



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 616 OF 2013

EVANS NAKHABALA WEKESA..... PLAINTIFF

VERSUS

KENYA AFRICAN NATIONAL UNION..... DEFENDANT

JUDGMENT

The plaintiff moved this Court by his plaint filed herein on 24th July 2013 seeking judgment against the defendant in the following terms:-

- a. ***A permanent order of injunction restraining the defendant, its agents, servants and/or employees or anybody claiming under them from interfering with plot No. MURANGA MUNICIPALITY BLOCK 3/12 and to give vacant possession to the plaintiff and return the premises to its original rentable status.***
- b. ***Payment of mesne profits from the date of filing suit upto vacation.***
- c. ***Costs of the suit.***
- d. ***Interest on (b) and (c) above.***

The basis of the plaintiff's suit was that he is the legal registered owner of the plot number MURANGA MUNICIPALITY BLOCK 3/12 situated at Muranga Town (the suit plot) and is in possession of all the necessary legal documents. The said plot is developed with a permanent building consisting of one hall and other room which is leased for Ksh. 50,000 per month to a third party. However, the defendant has forcefully entered into the suit plot arguing that as a political party, they have a right to any property. The defendant has refused to give vacant possession and is instead constructing illegal structures therein and have also rent out the suit plot to third parties for Ksh. 50,000. The plaintiff has therefore suffered loss and damage as he has had to lease other premises yet he pays property rates and ground rent to the Muranga County Government.

The defendant entered appearance and filed a defence and counter-claim through the firm of Mungai Kivuti Advocates in which it averred that it is the legal owner of the suit plot and denied all the plaintiff's claims. It counter-claimed for a declaration that the suit plot was registered in the names of the plaintiff fraudulently and the said title should be cancelled and rectified to read K.A.N.U MURANGA BRANCH. It also sought an order as to costs.

The plaintiff filed a reply to the defence and defence to counter-claim in which he gave notice that he would be moving to strike out the statement of defence as being a sham, frivolous and an abuse of the Court process. He also denied the contents of the defence adding that he legally owns the suit plot for which he has been paying all the relevant land rates to the County Government of Muranga.

On 13th July 2015 when the matter came up for pre-trial, the parties advocates agreed to have it heard on 29th October 2015. However, on the hearing date, only the plaintiff and his advocate attended Court for the hearing and there was no appearance by the defendant's representative or their advocate nor any explanation for their absence and on the application of Mr. Kinuthia advocate for the plaintiff, the case proceeded to trial. The plaintiff testified in support of his case and produced the list of his documentary exhibits. Mr. Kinuthia advocate for the plaintiff then applied to be given upto 4th December 2015 to file his submissions which was granted. However, on 1st December 2015, the firm of Suyianka Lempaa advocates came on record on behalf of the defendant and filed an application under certificate of urgency seeking orders that:-

1. ***The proceedings of 29th October 2015 be expunged.***
2. ***The defendant be given time to produce its evidence and/or testify in the suit.***
3. ***In the alternative, the plaintiff be called for cross-examination.***

Since the matter was coming up on 4th December 2015 to confirm the filing of submissions by the plaintiff's advocate, I advised Mr. Kariuki advocate who was holding brief on behalf of defendant's advocate to attend Court on that day for directions. I shall revert to that application later in the judgment.

Back to the plaintiff's case, he testified that he is the registered proprietor of the suit plot which was transferred to him in exchange of plot No. UNS MUNICIPALITY PLOT which he transferred to the Salvation Army. He produced the transfer of lease (Exhibit 2) and the certificate of search (Exhibit 3) as well as the other documentary exhibits numbered 1 to 11 adding that he has been paying the necessary land rates. The defendant has however trespassed onto the suit plot and put up a building although he had obtained an order restraining them. He therefore filed this suit seeking the remedies enumerated above. At the close of the plaintiff's case, the Court granted Mr. Kinuthia advocate upto 4th December 2015 to file his submissions.

I can now revert to the defendant's application filed herein on 1st December 2015 seeking the orders indicated above. When Mr. Kariuki advocate holding brief for Salopian advocate for the defendant appeared before me on 1st December 2015 on the said application, I advised him that since the matter was coming up on 4th December 2015 to confirm filing of submissions on behalf of the plaintiff, he should attend on that day for directions as it was only two days away. However, there was no appearance by counsel for the defendant on that day yet the date had been fixed in the presence of another advocate holding his brief. On 26th January 2016, Ms Thungu advocate holding brief for Mr. Kinuthia advocate for the plaintiff informed the Court that he had filed submissions but none had been filed by advocate for the defendant. The Court therefore fixed a judgment date for 16th March 2016. The import of all the above is that the defendant's application dated 1st December 2015 was never prosecuted for reasons best known to the defendant and their advocate. This Court will therefore proceed to write a judgment on the evidence on record.

It is clear from the plaintiff's un-challenged evidence that he is the registered proprietor of the suit plot. He produced a certificate of lease to that effect (Exhibit 2). As the registered proprietor of the suit plot which is registered under the now ***repealed Registered Land Act***, the plaintiff is entitled to all the rights and privileges appurtenant thereto – see ***Sections 27 and 28 of the Registered Land Act***. Similar provisions are found in ***Sections 24 and 25 of the Land Registration Act 2012***. The plaintiff's title to the suit property is therefore indefeasible as there is no evidence to suggest that such registration was obtained by fraud or other illegal means. Indeed although the defendant pleaded in its un-prosecuted defence and counter-claim that the plaintiff had obtained the title through fraudulent means including corruption (see paragraphs 1 and 2 of the counter-claim), no such particular of fraud are were pleaded and of course no evidence having been led by the defendant, those averments remain mere allegations. The defendant not having led any evidence to support its counter-claim, the same is dismissed with costs.

The plaintiff, on his un-controverted evidence, has proved that he is the owner of the suit plot by virtue of being so registered. Therefore, his claim for an order to injunct the defendant or its agents, servants and

employees from interfering with it is well founded. As the registered proprietor of the suit plot, he has the right to eject trespassers. He also has the right to vacant possession of the same.

With regard to the claim for mesne profits, these are supposed to be the profits that the person who has illegally occupied another person's land has received in the course of such illegal occupation. Apart from a mere averment that the plaintiff is entitled to a sum of Ksh. 50,000 per month, no evidence was led to prove that indeed the plaintiff would have made such profits or that the defendant illegally obtained such profits as a result of its occupation of the plaintiff's property. That claim is therefore not available to the plaintiff. The plaintiff is however entitled to costs both of his plaint and the dismissed counter-claim.

Ultimately therefore, there shall be judgment for the plaintiff against the defendant in the following terms:-

1. *An order of permanent injunction restraining the defendant, its agents, servants and/or employees or anybody claiming under them from interfering with the plot number MURANGA/MUNICIPALITY BLOCK 3/12 and to give vacant possession to the plaintiff and return it to its original rentable status.*
2. *The defendants counter-claim is dismissed.*
3. *The plaintiff shall have costs.*
4. *The plaintiff is also entitled to an order for interest on costs.*

B.N. OLAO

JUDGE

16TH MARCH, 2016

Judgment delivered this 16th day of March, 2016 in open Court

Ms Thungu for Mr. Kinuthia for Plaintiff present

Mr. Wachira for Lempaa for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

16TH MARCH, 2016