



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 982 OF 2007

PETER OLUOCH.....PLAINTIFF

VERSUS

THOMAS OKOTH.....DEFENDANT

JUDGMENT

The Plaintiff's case

The Plaintiff initially brought the suit against the Respondent by way of an Originating Summons dated 10th March 2003, which was initially filed as Nairobi High Court Civil Suit No 221 of 2003 . The suit was thereafter transferred to the Environment and Land Court and given its present case number. On 29/4/2004 the court directed that the Originating Summons be converted into a Plaint. The Plaintiff is seeking the following prayers in his Originating Summons:-

1. A declaration that the Plaintiff is the legal owner entitled to possession and occupation of the property known as Nairobi/Block 134/2 (hereinafter referred to as “the suit property”, and that the Defendant is a trespasser on the said property.
2. An eviction order against the Defendant herein and/or his licensees, servants, agents and/or employees.
3. The Defendant be ordered to pay mesne profits from the 1st day of November 2003 to the date of eviction.
4. The Defendant be ordered to pay damages to the Plaintiff.
5. Costs of the suit
6. Interest on items (3), (4) and (5) above at court rates from the date of institution of this suit until judgment.
7. Any other relief this Court may deem fit to grant.

The Plaintiff claims that he is the registered proprietor as Lessee from the Government of Kenya of the suit property, together with the buildings and improvements erected and being thereof. Further, that he acquired the said property through a sale agreement entered into on 30th October 2000 between himself and the previous owner, one David Abdalla Itemere, who he had originally sued as the 1st Defendant herein, but later withdrew the suit against him. The Plaintiff stated that pursuant to the said sale he obtained a transfer of lease dated 6th February 2001.

The Plaintiff further states that he bought the said property for purposes of occupying it as a family home, but that on attempting to take possession he found the Defendant in occupation of the same,. Further, that he has on several occasions requested the Defendant to vacate the said property, who has refused to do so, and continues to occupy the said property as a trespasser. The Plaintiff also claims that he has had to lease

alternative premises for his family at a monthly rent of Kshs 13,000/=, and that the Defendant continues to reside on the suit property without paying rent and thus occasioning him loss. Further, the said property was purchased through a house loan facility of Kshs. One Million, One Hundred Thousand (Kshs 1,100,000/=), which the Plaintiff services at the rate of Kshs.65,000/= per month.

The Plaintiff (PW1) gave oral testimony during the hearing of the suit and reiterated the averments in the foregoing. He stated that he purchased the suit property for Kshs 1,750,000/= which he paid in two instalments, namely a deposit of Kshs 500,000/= and the balance of Kshs 1,250,000/= . He produced as exhibits the said sale agreement, the bank deposit slip and receipts of the said payments, the transfer of lease, and the lease certificate to the suit property issued in his name.

The Plaintiff further testified that the sale agreement provided that he was to get vacant possession of the suit property, but that this did not happen as the Defendant was in occupation of the suit property and refused to vacate despite notice. Further, that he reported the matter to the Buru Buru Police Station who tried in vain to get the Defendant give up possession. When all attempts failed he approached his advocates who filed this suit.

During cross examination, PW1 testified that bought the suit property from David Abdalla Itemere who lives in America. He further stated that he withdrew the suit against the said David Abdalla Itemere because he discovered after the had filed the case that the said Mr. Itemere had left the country. PW1 confirmed that Mr. Itemere did not give him vacant possession and had not done so upto now. Further, that when he inspected the suit property the Defendant was living there, and that he had not seen any title in the names of Defendant and his wife.

PW1 also stated that he not aware that a year before filing of this suit David Abdalla Itemere had sued the Defendant and Pamela Mbai for vacant possession and mesne profitS. Nor was he aware that the said suit is still pending. Lastly, PW1 testified that he did not know who built the storeyed extension on the suit property, and that what he bought was the original house built by Housing Finance Company of Kenya. He confirmed that he saw the extension when he visited the suit property, and that it was on the land occupied by the original house.

The Defendants' Case

The Defendant filed a statement of defence dated 27th June 2013. His defence is that he and his spouse Pamela Akinyi Mbaye jointly purchased the suit property in 1995 through a mortgage facility of Kshs.964,220/= which was repayable monthly, and have to date lived thereon with their children as a family.

However, that on or about 21st November 2000 one David Abdalla Itemere filed Nairobi HCCC No. 1921 of 2000 against the Defendant and his spouse seeking their eviction from the suit property and mesne profits for trespass. The Defendant and his spouse thereupon filed their defence challenging the sale of the suit property to Mr. Itemere which they claimed was illegal and fraudulent, and applied to join both Housing Finance Company of Kenya and Panama Auctioneers as the First and Second Third Parties in a counter claim for damages, nullification or setting aside of the sham undersale, and also sought full accounts. The Defendant averred that the said dispute has since not been prosecuted by Mr. Itemere since an order given by Kuloba J. (as he then was) dated 5/3/2001, which maintained the *status quo* to date.

The Defendant claims that he and his spouse have improved the original property by erecting a storeyed extension thereon at a value or cost of over Kshs.2.8 million, and have continued to live with their children on the suit property, as they are not parties or privy to the sale agreement dated 30th October 2000 between Mr. Itemere and the Plaintiff herein. Further, that the Defendant and his spouse cannot be trespassers on their own property and are not liable to pay mesne profits claimed herein.

The defence called Pamela Akinyi Mbaye (DW1) as its only witness. DW1 testified that she was the Defendant's wife, and that she has been living on the suit property since 1995 with her family after she jointly bought it with the Defendant on mortgage from the Housing Finance Company of Kenya. She

remembered that in November 2000, Mr. Itemere came to the house and asked them to move out of the house. Further, that they did not move out, and reported the matter to their lawyer, and they were subsequently granted court orders not to move out. She testified that the last order was given by Justice Kuloba on 5th March 2001, and that since then the case has been pending in court and Mr. Itemere had disappeared.

DW1 further testified that in 2006, the Plaintiff went to the suit property with policemen to arrest the Defendant's family on the ground that they had refused to move out of the suit property. Further, that the Defendant's family reported the matter to the Buru Buru police station, and that the Plaintiff had not been back to the property since that time. The witness stated that the Defendant do not have any contract with the Plaintiff and only knew Mr. Itemere, and that they have to date not been served with any court orders by the Plaintiff or Mr. Itemere. She also stated that since they bought the property she has developed a two-storey extension on it which cost Kshs 2.6 million, and was doing so because they were the owners of the suit property.

The witness also testified that they are still pursuing their case with Mr. Itemere as Housing Finance Company of Kenya sold the property to him through auctioneers at a throw away price of Kshs.800,000/=. Further, that she is not ready to give vacant possession because she has nowhere to take her children. She also stated that she cannot pay the Plaintiff rent because she did not know him, and that she only knows Mr. Itemere who is the one she can vacate the house to. DW1 asked the court to adopt her witness statement signed on 31st May 2013 as her evidence, and produce a bundle of documents as her exhibits, made by of a letter from Housing Finance Company of Kenya dated 6th September 2000 and court proceedings in Nairobi HCCC 1921 of 2000.

Upon cross-examination, DW1 admitted that they had difficulties in paying their mortgage that led to auctioneers selling the suit property to Mr. Itemere on the instruction of Housing Finance Company of Kenya. Further, that they had arrears in payment of their mortgage of Kshs Kshs.1,177,190.79 as shown in the letter from Housing Finance Company of Kenya dated 6th September 2000 which she had produced as an exhibit.

She further stated that she did not know that Mr. Itemere sold the property to the Plaintiff, and that it was not correct for the Plaintiff to ask her to vacate the suit property because she had not finished the case with Mr. Itemere. She confirmed that the Plaintiff is not a party in that case, which is Nairobi HCCC 1921 of 2000. DW1 also conceded that she did not have any valuation showing the suit property was worth Kshs.4.5 million, nor did she have any photographs of the extension she had built on the suit property or any documents to show that the suit property is her property.

DW1 confirmed that she had seen the copy of certificate of lease in the Plaintiff's bundle of documents dated 5th February 2008, which showed that the property on which she was staying belongs to the Plaintiff. She however stated that she cannot pay the Plaintiff rent because she built the extension on the property.

The Issues and Determination

The parties were directed to file written submissions. Oluoch Olunya & Associates, the Advocates for the Plaintiff, filed written submissions dated 18th November 2013. The Defendant's Advocates did not file any written submissions. From the evidence given in court, It is not disputed that the Plaintiff did buy the suit property from on David Abdallah Itemere. It is also not disputed that the Defendant is in possession of the suit property. There are thus three remaining issues for determination:

1. Who is the legal and rightful owner of the suit property?
2. Whether the Defendant is a trespasser on the suit property.
3. Whether the Plaintiff is entitled to the remedies sought.

Who is the legal and rightful owner of the suit property?

It was submitted by the Plaintiff's counsel that the Plaintiff had confirmed through his oral evidence and his statement adopted in court dated and filed on 22nd November 2011, that he is the registered owner of the suit property being Nairobi/Block 134/2. The counsel referred the court to the Plaintiff's Bundle of Documents dated and filed on 5th February 2009 and highlighted the documents showing evidence of ownership. He submitted that the Plaintiff had thereby established his claim as per the set standard in section 26(1) of the Land Registration Act.

I have perused the Plaintiff's bundle of documents which he produced as his exhibit. It contains evidence of an executed agreement for sale dated 30th October 2000 in which the Plaintiff purchased the suit property from Mr. David Abdallah Itemere at a consideration of Kshs.1,750,000/=. Evidence of payment of the said purchase price in two installments of Kshs.500,000/= and Kshs.1,250,000/= is also provided by way of a copies of payment slips to Kenya Commercial Bank and receipts from the sellers advocates for both amounts. Evidence was also provided by the Plaintiff of the receipt for payment of the stamp duty from the Lands office dated 7th February 2001; the duly executed transfer of lease by David Abdallah Itemere and the Plaintiff dated 6th February 2001; and of the Certificate of Lease with respect to the suit property issued to the Plaintiff on 15th February 2001 under the Registered Land Act .

The effect of registration of a person as the proprietor of a leasehold interest under the repealed Registered Land Act was provided in section 27(b) which stated as follows:

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

Under section 28 of the repealed Registered Land Act, the rights acquired by a proprietor were only subject to any leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, or the overriding interests that were provided in section 30 of the said Act.

Section 26(1) of the Land Registration Act now provides as follows in this respect:

“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 Plaintiff has brought evidence of his purchase of, and title to the suit property. The Defendant has not brought any evidence of any title to the suit property, of any overriding interest in his favour, or of any misrepresentation, or fraudulent and illegal actions by the Plaintiff in his registration as owner of the suit property. On the contrary, his allegation is that the Housing Finance Company of Kenya sold the land fraudulently to David Abdallah Itemere, at an undervalue and he has filed a counterclaim in this respect in Nairobi HCCC 1921 of 2001.

I also note in this respect that the Defence conceded that they were in arrears of payment of the mortgage with Housing Finance Company of Kenya, and that the suit property was sold by way of auction to David Abdallah Itemere. The Defendant's remedy if any is thus against the Housing Finance Company of Kenya for their claim that the suit property was sold at an undervalue, and not the Plaintiff who bought the suit

property as an innocent purchaser for value from a third party.

Furthermore, the only remedy that can be available to the Defendant in the circumstances is that of damages, as it was provided in section 69B(2) of the Transfer of Property Act (since repealed) which was applicable at the time of the sale of the suit property to the Plaintiff, that the effect of a transfer of a sale by a mortgagee was as follows:

“Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

Similar provisions are now provided for the protection of a purchaser who has bought land sold in exercise of a statutory power of sale in section 99 of the Land Act of 2012 as follows:

“(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

I thus find for the foregoing reasons that in the circumstances of this case the Plaintiff is the legal and rightful owner of the suit property.

Whether the Defendant is a trespasser on the suit property

It is not disputed that the Defendant is in possession of the suit property. The Plaintiff submitted in this regard that the Defendant's witness during cross-examination stated that she had no documents to show that the suit property was owned by the Defendant, who was thereby a trespasser, and that an honest belief that the land belongs to him is no defence. The Plaintiff cited the decisions in **Willesden Investments Limited vs Kenya Hotel Properties Limited, Nairobi HCCC NO. 367** and **M'Mukanya vs M'Mbijiwe, HCCA No. 13 of 1980** in this respect.

This Court has already found that the Plaintiff is the rightful owner of the suit property. The Plaintiff tendered evidence in court that the Defendant refused to vacate his property despite being issued with notice. The Defendant witness also conceded on oath that they had been requested to vacate but they were not willing to vacate as they did not know the Plaintiff, and had nowhere else to go. The Defendant having no right of ownership of the suit property is thus a trespasser in light of Plaintiff's legitimate proof of ownership that has been established herein.

This Court is in this respect guided by the decision of the Court of Appeal in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, wherein it was held that an absolute and indefeasible owner of land is entitled to take proceedings in trespass. Further, that where an Act gives a registered proprietor title upon registration, unless there is any other person lawfully in possession such as a tenant, that title carries with it legal possession.

I have also perused the proceedings produced in evidence by the Defendant and note that no orders of *status quo* were granted by Kuloba J. on 5th March 2011 as claimed by the Defendant. All that the learned Judge ordered on that date was the setting aside the interlocutory judgment entered in favour of the Plaintiff.

Whether the Plaintiff is entitled to the remedies sought.

The Plaintiff in addition to his submissions on his entitlement to ownership of the suit property, also submitted that the action of trespass by the Defendant has occasioned him the loss of use of the suit property as a home and suffered damages. Further, that the Plaintiff had been forced to seek out alternative housing at a monthly rent. He cited the decision in **Kamau Macharia vs Mwangi Kigongu & 2 Others; HCCC No. 4067 of 1986** to the effect that even without evidence of loss the court is obliged to assess damages and that where the Plaintiff has for a long time been deprived of the use of the land in dispute, he is entitled to damages.

Further, that the measure of damages is such a sum as the court consider reasonable, considering the size of the land involved and the length of time. The Plaintiff further alleged that he had brought evidence that he did purchase the suit property through a loan facility from Stima Sacco Limited through his Co-operative Bank of Kenya Account of Kshs.1,100,000/=.

This court has found the Defendant to be a trespasser on the suit property, which has also been found to be legally owned by the Plaintiff, and it therefore follows that the Plaintiff is entitled to the remedies of declaration of ownership and eviction sought. This finding notwithstanding, this Court also notes that the Defendant and his family have been living on the suit property, and will therefore require adequate notice to remove their possessions from the suit property and secure alternative accommodation.

On the remedy sought of payment of mesne profits, this Court notes that the Plaintiff did not bring any evidence of the rent he claims to have paid for the alternative accommodation he sought. He also did not bring any evidence of the rent payable for the suit premises that would have formed the basis for his claim for mesne profits. Therefore his claim for special damages under the head of mesne profits fails, in light of the requirement stated by the Court of Appeal in **Hahn -vs- Singh , (1985) KLR 716** that special damages must not only be pleaded but must also be strictly proved.

On the remedy sought of general damages, I note that the Defendant had constructed a storeyed extension

on the suit property, whose existence was also conceded by the Plaintiff. The Plaintiff also conceded that hat he bought from Mr. Itemere was the original house built on the suit property by Housing Finance Company of Kenya. It is my view that the extension built on the suit property by the Defendant will adequately compensate the Plaintiff for any damage he may have incurred as a result of the trespass on the suit property. It would also be inequitable in the circumstances to require the Defendant to pay general damages having incurred the costs of building the said extension. However, the Defendant having been spared the cost of damages, must in turn not interfere with the structures on the suit property.

I accordingly find that the Plaintiff has proved his case on the balance of probabilities and hereby order as follows:

1. That the Plaintiff herein namely Peter Oluoch, is hereby declared the legal owner of, and entitled to possession of the parcel of land known as Nairobi/Block 134/2 .
2. That the Defendant herein namely Thomas Okoth, by himself, his licensees, servants, agents and/or employees are hereby ordered to vacate the parcel of land known as Nairobi/Block 134/2 within 60 days of the date of service by the Plaintiff of the orders given herein, failing which orders of eviction shall issue.
3. That in lieu of payment of general damages for trespass, the Defendant shall not demolish or in any manner interfere with the structures built on the suit property.
4. The Plaintiff is awarded the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE