



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL CASE 73 OF 2002

ELGON INSURANCE CONSULTANT LTD.....PLAINTIFF

VERSUS

PRISCILLA MUTHONI KIRUGI AND 19 OTHERS ...DEFENDANTS

JUDGMENT

In the amended plaint dated 15th October 2008, Elgon Insurance Consultants Ltd., the plaintiff herein, prayed for judgment against Priscilla Muthoni Kirugi, Esther Kori Kirugi, Peterson Murimi Kirugi, Samuel Gichobi Kirugi, Mwangi Kirugi, Eunice Njeri Kirugi, Dan Muchira Kirugi, James Nyaga Kirugi, Dickson Mwai Kirugi, Jacinta Njoki Kirugi, Muchiri Kirugi, Joseph Kinyua Kirugi, Mugo Kirugi, David Bundi Kirugi, Jamlick Kimotho Kirugi, Ephraim Thiaka Kirugi, Amos Kathigo Kirugi, Wawira Kirugi, Mithamo Kirugi and Mary Muthoni Kirugi, being the 1st to 20th defendants herein in the following terms:

- a. *An order for eviction of the defendants, their families and property from L.R. NO. INOI/KAMONDO/1829, INOI/KAMONDO/1830, INOI/KAMONDO/1831, INOI/KAMONDO/1832.***
- b. *Damages for trespass.***
- c. *Permanent injunction restraining the Defendants by themselves, their families, servants, agents or employees from entering, staying and/or interfering or dealing in any manner whatsoever with land parcel number INOI/KAMONDO/1829, INOI/KAMONDO/1830, INOI/KAMONDO/1831 and INOI/KAMONDO/1832.***
- d. *Cost of this unit.***
- e. *Interest on (b) and (d) above at court rates.***
- f. *Any other and further relief this honourable court may deem just and expedient to grant.***

The Plaintiff tendered the evidence of its managing Director, Ephantus Mugo Mburia (P.W.1). P.W.1 produced four certified copies of the green cards in respect of Inoi/Kamondo/1829, Inoi/Kamondo/1830, Inoi/Kamondo/1831 and Inoi/Kamondo/1832 to show that the plaintiff was the registered proprietor of the aforesaid parcels of land. According to the aforesaid copies of the register the plaintiff became the registered proprietor on 21st July 2000 and was issued with title deeds on 18th September 2000. P.W.1 told this court that the aforesaid parcels of land were the resultant subdivisions of the original parcel of land known as L.R. No. Inoi/Kamondo/583. He produced a copy of the register as an exhibit in evidence. It is the evidence of P.W.1 that he bought the parcel of land sometimes in the year 1962 and caused it to be registered in the name of Kirugi Mburia, now deceased to hold it in trust for him since he was preparing to travel overseas for further studies. P.W.1 further alleged that he agreed with his late brother Kirugi Mburia, that upon his return he would re-transfer the land to

him. The register shows that parcel No. Inoi/Kamondo/583 was transferred from Kirugi Mburia to Ephantus Mugo Mburia on 30th December 1976. P.W.1 produced the application for land control board consent, the letter of consent and the transfer duly signed by the late Kirugi Mburia as exhibits in evidence. P.W.1 said that the late Kirugi Mburia died in 1992 without raising any complaint over the land in question. The copy of the register produced shows that title No. Inoi/Kamondo/583 was closed upon subdivision giving rise to the four parcels of land earlier stated hereinabove. P.W.1 stated that he put up a house for himself and another for his parents on the suit land. He also said that he planted a total of 3000 coffee and 2000 grivellia trees. He also testified that he caused the four parcels of land to be transferred to the plaintiff. P.W.1 further said that he allowed his late brother, Wilson Kirugi Mburia and his family to occupy a ¼ of an acre of the land. It is alleged that when Wilson Kirugi Mburia died in 1992, his family, the defendants herein, invaded the land and subdivided it amongst themselves. P.W.1 now wants them evicted by an order of this court. P.W.1 claimed that his late brother had been allocated another piece of land known as Mwea/Mukima/373 in Mwea location, Embu District. P.W.1 claimed for payment of loss of user calculated at a rate of Kshs. 1000/= per acre per year i.e Kshs. 6000/= for 6 acres from the date of registration.

A total of 11 witnesses testified in support of the defence case. Priscilla Muthoni Kirugi (D.W.1) told this court that the suit premises belonged to her deceased husband, Wilson Kirugi Mburia. She stated that they have been in occupation of the suit land for a very long period and that they even buried the deceased on the suit land. D.W.1 said the family planted bananas on the land. It is D.W.1's evidence that P.W.1 has done no developments at all on the land in dispute. D.W.1 denied that there was any coffee trees planted on the suit land. It is her submission that her deceased husband had planted coffee which were later on uprooted by the deceased. D.W.2 – D.W.11 adopted the evidence of D.W.1. D.W. 7 was of the view that if the land was transferred to P.W.1 then he holds it in trust for the estate of Wilson Kirugi Mburia, deceased.

At the close of the evidence, learned counsels from both sides were allowed to file written submissions which they duly did. I have considered the evidence and the submissions presented by both sides. There is no evidence that learned advocate filed the agreed issues. However, from the evidence and the submissions I think the following issues arose for the determination of this court:

i Who between the plaintiff and the defendants has proprietary interest over the four parcels of land?

ii What are the available remedies?

The Plaintiff company was incorporated on the 7th day of September 1999. Ephantus Mugo Mburia (P.W.1) has been able to show that he purchased the parcel of land known as L.R. Inoi/Kamondo/583 from one Njeru Kiranga in 1962. P.W.1 further stated that he allowed his brother, Wilson Kirugi Mburia, deceased to be registered as proprietor of the aforesaid parcel of land in trust for him because he was proceeding for further studies in England. The defendants did not tender any evidence to contradict the aforesaid assertion. The defendant's main defence is that they have been in occupation of the land for many years and that they have known no other home for the last 46 years. P.W.1 gave in detail the legal steps he undertook to have the parcel of land known as Inoi/Kamondo/583 subdivided into four portions namely Inoi/Kamondo/1829, Inoi/Kamondo/1830, Inoi/Kamondo/1831 and Inoi/Kamondo/1832. There is also evidence that he caused the aforesaid parcels of land to be transferred and registered in the name of Elgon Insurance consultants Ltd. on 21st July 2000. P.W.1 admits that he allowed Wilson Kirugi Mburia, deceased to occupy a ¼ of an acre where his remains was buried. P.W.1 stated that his late brother lived on the suit land on a licence which was terminable at any time. It is apparent from the green cards produced that the four parcels of land are in the name of the plaintiff herein. The defendants have alleged that the plaintiff acquired the suit premises fraudulently. They have not given the particulars of fraud nor have they tendered evidence proving that the plaintiff had acquired the same by fraudulent means. Worst still, the defendants have set up the defence of adverse possession but have failed to displace the assertion that Wilson Kirugi Mburia, deceased and his family were in occupation as tenants at will by the plaintiff. I am convinced that the plaintiff's titles are protected under section 27 and 28 of the Registered Land Act. I am satisfied the plaintiff is entitled to the orders sought.

Having come to the conclusion that the plaintiff is legal owner of the four parcels of land, the next question to be answered is what remedies are available. The plaintiff has asked for inter alia damages for trespass in form of loss of user from the date of registration at the rate of Kshs. 1000/= per acre per year. It should be noted that P.W.1 transferred the aforesaid parcel of land to the plaintiff when the defendants were on the suit land with his permission. They were tenants at will. There is no evidence that the plaintiff issued quit notices to the defendants sake for the allegations made in paragraph 9 of the amended plaint. On this basis I decline to grant the order for damages for trespass and loss of user. The plaintiff was bound to deal with the defendants as sitting tenants at will. The plaintiff is entitled to the other prayers prayed in the amended plaint.

In the end judgment is entered for the plaintiff and against the defendants as follows:

- i The defendants are ordered to vacate the suit premises namely Inoi/Kamondo/1829, Inoi/Kamondo/1830, Inoi/Kamondo/1831, noi/Kamondo/1832 within a period of 30 days. from the date of judgment, in default the plaintiff shall be at liberty to forcefully evict the defendant their families, servants, agents and or employees at their expense without further reference to this court.*
- ii A permanent injunction is issued to restrain the defendants by their families, servants, agents and or employees from entering, staying thereon and or interfering in any way with the aforesaid parcels of land after the lapse of 30 days from the date of this judgment.*
- iii Costs of the suit.*

Dated and delivered this 10th day of March 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kahiga h/b Mr. Muchira for Plaintiff N/A Magee wa Magee for the Defendants.

J.K. SERGON

JUDGE