statement, **Peter Njoroge Mungai**, reiterated the contents of the Plaintiff and averred that their mother **Mary Muthoni Mungai** passed on, on **14th October 2005**. He thereafter filed a Succession Cause and applied for Letters of Administration. That he visited the subject property with the purpose of utilizing the same on behalf of the beneficiaries. To his surprise, he found the same had been occupied by the Defendants who had erected structures thereon. He testified that the said occupation was done illegally and without his consent and authority as the administrator of the estate of **Mary Muthoni Mungai**. It was his further testimony that the Defendants' actions have caused and continue to cause substantial loss of use. He further testified that after the confirmation of grant, the said land vested to his brother **James Muchiri Mungai**. He produced the **Certificate of Confirmation of Grant** as **exhibit no.2** and **search** as **exhibit no.3**. Further he produced a copy of the current title deed as **exhibit no.5**. It was his testimony that as an administrator of the estate of **Mary Muthoni Mungai**, he did not allow the Defendants to construct thereon. He urged the court to allow the Plaintiff's claim.

PW2 – James Muchiri Mungai told the court that he is the Plaintiff herein and the proprietor of **Ruiru/Ruiru East Block 2/2222**, having inherited the same through a Succession Cause over the estate of his mother, the late **Mary Muthoni Mungai**. He also testified that initially the land belonged to his mother and PW1 became the administrator of the estate of their mother. However, after Confirmation of Grant, the land was transmitted to him. It was his testimony that after that, he visited the suit property and found that the Defendants had constructed on it. He identified the title deed in his name in court. It was his testimony that he cannot use the land as it has been occupied by the Defendants who are now wasting it through constructions. He asked the court to allow his claim.

The Plaintiff thereafter filed written submission through the **Law Firm of Njoroge Kugwa & Co. Advocates** on **24th August 2017**. He submitted that he is entitled to the orders sought in the Plaintiff. And relied on the case of **Paul Audi Ochuodho...Vs...Joshua Ombura Orwa (2014) eKLR** and also the case of **Murtahar Ahmed Dahman & Another ...Vs...Athuman Sudi (2013) eKLR**, where the Court held that:-

“The Defendant continued possession and occupation of the temporary structure on portion 522 Malindi is illegal and the Defendant is liable to pay to the Plaintiff's”

The Court has now carefully considered the available evidence and the written submissions. The court has also considered the relevant provisions of law and finds that;- though the Defendants herein did not file their Defence and/or participate in the proceedings herein, the Plaintiff herein had the onerous task of proving his case on the required standard of balance of probabilities. It is trite that whoever alleges must prove. This position is provided for in Section 107 of the Evidence Act which provides:-

(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, it is said that the burden of proof lies on that person.

Further, as provided by Section 109 of the Evidence Act, the burden of proof is always on the person who alleges. It states:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The Plaintiff amended his Complaint on **14th June 2016**. The title deed in his name was issued on **28th July 2014**. Therefore the applicable law herein is **“The Land Registration Act No.3 of 2012”**. It is evident that the suit property herein **Ruiru/Ruiru East Block 2/2222**, was registered in the name of the Plaintiff on **28th July 2014**. Therefore as provided by Section 26(1) of the said Act, the certificate of title herein is a *prima facie* evidence that the Plaintiff herein is the **absolute** and **indefeasible** owner of the suit property unless the same is challenged under subsection (a) &(b). The said Section 26(1) reads as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Further as an **absolute** and **indefeasible** owner of the said suit property, the Plaintiff has his rights protected under Sections 24(a) and 25(1) of the said Land Registration Act which provides as follows:-

24. 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:

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.

The Plaintiff has alleged that after the suit land was transmitted to him through the Confirmation of Grant issued on **8th May 2014**, he has not been able to access the said suit land as the Defendants have trespassed thereon and have constructed some structures thereon. The Court has seen a demand letter written to the Defendants herein on **18th October 2012**, alleging that the said Defendant have taken

possession of the suit land. The Defendants were authorized to vacate the said suit land within a period of 30 days from the date of the said letter. There was no evidence that the Defendants herein replied to the said letter and disputed the contents thereof. The Defendants further entered appearance and did not file their Defence. The Defendants have not controverted or challenged the Plaintiff's case.

It is evident that the Plaintiff is the registered proprietor of the suit property. There is no available evidence that his said title has been challenged or revoked. As a registered absolute and indefeasible owner, the Plaintiff is entitled to enjoy the rights of a proprietor as provided by Sections 24 and 25 of the Land Registration Act. Such rights include right to access the said property and use it as he deems fit. However, the Plaintiff has alleged that the Defendants have encroached on the said property and have even constructed some permanent structures thereon. If that is the case, the Plaintiff's rights have been infringed and he has been deprived of his property contrary to the provisions of Article 40 of the Constitution of Kenya 2010 which guarantees each party right to own property without any deprivation.

Having found that the Plaintiff is the registered proprietor of the suit property with his rights protected by the Constitution and the Land Registration Act, if the Defendants are in occupation, then the said occupation is illegal and the Plaintiff herein is entitled to actual possession of this parcel of land. The Defendants herein should therefore give the Plaintiff vacant possession of the suit property as their possession of the same is illegal. The Defendants did not offer any evidence to controvert the Plaintiff's evidence or at least offer an explanation of how they got into possession of the suit property.

For the above reasons, the ***Court finds that the Plaintiff's case is merited.***

Having now carefully considered the available evidence, the Court

finds that the Plaintiff has proved his case against the Defendants herein

jointly and severally on the required standard of balance of probabilities. For the above reasons, the ***Court enters Judgement for the Plaintiff against the Defendant jointly and severally in terms of prayers no.(a) and (b) and (e) of the Plaintiff.***

In terms of ***prayer no.(c) the Defendants are to give the Plaintiff vacant possession of the suit property within the next 90 days from the date hereof. The Plaintiff to give the Defendants herein the necessary Notice of vacating. Failure to do so, eviction order to issue.***

The Plaintiff is also entitled to ***general damages*** in the tune of ***Kshs.100,000/=***.

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of ***November 2017.***

L. GACHERU

JUDGE

In the presence of

M/S Murigi H/B Mr. Mureithi for Plaintiff

No appearance for Defendants

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above advocate and absence of the Defendants.

L. GACHERU

JUDGE

17/11/2017