



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. 308 OF 2013

SAMUEL NJOROGI GICHUHI.....PLAINTIFF

VERSUS

GEORGE MACHARIA KAGUA.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU....2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced the instant suit by way of a Plaint dated **16/04/2013** and filed in court on the same date. Later he filed an amended plaint dated **02/04/2014** on **03/04/2014**. He further amended his pleading on **8/03/2018** and filed it on the same date. In the last amended plaint dated **8/03/2018** the plaintiff sought the following orders against the defendants:

- a. **A declaration that the plaintiff is entitled to exclusive and unimpeded possession of the property LR No. 668 Gilgil Site & Service Residential and the 1st defendant is a trespasser occupying the Plaintiff's parcel illegally.**
- b. **Eviction orders and/or demolition orders against the 1st defendant from the property Plot LR No. 668 Gilgil Site & Service Residential.**
- c. **A perpetual/permanent injunction restraining the defendants or their servants/agents from entering, constructing, remaining, taking up, evicting, leasing out, renting out and/or interfering with the Plaintiff's quiet possession and occupation of parcel Plot LR No. 668 Gilgil site & Service Residential.**
- d. **General damages for trespass on the plaintiff's parcel.**
- e. **Costs of this suit together with interest on (d) above at court rates from the date of filing suit till payment in full.**

The Plaintiff's Case

2. The Plaintiff averred that he was allotted **Plot LR No. 668 Gilgil Site and Service Residential** and has been in occupation since the year **1996**. That he was re-issued with an allocation letter by the 2nd defendant on **25/03/2013** after losing the original allocation letter sometime in the year **2004**; that he has been paying the required rent and rates for the said parcel; that the 1st defendant begun the encroachment in **November 2003**; that sometime in the month of **October 2012** the 1st defendant invaded the suit property and started constructing; that when the plaintiff confronted him, the 1st defendant stated that he had been allocated Plot No. **677**; that the 1st defendant claimed that his plot no **677** was where the plaintiff's plot No. **668** stood; that the plaintiff attended various arbitration committees set up by the 2nd defendant to resolve the dispute but the 1st defendant failed to show up in those fora. That in **2006** the County Government advised the plaintiff to pay for a demolition order so as to demolish the fence constructed by the 1st defendant around the suit property but after payment of the same, the 2nd defendant did nothing. That on **11/03/2009**, the County Council Arbitration Committee recommended that the 1st defendant should remove the fence constructed on the disputed plot; that the 1st defendant's actual plot is Gilgil Site and Service Residential Plot No. **677** which is not adjacent to the plaintiff's plot; that according to the Nakuru County Government's Survey report, together with the survey plan, it is established that it is the 1st defendant who has encroached on the plaintiff's plot No. **668**. That the 1st defendant has continued with his acts of trespass on the suit property hence the instant suit.

The 1st defendant's Defence

3. The 1st defendant filed his defence dated **29/04/2013** on **30/04/2013**. The same was amended on **13/03/2018** and filed on **15/03/2018**. In the amended defence the 1st defendant denied the allegations as set out in the plaint. He stated that the 2nd defendant offered the plaintiff allocation of a parcel of land under certain conditions; that the plaintiff never accepted the offer, failed to pay the stand premium, and was therefore not allocated any plot identified by the number 668; that the 1st defendant does not claim either plot no 667 or 668; that he was never summoned to any arbitration forum as alleged by the plaintiff; That he purchased the parcel of land known as parcel No. **677** from one Joseph Cuthi Kinja and a transfer to his name done that he applied for and was granted permission to put up structures on his parcel of land; that he occupied the parcel of land from the date of transfer and started developing it; that he was not notified of need for demolition of his structures; that he has since completed constructing residential houses thereon and they are occupied; that he occupied the suit property with the knowledge of the plaintiff who never filed any suit for eviction until **2013** and that therefore the instant suit is barred by the **Limitation of Actions Act**; that he occupied plot number **677** in **1999**; that to the extent that the entire suit does not touch the possession and ownership of parcel No. **677**, then the same is incompetent and does not disclose any cause of action against him.

2nd defendant's Defence

4. The 2nd defendant filed his statement of defence dated **02/05/2013** on **03/05/2013** and simply denied the contents of the plaint.

The Plaintiff's Evidence

5. The Plaintiff gave his evidence on **20/07/2018**. It was his testimony that the 1st defendant invaded his plot Gilgil Site and Service plot No. **668** which was allocated to him by the 2nd defendant in the year **1996**. He testified that he was issued with an allotment letter in the year **1998** which he lost and that he was subsequently issued with another allotment letter dated **25/03/2013 (P.Exh. 1.)** It was his further evidence that he was shown the suit property by a surveyor of the 2nd defendant known as Mr. Muchiri after paying Ksh.1000/= which was the fee for services of being shown the plot; that he was to pay **Ksh. 10,500/=** so as to be issued with a lease, which amount he testified that he paid. It was his testimony that he has paid rates for the plot, his first payment having been on **2/07/1997** and the last payment on **27/06/2018**. He produced a bundle of twenty-two receipts (**P. Exh 2(a) to (v)**) as evidence of payment of rates.

6. It was PW1's testimony that he fenced the plot with a live plant fence. That he went away for work and was called by his wife in the year **2003** and informed that someone had interfered with the plot. It was his evidence that he went to the offices of the County Council and found out that it was the 1st defendant who was interfering with his land and that the 1st defendant was summoned to the County Council Office but failed to comply with the summons. He testified they were referred to arbitration but the 1st defendant did not show up and later he was asked to pay for a demolition order which he paid for and was issued with a receipt dated **03/08/2006** for **Ksh. 1000/= (P. Exh 3.)**; that the County Council officers accompanied him to the plot and demolished a gate, a fence and a small structure that had been put up. He testified that he was referred to arbitration vide the letters dated **21/05/2007, 25/05/2008** and **11/03/2009** which letters he produced as **P. Exh 4, 5** and **6** respectively. He also produced photographs of the plot that he took of the suit property on **9/02/2013** which he produced as **P. Exh 7 (a), (b)** and **(c)**. He testified further that when the 1st defendant declined to vacate the suit property, he was advised to go to court. He produced a demand letter dated **12/02/2013** as **P. Exh. 8** and a response by the County Council dated **15/02/2013** as **P. Exh. 9**.

7. **PW1** testified that the 1st defendant claimed he owned plot no. **668** but he never produced documents to support his claim. The plaintiff maintained that plot no. **667** is separate from plot no. **668**; that he obtained a court order on **17/04/2013 (P. Exh 10.)** that further vide an order issued on **1/08/2013 (P. Exh 11)** the court ordered the 1st defendant to be depositing **Ksh. 25,000/=** every month. It was further the plaintiff's evidence that the court ordered a surveyor to visit the suit land which he did and filed the report dated **20/02/2018**.

8. On cross-examination he reiterated that he was allocated the suit property in the year **1996** but lost the allocation letter. He also stated that he has in his possession a police abstract that shows that he reported the loss. When he was referred to the certified copy of allotment letter dated **25/03/2013**, he confirmed that it does not state that he was allocated the land in **1996** but that he paid the money as indicated in the letter and that the receipts he produced were for payments made between the years **1997** to **2006**.

9. **PW1** also admitted that he is not sure whether the arbitration notices from the County Council were sent to the 1st defendant. When he was referred to the letter dated **11/03/2009**, he confirmed that the dispute was between plots **667** and **668** which were contiguous plots while the 1st defendant had claimed that his plot was no. **677**. He also admitted that the findings of the arbitration were that he did not produce an allotment letter. He stated that he first knew of the invasion in the year **1998** and that it was in **2008** when he realized that he had lost the **1996** letter of allotment.

10. On re-examination he stated that the first time he went to arbitration was in the year **2003** and that he engaged with the 1st defendant for over six years before coming to court.

11. **Atai Kingoina Oren** testified as **PW2**. He stated that he is a surveyor and works for the County Government of Nakuru. It was his evidence that he went to the disputed parcel of land on **12/02/2018**; that he used the departmental map and the Part Development Plan for Gilgil Site and Service; that both the plaintiff and the 1st defendant were present; that his findings were that plot **No. 668** is developed and next to the Nakuru-Nairobi highway while plot **No. 677** has a perimeter fence and was not developed and was located near the extension to the Village Polytechnic in Gilgil; that both parcels of land measure **25** meters by **12** meters; that he attached a copy of the original map used in the department with serial **No. 7134** and certified by the Director of Survey at the County.

12. On cross-examination he stated that a part development plan shows that the area has been planned and persons allocated land would need to be published in the Kenya gazette which he could not confirm if it that done.

13. **James Kariuki** testified as **PW3**. He stated that he is the Principal Surveyor in charge of Nakuru County. It was his evidence that the property in dispute is located at Gilgil at a place called Gilgil Site and Service. He testified that he was served with an order; that the order

related to plot no's **668** and **677**; that on **8/02/2018** he certified the map and assigned Atai Oren, **PW2** to do the survey; that he visited the suit property on **12/02/2018**; that **PW2** used the scheme plan which is a copy as they could not trace the original; that it had serial number **T134** which showed that it was authentic. He then produced the survey report dated **20/02/2018** and the scheme plan as **P. Exh. 12A** and **P. Exh. 12B** respectively.

14. On cross-examination, he was referred to the Scheme Plan produced as **PExb. 12B** and he confirmed that at the bottom it stated "*Proposed Part Development, Plan Gilgil Site and Service*". He also confirmed that he had no evidence that the part development plan was gazetted and that when he applied for the blue print from the Director of Survey, he did not get any response. He also admitted that the scheme plan does not show if it was received by the Director of Surveys whom he needed to go to for a conclusive record of where the two plots are physically located. He further admitted that he did not get a map from the Director of Surveys. He was referred to **document 1** on the 1st defendant's additional list of documents and he identified the stamp of District Public Physical Planning Department which had a location plan and admitted that it was not the one that he used. He confirmed that the 1st defendant needed the approval of the surveyor and that there was no evidence that that approval was given. He was also referred to a bill of payment of rates for **plot 668 Gilgil Kampi Somali** and he stated that Kampi Somali is part of Gilgil Site and Service and was referred to that way as it has a high concentration of Somalis.

15. On re-examination he stated that each plot at Gilgil Site and Service has a plot number and that plot numbers **677** and **668** are located at Gilgil site and service.

Defendants Evidence

16. George Macharia Kagua, the 1st defendant, testified as **DW1**. It was his evidence he owns a plot in Gilgil which is plot **No. 677**. He testified that he bought it from a Mr Kinja in the year **1999**; that the previous owners preceding Mr. Kinja were Kamunya Ndemo and Elijah Delhi Muriu; he produced the documents in his list of documents filed on **31/07/2018** as **D.Exh 1- 4**; that after buying land parcel No. Gilgil site and Service **677** he started paying rates; that in the year **2000**, he begun cultivating the land and built an iron sheet structure; that the plaintiff went to him and asked him to enable him get a buyer for the next plot, No. **667** and when he did, the transaction could not go through as he did not have the documents; that four years later the plaintiff came and informed him, that he had obtained documents and that he needed a buyer; that DW1 got the plaintiff a buyer as he desired, but later the plaintiff came to the plot with a Mr. Otieno and told him that he had constructed on the wrong plot; that he was never called for arbitration by the 2nd defendant; that however he is aware that in the year **2004** the County Council attempted to resolve the dispute. He was referred to the receipts produced as **P. Exh. 2P** and **PExb. 2Q** and the demand letter produced as **P. Exh. 8** and he stated that the plot the plaintiff claims as per his documents, including **P.Exh 2P**, is plot **668 Gilgil Kampi Somali**; he held that **Kampi Somali** and **Gilgil Site and Service Scheme** are two different sites; that the former site is on the right side of the Gilgil-Nairobi road as one faces towards Nairobi while the latter site is on the left side while facing the same direction.

17. On cross-examination he stated that his plot is number **677** and that plot number **667** encroached on his side. He also confirmed that that the plot that he is occupying is plot No. **677 Gilgil Site and Service** and that he finished construction of the permanent house in the year **2012**. He further confirmed that he did not have the approved plans for construction in court. He also stated that in the year **2004**, he was served with a demolition order which he stated he complied with. He admitted that by the time he was served with the demand notice dated **12/02/2013**, there was no construction ongoing on the suit property. He confirmed that on **18/07/2013** the court ordered that he deposits the rent of **Ksh. 25,000/=** per month in court which he admitted he was no longer depositing. He also admitted to being present when the surveyor came to the ground but added that he did not agree with his report. He further confirmed that he had in his possession the allotment letter for **plot 677** which he got from Kamunya.

18. On re-examination, he stated that the demand letter was in respect to plot no. **668 - Gilgil Kampi Somali** which he was not in occupation of.

Submissions

19. The Plaintiff filed his submissions on **8/02/2022** while the 1st defendant filed his submissions on **21/02/2022**.

20. The plaintiff in his submissions gave a brief history and facts of the case and submitted on the following issues: whether the plaintiff's suit is barred by limitation of time, whether the 1st defendant has occupied the plaintiff's **Plot No. 668 Gilgil Site & Service** or whether the 1st defendant is on his rightful **Plot No. 677 Gilgil Site & Service** and whether the Plaintiff is entitled to the orders sought.

21. On the first issue, the plaintiff relied on **Section 7** of the **Limitation of Actions Act** and the case of **Githu vs Ndeete [1984] KLR 776** among other cases and submitted that no party can invoke the provisions of the **Limitation of Actions Act** to claim County Council land or to impeach the allocation rights bestowed upon another party by the County Council.

22. On whether the 1st defendant has occupied the plaintiff's plot No. **668** or Plot No. **677** Gilgil Site and service, the plaintiff submitted that the arbitration committee of the County Council in its recommendations on **11/03/2009** directed the 1st defendant to remove the fence surrounding plot **No. 668**; that also the report by the County Surveyor dated **20/02/2018** concluded that the 1st defendant is in occupation of the plaintiff's plot No. **668 Gilgil Site & Service**. The plaintiff also submitted that it is clear that the 1st defendant had trespassed onto the suit property and prayed that the orders sought in the Plaintiff be granted.

23. The 1st defendant in his submissions gave a summary of the pleadings and the facts and submitted that the plaintiff's suit is barred by the **Limitation of Actions Act**. It was his submissions that the cause of action arose in **1998** and the suit filed in **2013** which was fifteen (15) years after the cause of action arose. The 1st defendant also submitted that the suit property is not community or trust land as alleged in the plaintiff's submissions because the same was not pleaded. It was the 1st defendant's submissions that the plaintiff did not comply with the

terms of the letter of allocation in **1996** or **2013** and has never been in occupation since the 1st defendant occupied it and he therefore lacks the *locus standi* to sue. On whether the plaintiff demonstrated the physical location of parcel number **668**, it was submitted that the County Surveyor did not use the accurate maps to identify the physical location of the disputed property but instead used a part development plan that had not been published in the Kenya Gazette. In conclusion the 1st defendant submitted that the plaintiff's claim is defeated by proprietary estoppel and prayed that the suit be dismissed.

Analysis and Determination

24. After considering the pleadings, evidence and submissions of the parties, the following issues arise for determination:

a. Whether the plaintiff's suit is barred by law of limitation;

b. If the answer to (a) above is in the negative, who between the plaintiff and the 1st defendant is the lawful owner of the suit property?

c. Whether the plaintiff should be granted the orders sought in the Plaintiff.

Whether the plaintiff's suit is barred by the law of limitation.

25. I will first address the issue of whether the plaintiff's claim is barred by limitation. The plaintiff admitted that he became aware of the 1st defendant's presence on the suit property in the year **1998**. That he opted to go to the County Council of Nakuru to report the same and they were then referred to arbitration and he later filed the present suit in **2013**. The 1st defendant on the other had stated that the plaintiff instituted the present suit fifteen years after the cause of action arose. It is my view that the plaintiff's claim against the 1st defendant is one of trespass. The **Trespass Act Cap 403** defines a trespasser to mean 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.

26. The **Black's Law Dictionary** defines a continuing trespass as follows:

"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".

27. In **Clerk & Lindsell on Torts 16th Edition** paragraph 23- 01 it is stated that:

"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

28. The plaintiff's claim is that the 1st defendant entered into and remained in occupation of land that belongs to him which is essentially trespass. The plaintiff's claim of trespass being a continuous tort is not time barred. This was the determination by the Court of Appeal in the case of **Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR)** where it was held that:

"...it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant's continued occupation of the said property from the first date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred."

29. This court therefore holds that the plaintiff's claim is not barred by limitation.

Who between the plaintiff and the 1st defendant is the lawful owner of the suit property?

30. The plaintiff gave evidence that he was allocated land parcel No. Gilgil Site and Service Plot No. **668** in **1996** but lost the allotment letter. He produced a re-issued letter of allotment dated **25/03/2013** by the County Council of Nakuru. He testified that he was to pay **Kshs. 10,500/=** so as to be issued with a lease and produced a bundle of receipts that indicate that he paid rent and rates for plot **No. 668**. The receipts produced refer to the suit property as **LR No. 668 Gilgil Site & Service** and **Plot No. 668 Gilgil Kampi Somali**. It was also his evidence that when he was informed that the 1st defendant had trespassed onto the suit property; he went to the County Council of Nakuru who referred them to arbitration but the 1st defendant did not show up.

31. Of particular interest is the letter dated **11/03/2009** addressed to the plaintiff from the County Council of Nakuru which indicated that plot number **668** was allocated to him even though he did not produce an allotment letter and that his claim was that plot number **667**, which the 1st defendant had fenced off, was the site of his plot. The letter goes on to indicate that the plot (**667**) was allocated to Kamunya Ndemo in **1987** who transferred it to the 1st defendant George Kagua who had paid all the Council dues in respect of the plot. That the Part Development Plans produced by the Planning Officer had the sequence interrupted thereby showing plot number **688** at the site of plot **677** and *vice versa*. The arbitration committee recommended that the site where plot number **667** stands is the actual site for plot number **668**.

32. The Transfer of Plot Form produced by the 1st defendant dated **24/07/1996** from Kamunya Ndemo to Elijah Muriu indicated that the transfer was in respect of plot No. **677**. It is my view that the plot number that the letter dated **11/03/2009** meant to refer to was “**677**” as it is the one whose previous allottee was Kamunya Ndemo who later transferred the plot to Elijah Muriu. Elijah Muriu later transferred Plot **677** to Joseph Cuthi Kinja vide the Transfer of Plot dated **2/4/1998** and Joseph Cuthi Kinja vide the transfer of plot dated **19/07/1999** transferred the same plot to the 1st defendant George M. Kagua.

33. The plaintiff also produced a surveyor’s Ground Status Report dated **20/02/2018** whose finding was that plot No. **668** is developed and next to the Nakuru Nairobi Highway while Plot No. **677** has a perimeter fence with no development and located near the extension to the Gilgil village Polytechnic. On cross-examination, the plaintiff admitted that he did not have the receipt for Ksh. **10, 500/=** in the bundle. He also admitted that in Gilgil there is an area called Gilgil Site and Service and another called Kampi Somali which according to him were two distinct areas. He confirmed that the demand letter and some of the receipts referred to **LR 668 Kampi Somali**. He also confirmed that he found out about the occupation of the 1st defendant on his property in **1998** but filed the case in **2013**.

34. James Kariuki, the principal surveyor in charge of Nakuru County testified in support of the plaintiff’s case as **PW3**. It was his evidence that the suit property is located in Gilgil at a place called Gilgil Site and Service and after receiving the court order, he assigned a surveyor the task of surveying the property. It was his evidence that they used a copy of a scheme plan to conduct the survey because the original was lost. On cross-examination he confirmed that he was not sure whether the PDP was gazetted, that there is no evidence of the surveyor approving the 1st defendant’s developments and that Kampi Somali is part of Gilgil Site and Service. Atai Kingoina, the surveyor who conducted the survey stated on cross-examination that Gilgil Site and Service and Kampi Somali are two different locations. On re-examination he stated that both plots are located at Gilgil Site and Service and that there are no plots known as No. **677** and **668** within Kampi Somali.

35. The 1st defendant’s case on the other hand is that he was allocated plot **No. 677** in Gilgil located at Site and Service. It was his evidence that he bought it from a Joseph Kinja in the year **1999** and produced a transfer of plot dated **19/07/1999**. He stated that after purchasing it, he continued paying rates and that in the year **2004**, he was informed that he was occupying the wrong plot but he was never called for any arbitration. He also stated that Site and Service and Kampi Somali are two different places. He pointed out that some of the documents produced by the plaintiff referred to **plot 668** Kampi Somali. On cross-examination he stated that he is in occupation of plot No. **677** Gilgil Site and Service and that in **2004** he was served with a demolition order.

36. The plaintiff claims to be the owner of Gilgil Site and Service Plot No. **668** which he alleges the 1st defendant is occupying while the 1st defendant claims that he is the owner of Gilgil Site and Service Plot No. **677**. They are both claiming the same property on the ground but each identifies it by a different plot number. The surveyor’s Ground Status Report dated **20/02/2018** indicated that Plot No. **668** is next to the Nakuru Nairobi Highway while plot **677** has a perimeter fence with no development and is located near the extension to the Village Polytechnic. The property in dispute has been identified by the surveyor to be plot No. **668** that belongs to the plaintiff meaning that the 1st defendant developed plot No. **668** instead of his plot No. **677**. The 1st defendant demonstrated in his evidence how he acquired plot No. **677** which is clearly not the one that he is in occupation of. The 1st defendant also admitted that in the year **2004** he was informed that he was in occupation of the wrong plot and was served with a demolition order but he still went ahead to later construct more houses on the land.

37. It is this court’s finding that the surveyor’s report is sufficient evidence to prove on a balance of probability that the 1st defendant is in occupation of plot **No. 668** which belongs to the plaintiff. In the end, I find that the plaintiff has established his claim as required by law and therefore it must succeed. I also note that this is a dispute that was within the ability of the allocating authority to resolve easily and therefore the 2nd defendant having failed to do so can not escape liability for costs of this litigation.

38. Consequently, I hereby enter judgment for the plaintiff against the defendants and I issue the following final orders:

a. It is hereby declared that the plaintiff is entitled to exclusive and unimpeded possession of the property LR No. 668 Gilgil Site & Service Residential and the 1st defendant is a trespasser occupying the Plaintiff’s parcel illegally.

b. The 1st defendant shall remove himself and his property from plot No. 668 Gilgil Site & Service Residential forthwith and in default, the relevant officials of the Nakuru County Government shall enter the premises known as Plot No. 668 Gilgil Site & Service Residential and evict 1st defendant and remove his structures from the plot No. 668 Gilgil Site & Service Residential to give vacant possession to the plaintiff.

c. An order of permanent injunction is hereby issued restraining the defendants or their servants/agents from entering, constructing, remaining, taking up, evicting, leasing out, renting out and/or interfering with the Plaintiff’s quiet possession and occupation of parcel Plot LR No. 668 Gilgil site & Service Residential.

d. The 1st defendant shall pay to the plaintiff the sum of Ksh 50,000/= (in words, Fifty Thousand shillings only) as general damages for trespass on the plaintiff’s parcel.

e. Owing to the circumstances of this case the defendants shall jointly and severally bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF APRIL, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU

