



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 225 OF 2017**

**ESTHER WANJUGU MAINA.....PLAINTIFF**

**VERSUS**

**ZIPPORAH NDUTA KARANJA.....DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter that was originally filed in the High Court at Nakuru as Civil Suit No. 220 of 2016 on the 20<sup>th</sup> June 2016 before the same was transferred to this court after its establishment and registered with the present number.

2. In the said suit the plaintiff prayed for orders of eviction against the Defendant from the suit parcel of land No. Nyandarua/Kipipiri/4044 and a further permanent injunction to issue to restrain the defendant by herself, her agent, servants or any person claiming under her from trespass, entering, disposing, selling and/or dealing in whatever manner the plaintiff's parcel of land. The plaintiff also prayed for General damages for trespass and cost of the suit.

3. The application together with the summons to enter appearance as well as all pleadings were served upon the Defendant on the 21<sup>st</sup> June 2016 wherein the Defendant entered appearance on the 8<sup>th</sup> July 2016 in person and also filed her statement of defence on the 13<sup>th</sup> July 2016.

4. Pursuant to the filing of the defence, the Plaintiff subsequently filed an amended plaint on the 10<sup>th</sup> August 2016 and subsequently the matter was transferred from the Nakuru Environment and Land Court to the present court on the 26<sup>th</sup> January 2017 and was received on the 9<sup>th</sup> February 2017 wherein it was listed for mention on the 26<sup>th</sup> February 2017.

5. That on the said date, while there was an appearance by counsel for the Plaintiff, there was no appearance for the Defendant. The court then directed the parties to comply with this provisions of Section 11 of the Civil procedure Code and the matter was listed for mention to confirm compliance on the 21<sup>st</sup> June 2017.

6. On the said dated there was no response from the Defendant and the court proceeded to certify the matter ready for hearing thus giving it a hearing date for the 2<sup>nd</sup> October 2017.

7. The hearing Notice was served upon the Defendant by postage on the 20<sup>th</sup> September 2017 as was evidenced by Affidavit of service filed in court on the 2<sup>nd</sup> October 2017 which elicited no response from the Defendant.

8. The court having satisfied itself that service was effected vide the address the Defendant had given, but she had failed to appear in court and further that Plaintiff had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing with the Plaintiff's case ex-parte on the 2<sup>nd</sup> October 2017, pursuant to Order 12 Rule 2 of the Civil Procedure Rules.

**The Plaintiffs case**

9. It was the Plaintiff's case that she knew the Defendant in this case just as a Ddefendant whereby she had sued her in respect of her land parcel No. Nyandarua/Kipipiri/4044.

10. She testified on the brief history of the suit land as the same having initially belonged to one Esther Ndula Macharia (now deceased) who had subsequently sold it to her husband one Mr. Eliud Maina Gikandi, also deceased, and who hsal be refered to as 'deceased' in regard to this matter, vide agreements dated the 18<sup>th</sup> April 2007 and 31<sup>st</sup> March 2007 which were not produced as exhibits since they had not been translated into English language from Kikuyu Language.

11. The witness produced a marriage certificate between her and the deceased Mr Eliud Gikandi as Exhibit 1 which confirmed that they had

married on 3<sup>rd</sup> October 1976.

12. The Plaintiff proceeded to testify that upon the demise of her husband on the 30<sup>th</sup> August 2010 as evidenced by the death certificate produced as Exhibit 3, she filed for succession proceedings and was granted the letters of administration on the 23<sup>rd</sup> May 2011 at the Nakuru High Court, as is evidenced by her exhibit 4.

13. That because she and her late husband had agreed to hold the suit parcel in trust of all the beneficiaries, she had obtained the certificate of Confirmation of Grant to that effect on the 13<sup>th</sup> July 2012 herein marked as exhibit 5.

14. The plaintiff's further Evidence was to the effect that after obtaining the confirmation of Grant, she proceeded to register the suit land in her name to hold the same in trust for the deceased's beneficiaries as is evidenced in the Title deed produced as Exhibit 6. She also testified that she had been paying the rates in regard to the suit land and produced a receipt for payment of the rates for the period 23<sup>rd</sup> November 2010 to 31<sup>st</sup> December 2010, as exhibit 7 to confirm her evidence.

15. The witness then proceeded to testify that she had sued the Defendant because she had claimed ownership of the suit premises in the year 2011 after the death of her husband and moved onto the land claiming to be her co-wife thereby erecting a semi-permanent house. She produced photos of the structures as Exhibit 7 (a-c).

16. That when she petitioned for the letters of administration and parties had gone to the Administration being the chief, the Defendant had not been listed as a beneficiary of the deceased's estate and neither had she filed any objection to the proceedings in the Succession Cause.

17. The plaintiff's further testimony was to the effect that since the Defendant had moved onto the suit land, she had denied her access to the same and that was why she had come to court seeking to have the Defendant evicted from the suit land herein because the Defendant was not a wife to the deceased and therefore had no authority to be on the suit land.

18. Upon closure of the Plaintiff's case, her Counsel filed written submissions to which he reiterated aspects of the evidence adduced and further stated that the process which the plaintiff acquired the suit land was not challenged by the Defendant who did not adduce any evidence to controvert or challenge the same.

19. The Plaintiff's submission was to the effect that all times the deceased, Eliud Wambugu Maina was the beneficial owner of the suit land having purchased the same from the late Esther Ndula Macharia vide an agreement dated the 18<sup>th</sup> April 2007. That upon the death of the Plaintiff's husband the estate was administered in accordance to the terms agreed by the deceased relating to the beneficiaries of his estate. Plaintiff obtained all the relevant documents and registered the suit land in her name to hold the same in trust for the beneficiaries.

20. That in the year 2011, that the Defendant herein invaded the suit land wherein she erected temporal structures while claiming that the deceased had bought the suit land from Esther in order to settle her and her 4 children thereon as his second wife.

21. The Plaintiff's submission was to the effect that although the defendant filed her defence yet, she did not attend court to prosecute it at all. That further although the Defendant had claimed to have been the wife to the deceased, yet she did not come to court to prove her assertion as was expected of her by virtue of Section 107 of the Evidence Act, and her allegation thus remained as such.

22. That the Defendant had not taken part in the succession proceedings and in the absence of these vital evidence, and the Plaintiff having proved that there had been a marriage between her and the deceased Mr. Eliud by the production of the marriage certificate, the same was sufficient proof that she was the legal wife to the deceased.

23. The Plaintiff's further submission was to the effect that the title deed held by the plaintiff was validly obtained pursuant to the court proceedings in Nakuru High Court civil case No. 134 of 2011, wherein she had obtained the Letters of Administration and later the Grant of Confirmation which documents were produced in evidence to support the plaintiff's case.

24. The Plaintiff relied on Section 24 of the Land Registration Act and Section 25 of the same Act that stipulate the effect of registration of proprietor of land and the rights accrued thereof, to submit that the Defendant had not placed any evidence before the court to show that the indeed the land had been obtained through fraudulent means. Reliance was placed on the case of **Kinyanjui Kamau vs George Kamau Njiroge [2015] eKLR** and **Vijay Morjara vs Nansingh Madhusingh Darbar and Another [2000] eKLR**.

25. The Plaintiff then submitted that the Defendant having failed to come to court to dispose the plaintiff's case through her defence, that the Plaintiff was therefore entitled to the prayers sought in her plaint as her evidence remained uncontroverted. The case of **Trust Bank Ltd vs. Paramount Universal Bank Limited and 2 Others [2009] eKLR** was relied on to support the Plaintiff's submission.

26. The Plaintiff's further submission was to the effect that the act of the Defendant's entry onto the suit land, erecting temporal structures therein and restricting the plaintiff's use of the land as well as pulling down the Plaintiff's fence without permission, consisted of acts of trespass and that given the Defendant's unjustifiable intrusion, the Plaintiff was entitled to general damages as a way of compensation for the wrongful act by the Defendant against her. That the act of trespass being actionable per se the plaintiff was entitled to Ksh100,000/ being the nominal value awarded by courts on damages for trespass.

27. After perusal of the pleadings and documents filed herein and upon hearing the testimony of the Plaintiff, I find that the following as the issues for determination:

- i. Whether the Plaintiff is the legal proprietor of the suit land

ii. Whether the Defendant has encroached on the suit land.

iii. Whether the Defendant and/or members of her family, agents/servants should be permanently restrained from trespassing on the suit land.

iv. Whether the Defendant and/or members of her family, his agents/servants should be evicted from the suit land.

**Findings and determination.**

28. I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the Defendant did not appear at the hearing either in person or through counsel.

29. In the said suit the plaintiff prayed for orders of eviction against the Defendant from the suit parcel of land No. Nyandarua/Kipipiri/4044 and a further permanent injunction to issue restraining the Defendant by herself, her agent, servants or any person claiming under her from trespass, entering, disposing, selling and/or dealing in whatever manner the plaintiff's parcel of land. The plaintiff also prayed for General damages for trespass and cost of the suit.

30. It is evident that the Defendant herein was served with the summons to enter appearance which she did but did, not defend the case. Although the suit was undefended, yet the plaintiff still had the duty to formally prove her case on the balance of probabilities as required by law.

31. It is not in dispute that the Plaintiff was the legal wife of Mr Eliud Gikandi (deceased) having married on the 3<sup>rd</sup> October 1976 as was evidenced by the marriage certificate produced as Exhibit 1.

32. It is further not in dispute that Plaintiff's husband one Mr. Eliud Maina Gikandi (deceased), bought the suit land from one Esther Ndula Macharia (also deceased) and that upon his demise, the Plaintiff herein went through the motion of filing a succession cause, got the confirmation of Grant, and proceeded to register the suit land in her name to hold the same in trust for the deceased's beneficiaries as is evidenced in the Title deed produced as Exhibit 6.

33. That further, she has also been paying the rates in regard to the suit land as was evidenced through the production of a receipt for payment of the rates for the period 23<sup>rd</sup> November 2010 to 31<sup>st</sup> December 2010, as exhibit 7 to confirm her evidence.

34. It is also not in dispute that the Defendant herein trespassed on the plaintiff 'suit land and, erected temporal structures therein restricting the plaintiff's use of the land and pulled down the Plaintiff's fence without permission.

35. The provision of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

Section 24 of the Land Registration Act provides as follows

*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 rights and privileges belonging or appurtenant thereto; and*

Section 25 of the Land Registration Act provides as follows

*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—*

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 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.*

36. It will be seen from the above provisions that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

37. The defendant did not adduce any evidence that the plaintiff acquired Title to the suit land illegally, un-procedurally or through a corrupt

scheme. Indeed if anything the Defendant's defence is that she is entitled to the suit land by virtue of her marriage to the deceased as per her filed statement of Defence.

38. Based on the evidence adduced above, and in relying on section 26(1) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that she is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

39. As to whether the Defendant and her family have encroached on the suit land, the uncontroverted evidence adduced by the plaintiff as well as the production of the Certificate of Lease are proof enough that indeed the Defendant and her family have encroached on the Plaintiffs land.

40. Section 24 (a) of the Land Registration Act stipulates as follows:

*' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'*

41. These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it.

42. I find that the Plaintiff is indeed entitled to protection by the law from the Defendant and her family who have interfered with her rights and privileges over the suit land.

43. The issue as to whether the plaintiff suffered any loss or damage on account of the impugned activities by the defendant, I find that there being no evidence that the Defendant's action of entering into the plaintiff's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Defendant's action therefore constituted trespass to land.

44. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

*'I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...'*

45. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

*"...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' trespass"*

46. The net result is that I find and hold the plaintiff's suit against the Defendant has been proved on a balance of probabilities. I accordingly enter judgment in favor of the plaintiff as against the defendant in the following terms:

- i. Defendant and members of her family do forthwith vacate land parcel No. Nyandarua/Kipipiri/4044 within 30 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.
- ii. That a permanent injunction is hereby issued restraining the Defendant and members of her family, servants, and /or agents from trespassing, entering, disposing, selling and/or dealing in whatever manner with the suit land
- iii. I find that general damages of Kshs.100,000/= shall be paid by the defendant to the Plaintiff to compensate her for the wrongful entry onto her Land
- iv. Costs to the Plaintiff at the lower scale since the suit was undefended.

It is so ordered.

**Dated and delivered at Nyahururu this 25<sup>th</sup> day of April 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**