



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 304 OF 2017**

**STANLEY MUTURI GATHERI - PLAINTIFF**

**VS**

**NAOMI WANJIKU MUIRURI - DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant on 15/3/17 seeking interalia orders to evict the Defendant and mense profits. The Plaintiff avers that he is the registered owner of LR No. LOC.1/THUITA/160 having acquired the same in 2016 from Francis Karuma Karege and Andrew Ngigi Nganga, the Successors of Wanganga Wangombe vide Succession Cause No. 419 of 2014 Thika.

2. The Defendant did not enter any appearance nor file a defence at all or within the stipulated time despite being served as shown by the Affidavit of service dated 11/4/17 and filed on record. On the 11/4/17 the Plaintiff sought a request for Judgement, the same was entered against the defendant and the matter was set down for formal proof. It is also on record that another service was effected on her on 6/6/17 but as it were did not elicit any response.

3. At the hearing of the formal proof the Plaintiff testified together with one witness. He also adopted his written statement in its entirety. He stated that he acquired the suit property in August 2016 by way of purchase from Francis Karuma Karege and Andrew Ngugi Nganga who succeeded the original owner of the suit property Wanganga Wangombe vide confirmed grant of letters of administration issued on 10/6/16.

4. He stated that on acquisition he wrote to the Defendant demanding that she vacates the suit land but in response the Defendant adamantly refused and through her lawyers and vide a letter dated the 9/1/17 denying trespass and insisted that she owns the suit land, her interest being overriding the plaintiff's interest, if any.

5. Further he deponed that the Defendant has alternative land which is LOC. 1/Thuita/159 which is alleged to belong to her husband.

6. PW2, Andrew Ngugi Nganga, while adopting his written statement filed on 15/3/2017 stated that he is the son of Wanganga Wangombe the original owner of the Loc.1/Thuita/160 who died on 15/6/65. That he and Francis Karuma Karege were appointed legal representatives of the estate of Wanganga Wangombe on 3/11/14 and the certificate of confirmation of grant was issued on 10/6/16. In the said confirmed grant the suit land was distributed to the Plaintiff absolutely. It is his testimony that he and the co-administrator disposed the suit land before the Confirmation of grant and hence the reason why the plaintiff is being stated as the beneficiary in the grant. He explained that his (plaintiff's) beneficial interest stems from a purchase and not as a family member of the estate of Wanganga Wangombe.

7. That the suit land lay fallow and unutilized for a long time since the demise of his father and hence the decision to dispose it.

8. That in 2008 he discovered that one William Muiruri Njiru (said to be the husband of the defendant), now deceased had trespassed on to the suit land without any permission and was cultivating the land. Despite the Chief of Kihumbu-ini location trying to arbitrate the Defendant refused to vacate the suit land. Upon his death the Defendant continued the trespass. That she has no valid claim on the suit land as her husband owned Loc.1/Thuita/159. That despite the Succession proceedings being done openly the Defendant did not object to the same in Court.

9. Though Francis Karuma Kareng'e filed a written statement, he did not testify as he was said to be unwell, his evidence though is similar, almost word for word to that of PW1.

10. The Plaintiff submitted that he is the registered owner of the suit land. That the Defendant is illegally occupying the same and has declined to vacate despite numerous demands to her to do so. That she is claiming an overriding interest on the suit land as stated in her response letter through her lawyers Maina Kagura Advocates dated 9/1/17.

11. Relying on the case of Appeal Joseph **Arap Ngok vs. Justice Maijo O'le Keiwua Nairobi Civil Appeal No. 60 of 1997**, the Plaintiff avers that a title of a registered owner can only be challenged on fraud or misrepresentation to which the person is proved to be a party or where the title is proved to be illegally or unprocedurally acquired through a corrupt scheme. That in this instant case the proof of title is clear evidence of ownership.

12. Quoting section 3 of the Trespass Act, he states that the defendant, having remained on the suit land without the Plaintiffs consent is clearly in trespass and should be forcefully removed.

13. Quoting the case of **Kasuve vs. Mwaani Investments Limited & 4 Others (2004) IKLR 184** the Plaintiff was categorical that the Defendant has occupied the land for less than the stipulated period of 12 years and the same has been interrupted by the futile efforts in form of demands to have her vacate the suit premises. That the claim of an overriding interest is not available to the Defendant.

### **Analysis & Determination**

14. The key issue in this case is whether the Plaintiff has proved a right of ownership in the suit land. It is uncontested that the suit land was originally owned by Waganga Wangombe who died in 1965. It would appear that the matter of succession to his estate lay dormant until 2014 when Francis Karuma Kareng'e and Andrew Ngugi Nganga (who are step son and son respectively of the deceased Waganga Wangombe) were appointed legal representatives vide letters of grant of administration issued on 3/11/2014 and confirmed on 10/6/16. I note that the grant of letters of administration issued on 3/11/14 bears the name of Andrew Ngugi Nyaga while the certificate of confirmation of grant issued on 10/6/16 bears the names Andrew Ngugi Nganga, the latter being the plaintiffs witness no 1.

15. It is on record that the Plaintiff has presented a title registered in his name, upon which basis he seeks possession of the suit property. He has presented title No. Loc.1/Thuita/160 registered in his name. A close scrutiny of the title reveals that the area of the land on both the face of the title and the property section (Part A) is missing. This would put in doubt the authenticity of the said title in the face of such an omission, however the same may also be rectified as an error on the face of the title by the Land Registrar on satisfaction that indeed it qualifies as an error.

16. I have also made observations in respect to the gaps in this case which I wish to bring to light. Despite the plaintiff's averment that he bought the land from the successors of title to the original owner, no agreement for sale has been tabled. The plaintiff is noted on the confirmation of grant as a beneficiary. No documents have been presented to this Court to support his beneficial interest. Is he a purchaser or a beneficiary?. In which event if he is a purchaser, he would be obliged to support his case by presenting an agreement for sale. Further the plaintiff has not disclosed when the Defendant is alleged to have

trespassed on to the land other than to say that they discovered her husband was cultivating the land. It means he lived on the land as at 2008. It is not disclosed whether or not the plaintiff being the purchaser ascertained the nature of the occupation of the Defendant of the suit property. It is also not disclosed what activities have been ongoing on the suit land from 1965 to 2008 or 2014 for that matter. It is also not disclosed when the defendant trespassed onto the land, if any. The Defendant did respond to the demand letter by the plaintiff through the firm of Advocates of Maina Kagura & Co and in their response stated categorically that they had instructions to receive the court summons on behalf of the defendant however I note that the summons were served onto the defendant directly and the address of the defendant given on the summons is C/O Assistant Chief, Thuita Location. One would have thought with such express instructions it would be natural to serve the Defendants lawyers. Having said that and in the absence of any material placed before me to challenge the service of summons on record, I see no reason to disabuse them.

17. Section 26 of the Land Registration Act states as follows;-

“(1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

In the absence of evidence to the contrary, it would be difficult for this Court impugn the above title. No evidence to the contrary has been tabled before this Court to assail the title held by the Plaintiff. It is on record that the Defendant was duly served however she did not defend the claim.

18. The second limb of the Plaintiffs herein is that the Defendant has trespassed on the land. Section 3(1) of trespass Act cap 294 states as follows;-

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence”.

It is the evidence of the Plaintiff that the Defendant is occupying the land without his consent. In view of the fact that there is no evidence to the contrary to assail the title of the Plaintiff, in the circumstances finds and held that the Defendant is a trespasser.

19. The Plaintiff has pleaded mesne profits but has failed to proof the same, I decline to entertain the claim.

20. In the end I make orders as follows; -

- a) The Defendant is ordered to voluntarily vacate the suit land within the next 90 days in default eviction notice to issue.
- b) Eviction notice to issue and eviction to be carried out in strict provisions of the law.
- c) Mesne profits are declined.

d) Costs to be paid by the Defendant.

**DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF DECEMBER 2017**

**J G KEMEI**

**JUDGE**