



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 951 OF 2013

GA INSURANCE LIMITED.....PLAINTIFF

-VERSUS-

AINU SHAMSI AUTOMOBILE & HARDWARE LTD.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

PERMANENT SECRETARY, MINISTRY OF LANDS.....3RD DEFENDANT

THE DIRECTOR OF SURVEY.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Plaintiff dated the **19th July 2013**, the Plaintiff herein sought for the following reliefs;

- a. An order for cancellation and/or rectification of the title L.R No. 209/20292 to reflect the actual size of parcel of land.**
- b. An order for reestablishment and relocation of the beacons relating to the parcels of land number L.R No. 209/20038 and I.R Number 209/10853 to the actual position.**
- c. An order for demolition of the wall erected by the 1st defendant on the 76.29 Meters of the Plaintiff's land.**
- d. General damages for trespass and fraud against the 1st Defendant.**
- e. Costs of the suit with interests.**
- f. Costs of the suit and interest thereon**

2. Upon being served with the Plaintiff and Summons to Enter Appearance in respect of the subject matter, the 1st, 2nd, 3rd and 4th Defendants herein entered appearance and thereafter filed a statement of defense on the **29th August 2013**, whereby the said Defendants denied the Plaintiff's claim.

3. On the other hand, the 2nd to 5th Defendants also filed their list and bundle of documents on the **27th October 2014** as well as a witness statement by one Wilfred Muchahi, in respect of which same contended that the portion of land which the Plaintiff alludes to and which it claims is amalgamated and acquired by the 1st Defendant, indeed belonged to the Government of the Republic of Kenya.

4. On behalf of the 1st Defendant, even though same was duly served with summons to enter appearance and Plaintiff over and in respect of the

subject matter, same neither entered appearance nor filed a statement of defence. Consequently, the suit proceeded for formal proof as against the 1st Defendant.

EVIDENCE BY THE PARTIES

EVIDENCE BY THE PLAINTIFF

5. The Plaintiff herein called one witness, namely, Simon K Lariak, who testified as PW1. According to the witness, same works for the Plaintiff company as the assistant legal manager in charge of the Plaintiff's legal affairs and in the course of his duties, the witness indicated that the same take custody of the Plaintiff's title documents and other instruments of Title.
6. Besides, the witness further testified that as concerns **L.R No 209/11930**, same belongs to and is registered in the name of the Plaintiff herein. For clarity, the witness confirmed that the Plaintiff was indeed issued with a Title over and in respect of the suit property.
7. On the other hand, the witness further confirmed that same recorded a witness statement dated the **18th March 2021** and which statement same contends to adopt and rely on. In this regard, the witness statement by the witness, namely the witness statement dated the **18th March 2021**, was duly admitted and adopted as the witness evidence-in-chief.
8. Other than the witness statement dated the **18th March 2021**, the witness also pointed out that same had recorded another witness statement dated the **20th November 2018**, which witness statement, the witness also proposed to adopt as his evidence-in-chief. Consequently, the said witness statement was similarly admitted as the evidence in chief of the witness.
9. Besides, the witness testified that the Plaintiff herein had also filed a list and bundle of documents dated the **19th July 2013**, and which list contained a total of 8 documents and in this regard, the witness sought Leave of the court to rely on same.
10. It is worthy to note that the bundle of documents which were filed by the Plaintiff and which are contained at the foot of the list dated the **19th July 2013**, were thereafter produced and admitted as exhibit P1 to P8.
11. Other than the foregoing documents, the witness also alluded to a supplementary bundle of documents dated the 22nd March 2021, which contains four (4) documents, which the witness also sought to produce and which were similarly produced and marked as P9 to P12 respectively.
12. Having produced the foregoing documents, the witness further testified that the portion of land which is the subject of dispute was delineated and is captured in the Deed Plan which was prepared by B. M Okumu, who is a licensed surveyor.
13. On the other hand, the witness further testified that the Deed Plan in question also shows that the original parcel of land was **L.R No. 2019/11076 GL** and that the suit property is an amalgamation of two (2) Titles.
14. On cross-examination, the witness herein contended that the suit property was not an amalgamation of **L.R No. 209/11930** and Government land as claimed by counsel for the 2nd to 5th Defendants.
15. The witness further stated that the portion of land which is in dispute measures approximately 76.29 meters and that the said portion of land touches on a road of access.
16. It was the witness's further testimony that when the 1st Defendant's land was amalgamated, the 1st Defendant annexed a portion of the road of access and also encroached onto the 76.29 meters portion of land that belongs to and falls within the Plaintiff's land.
17. During re-examination, the witness herein pointed out that the 76.29-meter portion of land, which is claimed by the Plaintiff runs up to the road access. For clarity, the witness emphasized that it is the said portion that enables the Plaintiff to access the suit property and that without the disputed portion, access to the suit property would be restricted and/or hindered.

EVIDENCE BY THE DEFENSE

18. Upon the close of the Plaintiff's case, the 2nd to 5th Defendants called one witness, namely Mr. Wilfred Muchahi, who informed the court that same works with the Ministry of Lands and Physical Planning. For clarity, same testified that he is currently designated as the Principal Land Surveyor.
19. The witness thereafter proceeded to and informed the court that same is aware and/or knowledgeable of one P. M Njoroge who was also an employee of the Ministry of Lands and Physical Planning and who had recorded a witness statement in respect of the subject matter. For clarity, the witness pointed out that Mr. P. M Njoroge has since retired from service and indeed same has also passed on.
20. Be that as it may, the witness alluded to the witness statement dated the **27th October 2014**, and adopted the same as his evidence in chief.
21. Other than the witness statement, the witness herein also referred to a list and bundle of documents dated the **27th October 2014**, containing three (3) documents, which the witness also adopted and relied upon. In this regard, the witness implored the court to admit the

said documents as exhibits.

22. Finally, the witness herein alluded to a survey report dated the **4th February 2021**, which was also filed before the court and which report the witness also relied upon. Consequently, the report under reference was produced and marked as D exhibit 4.

23. On cross-examination, the witness herein confirmed that **L.R No. 209/20292**, which belongs to and is registered in the name of the 1st Defendant herein was indeed an amalgamation of two (2) properties, namely **L.R No. 209/11076** and part of Government land.

24. On the other hand, the witness herein also confirmed that the survey report dated the **4th February 2021**, contains an Arial image and the Arial image shows an encroachment of the 1st Defendant's land onto the access road and onto **L.R No. 209/11930**.

25. The witness herein further admitted that the warehouse that was constructed by the 1st Defendant has encroached to and falls upon **L.R No. 209/11930**, belonging to and registered in the name of the Plaintiff.

26. When the witness was referred to the Deed Plan, which was produced as exhibit P2, the witness herein confirmed that the said exhibit shows the boundaries of the suit property, that is **L.R No. 209/11930** and in particular it shows that the area measuring 76.29 meters, which is in dispute, falls within the Plaintiff's land.

27. On the other hand, the witness herein also conceded that the road of access touches on and/or connects to the disputed portion measuring 76.29 meters and that without the disputed area access to the suit property would be restricted and/or hindered.

28. During the re-examination, the witness herein confirmed that the warehouse belonging to the 1st Defendant is actually seated on the suit property.

29. On the other hand, the witness also confirmed that the disputed portion, that is the 76.29 meters, which was annexed and amalgamated to the 1st Defendant's land actually falls within and constitutes part of **L.R No. 209/11930**, which belongs to the plaintiff.

SUBMISSIONS BY THE PARTIES

30. At the close of the Defense case, the parties herein proposed to file and exchange written submissions and in this regard, the court proceeded to and indeed granted directions on the filing and exchange of the said submissions.

31. Pursuant to the foregoing directions, the Plaintiff filed her submissions on the **15th December 2021**, while the 2nd to 5th Defendants filed their submissions on the **17th February 2022**.

32. I must point out that the two sets of written submissions are on record and same have been duly considered and taken into account.

ISSUES FOR DETERMINATION

33. Having evaluated and/or reviewed the Plaint dated the **19th July 2013**, filed by and/or on behalf of the Plaintiff herein, the Statement of Defense dated the **29th August 2014**, the Witness Statements as well as the oral evidence tendered on behalf of the parties herein and having similarly considered the written submissions filed on behalf of the parties, the following issues are germane for determination;

a. Whether the 76.29 meters portion access neck, which is in dispute forms part and parcel of the suit property.

b. If the answer to (a) above is in the affirmative, whether the said portion could be amalgamated to and/or included to form part of the 1st Defendant's L.R No. 209/20292, without the Plaintiff's knowledge or at all.

c. Whether the amalgamation, culminating into annexation of the portion measuring 76.29 access neck was lawful or otherwise.

d. What reliefs ought to issue.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the 76.29 meters portion access neck, which is in dispute forms part and parcel of the suit property.

34. During the testimony by and/or on behalf of the Plaintiff, it was established that the Plaintiff herein is the lawful and registered owner of the property known as L.R No. 209/11930, having lawfully been issued with a grant to that effect, by the Office of the Commissioner of Lands. In any event, there was no dispute pertaining to and/or concerning the Plaintiff's ownership of the suit property.

35. On the other hand, the Plaintiff herein also contended that during the allocation of the suit property, the Office of the Commissioner of Lands and in particular the Department of Physical Planning, prepared and/or generated a Deed Plan, which showed the boundaries and/or

extent of the suit property and the Deed Plan in question was duly tendered and adopted as exhibit P2.

36. It was the Plaintiff's further testimony that according to the Deed Plan, the 76.29 access neck, which is the portion in dispute, was shown to form part and parcel of the suit property. Consequently, same belonged to the Plaintiff and hence the Plaintiff possessed exclusive and absolute right over and in respect thereto.

37. As pertains to the ground location of the disputed portion of land, that is the 76.29 meters access neck, the witness called by the 2nd to 5th Defendants, namely Wilfred Muchahi, testified as hereunder;

“The warehouse in question falls on L.R No. 209/11930 belonging to the Plaintiff”.

“Whilst referred to the Plaintiff exhibit P2, which is the deed plan, the witness confirms that same shows the boundaries of L.R. No. 209/11930”

“The area of 76.29 meters is shown to be within the Plaintiff lands”

38. From the Defendants' own witness, it is apparent and evident that the 76.29 access neck which is the area in dispute falls within **L.R No. 209/11930** belonging to and registered in the name of the Plaintiff.

39. To the extent that the disputed portion of land falls within the Plaintiff's land, the Plaintiff is therefore seized and/or possessed of the requisite authority and mandate thereto and no one, let alone the 2nd to 5th Defendants, can annex and or interfere with the Plaintiff's ownership rights, in any manner whatsoever, subject only to compliance with the due process of the law.

40. In support of the foregoing position I adopt and restate the holding of the court in the case **of Ocean View Plaza v The Commissioner of Land (2002) eKLR**, where the court observed as hereunder;

Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed. Indeed it is categorically denied that the provisions of the said Act were applied to the pieces of land the subject of this case. I would further hold that where the compulsory acquisition procedure would be applied, it would or should be applied uniformly and without discrimination against all the parties concerned. In this case it would appear that the Commissioner's letter was discriminative.

41. In a nutshell I find and hold that the disputed portion of land, namely the 76.29-meter access neck falls within and forms part of **L.R No. 209/11930**.

ISSUES NUMBER 2 & 3

If the answer to a above is in the affirmative, whether the said portion could be amalgamated to and/or included to form part of the 1st Defendants L.R No. 209/20292, without the plaintiff knowledge or at all.

Whether the amalgamation, culminating into annexation of the portion measuring 76.29 access neck was lawful or otherwise.

42. It is not disputed that the 1st Defendant herein was indeed the registered owner and/or proprietor of **L.R No. 209/20038** and **L.R No. 209/10853** respectively, which two parcels of land shared common boundaries with the suit property belonging to and registered in the name of the Plaintiff.

43. On the other hand, it is also common ground that the 1st Defendant herein approached the offices of the 2nd and 5th Defendants with a request to amalgamate the two parcels of land namely **L.R No. 209/20038** and **L.R No. 209/10853**, which request appears to have been granted. Consequently, the 1st Defendant proceeded to and caused the two properties to be amalgamated culminating into the creation of **L.R No. 209/ 20292**.

44. However, in the course of amalgamating the two properties belonging to and registered in the name of the 1st Defendant, same proceeded to and annexed the portion of land, measuring 76.29 meters, which hitherto forms part and parcel of **L.R No. 209/11930**, albeit without the knowledge of the Plaintiff.

45. It is worthy to point out that the process of amalgamation cannot be undertaken and/or concluded without the input of the relevant government offices, more particularly the Director of Physical Planning, the Director of Survey and the Office of the Chief Land Registrar, who are mandated to verify the information availed and cross-check same and to avert annexation of neighboring land.

46. Unfortunately, in respect of the subject matter, the concerned government offices and officers failed to undertake their mandate and as a result of such failure, a portion of land which was admitted by DW1 to form part and parcel of the Plaintiff's land, was illegally amalgamated and included in the 1st Defendant's parcel of land.

47. Suffice it to say, that if the concerned officers were diligent in the performance of the execution of their mandate, the scenario beforehand would have not transpired and/or occurred.

48. Be that as it may, it is my finding and holding that the impugned amalgamation, which culminated into the creation of **L.R No. 209/20292**, belonging to and registered in the names of the 1st Defendant and which amalgamation has annexed a portion of land which hitherto fell within the Plaintiff's land, was illegal, unlawful and thus constitutes a violation of the Plaintiff's constitutional rights to property.

49. I must also point out that in the course of arguments and submissions by the 2nd to 5th Defendants, it was submitted that the portion of land, the 76.29 meters access neck which the Plaintiff is claiming, was indeed Government land that has been annexed and legally acquired by the Plaintiff.

50. Based on the foregoing, counsel for the 2nd to 5th Defendants therefore submitted that the relief claims by the Plaintiff, ought not to be granted, because the portion of land claimed was illegally acquired. However, in my humble opinion, the submissions herein seem to be misplaced to the extent that the said portion of land has since been illegally annexed into the 1st Defendant's land vide an amalgamation which was sanctioned by the government officers.

51. In any event, the allegations that are being made as pertains to the disputed portion of land that was illegally acquired, have not been subjected to due process of the law, to warrant a determination thereto by a court of competent jurisdiction. Suffice it to note that it does not lie in the mouth of the 2nd to 5th Defendants to make a determination as to the legality or otherwise of the acquisition process and thereby arrogate unto themselves the mandate of the court.

52. In any event, it is worthy to note, that no counter-claim was mounted and/or lodged on behalf of the 2nd to 5th Defendants, whatsoever.

53. Nevertheless, I beg to adopt and reiterate the observation in the decision in the case **Isaac Gathungu Wanjoi & another v Attorney General & 6 others [2012] eKLR**, where the court observed as hereunder;

The state has asserted that the suit property was acquired illegally, in that event it must use due process to establish this position. Article 40(6) contemplates that the finding of unlawfulness must be by due process. As part of my jurisdiction to frame appropriate relief under Article 23 and in order to give effect to the petitioner's right I direct that should the state wish to do so, it must commence such proceedings within 12 months from the date of this judgment.

I must however state that the petitioners are the holders of the title to the suit property; LR No. 209/2052 and the Gazette Notice No. 9230 is null and void in so far as it purported to revoke that title. It is improper and contemptuous for the respondents to insist that the revocation is valid and that consequently no compulsory acquisition can take place. In view of what I have stated the court cannot continue to assert that the revocation was valid. That action was further aggravated by the trespass into the property by the 2nd, 3rd and 5th respondents. The deliberate acts of the respondents which were without legal foundation and which are in breach of Article 47 and must be sanctioned.

ISSUE NUMBER 4

What reliefs ought to issue.

54. The Plaintiff herein tendered and/or adduced evidence that the 76.29 meters access neck, which comprises of the disputed portion of land touched on the access road and same, therefore, constituted the access way for entry into and exit from the suit property. Consequently, upon the annexation of the disputed portion of land, the Plaintiff's entry upon the suit property was therefore restricted and/or limited.

55. On the other hand, evidence was also tendered that other than the annexation of the disputed portion of land, which was admitted by DW1 to form part and parcel of the suit property, the 1st Defendant herein has since proceeded to and erected a wall which barricades the access to the Plaintiff's property.

56. As if the foregoing is not enough, evidence was also placed before the court which confirmed that the 1st Defendant has also built a warehouse that has encroached onto the Plaintiff's parcel of land. For clarity, DW1 testified as hereunder during cross-examination;

“The warehouse in question falls on L.R No. 209/11930 belonging to the Plaintiff”

57. In re-examination, DW1 proceeded to and reiterated his evidence during cross-examination when he stated as hereunder;

“I now say that the warehouse seats on the Plaintiff's land, namely L.R No. 209/11930. The warehouse is actually constructed on the portion that falls within the 76.29 meters but on L.R No. 209/11930.”

58. From the foregoing evidence, it is evident that the 1st Defendant has actually been benefiting from possession and use of the suit property, to the detriment of the true and real owner thereof, namely the Plaintiff.

59. Based on the foregoing, it is my finding and holding that the action and/or activities by the 1st Defendant amount to and/or constitute trespass. In this regard, the Plaintiff herein is no doubt entitled to compensation for trespass, essentially as against the 1st Defendant, who is the person guilty of denying and/or depriving same of her lawful rights to enter upon and use the suit property.

60. In support of the foregoing position, I can do no better than to refer to the decision in the case of **Park Towers v Moses Chege & Others (2014) eKLR**, where the court held as hereunder;

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”

61. Premised on the foregoing decisions, I am minded to assess and award general damages in the sum of **Kes.5, 000, 000/=** only as against the 1st Defendant.

62. To underscore the assessment and award of general damages in the sum of **Kes.5, 000, 000/=** only, in terms of the preceding paragraph, I am persuaded by the decision in the case **Joshua Ngeno v Kenya Power & Lighting Company Limited & County Government of Kericho [2021] eKLR** where the Honourable Judge entered judgment as hereunder;

Judgment is however entered for the Plaintiff against the 1st Defendant wherein I award him Kshs 5,000,000/= (five million shillings only) plus interest from the date of this judgment until payment in full, as compensation of the infringement of his right to use and enjoy the suit property.

63. Other than the issue of the trespass, it is also evident that the amalgamation complained of has denied and/or deprived the Plaintiff of a substantial chunk and/or portion of the suit property herein. Consequently, it is imperative that the impugned amalgamation be revoked, nullified and/or canceled, and thereafter the portion measuring 76.29 meters access neck, be exercised therefrom and returned to the suit property.

64. On the other hand, it will also be appropriate that the beacons that hitherto separated and/or demarcated the suit property from the neighboring properties, namely **L.R No’s 209/20038** and **L.R No. 209/10853**, be reinstated and/or restored by the 2nd and 5th Defendants, to avert any further acts of aggression.

FINAL DISPOSITION

65. Having reviewed the issues herein enumerated, I come to the conclusion that the Plaintiff has proven and or established her case on a balance of probabilities.

66. Consequently and in the premises, I am minded to make the following Orders;

a. The Title over and in respect of L.R No. 209/20292 be and is hereby canceled and/or nullified.

b. The Titles over and in respect of L.R No’s 209/20038 and 209/10853, be and are hereby restored and/or reinstated.

c. The 2nd and 5th Defendants be and are hereby ordered and/or directed to restore and/or re-establish the boundary beacon relating to the boundaries between L.R No’s 209/11930 and 209/20038 and 209/10853, respectively.

d. The re-establishment and/or restoration of the boundary beacon herein to be carried out and/or undertaken within 30 days and the costs of the restoration be borne by the Plaintiff herein.

e. The 1st Defendant be and is hereby ordered to demolish the wall erected on the 76.29-meter access neck, which falls within and/or form part of L.R No. 209/ 11930 and same be demolished within thirty (30) days from the date hereof.

f. In default by the 1st Defendant to demolish the offensive wall within the designated thirty (30) days from the date herein, the Plaintiff herein shall be at liberty to demolish same and costs of such demolition shall be certified and same shall be recovered as part of costs of the suit.

g. The Plaintiff be and is hereby awarded General Damages for trespass for the sum of Kes. 5, 000, 000/= as against the 1st Defendant, which shall accrue interest at court rates from the date of Judgment.

h. Cost of the suit be and is hereby awarded to the Plaintiff.

67. It is hereby Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Vincent Oloo for the Plaintiff

No Appearance for the 1st Defendant

Mr. Allen Kamau for the 2nd, 3rd & 5th Defendants