



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.454 OF 2017
(FORMERLY NAIROBI ELC.260 OF 2013)

CRISPUS THUKU KINENE.....PLAINITFF

-VERSUS-

TERESIA WAITHIRA MACHUA.....DEFENDANT

JUDGEMENT

By a *Plaint* dated **18th February 2013**, the Plaintiff herein **Crispus Thuku Kinene**, has sought for various reliefs against the Defendant herein, **Teresia Waithira Machua**. The orders sought are:-

- a) A declaration that LR.No.Ruiru/Ruiru East Block 2/6841 legally belongs to the Plaintiff and that the Defendant is a trespasser thereto.***
- b) An order to evict the Defendant from LR/No.Ruiru/Ruiru East Block 2/6841.***
- c) An order to demolish the illegal structures erected by the Defendant/her agents and/or servants upon LR.No.Ruiru/Ruiru East Block 2/6841.***
- d) Mesne profits since 3rd January 2011 till the final determination of this case.***
- e) Costs of this suit.***
- f) Interest thereon.***
- g) Any other relief or further relief this Court may deem necessary and just to grant.***

In his *Plaint*, the Plaintiff averred that he is the registered owner of the suit premises known as **Title No.Ruiru/Ruiru East Block 2/6841**.

He also alleged that he bought the suit premises from one **Teresia Wambui Wairegi**, on **3rd January 2011**, as is evident from the **Sale Agreement** even dated for a consideration of **Kshs.1,700,000/=** which he paid in full. Further that pursuant to the referred sale, the suit premises was transferred to the Plaintiff on **15th March 2011**, and subsequently, a title deed was issued on **28th March 2011**, by the relevant and competent Government office – the Land Registrar situated in Thika Land Registry, within the Kiambu County. He contended that the Defendant has infringed on his absolute right of ownership and continue

trespassing on the suit premises by erecting illegal structures on the said suit premises. The Plaintiff further alleged that the Defendant continued stay on the suit premises is without his consent and amounts to trespass. It was his contention that the Defendant has been leaping benefits from her illegal occupation and at the expense of the Plaintiff. It was therefore his claim that the Court should declare that **LR.No.Ruiru/Ruiru East Block 2/6841**, belongs legally to the Plaintiff and should further order an eviction and demolition of the illegal structures erected on the suit property by the Defendant. He urged the Court to allow his claim.

The Defendant though served with Summons to enter appearance did not file any Defence. An **interlocutory Judgement** was entered against the Defendant on **4th April 2013**, and matter was directed to proceed for hearing under Order 10 Rule 9 of the Civil Procedure Rules.

Subsequent thereto, the Defendant filed a **Notice of Motion** application dated **9th June 2014**, and sought for various orders. Among the orders sought is an order to set aside the Interlocutory Judgement entered on **4th April 2013**, and also consequent orders arising therefrom. The Defendant had also sought to have this suit consolidated with **HCCC No.135 of 2011 (OS)**, which was seeking for orders to compel one **Teresia Wambui Wairegi**, to transfer **LR. No.Ruiru/Ruiru East Block 2/6179** and **Ruiru/ Ruiru East Block 2/6180** to the Plaintiff therein who is the Defendant herein.

The said **Notice of Motion** application dated **9th June 2014**, was opposed by the Plaintiff herein, who alleged that the suit property herein **No.Ruiru/Ruiru East Block 2/6841**, is an independent parcel of land from the ones mentioned by the Defendant in **ELC No.135 of 2011(OS)**, which are **LR.No.Ruiru/Ruiru East Block 2/6179 and 6180**. Further that the Plaintiff herein has a title to the suit property, **LR.No.Ruiru/Ruiru East Block 2/6841**, which the Defendant herein does not have.

Even after filing of the said **Notice of Motion** dated **9th June 2014**, the Defendant failed to prosecute the same. The Court had on **19th October 2015**, directed the Defendant to set the said application down for hearing within a period of 21 days from the date thereof with a rider that failure to do so, the Plaintiff was at liberty to set the matter down for formal proof.

From the Court record, it is evident that the Defendant never set the said application down for hearing. Consequently, the matter proceeded for **Pre-trial Conference** on **18th July 2016**, wherein the matter was certified ready for hearing.

Therefore on **29th June 2017**, this matter was listed before this Court for **Formal Proof**. The Plaintiff gave evidence for himself and called no witness. The Plaintiff adopted his witness statement filed on court on **18th February 2013** as his evidence. He further reiterated that the suit herein related to **LR.No.Ruiru/Ruiru East Block 2/6841**, which he bought from **Teresia Wambui Wairegi**, after he had carried due diligence by carrying a search at Thika Lands Registry. It was his evidence that he ascertained that the land was registered in the name of **Teresia Wambui Wairegi**, and was also clear from any encumbrances. Upon carrying due diligence, the Plaintiff and **Teresia Wambui Wairegi** appeared before **Gathii Irungu Advocates**, who prepared a **Sale Agreement** and they both signed it. The purchase price was agreed at **Kshs.1.7 million** and the Plaintiff paid the initial instalment of **Kshs.400,000/=** plus an earlier payment of **Kshs.100,000/=**. The **balance** of **Kshs.1.2 million** was paid after transfer. He produced the said Sale Agreement as **exhibit No.1**. It was his evidence that the said **Teresia Wambui Wairegi** gave him all the completion documents and this suit property **LR.No.Ruiru/Ruiru East Block 2/6841**, was eventually transferred to his name. He produced the **Title Deed** which is in his name and issued on **28th March 2011** as **exhibit No.2**. He also produced the **official search** dated **13th December 2012** as **exhibit No.3**.

It was his testimony that after the purchase of the suit property and the transfer of the same to his name, he found some temporary structures on the suit property. The vendor **Teresia Wambui Wairegi**, told him the structures thereon were by a trespasser who was **Teresia Waithira Machua**, the Defendant herein. It was his testimony that he asked the trespasser to vacate the suit premises but she declined to do so. His advocate wrote a **Demand Letter** to her, **exhibit No.4**, but she also ignored the said demand letter dated

15th March 2012. Thereafter, this suit was filed against the Defendant. He also testified that he bought the suit property without any defect on the title. He urged the Court to allow his claim as he is the legitimate owner of the suit property **LR.No.Ruiru/Ruiru East Block 2/6841**. He also urged the Court to declare the Defendant herein a trespasser. The Plaintiff further filed his **written submissions** on **14th July 2017**, through the **Law Firm of Gathirwa & Co. Advocates**.

This Court has now carefully considered the pleadings in general, the available evidence, the written submissions and relevant provisions of law and it renders itself as follows:-

The Defendant herein did not file her Defence. The suit therefore proceeded as an undefended suit. Though the Defendant did not attend Court on the date of the hearing, the onus of proof is still on the Plaintiff. It is trite that he who asserts or alleges must prove. The said proof is on the balance of probability. See the Evidence Act Section 107 which states:-

(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.

The matter proceeded for hearing through formal proof. What is formal proof? In the case of **Samson S. Maitai & Ano....Vs...African Safari Club Ltd & Ano. (2010) eKLR**, the Court held that:-

“.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

It is therefore evident from the above observation of the Court that in a formal proof hearing, all rules of evidence and procedures are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. Further, it is also evident that in adducing such evidence, the party has to raise a presumption that whatever is claimed is true and this is what goes to the merit of the case.

Taking into account the above principles on what entails a formal proof, the Court will juxtapose the same with the available evidence and facts to establish whether the Plaintiff herein has raised a presumption that whatever is claimed by him is true.

The issue now for determination is whether the Plaintiff is deserving of the orders sought. The Plaintiff did allege that he is the registered owner of **LR.No.Ruiru/Ruiru East Block 2/6841**, having purchased the same from one **Teresia Wambui Wairegi (now deceased)**. He produced the **Sale Agreement** as **exhibit No.1** and from the said sale agreement, it is evident that indeed **Crispus Thuku Kinene**, purchased the suit property from **Teresia Wambui Wairegi** for **Kshs.1,700,000/=**. It is also evident that the Plaintiff was issued with a **Title Deed** on **28th March 2011**, under the regime of the Registered Land Act, Cap 300 (now repealed). As provided by Section 27 of the said Cap 300(now repealed), the Plaintiff acquired all rights and privileges appurtenant thereto. Under the above stated regime of registration, Section 27(a) provides that:-

27. 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”.

Further, the rights of the Plaintiff cannot be defeated except by operation of the law. That protection is provided by Section 28 of Cap 300(now repealed) which provides as follows:-

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

As a registered proprietor, the Plaintiff is *prima-facie*, the absolute and indefeasible owner of the suit property as provided by Section 26(1) of the Land Registration Act which provides 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.

The Plaintiff's Certificate of title can only be challenged if the same was acquired through ***fraud, misrepresentation, illegally*** or ***through corrupt scheme*** as provided by Section 26(1) (a)&(b) of the Land Registration Act. However, the Defendant did not file her defence and has not challenged the Plaintiff's Certificate of title. Therefore the Court will find and hold that the Plaintiff herein is the absolute and indefeasible owner of the suit property.

As an absolute and indefeasible proprietor, the Plaintiff's rights are protected under Section 24(a) and 25(1) of the 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.

Such rights of a proprietor include access to the property and occupation of the same. The Plaintiff has alleged that the Defendant herein has encroached on his suit property and has erected illegal structures thereon. The Defendant did not file her defence to dispute the said allegations. It is also evident from the ***Certificate of official search*** dated ***15th December 2012***, that the Plaintiff herein is the registered proprietor of the suit property ***No.Ruiru/Ruiru East Block 2/6841***, without any encumbrances. As a proprietor then, the Plaintiff should be allowed to enjoy quiet possession of his property. He cannot be guaranteed such right if the Defendant is allowed to continue with her illegal occupation of the suit property. The Plaintiff alleged that the Defendant entered into her suit property without his consent. That allegation has also not been disputed by the Defendant herein as she never filed her Defence nor participated in the pleadings. Therefore the Plaintiff has availed sufficient evidence to sustain his claim.

Having carefully considered the available evidence, the Court finds that the Plaintiff herein is the registered proprietor of the suit property as is evident from his ***Certificate of Title*** issued on ***28th March 2011***, ***exhibit No.2*** which certificate has not been cancelled. The Plaintiff is therefore entitled to possession of his property. Consequently, the ***Court finds that the Plaintiff herein has proved his case on a balance of probability***. Therefore the ***Court enters Judgement for the Plaintiff against the Defendant in terms of prayers no.(a), (b),(c),(e) and (f) of the Plaint*** dated ***18th February 2013***.

In regard to ***prayers no.(b) and (c)***, the Defendant herein ***is directed to move out of the suit property within a period of 60 days from the date hereof and remove the illegal structures erected thereon. Failure to comply with the above directions, the Plaintiff is at liberty to evict the Defendant and demolish the illegal structures erected thereon.*** The Plaintiff herein to serve the Defendant with the relevant Notice.

It is so ordered.

Dated, Signed and Delivered at Thika this ***3RD*** day of ***November 2017***.

L. GACHERU

JUDGE

In the presence of

Mr. Njoroge holding brief for Mr. Gathirwa for Plaintiff

No appearance for Defendant

Lucy - Court clerk.

L. GACHERU

JUDGE

3/11/2017