



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 62 OF 2004**

**MWALIMU HOUSING COOP SOCIETY.....PLAINTIFF**

**VERSUS**

**MUNYAO KIILU NZESI.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated 19th May, 2004 and amended on 21st May, 2004, the Plaintiff is seeking for judgement against the Defendant as follows:

- a) An order of eviction from LR ATHI - RIVER/ATHI - RIVER/BLOCK 1/1664
- b) A permanent injunction restraining the Defendant by himself or through his agents and/or servants from in any way whatsoever interfering with land parcel number ATHI RIVER/ATHI RIVER BLOCK 1/1664
- c) An order directing the defendant to replace all the beacons at his (defendant's) expense
- d) General damages for trespass and loss of user of ATHI RIVER/ATHI RIVER BLOCK 1/1664.
- e) costs and interest

The Defendant entered appearance and filed a Defence on 31st May, 2004 where he denied the averments in the Plaint and stated that he bought land parcel number ATHI RIVER/ATHI RIVER BLOCK 1/1664 sometime in 1992 and has always been living and cultivating the suit land.

Both the Plaintiff and the Defendant filed a list of documents and witness statements to prove their respective claims.

The Plaintiff had three witness while the Defendant only had one witness.

**Evidence of Plaintiff**

PW1 NAHASHON NDUNGU MAINA in his examination in chief testified that he is a member of the Plaintiff society and one of the officials. He stated that they bought land parcel number ATHI RIVER/ATHI RIVER BLOCK 1/1664 (suit land) measuring 2.04 acres from the late MOHAMMED ATHMAN MUMINA (deceased). He averred that they entered into an agreement dated 26th May, 2003 with the deceased after which the land was transferred to the Plaintiff's name on 28th May 2003 and title deed issued on the same day. Further that after the purchase, there was subdivision of the said land to sixteen (16) plots which was then given to 8 - 10 members of the Plaintiff society who had paid Kshs.

30,000 per plot. He stated that the members were then shown their plots but later learnt the Defendant was trespassing upon their land. The Chairman and Secretary of the Plaintiff society made a report to the local Chief of Lukenya Location who summoned the Defendant but he failed to cooperate despite the Chief summoning him three times. The Chief finally sent him a letter dated the 11th April, 2004 but the Defendant did not leave the suit parcel and even planted a live fence thereon. He averred that they do not have quiet possession of the suit land although they are the bona fide purchasers.

During cross examination PW1 said he is a member and an official of the Plaintiff society who bought the suit land and is not aware that in 2002 the same had been sold to the Defendant. He stated that at the time of purchase of the suit land it was registered in the name of MOHAMMED ATHMAN MUMINA, a search was done and they also got a copy of the title deed. He averred that they did not know the original allotment of Katelembu Athiani Farming and Ranching Cooperative Society Limited and that title no. 1664 does not exist since subdivisions were undertaken, resultant plots allocated to 10 members of the Plaintiff society and the title deed closed. That in the instant case they are claiming 1664 and the resultant subdivisions arising therefrom as this formed part of the suit land. He said he knew the extent of the suit land including the beacons as one month after seeing it, they went and planted euphorbia but when he checked two (2) months later, they learnt the beacons had been removed by the Defendant and his family. Further that there is a live fence demarcating the suit land and the Defendant's land but they do not know who planted it and were only shown the beacons when they bought it. He said the suit land has three corners fully fenced by sisal but where they border with the Defendant the live fence is scattered but the Plaintiff has strived to mark the boundary. Further that there are two parcels of land that look like they belong to the same person with a cattle shed or storage for animal feed at the boundary of the fence between the suit land and the Defendant's land. He testified that there is occasional interference with the suit land. PW1 said after subdivision, he received plot numbers ATHI RIVER/ATHI RIVER/BLOCK 1/2087, 2088, 2095 and 2096 respectively.

During reexamination PW1 said he was not aware of any agreement between the Defendant and MOHAMMED ATHMAN MUMINA (deceased) and he could not see the name of the Defendant nor Katelembu Athiani Farming and Ranching Cooperative Society Limited appearing within the Green Card on the suit property. From the Green Card, the initial owner of the suit property was the Government of Kenya after which the property was transferred to the deceased and when they did a search before purchasing it, it belonged to the late MOHAMMED ATHMAN MUMINA with no caution nor restriction registered thereon. Further that subdivision was done on 25th May, 2004 and by the time of filing the suit, subdivision had been done but not yet concluded.

PW2 FRANCO MUNENE NJERU stated in his examination in chief that he is the founder member of the Plaintiff society and in 2003 when it purchased the suit property from the deceased he was its chairman. He said before purchase they undertook a search and established the owner of the suit land and that there were no encumbrances existing thereon. He produced Certificate of search as exhibit P '1'. He said they entered into an agreement on 26th May, 2003 with the vendor who is deceased, which Sale Agreement was signed by the Plaintiff's Chairman, Treasurer and son to the Vendor KHALIF MOHAMMED MUMINA, and he produced it as exhibit P 2. At the time of entering into the Sale Agreement, there was no reference to the Defendant and they were given a copy of the title deed which bore the name of the deceased and he produced a certified copy of the same as exhibit P3. He said they got the Green Card to the suit parcel which did not indicate the name of the Defendant, he produced it as exhibit P4. PW2 stated that they had a meeting to agree on subdivisions and he signed the minutes dated 13th March, 2004 as the Chairman which he produced as exhibit P5. Pursuant to the meetings they had made an application dated 24th April, 2003 for subdivision of suit land at the Land's Office and application for consent to transfer which he produced as exhibit P7. He said that they got consent to subdivide suit land which is dated 24th April, 2003 that he produced as Exhibit P6 and the Plaintiff's Certificate of Registration as exhibit P9. He averred that upon subdivision, the Defendant trespassed and destroyed the beacons and when they complained, he told them the seller had promised to sell him the suit land but on asking for evidence, he did not avail it. The Defendant insisted he would continue cultivating the suit land and they informed the seller, who confirmed that the Defendant was his longtime friend, and had promised to stop cultivating the suit land. They reported the matter to the local chief who summoned the Defendant but he failed to heed to the same and despite seeking intervention from third parties, Defendant has continued to interfere

with the suit land and insists the land belongs to him. He averred that the suit land was subdivided into sixteen (16) pieces of ? of an acre each and they have titles which were transferred to bona fide members who purchased the same through the Plaintiff. He produced copies of the sixteen (16) title deeds as exhibit P 11 'a' - 'p' and the map to the suit land as exhibit P12. He averred that since 2003 the Plaintiff's members have been unable to make use of the suit land because of the current case and therefore seeks the Court's intervention to restrain Defendant from interfering with the suit land and adequate compensation be provided for the loss.

During cross examination he confirmed there is a neighbouring house to the suit land but does not know who it belongs to. He said the young man who was interfering with the suit property is a son to the Defendant who kept referring to his father. He met the young man at the suit land and also at the house in the neighbouring land and he confirmed removing the beacons as it is his father's land. What the young man said was corroborated when they met the Defendant when he was told the Plaintiff was taking the matter to court. He said the Defendant informed them that if the seller would sell the suit land, he would get the first preference but never told them if he ever bought it. Further, when they did the search, they found that the first owner of the suit land was the Government of Kenya but they do not know how the Defendant got it from the government. He averred that land in this area originally belonged to Katelembu Athiani Farming and Ranching Cooperative Society Limited and members originally acquired land from the said Cooperative Society but he does not know the allotment number of the suit land from the said society before the Plaintiff purchased it. Further that they were using the four beacons defining the land and not the aloe vera vegetation, and the said beacons were not close to the Defendant's land. He said on 25th May, 2004 the title deed to the suit land was closed but this does not negate the responsibility and obligation of the Plaintiff society to its members who purchased the resultant plots. He said the beacons to the suit land were interfered with and these are the ones that identified the plots that emanated from it. The Defendant was duly notified before the suit was filed but he refused to adhere to the summons and told the Plaintiff's representative to proceed with the court case. He said he did not see the Defendant's list of documents and neither was he aware of the case no 141 of 2004 filed by him for recovery of suit land from the deceased.

In re examination he stated that MOHAMMED ATHMAN MUMINA died in 2009 and they were not aware of the case filed by the Defendant against him. He stated that there was a boundary dispute over the suit land.

PW3 KHALIFA MOHAMMED MUMINA stated that he is one of children to MOHAMMED ATHMAN MUMINA who died in August 2009 and was the owner of the suit land which he sold to the Plaintiff on 25th May, 2003 with an agreement entered on the said date to that effect. He admitted signing the Sale Agreement and confirmed his father's signature on the said agreement. He stated that he does not have a claim over the suit land nor any member of his family and confirms knowing the Defendant as their neighbour where the suit land is situated.

In cross examination PW3 confirms he was the son to the deceased seller, knew his signature, confirmed it is the one appended on the Sale Agreement and denied the deceased alleged signature in the Sale Agreement with the Defendant. He said he did not remember the allotment number of Katelembu Athiani Farming and Ranching Cooperative Society Limited and when he signed the Sale Agreement, he did so on behalf of his brothers who had agreed that the suit land could be sold . He averred that he does not know whether the Defendant bought land from his father, were neighbours and their land had been vacant but the Defendant had built his home on an adjacent plot including planting a live fence thereon. He said he signed the Sale Agreement but did not go to show the purchasers the suit land. Further that the purchase price was paid the day the agreement was signed and he does not know whether the Defendant used to cultivate the suit land.

The Plaintiff thereafter closed its case.

### **Evidence of Defence**

In his examination in chief, DW1 JOSEPH MUNYAO KIILU who was the Defendant herein stated that

the deceased was his school mate and he knows Katelembu Athiani Farming and Ranching Cooperative Society Limited where the deceased was a member. He said they got plots from Katelembu Athiani Farming and Ranching Cooperative Society Limited where they were neighbours with the deceased. Further that when they were shown their plots, with the deceased getting a plot adjacent to his which he sold to him. They went to the Katelembu Athiani Farming and Ranching Cooperative Society Limited offices together with the deceased and one MUTUNGA WAMBUA where they got a form in triplicate typed by the said Sacco Society who advised them on the sections to fill in. There were various sections for plot number and areas for buyer and seller to sign with the plot number for suit land being 1743. He averred that together with the deceased and one MUTUNGA WAMBUA who was a witness, they signed the said forms. However MUTUNGA WAMBUA did not know how to read properly and that is why the form had a mistake as he did not sign the correct section for the witness but instead signed for the buyer. DW1 produced the triplicate forms from the Katelembu Athiani Farming and Ranching Cooperative Society Limited as exhibit D 1'a' and 1 'b'. He said he paid the deceased Kshs. 70,000 and produced a receipt as exhibit D 2. He said he was a neighbour to the deceased and his cows were grazing on the suit land. In 2004 he was called by the Chief and told to move from the suit land as it had been sold, which he did. Further that he did pursue title to the suit land after learning it had been sold. The total purchase price was Kshs. 120,000 and deceased did not return his money. He initially paid Kshs. 50,000 in 2002 which proof he produced as exhibit D3. Further that he has never prevented the Plaintiff from using the suit land and neither did he remove the beacons, and now does not want it.

During cross examination DW1 stated that he was the first one who bought the suit land from deceased which was later sold to the Plaintiff. The son resides on his plot that neighbours the suit land and he denies ever meeting representatives from the Plaintiff Sacco. He does not have a title deed to the suit land but only a Sale Agreement. He said he never sued the deceased for the suit land nor his family but will follow up his purchase price with his family. He said he was using the suit land in 2004 and taking care of it. In the Sale Agreement the plot indicated is 1743 and not 1664; the title deed and the Katelembu Athiani Farming and Ranching Cooperative Society Limited plot are different as the said Sacco only gives one a title deed after paying up. He averred that in exhibit D 1 'a' MUTUNGA WAMBUA is indicated as the Seller but he was a witness and insists the deceased signed the Sale Agreement as there is a witness NZIOKI who was the Assistant Chief. Further that in exhibit D 1 'b' it shows the deceased sold the land, the two Sale Agreements bear the date 4th October, 1992 but the name of the seller is different. He admitted that in exhibit D '2' the plot is indicated as 1743 but does not indicate who is the seller or buyer is neither the reason for payment. It only shows the balance is Kshs70,000 and cash Kshs. 50,000

The Defendant thereafter closed his case.

Both parties filed respective written submissions which I have considered.

### **Analysis and determination**

The key issues for determination are:

- Whether the Plaintiff was the owner of the suit land at the commencement of the suit
- Whether the Defendant has trespassed on the suit land.
- Whether the Defendant and or his agents should be permanently restrained from trespassing on the suit land.
- Whether the Plaintiff is entitled to the general damages sought.

From the evidence presented it is not in dispute that the suit land initially belonged to one MOHAMMED ATHMAN MUMINA who sold it to the Plaintiff. PW2 produced a Sale Agreement, Certificate of Official Search, Certified copy of the title deed, Green Card to the suit parcel, consent to subdivide suit land dated 24th April, 2003 and Plaintiff's Certificate of Registration to prove its claim. The Court notes from the documents produced that the suit land legally belonged to the deceased who sold it to the Plaintiff. Except for two Sale Agreements dated 4th October, 1992 which indicated different plot numbers and contradictory information, the Defendant failed to furnish any other documentary proof of ownership over the suit land. What DW1 provided in terms of exhibit D 1 'b' were two Sale Agreements dated 4th

October, 1992 with two different sellers indicated. In his exhibit D '2' the Defendant admitted it indicates the plot number as 1743 but does not indicate who is the seller or buyer is neither the reasons for payment. The Court finds that this evidence provided by the Defendant is contradictory and not conclusive proof of purchase of the suit land from the deceased. PW1 and PW2 informed the court that the suit land has now been subdivided into 16 plots and allocated to around 10 members. The Court in relying on section 26 (1) of the Land Registration Act which stipulates that '**the certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner.....**'

finds that the suit land indeed belonged to the Plaintiff at the time of institution of the suit, and later to its 10 members who were allocated the 16 plots which were resultant subdivisions therefrom. DW1 who is the Defendant did not controvert this evidence and even admitted that he was no longer interested in pursuing his ownership over the suit land but would use other means to get the purchase price he had paid, from the deceased family.

In accordance with the Land Registration Act at Section 24(a) which provides that '**.....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..**', the Court finds that Plaintiff was indeed the absolute proprietor of the suit land at the commencement of this suit.

The Defendant raised the issue that the Plaintiff did not have locus standi to institute the suit. *locus standi* is defined in *Black's Law Dictionary, 9<sup>th</sup> Edition (page 1026)* as "***the right to bring an action or to be heard in a given forum***". *locus standi* denotes the right or capacity to bring an action or to appear in a court. I note the Plaintiff entered into an agreement dated 26th May, 2003 with the deceased after which the land was transferred to the Plaintiff's name on 28th May 2003 and title deed issued on the same day. The Court takes cognizance of the fact that this suit was instituted on 19th May, 2004 when the suit land was still registered in the name of the Plaintiff, hence the issue raised by the Defendant that the Plaintiff does not have *locus standi* is a mere fallacy as the suit was filed before the resultant title deeds were issued to the Plaintiff's members. The Court notes that PW2 produced Certificate of Registration of the Plaintiff and this demonstrates that the Plaintiff is an entity which can sue and be sued, hence had the capacity to institute this suit.

On the issue of trespass, the Defendant in his Defence dated 31st May, 2004 averred that he bought the suit land from the deceased sometime in 1992 and has always been living thereon cultivating it and his son has been grazing on it. He however denied uprooting beacons from the suit land. PW1 stated that the Chairman and Secretary of the Plaintiff society made a report to the local Chief of Lukenya Location regarding the Defendant's acts of trespass, who summoned him but he failed to cooperate despite the Chief summoning him three times. The Chief finally sent him a letter dated the 11th April, 2004 but the Defendant did not leave the suit parcel and even planted a live fence thereon. The Defendant did not controvert these allegations but insisted he had been taking care of the suit land as directed by the deceased. The Plaintiff however failed to furnish evidence to prove that it is indeed the Defendant who tampered with the beacons. The Court finds the Plaintiff as proved the allegations of trespass against the Defendant but not tampering with the beacons.

On the issue of general damages, in so far as the Plaintiff has proved the Defendant's acts of trespass on the suit parcel, it has failed to furnish the court with sufficient materials to assess it. I hence decline to make any on the same.

On the question of eviction, since the Defendant denies being on the suit parcel, prayer (a) seeking eviction must fail as it has been overtaken by events and is not enforceable. Further, the suit parcel has already been subdivided into sixteen (16) plots and hence does not exist on its own.

In the circumstances I find that the Plaintiff has proved its case on a balance of probability and enter judgement in their favour by proceeding to make the following order:

a) An order of permanent injunction restraining the Defendant by himself or through his agents and/or servants from in any way whatsoever interfering with land parcel number ATHI RIVER/ATHI RIVER BLOCK 1/1664 and the resultant subdivisions thereon.

b) costs of the suit to be borne by the Defendant

**Dated signed and delivered in open court at Kajiado this 29<sup>th</sup> day of September, 2017.**

**CHRISTINE OCHIENG JUDGE**

**REPRESENTATION.**

Judgment delivered in absence of parties

Court Assistant Mpoye.