



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.29 OF 2014

JOHN NDEREBA THINWA.....PLAINTIFF

VERSUS

CHARLES GIKUNJU THINWA alias CHARLES

**SAMSON GIKUNJU
THINWA.....DEFENDANT**

JUDGMENT

1. By a plaint dated **22nd February, 2014** the plaintiff brought the current suit seeking the following orders:-

1. **An order of eviction against the defendant, his servants, agents, family or any other person claiming under him from LR. No. Aguthi/Mung'aria/577 at his own costs;**
2. **A permanent injunction to restrain the defendant by himself, his agents or family members from trespassing, wasting or in any other manner interfering with LR. No. Aguthi/Mung'aria/577 after being evicted;**
3. **Damages for trespass plus interest thereof at court rates;**
4. **Cost of the suit plus interest;**
5. **Any other or further relief that this court may deem fit and just to grant.**

2. The plaintiff prays that if granted the order for eviction, eviction be supervised by the Officer Commanding Nyeri Police Station in order to safeguard law and order.

3. In the plaint filed herein, the plaintiff has averred that he is the absolute proprietor of all that parcel of land known as **LR. No. Aguthi/Mung'aria/577** (hereinafter referred to as "the suit property"). The plaintiff claims that the defendant trespassed into the suit property in 1985 and continues to trespass thereon. As a result of the alleged illegal activities of the defendant on the suit property, the plaintiff claims that he has suffered and continues to suffer loss to wit:-

- a. Damage to his trees and crops;
- b. Construction of house for the defendant's son;
- c. Financial expense to recover possession;
- d. Mental anguish and
- e. Destruction of boundary features.

4. The plaintiff has also averred that save for Nyeri HCC No. 112 of 1985 and the Land Dispute Tribunals Case No.2 of 2009 which have failed to resolve the dispute herein due to jurisdiction issues, there is no other suit or any other previous proceedings between the parties herein.

5. Apparently after the defendant was served with summons to enter appearance, he failed to enter appearance within the time stipulated in law and at all. As a result, on or about **12th May, 2014** the plaintiff applied for interlocutory judgment against the defendant, which was entered by the Deputy Registrar of this court on **21st May, 2014**.

6. Following entry of judgment against the defendant, the plaintiff fixed the suit for formal proof.

7. When the matter came for hearing (formal proof) on **23rd February, 2015** the plaintiff informed the court that the defendant is his step-brother; that whereas he is the registered owner of the suit property, the defendant entered therein and developed it by building a house and planting coffee therein; that he went to the Land Disputes Tribunals (now repealed) where he obtained an award in his favour; That the award was, however, set aside by the High Court on grounds that the Tribunal had no jurisdiction to determine the dispute; that because the High Court determined that the Tribunal did not have jurisdiction, he filed a fresh suit.

8. He further informed the court that he filed a witness statement and a list of documents which he wanted the court to adopt as his testimony and exhibits respectively.

After his witness statement and documents were adopted as requested, the plaintiff urged the court to grant all the orders sought in the plaint.

9. After the plaintiff closed his case his advocate, Mr. Waweru, filed submissions which I have read and considered.

10. In the submissions filed in support of the plaintiff's case, it is pointed out that the plaintiff filed a suit against the defendant to wit, Nyeri HCC No. 12 of 1985 but the dispute was referred to the Land Disputes Tribunal under the repealed Land Disputes Tribunal Act, No. 18 of 1990; that in its award, the Tribunal exceeded its mandate and the award was set aside; that following the setting aside of the order, the plaintiff filed the current suit.

11. Counsel submits that this being a claim of trespass and the plaintiff having established that he is the true owner of the suit property and given that the defendant did not defend the suit, the plaintiff is entitled to the orders sought.

12. With regard to the claim for general damages for trespass, reference is made to the case of **Gitathiru Kariobangi Company Ltd vs. James Gacheru Muriu & 9 others** (2014) eKLR where Kshs. 100,000/= was awarded against the defendants who had trespassed into the plaintiff's land and submitted that in the circumstances of this case, an award of Kshs.100,000/= would be fair and adequate compensation to the plaintiff.

Analysis and determination:

13. Although this case is undefended, there being evidence that the plaintiff had filed another suit in the High Court which was never heard and determined in its merits, the first point of call is determination whether the current suit is *sub judice* Nyeri HCCC No.112 of 1985.

14. Although this court has not had the advantage of seeing and considering the pleadings filed in that suit, from the pleadings and submissions filed in this suit, it is clear that the said suit is still pending. In this regard see the averment in the plaintiff's plaint to the effect that:-

“The plaintiff avers that there is no other suit nor have there been any previous proceedings between the parties hereto save for Nyeri HCCC NO.112 of 1985...which cases have failed to resolve the dispute due to jurisdiction issues”.

15. Whereas the plaintiff contends that the other suits failed to resolve the dispute due to jurisdiction issues, it is noteworthy that in dismissing the award of the tribunal referred to in the testimony of the

plaintiff and the submissions by his advocate, **Okwengu J.** (as she then was) ordered that:-

“...this court shall proceed with the hearing of the suit under order XLV rule 15(2) of the Civil Procedure Rules.”

16. Instead of fixing the earlier suit for hearing as ordered by the court, the plaintiff decided to file another suit while Nyeri HCCC NO.112 of 1985 was still pending. During hearing, for reasons based known to himself, he failed to apply for consolidation of that suit with the current suit.

17. Cognizance of the provisions of **Section 6** of the Civil Procedure Act which **prohibits a court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed,** and being of the view that contrary to the plaintiff's contention **that the Nyeri High court has no jurisdiction to hear and determine the dispute herein,** I find the current suit to be bad in law for having been brought in violation of the said provision of the law.

18. In support of the finding that the High Court has jurisdiction to determine the dispute herein, see the case of **Salah Chelagat Samoei v. Musa Kipkering Kosgei & another (2013) eKLR** where **Munyao J.**, stated:-

“...The transitional provisions in Section 30 above are drafted in almost similar terms to the transitional provisions in Article 22 of the 6th Schedule of the Constitution. An interpretation of Section 30 of the Act will reveal that the transitional provisions provide for matters pending before other courts, not being the Environment and Land Court, are supposed to continue being heard in those courts until the Environment and Land Court is established, or as may be directed by the Chief Justice or the Chief Registrar. The transitional did not therefore stop land and environment matters from proceeding in the courts or tribunals which were properly seized with those matters. Those courts were to continue hearing them until the Environment and Land Court was established or as the Chief Justice or Chief Registrar directed. The power given by the Chief Justice and Chief Registrar in Article 22 of Schedule 6 of the Constitution is again repeated in Section 30 of the Environment and Land Court Act.

19. The Environment and Land Court was set up on 3 October 2012 when the first group of judges of the court were gazetted. The court came into actual operation on 5th November 2012 when the Environment and Land Court judges were sworn into office and posted to various stations across the country.

20. The transitional provisions of S.30 are meant to cover the transition to the Environment and Land Court which under Article 162 (2) (b) of the Constitution is the court established to hear all matters touching on land and the environment.

21. Before the court was established in October 2012, the CJ had issued several practice directions. As noted earlier, these practice directions are anchored in Article 22 of the Transitional Provisions of the Constitution and Section 30 of the Environment and Land Court Act.

22. The first practice note was issued vide Gazette Notice No. 1617 of 17 February 2012. Note 1 of the practice direction provided that "All proceedings relating to the environment and the use and occupation of, and title to land pending before the Court of Appeal, High Court, Subordinate Courts of Local Tribunal of competent jurisdiction other than the Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act, No.18 of 1990, shall continue to be heard and determined by the same courts of Tribunal. Any proceedings which shall not have been concluded by the time the Environment and Land Court is established, shall be moved to the Court upon its establishment."

23. The contemplation as at February 2012 was that once the Environment and Land Court was established, all proceedings not yet concluded would be moved to the Environment and Land Court

24. This position was however changed by Gazette Notice No .13573 of 28 September 2012 which practice direction superceded that of 17 February 2012. Notes 3, 4 , 5 and 6 are of importance to our situation and were drawn as follows :-

3. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

4. All cases relating to the environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto has yet to commence, shall be transferred to the Environment and Land Court as directed by the Chief Registrar.

5. All proceedings which were pending before the Resident Magistrates' Courts, having been transferred thereto from the now defunct District Land Disputes Tribunals shall continue to be heard and determined by the same Courts.

6. All new cases relating to the environment and the use and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.

25. Thereafter followed the Practice Directions issued on 9 November 2012 and which superseded the directions of 28 September 2012. Note 6 and 7 is important for our circumstances. They provide as follows:-

6. All proceedings which were pending before the Magistrates Courts, having been transferred thereto from the now defunct District Land Disputes Tribunal, shall continue to be heard and determined by the same courts.

7. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.

26. It will be seen from the above practice direction, which at the time of this ruling, is the prevailing direction, provides for matters touching on environment and land, pending before Magistrates Courts, to continue to be heard and determined in those courts so long as the courts have the requisite pecuniary jurisdiction. I will not dwell on the direction on the filing of new matters in Magistrates Courts for that matter is not before me for determination. The subject herein is a suit that was pending before the Magistrates Courts when the Environment and Land Court Act, and the Environment and Land Court, came into operation and is caught up by the above practice directions. (Emphasis supplied).

27.. Having found the current suit to be Sub judice Nyeri HCCC 112 of 1985, I decline to grant the orders therein sought. Consequently, I set aside the interlocutory judgment entered in favour of the plaintiff and dismiss the suit with no orders as to costs.

28.. The plaintiff is advised to consider fixing the pending suit for hearing in the High Court or transferring the same to this court for hearing and determination.

Dated, signed and delivered in open court at Nyeri this 23rd day of April, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Macharia for the plaintiff

No appearance for the defendant

Lydiah – Court Assistant