



**Ombongi v Simiyu & another (Environment & Land Case
88 of 2017) [2023] KEELC 17148 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 88 OF 2017**

**LN MBUGUA, J
APRIL 27, 2023**

BETWEEN

JOEL MOTAROKI OMBONGI PLAINTIFF

AND

CHAMI SIMIYU 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 6.2.2017 and amended on 28.4.2018, the Plaintiff contends that he owns the property known as Plot Number G13 (C244) situated in Embakasi, Nairobi having acquired it from the 2nd Defendant. It is his case that in October 2016, he discovered that the 1st Defendant had trespassed onto the said property, erected a fence and had started putting up a house. He contends that the actions of the 1st defendant are in violation of his property rights and they have caused him irreparable damage.
2. He prays for judgment against the Defendants for;
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
 - b. A declaration that the 1st Defendant whether by himself or his servants or agents or otherwise howsoever is not entitled to trespass onto and impede the Plaintiff's quiet enjoyment of the suit property.
 - c. A permanent injunction restraining the 1st Defendant whether by himself or his servants or agents or otherwise howsoever from trespassing onto and interfering with the Plaintiff's quiet enjoyment of the suit property.



- d. General damages for trespass.
 - e. Costs of this suit together with interest thereon at such rates and for such period of time as this Honourable Court may deem fit to grant.
 - f. Any such other or further relief as this Honourable Court may deem appropriate.
3. Although the 1st Defendant participated in this suit from inception, he did not file a defence. The 2nd Defendant did not file a defence either despite being properly served with the pleadings herein. Vide a ruling delivered by this court on 26.1.2023, the court gave directions that the matter was an undefended suit.
 4. The Plaintiff's case was advanced by himself (PW1). He adopted his witness statement dated 6.2.2017 as his evidence. He also produced documents in his list of even date as Exhibits 1-13. It is his case that he acquired the suit property through share transfer from Mr. James Kimani Mwaura who had in turn acquired the same from Mr. Mwaura Muguima. The property is under the head ownership of the 2nd Defendant.
 5. He further states that he runs a business in Juba, South Sudan thus there are times he would be out of the country for extended periods. In November 2016, he visited the site of the suit property and found that the 1st Defendant had trespassed thereon and was in the process of building a permanent house.
 6. He reported the matter to the 2nd Defendant who summoned the 1st Defendant to appear with his ownership documents but he ignored and continued building the house on the suit land.
 7. On cross-examination, he stated that he acquired the suit plot by purchase of shares from one Mr. Muguima who became a shareholder of the 2nd Defendant in 1978 and who had been allocated the suit land in 1990. He was then issued with a share certificate.
 8. He also stated that he had not developed the suit land at the time of invasion by the 1st Defendant. Referred to Exhibit CM1 annexed to the affidavit dated 25.4.2017 sworn by the 1st Defendant, he stated that he sees it is a non-member certificate of plot ownership for plot V15763 issued to the 1st Defendant on 21.6.2016 by the 2nd Defendant and it is not for C244. He considers "V" to be alien.
 9. He contends that he had a sketch map of the area, when the allottee transferred the plot to him, he took him to the ground and showed him the suit plot. That the said land was allocated to a share holder in 1990, while all the 1st Defendant's documents came later in 2016. He stated that the suit plot was not available for allocation to any other person apart from him. However, he does not have a title deed as the process to obtain it was stopped due to this case.
 10. When re-examined, Pw1 stated that at paragraph 3 of the amended plaint, he claims for plot C244, 'C' being the map name and the plot number being 244. The plot number G13 is same as C244. He points out that his share certificate at page 18 A of his bundle of documents has the plot No. indicated as G13 which is same as C244 referred to in his plaint. He also stated that he has not seem any defence by the Defendants.
 11. On 26.1.2023, the court gave directions for the plaintiff to file submissions by 10.2.2023 and the defendants to file theirs by 24.2.2023. The plaintiff's submissions are dated 17.2.2023, hence they were filed outside the given timelines. They are hereby disregarded. The submissions of the 1st defendant were duly filed on time as they are dated 22.2.2023. However, it is pertinent to note that the said defendant has no foundational pleading, nor was any evidence



adduced to buttress his claim. His submissions can only be considered on points of law. However, the 1st defendant has purported to analyse issues of facts even adducing evidence in the platform of submissions which is neither tenable nor acceptable.

12. The issue falling for determination is whether the plaintiff is the rightful owner of the suit premises, whether the defendant is a trespasser on the said land, whether the plaintiff is entitled to damages and what relief is available in the circumstances.
13. The Plaintiff claims ownership of the parcel of land known as G13 (C244). He told the court that he bought shares in the 2nd Defendant in 2003 from James Kimani Mwaura who had in turn obtained his shares by way of transfer from Mwaura Muiguma; the original allottee.
14. Exhibit 7 is a provisional letter of allocation of plot G.13 to Mwaura Muguima dated 2.11.1990. As per the said allotment, the plot was not available for allocation to any other person. In *Republic v City Council of Nairobi & 3 Others* (2014) eKLR the Court held that;

“.... In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
15. Exhibit 9 is an affidavit of transfer of shares sworn by Mwaura Muguima on 15.10.1992 transferring his share certificate No.7578 to his son James Kimani Mwaura. This gives an indication that as at 15.10.1992, the suit plot was in control of Mwaura Muiguma. Upon transfer to James Kimani Mwaura, the said Mwaura was issued with the share certificate produced as P. Exhibit 18H.
16. The Plaintiff has established that he obtained his share by way of transfer from James Kimani Mwaura as per P. Exhibit 1. The Plaintiff paid for a site visit and was issued with a beacon certificate.
17. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR, the court stated that;

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered, then the holder of the documents is entitled to the protection of the law.”
18. I find that the Plaintiff has established by an unbroken chain, ownership to the suit land to entitle him to the orders sought. The 1st Defendant has no proprietary rights over the suit land and is therefore a trespasser. In the case of *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, I cited the case of *Willesden Investments Limited vs. Kenya Hotel properties limited* NBI H.C.C. No. 367 of 2000 where, the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”
19. In *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, the Court stated that;

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.”



20. The plaintiff had not developed his land before the trespass.

However, a structure in form of a house has been put up on the suit property by the 1st defendant. It is therefore apparent that the construction changed the character of the land. To this end, I award the plaintiff general damages for trespass to the tune of Ksh.500 000.

21. It is rather unfortunate that the 2nd defendant has been missing in action yet they are in a position to unravel the various unfolding disputes within the larger parcels of Embakasi ranching.

Final relief

22. In the final analysis, judgment is hereby entered for the plaintiff against the 1st defendant in the following terms.

1. It is hereby declared that the plaintiff is the rightful owner of the suit property and he is entitled to exclusive and unimpeded right of possession and occupation thereof.
2. An order is hereby issued declaring the 1st defendant as a trespasser on the suit property.
3. A permanent injunction is hereby issued restraining the 1st Defendant whether by himself or his servants or agents or otherwise howsoever from trespassing onto the suit property.
4. The plaintiff is awarded general damages for trespass as against the 1st defendant to the tune of Ksh.500 000.
5. An order is hereby issued for the 1st defendant to remove any structures he has constructed upon the suit premises within 30 days, failure to which eviction to take place against him.
6. The 1st defendant is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Lukoye for Plaintiff

Chami Simiyu

Court assistant: Vanilla

