



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 393 OF 2013

ABIGAEL BARMAO.....PLAINTIFF

VS

MWANGI THEURI.....DEFENDANT

(Suit by plaintiff inter alia seeking eviction of defendant from suit land; no defence filed by defendant; suit uncontested; no reason why suit ought not to succeed; eviction orders issued but no order on mesne profits and general damages; no orders as to costs)

JUDGMENT

In this suit, instituted by way of plaint on 23 July 2013, the plaintiff has pleaded that she is the registered owner of the land parcel Uasin Gishu/Kahungura Scheme/237 measuring 1.964 hectares. She has pleaded that on diverse dates in September 2009, the defendant without any colour of right encroached and illegally possessed the said land. The plaintiff thus wants the following orders :-

- (a) An order of eviction to remove the defendant his agents and/or servants from the suit land.
- (b) An order of permanent injunction to permanently restrain the defendant, his agents and/or servants from trespassing into, wasting, or interfere with the plaintiff's use, possession and ownership of the land.
- (c) General damages as mesne profits (sic).
- (d) interest and costs.
- (e) Any other or further relief the court may deem fit to grant.

Despite being served with summons, the defendant failed to enter appearance nor file a statement of defence. The matter was listed for hearing and the defendant was again served with a hearing notice but he failed to be present in court. The suit is therefore uncontested by the defendant.

The plaintiff testified as the sole witness. She testified that she purchased the suit land from the previous owner, one Kipkiyeng Kipsoi, on 10 November 2008. She produced the agreement of sale as an exhibit. The purchase price was Kshs. 500,000/= with Kshs. 250,000/= paid on the day of the agreement, Kshs. 50,000/= payable on or before 30 November 2008, and Kshs. 200,000/= payable after obtaining the land control board consent. Consent to transfer was duly obtained and the suit land was on 20 April 2009 transferred to the plaintiff and the title became registered in her name. The title deed was produced as an exhibit. The plaintiff stated that she had allowed the previous owner to plough the land in the year 2009. In the year 2010, she went to plough the land but found the same occupied by the defendant who was apparently occupying it with the knowledge of the previous seller. It emerged in evidence that the

plaintiff still owes the seller a sum of Kshs. 150,000/=. Her efforts to have the defendant removed from the suit land proved futile hence this suit.

I have considered the pleadings and the evidence of the plaintiff. The same is uncontroverted. There is no doubt that the plaintiff is the owner of the suit land as demonstrated by the Certificate of Title produced in evidence. By dint of being owner, she is vested with all proprietary rights including the right of exclusive possession. Her rights are set out in Section 25 of the Land Registration Act, Act No.3 of 2012 which provides as follows :-

S. 25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

There is no defence and no counterclaim filed by the defendant to demonstrate that he has any rights over the suit land.

In the circumstances I declare the plaintiff to be the owner of the whole of the land parcel Uasin Gishu/Kahungura Scheme/237 as against the defendant.

The defendant has no right over the suit land and I therefore hereby order the defendant to forthwith vacate the suit land and no later than 30 days upon service of the Judgment/ decree herein. If he fails to so vacate, the plaintiff is at liberty to move the court for an order of eviction.

I also issue an order of permanent injunction restraining the defendant from any interference with the suit land either by himself or his servants/agents or assigns.

As to the claim for mesne profits, no evidence was led on the same and I am unable to grant any in the absence of proof. I would probably have been moved to award something in general damages, but I do not think that the plaintiff deserves the same, given her conduct in not having paid in full the purchase price as agreed, yet the seller has already transferred title to her name. It may be, that because of the non-payment of the purchase price, the seller, who is not a party to this suit, has been unco-operative in evicting the defendant. Neither has any plausible explanation been given to me as to why the plaintiff waited from the year 2009 to the year 2013, to file this suit against the defendant. I therefore make no award on general damages.

As to costs, the same are in the discretion of the court. For the circumstances of this case, and especially given that the plaintiff has not paid the full purchase price as agreed, I make no orders as to costs. He who seeks equity must also do equity.

It is so declared and ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. J.B. Kibet of M/s A.K. Chepkonga & Co Advocates present for the plaintiff.

N/A for defendant who never entered appearance.