



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 317 OF 2012

WILLIAM GATHECHA NGUYO.....PLAINTIFF

VERSUS

MWANGI KIHARA.....1ST DEFENDANT

MONICA WAIRURI MWANGI.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to have defendants remove a structure which the plaintiff claims was put up by the defendants on his land; evidence showing that the structure is not on the plaintiff's land; no case demonstrated by the plaintiff; plaintiff's suit dismissed with costs)

1. This case was commenced by way of plaint that was filed on 3 October 2012 and amended on 5 November 2012. The case of the plaintiff is that he is the sole and absolute proprietor of the land parcel Marmanet/Melwa Block 1/112 (Muhotetu) but that sometimes in the year 2008, the defendants started laying claim over the said land and proceeded to dispossess him thus denying him his proprietary rights. In the plaint, the plaintiff has sought a declaration that he is the legal and absolute owner of the land parcel Marmanet/Melwa Block 1/112 (Muhotetu) (hereinafter the suit property) and for an order of eviction against the defendants. He has also asked for costs and any further relief that the court may deem fit and just to grant.

2. The defendants filed a joint defence and counterclaim. In their pleadings, they averred that the plaintiff is the owner of the suit property but contended that they have since the year 1983 been in possession, quiet use and occupation of part of the land parcel Marmanet/Melwa Block 1/2655 which was said to be the predecessor of the title of the plaintiff. They denied that they started claiming the plot in the year 2008 and further denied that the plaintiff has been in possession of any portion thereof. They pleaded in their counterclaim that they have acquired title by way of adverse possession having been in quiet possession since the year 1983.

3. However at the first hearing of the suit, the defendants abandoned their counterclaim and the matter proceeded on that basis.

4. The plaintiff testified that he owns the suit property and produced the title deed as proof. The said plot is in Gatundia Trading Centre and was previously owned by Muhotetu Company Limited of which the plaintiff was Secretary. Muhotetu Company Limited became registered as proprietors on 23 December 2005 and on 16 January 2008, the plot was transferred to the plaintiff. The plaintiff testified that he was

unable to take possession of the plot because the 1st defendant had built a timber structure which he used for business. He testified that the 1st defendant had a case with Muhotetu Ltd wherein he claimed 5 acres of land in addition to 24 acres that he had. He lost this case, and the 5 acres were subdivided into various plots one of which is the suit property. He testified that the 2nd defendant, who is wife to the plaintiff, is in occupation of the 24 acres that they own and not on the suit property. He stated that he has on several occasions asked the defendants to remove their structure in vain.

5. In cross-examination, he stated inter alia that he does not know when the defendants built the structure on the suit land. He testified that many others had made developments and they were told to leave, including the defendants, but they refused to move out. He stated that this was a commercial plot and the defendants did not get a commercial plot as they were not members of Muhotetu company; they having purchased their 24 acres from a previous shareholder. He stated that the defendants do not live in the timber structure, but in their 24 acres, but that they should remove the structure.

6. The 2nd defendant testified on behalf of both defendants. She stated that she and her husband, the 1st defendant, moved into Gatundia in the year 1983. They purchased 2 shares from Mwangi Gitonga which entitled them to 24 acres now comprised in the land parcel No. 368 and they took possession of the land. She testified that the land purchased borders Gatundia Trading Centre but at the time of purchase, the Trading Centre had not been put up and plots in the Trading Centre had not been allocated. She testified that upon moving into their land parcel No. 368, they cleared it and developed a commercial building and some dwelling houses at the rear in the year 1983. She stated that they are in occupation of the parcel No. 368 and she is at a loss as to why it is being claimed that they are in the plaintiff's plot. She testified that where they have developed is not part of the plaintiff's land.

7. In cross-examination, she testified that they never purchased any plot at Gatundia since their land bordered the Trading Centre. She was of the view that the plot in dispute is in the parcel No. 368 and that her only interest is in the structures which are situated in the said plot.

8. After listening to the plaintiff and the 2nd defendant, I was at a bit of a loss as to the exact location of the structure in issue. I therefore thought it fit to commission a surveyor to visit the land and determine where the structure which is the subject of litigation lies. This was opposed by the defendant but I explained that I will have difficulty in determining where the truth lies without such a report and in my discretion I did order for one to be done.

9. The survey was conducted by the District Surveyor, Laikipia District, and a report filed. In his findings, the District Surveyor reported that the structure in dispute does not fall within the suit land (which is parcel No. 112) but rather falls partly within the land parcel Marmarnet/Melwa Block 1/ 110 and partly within the land parcel Marmanet/Melwa Block 1/111.

10. None of the parties contested the report and I invited counsels to file written submissions. Only counsel for the plaintiff did so. He submitted inter alia that the defendants have not proved that they have acquired title to the suit land by way of adverse possession. In reference to the Survey Report, he submitted that the parties were under a misguided notion about the defendants' occupation on the ground and therefore it is not necessary to issue the order of eviction. He however submitted that the plaintiff is entitled to the prayer that he be declared to be the absolute proprietor of the suit property.

11. I have considered the matter. I actually expected the plaintiff to abandon his case against the defendants given the report of the District Surveyor but he did not do so. On assessment of the evidence tabled, there is really no evidence that the defendants are in possession of the suit property. The evidence shows that the structure, which the plaintiff thought was put up by the defendants in his land, does not actually fall within his land but in the land parcels No. 110 and 111. Proceeding with the case after the report of the District Surveyor, in my view, was completely unnecessary. It is apparent that the plaintiff has no case against the defendants and I have no choice but to dismiss his suit with costs. Counsel for the plaintiff of course went at lengths to demonstrate that the plaintiff is entitled to the declaration that he owns the suit property, but since the defendants have made no claim over it, having abandoned their counterclaim, it is not proper for me to make that declaration in this suit, for the reason that the

defendants do not contest the ownership of the same. There were also submissions that the defendants have not proved their counterclaim on adverse possession, but again this was unnecessary, since as I have pointed out, the counterclaim was abandoned.

12. The result is that the plaintiff's case is dismissed with costs.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of July 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

No appearance on part of M/s Nderitu Komu for plaintiff.

Mr. Gakuhi Chege present for defendants.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU