



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 17 OF 2018**

**MOTO MOTO MULTIPURPOSE COOPERATIVE**

**SOCIETY LIMITED *Suing through***

**JOSEPHINE K. MUTUA – *Chairperson***

**GEORGE G. KIMARI – *Secretary***

**JOHNSON KANYONGORO- *Treasurer*.....PLAINTIFF**

**VERSUS**

**FLORENCE A. ODHIAMBO.....1<sup>ST</sup> DEFENDANT**

**LAINA KATIKA MOROKIA.....2<sup>ND</sup> DEFENDANT**

**BONIFACE KIHO MUTUNE.....3<sup>RD</sup> DEFENDANT**

**JONES MWANZIA MUTUNE.....4<sup>TH</sup> DEFENDANT**

**PATRICK OKOTH.....5<sup>TH</sup> DEFENDANT**

**CONSOLATA MBOYA.....6<sup>TH</sup> DEFENDANT**

**MBULA NGUKU WAEMA.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

Through a Plaintiff dated the 24<sup>th</sup> January, 2018, the Plaintiff prays for Judgment against the Defendants for:-

- a. An order of permanent injunction restraining the 1<sup>st</sup> to 7<sup>th</sup> Defendants, their agents and servants from further using, trespassing, erecting structures or in any other way dealing with the Land Reference Number 7149/10 situated at Mavoko, Mlolongo area, off Mombasa Road Machakos County.***
- b. An order evicting the 1<sup>st</sup> to 7<sup>th</sup> Defendants, their agents and servants from the suit property.***
- c. General damages for trespass on the suit land and/or destruction of property.***
- d. Costs of the suit.***
- e. Costs and interest.***
- f. Any other just relief that court may deem fit to grant.***

The Defendants though duly served failed to enter appearance and file their respective Defences to controvert the Plaintiff's averment. The matter then proceeded for hearing where the Plaintiff called two witnesses.

## Evidence of the Plaintiff

PW1 JOSEPHINE K. MUTUA and PW2 JOHNSON KANYOGORO, who are the Plaintiff's Chairperson and Treasurer respectively testified that the Plaintiff is the registered owner of Land Reference Number 7149/10 situated at Mavoko hereinafter referred to as the 'suit land'. It was their testimony that recently, the members of the Plaintiff Co-operative Society Limited noticed some structures been erected on the suit land and the Chairperson reported the matter to the Machakos County Commissioner who referred it, to a criminal investigator. Further, that the said criminal investigator learnt that the Defendants were claiming ownership of the suit land and erected permanent structures thereon. They explained that the Defendants have no registerable right over the suit land and their acts of erecting permanent structures/ trespassing/interfering with the said property should be stopped. They reiterated that the Defendants had interfered with the Plaintiff's quiet possession of the suit land by selling and leasing the land to third parties hence causing the Plaintiff great losses and damage. The Plaintiff produced the following documents as exhibits: Certificate of Title for Land Reference Number 7149/10 situated at Mavoko; Certificate of Registration for Moto Moto Multipurpose Cooperative Society Limited and Photographs of structures erected on suit land.

## Analysis and Determination

Upon consideration of the Plaintiff, Witness Testimonies, Exhibits and Submissions, the following are the issues for determination:

- ***Whether the Defendants have trespassed on the suit land.***
- ***Whether the Defendants should be evicted from the suit land.***
- ***Whether the Plaintiff is entitled to damages for trespass.***
- ***Whether the Plaintiff is entitled to the orders sought in the Plaintiff.***
- ***Who should bear the costs of the suit?***

I will deal with these issues jointly.

The Plaintiff in its submissions reiterated its averments in the Plaintiff and contended that the Defendants have trespassed on the suit land and erected structures without its consent. It sought for Judgment to be entered in its favour as against the Defendants. To buttress its averments, it relied on the case of ***Justine Magare Bosire v. Isaac Omboga (2018) eKLR.***

Before I proceed to make a determination of the issues herein, I note the Defendants though duly served failed to enter appearance and file their respective defences nor participate during the hearing. In the circumstance, I find that the Plaintiff's evidence remains uncontroverted.

As to whether the Defendants have trespassed on the suit land and if they should be evicted therefrom. The Plaintiff's officials tendered evidence to prove that it is a Cooperative Society and the registered proprietor of the suit land. Further, that it holds a Certificate of Title to that effect which was produced as an exhibit. In that regard, I wish to make reference to Section 26(1) of the Land Registration Act which provides as follows:

***“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 the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

While Section 24(a) of the Land Registration Act further stipulates thus:

***“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....”***

In the case of ***Willy Kipsongok Morogo v Albert K. Morogo (2017) eKLR*** the Court held that;

***“The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.”***

From the legal provisions cited above, I hold that since the Plaintiff has produced a Certificate of Title to prove ownership of the suit land which title has not been challenged by the Defendants, it is indeed the absolute proprietor of the said suit land, hence entitled to all rights and privileges belonging or appurtenant thereto and to protection of the law as envisaged in Sections 24, 25 including 26 of the Land Registration Act.

The Plaintiff claims the Defendants have trespassed on its land. Both PW1 and PW2 confirmed that the Plaintiff's members noticed some structures had been erected on the suit land which issue the Chairperson reported to the Machakos County Commissioner who referred the

matter to a criminal investigator that discovered that the Defendants were claiming ownership of the said suit land and erected permanent structures thereon. They insisted that the Defendants had no registerable right over the suit land and their aforementioned acts was amounted to trespass as they had interfered with the Plaintiff's quiet possession of the said land by selling including leasing it to third parties, hence causing them great losses and damage.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. *See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01.*

Section 3 of the Trespass Act provides that;

**“(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”**

In the case of *Eliud Njoroge Gachiri vs. Stephen Kamau Nganga ELC No. 121 of 2017* the court held that:

***“However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”***

From the evidence before court which was uncontroverted, it emerged that the Defendants had trespassed on the suit land, erected permanent structures thereon, leased to third parties and interfered with the Plaintiff's quiet possession. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR*, P. Nyamweya J. held that:-

***“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs. 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' trespass.”***

See also the decisions of *Ochako Obinchi v Zachary Oyoti Nyamongo (2018) eKLR* and *Nakuru Industries Limited Vs S S Mehta & Sons (2016) eKLR* and *Justine Magare Bosire v. Isaac Omboga (2018) eKLR*.

In so far as the Plaintiff did not provide evidence on the loss they had incurred due the Defendants' aforementioned acts but in relying on the above decisions, and the Plaintiff's submissions, I find that it has indeed suffered damages as a result of the Defendants' acts of trespass. I will proceed and award it Kshs. 200,000 as general damages.

As to whether the Defendants should be evicted from the suit land. The Plaintiff claims the Defendants have constructed permanent structures on the suit land and produced photographs to that effect. Further, the Defendants have interfered with their quiet possession of the suit land. Since the Defendants failed to controvert the Plaintiff's averments, I find that they are trespassers on the suit land and should hence be evicted therefrom after being granted ample notice. Further, in line with the principles established in the decision of *Giella Vs Cassman Brown & Company Limited (1973) EA 358*, I find that the Defendants should be permanently restrained from their acts of trespass.

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendants' defiance and occupation of the suit land, I find that it is entitled to costs.

It is against the foregoing that I find that the Plaintiff has proved its case on a balance of probability and will proceed to make the following orders:

***a) The Plaintiff is the lawful owner of Land Reference Number 7149/10 situated at Mavoko, Mlolongo area, off Mombasa Road Machakos County.***

***b) An order of permanent injunction be and is hereby issued restraining the 1<sup>st</sup> to 7<sup>th</sup> Defendants, their agents and servants from further using, trespassing, erecting structures or in any other way dealing with the Land Reference Number 7149/10 situated at Mavoko, Mlolongo area, off Mombasa Road Machakos County.***

***c) The Defendants be and are hereby ordered to vacate and deliver vacant possession of LR No. 7149/10 situated at Mavoko, Mlolongo area, to the Plaintiff within Ninety (90) Days from the date hereof failure of which an Order of forcible eviction to issue upon application by the Plaintiff.***

***d) The Plaintiff be and is hereby awarded Kshs. 200,000 being General damages for trespass together with interest at court rates from the date of Judgment until payment in full.***

***e) Costs of the suit are awarded to the Plaintiff.***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**