



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.53 OF 2011

RICHARD NJOROGE NYANJUI PLAINTIFF

VERSUS

KIMANTHI MUYA 1ST DEFENDANT

MUTUKU MUYA 1ST DEFENDANT

LUCY KANGENI MUYA 1ST DEFENDANT

J U D G M E N T

1. By an amended Plaint filed in court on 16.6.2011, the Plaintiff prays for the following orders:

Permanent injunction, eviction and mesne profits, against Defendants over Machakos/Ndalani Phase 1/323.

The summons was served upon defendants on 15.7.2010 who failed to file appearance or file defence within the stipulated time. The request of judgment in default of appearance was filed on 14.9.2011, and on 6.9.2011 same was entered. The matter was formerly proved on 26.11.2014.

2. The Plaintiff testified to the effect that he was allocated the suit land **Machakos/Ndalani Phase 1/323** on 26.6.1972 by settlement Trustee Fund and he paid KShs.1,025/- requisite fees then. On 3.12.1998 he was issued with certificate of outright purchase and subsequently a title deed on 10.12.1998. Sometimes in March, 2009 he visited the land and found the Defendants had cultivated suit land. He also noted that they had built three temporary structures thereon. He reported the matter to the Yatta Division. He sought the said officer's assistance in eviction of the Defendants.

3. The District Officer issued Defendants with a notice to vacate the suit land on 14.5.09. The Defendants defied the same. The Plaintiff thereafter instructed surveyors to survey the suit land and ascertain whether the Defendants' structures were in the suit land. The surveyors undertook the task and confirmed actually the Defendants' structures were within the suit land. The Plaintiff also procured search certificate to confirm the status of the suit land and he confirmed that he was still the registered owner of the same. The surveyor who also valued, prepared the valuation dated 10.7.2010 and established market value of the suit land. The report also confirmed that the Defendants have built their structures on the suit land.

4. The Plaintiff thereafter instructed Advocates to issue demand notice dated 6.9.2010 for the Defendants to vacate suit land Within 21 days, otherwise face a legal suit. The Defendants ignored the same prompting the Plaintiff to institute the instant proceedings. The Plaintiff thus seeks injunctive relief, eviction and mesne profits and costs.

5. The Plaintiff documents were produced as 2 bundles P.Exh. 1 and 2. After going through the above unchallenged evidence, I make the following findings:

- The Plaintiff is the registered owner of the suit land vide the title deed dated 10.9.1998.
- As by 16.6.2010 vide search certificate he was still the registered owner.

By virtue of Section 76 of Land Registration Act 2012, the title is *prima facie* evidence of the ownership of the suit land.

6. The Defendants who were served with summons have ignored not only the summons but also the notices to vacate the suit land from the local District Officer and the Plaintiff's advocates. The Defendants have not laid any claim over the suit land but continue to trespass without any legal justification. The Plaintiff's property rights entrenched in Article 40 of the Constitution of Kenya are being violated with impunity. It is this court's findings that the Plaintiff has proved his case on balance of probabilities and thus entitled to the reliefs sought.

7. The reliefs of injunction and eviction will thus be granted as prayed. As for mesne profit, the only testimony tendered is that due to the Defendants' occupation and user of Plaintiff's land 8.5 acres, the Plaintiff has not been able to access it thus being deprived the user. But no evidence of what amount would amount to mesne profit. In the Case of **PETER MWANGI MBUTHIA & ANOTHER –VS- SAMON EDIN OSMAN Civil Appeal No.26/2004 Nairobi.**

8. The Court of Appeal held that it is incumbent upon claimant to place material before the court demonstrating the amount claimed and how the same is arrived at. The court thus makes the following orders:

1. The prayers No. **a**, **b** and **d** are granted as prayed.
2. Prayed (**c**) is denied as it was not proved.

Dated and Delivered at Machakos, this 20th day of February, 2015.

CHARLES KARIUKI

JUDGE