



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 439 OF 2017
(formerly MACHAKOS ELC NO. 202 OF 2015)

SHADRACK KURIA KIMANI.....PLAINTIFF

VERSUS

STEPHEN GITAU NGANGA.....1ST DEFENDANT

MARY MUMBI GITAU.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated 11th September, 2013 the Plaintiff is seeking for judgement against the Defendants as follows:

- a) A declaration that the Plaintiff is the registered owner of that piece of land situated in Ngong Town of Kajiado County known as Ngong Town Block 2/851.
- b) An order does issue to remove the Defendants their servants, agents and or whosoever from the said Ngong Town Block 2/851.
- c) A permanent injunction does issue to restrain the Defendants whether by themselves, their servants and/or agents or otherwise from trespassing, encroaching, wasting and or denying the Plaintiff access to that piece of land situated in Ngong Town of Kajiado County known as Ngong Town Block 2/851.
- d) Costs of this suit.
- e) Any other relief that this honourable court may deem fit to grant.

The Defendants entered appearance and filed their joint Statement of Defence on 15th October, 2015 where they stated that they are owners of the suit land vide letter of allotment issued to them on the 28th May, 1992. Further that they had not commenced the process of procuring the title deed in respect of the said piece of land and the one produced by the Plaintiff was fraudulently obtained. They aver that prior to being allotted the suit land, they occupied the same effective from the year 2015 to date and has constructed a house and been staying thereon and no one has claimed it until they were served with the court pleadings. They insist they have been in legal occupation of the suit land and claim the Plaintiff's letter of allotment is not even signed. They reiterate that it is clear from a letter dated the 26th May, 2006

by the Clerk to the Ol Kejuado County Council's addressed to the Commissioner of Lands that the Plaintiff was allocated plot number 177 and not 188 as alleged, and the said plot was allocated to the 1st Defendant.

The Plaintiff filed a reply to Defence dated 28th October, 2015 where he reiterated the contents of the Plaintiff and insisted he is the registered owner of plot 188 Ngong and the parcel was registered under Certificate of Lease Ngong Town Block 2/851. He contended that the Defendants are wrongly occupying his parcel of land and ought to be evicted.

The Plaintiff filed witness statements and his list of documents but the Defendants did not. On the 29th June, 2017 the matter proceeded to full hearing but it is only the Plaintiff who testified as the Defendant was absent though duly served as evidenced by the affidavit of service filed on 29th June, 2017.

Evidence of Plaintiff

PW1 Shadrack Kuria Kimani – Examination in Chief

He stated that he is the Plaintiff and is a transporter based in Kilifi. He stated that he has sued the Defendants who had trespassed on his land, put up a structure and when he inquired from them, they claimed the said land belonged to them. He said he sought the services of a surveyor who showed him his plot number 188 which the Defendants were staking claim to. He adopted his witness statement as evidence and reiterated the claim therein. He produced his witness statement as Plaintiff exhibit '1'. He confirmed being the registered owner of the suit land which he was allotted by the County Council of Kajiado and issued with a letter of allotment. He produced his first list of documents as a bundle which was marked as exhibit '2a' and the further list of documents marked as exhibit '2b'. He was categorical that he undertook due diligence and got all the documents relating to the suit land registered in his name. He reiterated that he got a Certificate of Lease dated 21st August, 2015, and this confirmed that the suit land was his. He further conducted a search to confirm this position and hired a surveyor who prepared a report on the suit land and recommended that he institutes legal proceedings to remove the Defendants therefrom. He produced the Surveyor's report and Allotment letter as evidence in court. He reaffirmed that before he filed the suit, he issued the Defendants with a demand letter but they refused to move out of the suit property.

He further stated that he received a letter from the County Council of Kajiado dated 1st July, 2015 confirming he is the registered lease holder of the suit land. All the documents were in his bundle of documents that he produced as exhibits. This is evident in the letter he received dated 23rd October, 2015 from the County Council of Kajiado confirming that he is the registered owner of plot number 188/Ngong Township which is registered under Certificate of Lease Ngong Town/Block 2/851 dated 27th May, 2015. He contended that he received a letter from Ministry of Lands, Housing and Urban Development dated the 26th October, 2015 confirming they issued him with a lease in respect of the suit land. He claimed the Defendants were hostile and did not allow him access to the suit land. They are not cultivating the suit land but have put up a tin house therein but he never gave them authority to enter his land and they also use the said land as a dumpsite for their rubbish. He affirmed that he had suffered loss as he is unable to develop the suit land and neither can he access it. Further that the surveyors met resistance from the Defendants but managed to do their work. He has tried to fence the suit land but this has been difficult. He was seeking orders as prayed for in the Plaintiff.

The Plaintiff's counsel thereafter closed the Plaintiff's case and stated that they served the Defendants but they failed to attend court and he was seeking leave to file the written submission. The Plaintiff filed their submissions on 4th July, 2017 which I have considered.

Analysis and Determination

After perusal of the pleadings including documents filed herein including the lists of documents and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the Plaintiff is the legal proprietor of the suit land
- Whether the Defendants have encroached on the suit land.
- Whether the Defendants and or their agents/servants should be permanently restrained from trespassing on the suit land.
- Whether the Defendants and or their agents/servants should be evicted from the suit land.
- Costs

It is not in dispute that the Plaintiff was allotted the suit land by the defunct County Council of Kajiado and later got a Certificate of Lease dated 21st August, 2015, but what is in dispute is the Defendants claiming ownership of the said land and alleging Plaintiff got his Certificate of Lease fraudulently. As to whether the Plaintiff is the legal proprietor of the suit land, PW1 produced the Certificate of Lease as exhibit '1' in court.

Section 26(1) of the Land Registration Act which provides that: **'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 Defendants claim they have letters of allotment to the suit land but had not processed the Certificate of Lease, and that the Lease held by the Plaintiff was obtained fraudulently.

In the case Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR Kimondo J held that:

"... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property"

The Plaintiff produced the Certificate of Lease dated that indicated he was the registered owner of plot number 188/Ngong Township which is registered under Certificate of Lease Ngong Town/Block 2/851 dated 27th May, 2015.

Based on the evidence adduced above, and in relying on section 26(1) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

As to whether the Defendants have encroached on the suit land, PW1 adduced evidence that after getting the Certificate of Lease, the Defendants have interfered with his quiet possession and encroached thereon by putting up a tin structure and using it as a rubbish dump. The Defendants have refused to remove it despite being asked to do so. The Defendants have even blocked the Plaintiff's agents from accessing the suit land. I note that the presence of temporary structures itself on the suit land is already proof of trespass. Section 24 (a) of the Land Registration Act further stipulates as follows: **' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested

rights and privileges therein and which no person should interfere with it.

The position is also reaffirmed in the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that ' **the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

The Defendants claim they have letters of allotment to the suit land and that the Plaintiff's Certificate of Lease is fake. They however failed to adduce any evidence to prove this allegation.

I find that the Plaintiff is indeed entitled to be protected by the law from the Defendants' who are interfering with his rights and privileges over the suit lands. Further that the Plaintiff's Certificate of Lease supersedes the Defendants' letters of Allotment which is trite law is not a document of title.

On the issue as to whether the Defendants including their servants, agents and or whosoever be removed from the suit land, I find that since they have not proved ownership of the same, they are occupying it illegally.

I am further persuaded by the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

In the circumstances, I find that it would be proper if the Defendants were removed from the suit land and Plaintiff left to enjoy quiet possession of his property.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in their favour as follows:

- a) The Plaintiff is the registered owner of that piece of land situated in Ngong Town of Kajiado County known as Ngong Town Block 2/851.
- b) The Defendants their servants, agents and or whosoever be and is hereby removed from the suit land Ngong Town Block 2/851.
- c) A permanent injunction be and is hereby issued against the Defendants, whether by themselves, their servants and/or agents or otherwise from trespassing, encroaching, wasting and or denying the Plaintiff access to that piece of land situated in Ngong Town of Kajiado County known as Ngong Town Block 2/851.
- d) *The Plaintiff is awarded the costs of the suit.*

Dated, signed and delivered in open court at Kajiado this 6th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Miss Kinyua holding brief for Mutinda Kimeu for Plaintiff

N/A for Defendant

Cc Mpoye