



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 493 OF 2016

NGUGI KAGIA.....PLAINTIFF

VERSUS

BUCI ROTUBA LIMITED.....DEFENDANT

JUDGMENT

1. By a plaint dated 9th November, 2016, the plaintiff averred that he was the sole lawful allottee of the parcel of land known as Plot No. 278 at Naivasha Municipal Council (Industrial Area) measuring 1/8 of an acre or 50ft by 100ft, hereinafter ‘the suit property’. That on 2nd November 2016, the defendant by itself, its agents, its servants and workers unlawfully trespassed unto the suit property without justifiable cause and commenced construction work thereon by digging trenches and foundations with a view of erecting permanent buildings or structures thereon.

2. The plaintiff therefore prayed for judgement against the defendant for:

a) That the Defendant by itself, its agents, its workers and or servants be ordered to vacate with all their buildings, structures and other belongings from the Plaintiff’s plot no. 278 (Naivasha Municipal Council – Industrial Area) in default of their vacation, the Plaintiff be granted the option of engaging licenced auctioneers to forcibly remove/ evict the Defendant by itself, its agents, its servants and its workers and all their buildings , structures and belongings from Plot No. 278 (Naivasha Municipal Council – Industrial Area) so that vacant possession thereof be handed over to the Plaintiff.

b) A permanent order of injunction be issued to permanently restrain the Defendant by itself, its agents, its servants and its workers from entering, trespassing or encroaching or in any way digging trenches/foundations or erecting any buildings or structures or in any manner howsoever interfering with the exclude use and enjoyment of Plot No. 278 (Naivasha Municipal Council - Industrial Area)

c) The costs of this suit be borne by the Defendant.

3. The defendant filed its statement of defence and counterclaim in which it denied the plaintiff’s allegations and averred that its own plot numbers are 273, 274 and 275 which are worlds apart from the suit property. It therefore prayed for dismissal of the plaintiff’s suit, general damages, special damages, costs and interest.

4. On 15th February 2017, a consent order was made to the effect that the District Land Registrar and District Surveyor proceed to the disputed properties and *inter alia* identify the plots, identify who is in occupation as well as the activities on the plots, identify whether any party had encroached into the other’s plot and to file a report in court together with a sketch map. The officers complied and a report dated 23rd May 2017 was produced in court on 24th May 2017 by the District Surveyor.

5. The matter subsequently proceeded to hearing. At the hearing, the plaintiff testified as the sole witness in respect of his case. He stated that he purchased the suit property through a sale agreement dated 14th February 2005 from Andrew Wanyoike. That the vendor gave him an allotment letter dated 1st September 1993 signed by the Commissioner of Lands and which referred to plot 278 Industrial Area Naivasha Township, a receipt dated 22nd April 1997 on account of payment of KShs 9,290 to Commissioner of Land. That he went with the vendor to Municipal Council of Naivasha on 19th November 2013 and a transfer was effected in his favour with the approval of the Town Clerk. That he was shown the suit property by the Municipal Surveyor and the Municipality Engineer and the Town Clerk signed a form known as “Certification of plot showing and Beacons” on 12th November 2013. He went on to state that he received a letter dated 20th June 2000 from Survey of Kenya addressed to the Commissioner of Lands and stating that the RIM had been amended to reflect parcels number 800 to 802 each measuring 0.0809 hectares.

6. The plaintiff further testified that he learnt that the defendant was constructing on the suit property. That following amendment of the registry index map, the suit property became known as Plot No. 800. He produced a copy of the surveyor’s report dated 23rd May 2017 and

stated that encroachment onto the suit property was 100% and that the suit property was totally taken over by the defendant. That after taking over the suit property, the defendant removed the beacons on the suit property and constructed a perimeter wall surrounding the suit property, plot numbers 273 and 274. He testified further that the defendant was still occupying the suit property as at the date of his testimony and that a title deed in respect of the suit property with the parcel number reading 800 was issued in the name of Wanyoike during the pendency of this case and that Wanyoike then transferred the plot to him and a title was issued to him. He urged the court to grant him judgment as prayed in the plaint.

7. The plaintiff's case was then closed.

8. Michael Mugo Mwangi, the general manager of the defendant, testified as the sole witness in respect of the defence case. He stated that the defendant is not the owner of the suit property and has no claim over it. That the defendant owns plot numbers 273, 274 and 275 on which it was constructing a wall after following due process. That the defendant only has allotment letters for the plots and not titles. He added that the defendant's project had financial timelines and that damages for its disruption are attributable to the plaintiff. When shown the surveyor's report he stated that he did not agree with its conclusion that the defendant trespassed into the suit property. He urged the court to dismiss the plaintiff's claim and to allow the defendant's counterclaim.

9. The defence case was then closed and parties ordered to file and exchange written submissions. I have considered the pleadings, the evidence and the submissions. The issues that arise for determination are whether the defendant trespassed onto the suit property and whether the reliefs sought should issue.

10. Trespass is essentially any unauthorised entry into another's land. See **Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February 2022) (Judgment)**. Thus, it is important to identify both the land and its boundary, so as to determine if there was any entry.

11. The plaintiff's case is that he is the sole lawful allottee of the suit property and that the defendant trespassed onto the suit property. He has described the suit property as the parcel of land known as Plot No. 278 at Naivasha Municipal Council (Industrial Area) measuring 1/8 of an acre or 50ft. In his testimony, he stated that the registry index map had been amended by the Director of Survey with the result that the suit property became known as Plot No. 800, measuring 0.0809 hectares. He further stated that while this case was pending, a title deed in respect of the suit property with the parcel number reading 800 was issued in the name of Andrew Wanyoike (the person he had purchased the suit property from) and that Andrew Wanyoike then transferred the plot to him and a title deed was issued to him.

12. A perusal of the letter of offer that the plaintiff relies on shows that it gives the size of the property as 0.06 hectares, a major departure from the 0.0809 hectares given by the Director of Survey. Thus, while the plaintiff built his case on an allotment letter with a different plot number and size, his own testimony is that all that has changed. Somehow, the plot became bigger by about 0.0209 hectares and he even obtained a title deed with the bigger size of 0.0809 hectares. Yet he neither amended his pleadings to base his case on the title deed nor produced the title deed in evidence.

13. The controversy about the plot sizes, and consequently boundaries, is aptly captured in the survey report dated 23rd May 2017 which was produced in court by the District Surveyor:

Jointly (sic) fencing ... was as a result of demarcation by Nakuru County Government and that demarcation is not recognised by the Director of Survey the custodian of official maps until a survey plan is drawn and submitted to his office for approval in respect of survey act Cap 299 ...

14. In other words, the delineations in the letter of offer, which is what the plaintiff is relying on in so far as his claim is based the said letter, are unrecognised by the Director of Survey. Put in survey language, the demarcations used in the letter of offer have not been authenticated. It is the process of authentication that validates any delineations of land or survey plans. See **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR**. Further, a perusal of the sketch marked EXP4 and annexed to the survey report dated 23rd May 2017 shows that the position of plot number 278 on the ground is slightly different from that the new plot number 800.

15. If indeed the plaintiff has a title deed in respect of the suit property, and I repeat that he did not produce the title at the hearing, any dispute regarding the boundaries of such a registered land will have to be resolved by the Land Registrar and the Director of Survey in terms of **Sections 18 and 19 of the Land Registration Act** and not through litigation as is sought in this case.

16. In view of the foregoing, neither the land in dispute nor its boundary have been identified, with the result that the plaintiff has not demonstrated that there was any entry into his land. The plaintiff has not demonstrated that the defendant trespassed onto the suit property and it is thus axiomatic that the reliefs sought cannot issue.

17. I therefore dismiss the plaintiff's suit. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma