



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1237 OF 2015

PHYLLIS WANGUI KTAVI.....1ST PLAINTIFF

SIMON KIBAKI KANG'ETHE.....2ND PLAINTIFF

=VERSUS =

STEPHEN PARASHO KAITO.....DEFENDANT

JUDGMENT

A. Introduction and Litigation History

1. The suit herein was filed by the Plaintiffs initially acting in person on 3rd December 2015. The Plaintiffs sought inter alia for an eviction order against the Defendant to vacate **L.R No. Kajiado/Kitengela/74727**.
2. On the same day, the Plaintiffs also filed a Notice of Motion application seeking for eviction orders against the Defendant. The said application was heard and determined ex parte and a ruling delivered on 19th April 2018 wherein, the Court declined to issue the eviction orders at the interlocutory stage and directed the Plaintiffs to set down the main suit for hearing.
3. In the meantime, the Plaintiffs had on 20th May 2016 appointed **M/S Mwangi Chege & Co. Advocates** to act for them in the matter.
4. The Defendant despite being served with all the court process did not enter appearance. Neither did he file a defence. In consequence and pursuant to **Order 10 Rule 9 of the Civil Procedure Rules**, the case was set down for formal proof hearing on 10th November 2021.
5. In a nutshell, the Plaintiffs case from the pleadings is that sometimes in the year 2008, the Defendant owned property known as L.R No. Kajiado/Kitengela /20706 measuring 5.9 hectares, upon which he agreed to sell to the Plaintiffs a portion of 1.5 hectares for a sum of **Ksh 1,750,000/-**. The Defendant was paid the purchase price in full and acknowledged receipt vide an agreement dated 9th June 2009.
6. The necessary sub-division and consents were obtained and the Plaintiffs sub-division was assigned **L.R No. Kajiado/Kitengela/74727**. After the transaction, the Defendant declined to give vacant possession of the suit property hence necessitating the Plaintiffs to file this suit. To the Plaintiffs, they had acquired an equitable interest in the property and they were entitled to the prayers sought in the Plaintiff.

B. Evidence

7. The case proceeded as an undefended case under **Order 10 Rule 9 of the Civil Procedure Rules**. Only the 1st Plaintiff testified as PW1. She gave evidence that she knew the Defendant and that together with her husband they had bought a portion of land **LR No. Kajiado/Kitengela/74727** from him. The land was initially part of **L.R No. Kajiado/Kitengela/20706** which comprised of 5.9 hectares prior to the subdivision and the subsequent purchase by them.

8. The 1st Plaintiff stated that they bought the said land with the intention of utilizing it and finally residing there. However, their efforts to do so had been frustrated by the Defendant who had refused to vacate despite receiving the full purchase price and since 2014, they have not been able to occupy and settle on the suit property.

9. It was the 1st Plaintiff's further testimony that their transaction was reduced into a sale agreement which was produced as evidence. The 1st Plaintiff also stated that they paid a total of **Ksh 1,750,000/** to the Defendant which the Defendant acknowledged receipt.

10. It was also the 1st Plaintiff's testimony that the Defendant is still illegally occupying the suit property despite selling the same to them. The 1st Plaintiff also availed all the documents to support their case and requested the Court to grant the necessary prayers as sought.

C. Submissions

11. The Plaintiffs filed their written submissions through their counsel **Mr. Chege of M/S Mwangi Chege & Co. Advocates** on 16th November 2021. The Plaintiff's counsel **Mr. Chege** submitted that the Plaintiffs had proved their case to the required standard. He submitted that there was an agreement which parties were bound. According to the Plaintiff's counsel the Defendant was in breach since he had not handed over vacant possession of the suit property despite receiving the full purchase price.

12. The Plaintiffs' counsel also submitted that the Defendant had infringed his clients' rights for a long time and it was about time that he be evicted from the property to allow his clients to take possession. Counsel also submitted that upon eviction of the Defendant he should be restrained by way of a permanent injunction from ever trespassing into the Plaintiffs' property **L.R No. Kajiado/Kitengela/74727** and further that he be condemned to pay the costs of the suit.

13. Reliance was placed by the Plaintiffs' Counsel on the case of **Anthony Ndun'gu Maina v Faith Wanjiku Maina [2020] eKLR** where the Court issued eviction orders against the Defendant after the Court had found that the Plaintiff was the owner of the suit property and was entitled to all the rights and privileges thereto as provided by section 24 and Section 25 of the Land Registration Act.

D. Analysis and Determination

14. With the foregoing outline of the pleadings, litigation history, evidence and submissions and of course the relevant law I must now decide the suit.

15. The main issue for determination is whether the plaintiffs have proved their case against the Defendant to the required standard.

16. Although the suit was undefended, the Plaintiffs have a duty to formally prove their case on a balance of probabilities as is required by law.

17. In the case of **Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347** the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

18. Similarly, in the case of **Gichinga Kibutha Vs Caroline Nduku (2018) eKLR** the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must

discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

19. PW1 stated that the Plaintiffs were the registered owner of the suit land. From the documentary evidence vide the copy of the title deed for **land parcel No. Kajiado/Kitengela/74722** produced as **exhibit 6**, it is evident that both plaintiffs were registered as the proprietors of the suit land on 24th October 2014. The title document was issued on the same day.

20. The law is very clear on the position of a holder of a title in respect to the land. **Section 24(a) of the Land Registration Act** provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

21. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

22. The Plaintiffs have proved that they are indeed the registered owner of the suit property and therefore the rightful owners having purchased the same lawfully from the Defendant. The Plaintiffs stated that the Defendant had refused to vacate and had trespassed onto the suit land to the extent of putting up a temporary structure.

23. From the foregoing, it is apparent that after the Plaintiffs bought and/or purchased, what now constitutes the suit property, the sale of which was duly consented to by the Defendant herein. In the premises, the Defendant cannot turn his back and deny the Plaintiffs peaceful occupation to the suit property. The Defendant has no business remaining on the land he himself had willfully sold to the Plaintiffs and even received full purchase price. It is unfortunate that since 2014 the Plaintiffs had not been able to enjoy peaceful possession of the suit land owing to Defendant’s misdeeds.

24. I find that the Plaintiffs are entitled to all the rights, interest and privileges that pertain to the land. The Plaintiffs are therefore entitled to the prayers sought.

E. Final orders

25. From the foregoing analysis, the Plaintiffs have proved their case on a balance of probabilities and in this regard, this Court makes the following final orders;

a) An eviction order be and is hereby issued directed to the Defendant ordering him to vacate the plaintiffs’ parcel of land known as Kajiado/ Kitengela/74727, forthwith.

b) A permanent injunction be and is hereby issued restraining the Defendant from trespassing, encroaching, entering into, selling, developing, dealing, or in any other manner interfering with the Plaintiffs’ quiet possession and ownership of parcel of land known as Kajiado/ Kitengela/ 74727.

c) That the officer commanding Kitengela police station (OCS) be and is hereby ordered to offer security and supervision in carrying out the exercise and to maintain law and order.

d) The Plaintiffs are awarded costs of the suit to be paid by the Defendant.

26. It is so ordered.

DATED, SIGNED AND DELIVERED BY ELECTRONIC MAIL AT NAIROBI THIS 30TH DAY OF NOVEMBER 2021.

E. K. WABWOTO

JUDGE



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