



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 254 OF 2009**

UMBISA MOSES GWEHONA.....PLAINTIFF

VERSUS

SEVENTH DAY ADVENTIST CHURCH OF EAST AFRICA UNION

(Sued on behalf of KAHAWA WEST SDA CHURCH).....DEFENDANT

**JUDGEMENT**

The Plaintiff instituted this suit by way of a plaint dated 29/5/2009. The Plaintiff avers that that he is the lawful owner of ***Plot No. X104 PART OF L.R. No. 71/5 Kahawa West***, having been allocated by the City Council of Nairobi and was issued with a beacon certificate in 1999. He avers that he took possession and has been paying the ground rent, rates and other charges owing to the Council. It is the Plaintiffs averments that the Defendant's branch – Kahawa West SDA Church has encroached on its property and erected a pit latrine without his consent, as a result, he has been deprived of quiet possession and use of his property. The Plaintiff thus prays for Judgment against the Defendant for:

- a. ***A Declaration that the forceful invasion and taking part of the Plaintiff's Plot No. X104 L.R. No. 71/5 Kahawa West by the Defendant amounts to trespass and is unlawful, null and void.***
- b. ***An order directing the Defendant's immediate eviction from the suit land.***
- c. ***A permanent injunction restraining the Respondent, its servants and/or agents from trespassing onto, constructing upon, fencing and/or in any other manner whatsoever interfering with Plot Np. X104 Part of LR 71/5 Kahawa West Estate.***
- d. ***General Damages for trespass***
- e. ***Costs of the suit***

**THERE IS NO DEFENCE ON FILE**

In evidence, the Plaintiff reiterated the contents of the Plaint and testified that he took possession of the property, cleared the bush, took building materials and put up a fence. He testified that the fence was

pulled down by the Defendant and building materials disappeared and he therefore incurred loss. The Plaintiff produced the following exhibits: Letter of allotment in respect of Plot No. X104 Part of LR. No. 71/5 in his

favour from the Council dated 5/3/1999; Beacon certificate dated 5/3/2013; Bundle of receipts of payment of survey fees, legal fees and submission of building plans. On cross-examination, the Plaintiff stated that he did not find any person on the property when he took possession, but that the side of church was cleared. The Plaintiff admitted that the Defendant was given its property in 1992 but alleged that it constructed the pit latrine on his property. The Plaintiff also stated that he did remove the said pit latrine but that the church constructed it again but subsequently removed it.

Nehemia Michika Shika an Elder of Kahawa West SDA Church testified on behalf of the Defendant. It was his evidence that the original allocation to the church by the Council was 0.2 HA. Subsequently, the Church sub-divided it in 1996 and one section was allocated to Green Cottage Primary School hence leaving the church with 0.1235HA. He testified that upon allocation by the Council, the church put up the latrine facility on the extreme left of the plot which the church utilized until 1998 when an individual came and insisted that he had been allocated the section which the church has constructed the said facility. The witnesses contended that the church did not trespass the Plaintiff's

property. The documents in support of the defence were: Letter of allotment dated 18/5/1992 which indicates that the Defendant was allocated "Sub-plot A" measuring 0.25HA; Letter of allotment of dated 22/4/1996 indicating that the Council allocated the Defendant **Plot KC2 PART OF LR No. 71/5 Kahawa West measuring 0.1HA**; and Survey Computations showing the location of the Defendant, Green Cottage School, Health Clinic and surrounding developments.

At the close of the hearing, both parties filed written submissions. Counsel for the Plaintiff filed submissions dated 15/7/2013 wherein he reiterated the contents of the Plaintiff's pleadings and testimony. It was his submission that the Plaintiff had established that he was the lawful owner of the said property and produced documents including the allotment letter in support thereof. Counsel submitted further that the Defendant admitted that it had occupied the Plaintiff's property and that its action of constructing a pit latrine thereon amounted to trespass. Counsel cited the case of **Hannah Wairimu v Wanjiru Muchiri HCCC No. 1324/2000** where the Court defined trespass as follows:

***".....in law, trespass is an entry in the possession of the Plaintiff or remaining upon the Plaintiff's land without justification".***

Counsel submitted that the Defendant had failed to establish that it was the lawful allottee of the suit property as it did not produce evidence to support the same. Counsel referred to the allotment letter of Plot No. **KC2 PART OF L.R. No. 71/5 Kahawa West** annexed to the Defendant's list of documents and submitted that the same was in respect to a different plot from the subject matter of the suit. Counsel submitted that on a balance of probabilities, the Plaintiff had proved trespass and was thus entitled to a permanent injunction against the Defendant. He submitted further that the construction of the pit latrine on the Plaintiff's property lowered its aesthetic value and also caused the Plaintiff not to develop it. Consequently, counsel submitted that the Plaintiff was entitled to general damages of an award of **Kshs. 800,000/-**.

Counsel for the Defendant filed submissions dated 26/7/2013 wherein he submitted that the section of the property, subject matter of this suit is part of a large section that the Defendant owned since 1992 hence 7 years before the Plaintiff laid claim over the same. Counsel submitted that the original allocation to the Defendant by the Council in 1992 was **Sub-plot A** known now as **LR No. 71/5 measuring 0.25HA**. He submitted further that the Council has continued to sub-divide the

Defendant's property and that is how in 1999 the Plaintiff came onto the land. Therefore, counsel submitted, the Plaintiff's allegation of invasion or encroachment is false. In respect to the pit latrine, counsel submitted that it was constructed in 1994 when the Defendant first got possession of the property and not later as insinuated by the Plaintiff as the Defendant could not have conducted its activities without

the facility all those years. It was his submission that in any event the said facility was removed and has not been in existence since the Plaintiff moved onto the land. Counsel further submitted that the Plaintiff had not tendered any evidence whatsoever that the Defendant is constructing upon, fencing or even trespassing upon his claimed allocated land. Therefore the suit be dismissed.

**Determination**

From the summary hereinabove, it appears that the City Council of Nairobi has allocated sections of **LR. No. 71/5 Kahawa West** to various persons beginning with the Defendant in the year 1992 and later the Plaintiff in 1999. Both parties have allotment letters from the Council and have documentation to show that they met the Council’s requirements specified in the allotment letters. The Plaintiff’s claim against the

Defendant is for trespass specifically that the Defendant constructed a latrine facility on its section of the property. The Defendant denies trespass and avers that it was first in time on the plot before the Council continued to sub-divide and allocate other persons sections of that property. The Defendant’s witness admitted that the Defendant constructed the facility on the extreme section of the plot sometimes in 1996 when after the Plaintiff in 1999 laid claim that he had been allocated the said section.

The Plaintiff did not come out clearly as to when the said facility was constructed whilst the Defendant avers that it was constructed sometimes in 1994 when it took possession of the property. The bottom line is that indeed the latrine facility was erected on the Plaintiff’s section. The question that is left to be answered is whether the Defendant can be said to have trespassed onto the Plaintiff’s section in view of the original allocation of 1992. This allocation was for 0.25HA which the Defendant avers to have selected a corner and erected the said facility. The Defendant further stated that there were other several sub-divisions of the said property by the Council before the Plaintiff’s allocation in 1999. The Plaintiff did not dispute these averments neither

did he call an officer from the Council to give evidence on the boundaries of sections of LR. No. 71/5 Kahawa West and whether his section was part of the 0.25HA that once was allocated to the Defendant. It is noteworthy, however, that the latrine facility is no longer on the Plaintiff’s property, albeit removed after the commencement of this suit, a fact that the Plaintiff confirmed during trial.

Undoubtedly there was a latrine facility on the Plaintiff’s section of the property. However, in view of the uncertainty outlined hereinabove, and the said facility having been removed, I find that the Plaintiff had not established a case to warrant an award of damages. Consequently, I will not award damages to the Plaintiff. So as to guarantee peaceful co-existence between these neighbors and pre-empt in further litigation, I enter Judgment for the Plaintiff in terms of **prayers (a) and (c)** of the Plaint. **Prayer (b)** has already been overtaken by events since the latrine facility has already been removed. As regards costs, I award the same to the Plaintiff for reasons that the latrine facility lingered on the Plaintiff’s section of the property until after the institution of this suit in 2009.

Orders accordingly.

Dated, signed and delivered this 25th day of February, 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk

**L.N. GACHERU**

**JUDGE**