



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 494 OF 2013

SUSAN NJOKI NJUGUNA.....PLAINTIFF

=VERSUS=

JUJA CONSTITUENCY DEVELOPMENT

FUND COMMITTEE.....1ST DEFENDANT

THE OFFICE OF INSPECTOR

GENERAL OF POLICE.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of a plaint dated 22nd April, 2013. The plaintiff averred that at all material times prior to the filing of this suit, she had been and continued to be the registered proprietor of all that parcel of land known as L.R No. Ruiru Kiu/Block 2 (Githunguri)/4997 (hereinafter referred to as “the suit property”). The plaintiff averred that on or about 9th October, 2012, the 1st defendant and/or its agents fraudulently entered the suit property and began erecting illegal structures thereon in the form of an Administration Police Post for the benefit of the 2nd defendant. The plaintiff averred that on or about 12th October, 2012, the plaintiff visited the 1st defendant and complained about the said trespass. The plaintiff averred that the 1st defendant admitted that the suit property was not public land and assured the plaintiff that the said illegal structures will be removed. The plaintiff averred that despite that assurance, the 1st and the 2nd defendants persisted with the said trespass and illegal construction.

The plaintiff averred that the suit property was private land and as such the 1st and 2nd defendants had no colour of right to enter and/or erect the said illegal structures thereon. The plaintiff averred that she purchased the suit property from Anne Waithira Kariuki and Hellen Gathoni Mwhia and was issued with a valid title in respect thereof by the 3rd defendant. The plaintiff averred that the 3rd defendant in an attempt to defeat the cause of justice and to deprive the plaintiff of possession of the suit property had acquiesced to the said acts of trespass by the 1st and 2nd defendants. The plaintiff averred that by reason of the aforesaid illegal and fraudulent entry and construction of an Administration Police Post on the suit property, the plaintiff had suffered loss and damage. The plaintiff sought judgment against the defendants for;

1. An order of permanent injunction restraining the defendants, their agents or servants from entering or remaining on the suit property or in any other manner whatsoever interfering with the peaceful and quiet possession of the aforesaid parcel of land by the plaintiff together with her family, servants and/or agents.

2. An order of permanent injunction restraining the 1st, 2nd and 3rd defendants jointly or severally, their agents or servants from transferring, selling, assigning, conveying, charging, or further dealing in any manner whatsoever with the suit property.
3. An order of eviction of the 1st and 2nd defendants from the suit property forthwith.
4. An order authorizing the plaintiff to demolish all the illegal structures constructed on the suit property forthwith.
5. General damages
6. Exemplary damages
7. Interest at court rates on damages from the date of judgement to the date of full and final payment.
8. Cost.

The suit was defended by the defendants. The 1st defendant filed its defence dated on 31st July, 2013 and denied the plaintiff's claim in its entirety. The 1st defendant averred that it had no claim of ownership over the suit property and that it had not constructed the alleged illegal structures on the suit property. The 1st defendant averred that its connection with the suit property was the funding that it gave for the construction of the Administration Police Post that the plaintiff claimed to be on the suit property. The 1st defendant averred that the said project that it funded was on public land that was reserved by the community/government for the construction of a Police Post. The 1st defendant denied that the plaintiff suffered any loss or damage and urged the court to dismiss the suit.

The 2nd, 3rd and 4th defendants filed a joint defence on 10th July, 2013. The 2nd, 3rd and 4th defendants denied that they were involved in the alleged acts of trespass on the suit property. The 2nd, 3rd and 4th defendants denied the acts of fraud pleaded against them and averred that they neither purported to own the suit property nor attempted to acquire it compulsorily. The 2nd, 3rd and 4th defendants denied further that they had carried out any construction on the suit property or that they colluded with the 1st defendant to deprive the plaintiff of the suit property. The 2nd, 3rd and 4th defendants averred that the structure on the suit property that was supposed to host the Administration Police on completion was constructed by the local community of Mutonya in Juja Constituency with funds from the 1st defendant to address insecurity issues in the area. The 2nd, 3rd and 4th defendants averred that neither the 2nd defendant nor the government was involved in the project save for the 2nd defendant's agreement to provide the police once the building was completed. The 2nd, 3rd and 4th defendants averred that since the construction of the said Administration Police Post had not been completed as at the time this suit was filed, the 2nd defendant had not posted any police to the said Police Post. The 2nd, 3rd and 4th defendants denied that the plaintiff had suffered loss and damage as a result of the alleged acts of trespass and urged the court to dismiss the plaintiff's suit.

At the trial, the plaintiff gave evidence and called one witness while the defendants closed their respective cases without calling evidence. After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed her submissions dated 13th March, 2020 while the 1st defendant filed its submissions dated 30th June, 2020 on 7th July, 2020. I did see any submissions by the 2nd, 3rd and 4th defendants on record.

I have considered the pleadings and the evidence tendered by the plaintiff in proof of her case. I have also considered the written submissions on record and the cases cited in support thereof. The issues arising for determination in this suit in my view are the following;

1. Whether the plaintiff is the proprietor of the suit property.
2. Whether the defendants trespassed on the suit property.
3. Whether the plaintiff is entitled to the reliefs sought.
4. Who is liable for the costs of the suit.

Whether the plaintiff is the proprietor of the suit property.

I am satisfied from the evidence on record that the plaintiff is the registered proprietor of the suit property. The plaintiff produced evidence showing that she lawfully acquired the suit property from Anne Waithira Kariuki and Helen Gathoni Mwihi for valuable consideration and that the property was transferred and registered in her name on 3rd December, 2011. The defendants did not dispute the plaintiff's title to the suit property. It is my finding that the plaintiff is the lawful proprietor of the suit property.

Whether the defendants trespassed on the suit property.

The plaintiff's claim against the defendants is based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the plaintiff is the lawful owner of the suit property. As the owner of the suit property, the plaintiff is entitled to possession thereof. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the said Act provides as follows:

“27. Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) 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.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The two sections have been reproduced in sections 24 and 25 of the Land Registration Act, 2012 as follows:

“24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) 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 or expressed agreements, liabilities or incidents of the lease.

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”.

The plaintiff placed evidence before the court showing that a building had been constructed on the suit property. None of the defendants disputed the photographs that were produced by the plaintiff in evidence in proof of the existence of the said building on the suit property. In their defences, the defendants while laying no claim to the suit property claimed that the said building was on public land. As I have stated earlier, the defendants did not tender evidence at the trial. The plaintiff placed before the court evidence showing that she was the owner of the suit property and that a building had been constructed on her land. The plaintiff produced photographs of the said building which she told the court was standing on her land. With that evidence, the burden shifted to the defendants to prove that the said building was on public land. The defendants did not place any evidence in proof of that allegation. It is therefore my finding that the said building or structure was constructed on the suit property. The next question is, who constructed that building on the suit property”

All the defendants denied entering the suit property and carrying out construction of the structure complained of by the plaintiff. The defendants admitted however that the said structure was meant to be an Administration Police Post. The burden of proof was upon the plaintiff to prove that it was the defendants who put up the said structure on the suit property. From her witness statement that she adopted as her evidence in chief, the plaintiff seems not to have known the identities of the people who put up the said structure on the suit property. This is clear from paragraph 5 of her witness statement. The 1st defendant admitted funding the construction of the building at the request of the local community. The 1st defendant denied however that it was involved in the construction. For the 2nd, 3rd and 4th defendants, there was no evidence connecting them to the construction of the said building save that the 2nd defendant had agreed to post Police Officers at the building once it was completed. It was not disputed however that the 2nd defendant had not posted police officers to the building as at the time when this suit was filed. By funding the construction of the building, the 1st defendant must have engaged a contractor for that purpose and paid him. In the absence of anyone coming forward to claim ownership of the building and the 1st defendant not giving the court the identities of “the public” on whose behalf it was funding the construction of the said building on the suit property, the 1st defendant must be taken to have been the one which entered the suit property and put up the said building thereon. It was not disputed that the said building was put up without the permission of the plaintiff.

The next question that I need to determine is whether the 1st defendant had any justifiable cause for entering into the suit property and putting up the said structure thereon. The 1st defendant did not tender any evidence at the trial. The 1st defendant had contended in its defence that the said building was constructed on public land. I have already dismissed that argument earlier in this judgment. Since neither the 1st defendant nor the public on whose behalf it claimed to have funded the construction of the said building had no interest in the suit property recognized in law, it is my finding that the 1st defendant had no lawful justification for entering and putting up a structure on the suit property. For the foregoing reasons, it is my finding that the 1st defendant trespassed on the suit property.

Whether the plaintiff is entitled to the reliefs sought.

I have set out herein earlier the reliefs that were sought by the plaintiff. From my findings above, I am satisfied that the plaintiff is entitled to prayers 1, 2 and 4 of the plaint. The plaintiff is also entitled to prayer 3 but only as against the 1st defendant since the 2nd defendant is not in occupation of the property. No basis was laid for the grant of prayers 5, 6 and 7 of the plaint and as such the same are not available to the plaintiff. On the issue of costs, I will award the plaintiff the costs of the suit to be paid by the 1st defendant.

Conclusion:

In conclusion, I hereby enter judgement for the plaintiff on the following terms;

1. An order of a permanent injunction is issued restraining the 1st and 2nd defendants by themselves, their servants or agents from entering, remaining on or in any other manner whatsoever interfering with the plaintiff's quiet possession of L.R No. Ruiru Kiu/Block 2 (Githunguri) /4997.
2. An order of a permanent injunction is issued restraining the 1st, 2nd and 3rd defendants jointly or severally by themselves, their servants or agents from transferring, selling, assigning, conveying, charging, or further dealing in any manner whatsoever with L.R No. Ruiru Kiu/Block 2 (Githunguri)/ 4997.
3. The 1st defendant shall vacate and handover possession of L.R No. Ruiru Kiu/Block 2 (Githunguri)/4997 to the plaintiff and shall demolish and remove all the structures it had put up thereon forthwith and in any event not later than 30 days from the date hereof.
4. In the event that the 1st defendant fails to demolish and remove the illegal structures it had put up on L.R No. Ruiru Kiu/Block 2 (Githunguri)/4997 within 30 days from the date hereof, the plaintiff shall be at liberty to demolish and remove the same from the property.
5. The 1st defendant shall pay the plaintiff's costs of the suit.

Dated and Delivered at Nairobi this 17th Day of December 2020

S. OKONG'O

JUDGE

Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Kori h/b Mr. Githui for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd, 3rd and 4th Defendants

Ms. C. Nyokabi-Court Assistant



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