



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 143 of 2011

SAWASAWA HOUSING ESTATES CO.

LTD.....PLAINTIFF

VERSUS

- 1. ISAAC MUTISYA**
- 2. JOSEPH MUSAU**
- 3. JOB KANGE'THE**
- 4. JOHN KAMAU**

5. PETER

MAINA.....DEFENDANTS

JUDGEMENT

1. **Sawa Sawa Housing Estates Co. Ltd** (“Plaintiff”) filed this suit on **21/06/2011** seeking for a declaration that it is the lawful owner of titles No. Donyo Sabuk/Komarock/Block 1/9036-9139 (formerly Title No. Donyo Sabuk/Komarock/Block 1/189) (hereinafter, “Suit Premises”). It further seeks an order of permanent injunction to restrain the Defendants, their agents, servants and/or employees or any person claiming interest through them from entering, remaining on, constructing, purporting to sell or in any manner interfering with the Suit Premises.

2. The Defendants were served with Summons, Complaint and documents relating to a Notice of Motion Application dated **20/06/2011** (“Application”). None of them entered appearance or filed any documents in paper either in response to the Application or the main suit. The Application came before *Justice Kihara Kariuki* on **30/06/2011**, and in the absence of the Defendants, he allowed the same save for prayer number 4 (seeking an order that the Officer Commanding Kangundo Police Station enforces the orders of the court). Subsequently, the Plaintiff requested for, and obtained interlocutory judgment and the matter was set for formal proof on **06/12/2011**.

3. In formal proof, the Plaintiff called one witness – **Mr. Richard Munene Njugi** (“Mr. Njugi”). **Mr. Njugi** is one of two directors of the Plaintiff. He testified that sometime in **1993**, the Plaintiff purchased the Property then known as Donyo Sabuk/Komarock/Block 1/189. It measured **2.81 hectares** and they bought it from **Komarock Ranching & Farming Cooperative Society Limited** at the price of **Kshs. 389,000/=**. He produced copies of two receipts evidencing the payments made to **Mutua Mboya &**

Nzisi Advocates and testified that the originals were lost.

4. After the Plaintiff completed payment of the purchase price, it was issued with a share certificate being Share Certificate No. **189** (which was also produced in evidence. It was then issued with an introductory letter dated **08/10/93** addressed to the **Land Registrar, Machakos District** requesting him to assist in processing the title corresponding to the parcel allotted to the Plaintiff as bearer of Share Certificate No. **189** upon payment of the requisite fees. A copy of the letter dated **08/10/93** was produced in evidence. The Plaintiff was issued with title to the parcel a copy of which was also produced in evidence.
5. Later on, the Plaintiff decided to subdivide the parcel. It applied for and obtained consent to subdivide vide a letter dated **13/07/1999**. The same was produced as evidence. A consent of the Land Control Board was also obtained as per the statutory provisions the land being registered under the **Registered Land Act** (Chapter 300, Laws of Kenya). **Mr. Njugi** produced as evidence copies of the Land Control Board consent and the green card to the parcel showing its history.
6. The Plaintiff's plan was to start selling the individual parcels as subdivided and then process new titles for each. New green cards were issued for each of the **104** plots as subdivided. The Plaintiff succeeded in selling some of the subdivided plots. However, **Mr. Njugi** testified that its plans were thwarted when some people, including the Defendants, came onto the land without any invitation, colour of right or title or permission and started allocating themselves parcels. These trespassers also started constructing temporary shelters on the land. They have also dug trenches on the land. The Plaintiff demanded that they vacate the land but while some of the original trespassers heeded the call and left, some of them persisted on remaining on the land. The Plaintiff's position is that they have absolutely no claim to the land and it therefore prays for the orders sought in the Plaintiff.
7. After listening to the evidence of **Mr. Njugi** and perusing the documents produced as evidence and in the absence of any contesting evidence by the Defendants, there is no doubt in my mind that the Plaintiff is the owner of the Suit Premises. The Defendants were served and elected not to contest the suit. Having proved ownership of the Suit Premises, the Plaintiff is entitled to the prayers **(a)**, **(b)**, **(d)** and **(e)** as sought in its Plaintiff and the same are hereby granted.
8. The Plaintiff has also sought general damages for trespass in prayer **(c)** of the Plaintiff. In view of the Court's findings and conclusions above, it is a fact that the Defendants were in willful trespass of the Suit Premises. A trespass is any wrongful, continuing interference with a right to the exclusive use and benefit of a property right. Any volitional act intended to interfere with the possessory rights of a land owner constitutes trespass. By this definition, the Defendants are liable for trespass. However, the Plaintiff neither prayed for nor proved any special or punitive damages arising from the trespass. Instead, the Plaintiff prayed for general damages. I already found that there was a willful trespass on the land by the Defendants. This constitutes a tortious invasion of the Plaintiff's property by the Defendants and gives rise to the right to recover damages. There is, therefore, a need to vindicate the Plaintiff's legal right. However, the Plaintiff did not adduce any evidence which could help the Court to determine what the measure of damages should be.
9. Generally, general damages recoveries for harm to interests in land are based on the diminished market value or diminished rental value of the land (*See Dan B. Dobbs, 1 LAW OF REMEDIES, 827 (2nd ed.)*). In this case, the general measure of damages might also have been the difference in the value of the Plaintiff's property immediately before the trespass and now given the Plaintiff's testimony that the presence of the Defendants as well as their physical destruction of the property has affected their ability to sell the plots. However, the Plaintiff adduced no evidence about the values of the property or the difference in value as a result of the physical destruction. Since the Plaintiff's entitlement for compensatory damages must be based on reasonable use of the property and no evidence of the reasonable value of use of the property was adduced, the court is unable to assess compensatory general damages payable. To vindicate the Plaintiff's right to exclusive possession of the Suit Premises, recognize that actual harm occurs in every trespass and intimate the state's protection of the right to exclude as one of the most important incidents of property ownership, I will award quasi-nominal damages of **Kshs.**

1,000/= against each of the Defendants.

10. In the end, the Plaintiff has succeeded in its action and the Court will issue the following orders:

- a. First, the Court declares that the Plaintiff is the lawful owner of Titles No. **Donyo Sabuk/Komarock/Block 1/9036-9139** (formerly known as Title No. **Donyo Sabuk/Komarock/Block 1/189**);
- b. Second, an order of permanent injunction will issue to restrain the Defendants, their agents, servants and/or employees or any person claiming interest through the Defendant from entering, remaining on, constructing, selling or in any other manner interfering with Titles No. **Donyo Sabuk/Komarock/Block 1/9036-9139** (formerly known as Title No. **Donyo Sabuk/Komarock/Block 1/189**);
- c. Third, the Defendants to pay to the Plaintiff quasi nominal damages in the sum of **Kshs. 1,000/=**.
- d. Fourth, the Defendant to pay to the Plaintiffs costs of the suit;
- e. Fifth, the Defendant to pay interests on **(c)** and **(d)** above at Court rates.

11. These are the orders of the Court.

DATED at MACHAKOS this 13TH day of MARCH 2012.

J.M. NGUGI
JUDGE

DELIVERED at MACHAKOS this 19TH day of MARCH 2012

ASIKE-MAKHANDIA
JUDGE