



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 748 OF 2011

WAMUHURI KAGECHA.....PLAINTIFF

VERSUS

SOPHIA WAIRIMU GACHAU.....DEFENDANT

JUDGMENT

The Plaintiff brought this suit against the defendant on 27th December 2011 seeking an order for the eviction of the defendant from all those parcels of land known as L.R No. LARI/KAMBAA/319 and L.R No. LARI/KIREITA/T.177 (together referred to as “the suit properties” and individually referred to as “Plot No. 319 and “Plot No. 177” respectively) and possession of the said parcels of land. The Plaintiff also sought mesne profits at the rate of Kshs.50,000/= per year from 5th October 2011 until possession is delivered by the defendant. In his plaint dated 16th December 2011, the Plaintiff averred that he became registered as the proprietor of Plot No.319 on 4th October 2011 and Plot No.177 on 28th September 2011 and that the defendant has been squatting on the suit properties without his permission. The Plaintiff averred that the defendant is a trespasser on the suit properties and that she has declined to vacate and handover the same to the Plaintiff despite a demand and notice of intention to sue having been served upon her.

The defendant entered appearance and filed a statement of defence on 9th May 2012. The defendant denied that the Plaintiff is entitled to possession of the suit property and mesne profits. The defendant contended that if the Plaintiff is the registered proprietor of the suit properties which she did not admit, the Plaintiff’s title to the suit properties is subject to her overriding interest on the said properties pursuant to the provisions of Section 30 (f) of the Registered Land Act Chapter 300 Laws of Kenya (now repealed). The defendant averred that she has occupied Plot No. 319 since the year 1959 and that her late husband and her had filed a suit namely, Nairobi High Court Civil Suit No. 433 of 2001 (O.S) against the Plaintiff and one, Wanjeri Kabeni seeking to be registered as the owners of the suit properties by adverse possession. The defendant averred that the Plaintiff’s allegation in the plaint that there is no suit pending between the Plaintiff and the defendant is false. The defendant averred that as at the time the Plaintiff purported to acquire the suit properties on 4th October 2011, the previous owner’s titles over the same had become extinguished by virtue of the provisions of Section 7 and 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The defendant averred that the Plaintiff’s contention that she is a trespasser on the suit properties has no basis.

When the suit came up for hearing on 26th October 2015, neither the defendant nor her advocates attended court. After satisfying myself that the hearing date was taken by consent, I allowed the Plaintiff to proceed with the hearing, the absence of the defendant notwithstanding. The Plaintiff gave evidence

and closed his case without calling any witness. The Plaintiff told the court in his evidence in chief that he is the owner of the suit properties. He stated that Plot No. 319 is an agricultural land while Plot no. 177 is a commercial plot. He stated that he purchased the suit properties from one, Kabeni Ngang'a also known as Thairu Ngang'a in the year 1973 at a consideration of Kshs.2,000/=.

He produced in evidence copies of certificates of official search on the registers of the suit properties as exhibits in proof of his title over the same. He stated that Kabeni Ngang'a died in the year 1975 before transferring the suit properties to him and that together with the widow of Rabeni Ngang'a, they applied for a Grant of Letters of Administration in respect of the estate of Rabeni Ngang'a which was duly issued to them. The said Grant of Letters of Administration was later confirmed. He produced a copy of the said Grant of Letters of Administration and Certificate of Confirmation as exhibits. He stated that after the confirmation of the said Grant as aforesaid, the suit properties were transferred to his name. He produced copies of the title deeds for the suit properties as exhibits. He stated that it is the defendant who has been in occupation of the suit properties and that once he acquired titles for the suit properties, he asked the defendant to vacate the same but she declined to comply rendering the filing of this suit necessary.

In examination by the court, the Plaintiff stated that Plot No. 177 was at all material times occupied by the defendant's deceased son who had put up a permanent residential house thereon. He stated that he cannot remember when the defendant's son entered the property. He stated that after the death of the defendant's son, the said parcel of land remained in possession of his widow. As concerns Plot No. 319, he stated that it is occupied by the defendant who resides thereon and also cultivates the same. He stated that when he purchased the suit properties, the defendant was in occupation thereof.

After the close of evidence, the Plaintiff made closing submissions in writing. The parties did not agree on issues for determination by the court. From the pleadings and the evidence that was adduced by the Plaintiff, I am of the view that the issues which arise for determination in this suit are; whether the defendant is a trespasser on the suit properties and whether the plaintiff is entitled to the reliefs sought. The plaintiff's claim against the defendant is based on trespass. The plaintiff has claimed that whereas he is the registered proprietor of the suit properties, the defendant has entered and occupied the same without his permission and has refused to vacate the same after being asked to do so. Trespass has been defined as any intrusion by one person onto the land in the possession of another without any justifiable cause.

It is not in dispute from the material before me that the plaintiff is the registered owner of the suit properties. What is in contention is whether the defendant is a trespasser on the suit properties. In other words, has the defendant entered onto and occupied the suit properties without any lawful cause? Starting with Plot No. 177, the Plaintiff testified that the said parcel of land is occupied not by the defendant but by the defendant's daughter in law who has her residence thereon.

It follows from that evidence that the defendant is not in occupation of Plot No. 177 and as such cannot be said to be a trespasser thereon. As concerns Plot No. 319, the plaintiff testified that the same was in occupation of the defendant when he purchased the same from Kabeni Ngang'a in 1973. He stated that the defendant has her residence on the property and also cultivates a portion thereof. In her statement of defence, the defendant had contended among others that the plaintiff having acquired title to the suit properties while the defendant was in possession thereof, the plaintiff's title was subject to the defendant's overriding interest on the said parcels of land which had accrued by virtue of the defendant's possession of the two properties and on account of the provisions of the Limitation of Actions Act, Chapter 22 Laws of Kenya. I am in agreement with the defendant's contention that when the plaintiff acquired title to Plot No. 319 on 4th October 2011, the defendant had an overriding interest on the same to which the plaintiff's title was subject to. It is admitted that the defendant was in possession of the suit properties when the plaintiff purportedly purchased the same from Kabeni Ngang'a in 1973. It is also admitted that the defendant was still in possession of Plot No. 319 when the same was purportedly transferred to the plaintiff 38 years later on 4th October 2011. There is no doubt that the defendant had acquired proprietary interest in Plot No. 319 by adverse possession having occupied the property for all those years. Pursuant to the provisions of section 30(f) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed), the defendant's adverse possession claim over Plot No. 319 was an overriding

interest on the said parcel of land to which the plaintiff's title was subject. The defendant also had an overriding interest on Plot No. 319 by virtue of her occupation thereof as at the time the plaintiff acquired the same pursuant to the provisions of section 30(g) of the said Act. Due to the foregoing it is my finding that the defendant had lawful interest on Plot No. 319 which entitled her to occupy the same. It cannot be said therefore that the defendant is occupying Plot No. 319 without any lawful cause. The defendant is therefore not a trespasser on Plot No. 319.

The upshot of the foregoing is that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. The plaintiff's claim fails and the same is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 20th day of May, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Mwaura for Plaintiff

Ms. Muigai for Defendant

Kajuju Court Assistant