



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL SUIT 1143 OF 2001

GUCHU MUIRURI.....PLAINTIFF

VERSUS

LABAN NJUGUNA.....DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff brought a suit against the Defendants by way of a Plaint dated 12th July 2001 and amended on 25th March 2002, wherein the Plaintiff claims that at all material times he was the owner of plot No. 19 and the Defendant was the owner of plot No. 55 both situated at Kamahuha market of Makuyu Division in Maranga District.

The two plots are adjacent to each other, and the Plaintiff claims that there is a passage measuring 10 by 90 feet between his plot and the Defendant's plot, and that on or about 6th January, 1997 the Defendant unlawfully encroached into the Plaintiff's plot and constructed on part of the passage way to the Plaintiff's plot. The Plaintiff averred that the Defendant has constructed on a 370 square feet area (10 by 37 feet) of the Plaintiff's passage and blocked the Plaintiff's butchery and produce store. As a consequence thereof the Plaintiff has incurred a loss of Kshs.3,620/= per month. The Plaintiff avers that the Defendant's actions are unlawful and amount to trespass to his land.

The Plaintiff is seeking the following substantive orders in the said Plaint:

- (a) A permanent injunction restraining the Defendant whether by himself, his servants and/or agents or otherwise from trespassing or obstructing and/or erecting structures on the access passage between the Plaintiffs plot No. 19 and plot No. 55 or committing any destructive acts of waste, and an order that the construction done on the Plaintiff's passage way measuring 37 x 10 feet (370 square feet) be removed.
- (b) The Defendant to pay to the Plaintiff loss of business from January, 1997 up to the date the Defendant shall remove/unblock the Plaintiff's entry to his butchery and store house.
- (c) Costs of this suit and interests on (b) above.
- (d) Any other or further relief this Honourable Court may deem fit to grant.

Summonses were issued on 12th July 2001. The Defendant entered appearance and filed a Defence dated 9th August 2001 which was amended on 13th February 2004. The Defendant admits that he owns plot No. 55 situated at Kamahuha market, Makuyu Division, Maragua District but denies that the plot is adjacent to the Plaintiff's nor that there is a passage measuring 10 by 90 feet as alleged between the two plots. The Defendant denied that he had encroached or trespassed into the Plaintiff's plot No. 19 or constructed on part of the said passage. The Defendant further denied that he blocked the Plaintiff's butchery and store, and that the Plaintiff has incurred any loss and put the Plaintiff to strict proof thereof.

The Defendant in his Defence also claimed that the Plaintiff was allocated 40 by 80 feet plot, but that the Plaintiff has erected a building on an area covering 40 by 90 feet thereby encroaching on the adjacent plot. The Defendant averred that the dispute herein was dealt with conclusively in H.C.C.C. 2489/77 wherein judgment was delivered on 18/4/1985, and in the subsequent Civil Appeal No. 166 of 1990 and this suit is thereforer *Res Judicata*.

Orders were given by this court on 17th November 2009 for a surveyor to file a report on the boundary between the two plots and the surveyor's report dated 7th May 2010 was duly filed in Court on 10th May 2010. Summons were also issued on 1st December 2011 for the said surveyor to appear in court on 1st February 2012 and produce the maps with respect to the two plots in dispute. The hearing proceeded on 1st February 2012.

The Plaintiff called Francis Mwangi Irungu, a surveyor from Maragua District as his expert witness (PWI). The said witness testified that he started his present work as surveyor of Maragua District in April 2010, and that he visited the site of the dispute herein and made a report dated 7th May 2010 which he produced as Plaintiff's Exhibit 1. The expert witness made observations in the said report that Plot No. Loc. 17/Kamahuha/55 measures 60 feet width by 80 feet length and is about 80% developed with full coverage on its frontages. Further, that no developments were observed encroaching on the extent of plot No. Loc. 17/Kamahuha/905/19 by plot No. 55. The report also states that Plot No. Loc. 17/Kamahuha/905/10 – measuring 40 feet width by 90 feet length is fully developed, and that there is no passage way observed between the two said plots. However, that it is it's clear that a public access was initially planned as per the market plan but later relocated by a Council resolution. The surveyor attached a site location sketch plan to his report.

PWI also produced as Exhibit 2 a 1961 map titled Fort Hall African District Council Plan of Kamahuha Market Location 17, and according to the map Plot No. 19 is 3,600 square feet, which translates to 40 by 90 feet, and Plot 55 is 3,200 square feet, which translates to 40 by 80 feet. On the ground Plot 55 measures 60 by 80 feet, and PW1 explained that its area was changed when there was a replanning by the Physical Planner, and the additional 20 feet allocated to the plot's width upon replanning is what gave rise to the dispute that is before this Court. PW1 produced as Exhibit 3 a map showing the development plan for Kamahuha prepared by the Department of Physical Planning in the Ministry of Urban Development and Housing dated 12/2/1981.

Upon cross examination by the Defendant's Advocate, PW1 stated that the Maragua County Council followed the law in the replanning, and before then there was no road of access between plot 19 and Plot 55 in the 1961 map.

The Defendant did not call any witness to give evidence.

After the close of evidence the Plaintiff's and Defendant's Advocates were directed to file written submissions, and the said submissions dated 8th March 2012 and 14th March 2012 respectively were duly filed. The Plaintiff's Advocate contended that the 1961 map showed that there was a road dividing the said two plots, and that the 1981 map also showed that there is such a road. He further submitted that the County Council of Maragua re-planned the market and created a public access between plot No. 19 and plot No. 55, and in doing so the said Council followed the law in apportioning the plots and it involved the physical planning department. This access is what the Plaintiff claims the defendant has encroached.

The Plaintiff also submitted that the evidence of the expert witness is that plot number 55 measures 40 by 80 feet but the defendant has built on an area measuring 60 by 80 feet thereby illegally extending it by 20 feet on one side. This is the access area and plot No. 19 is entitled to 10 feet access which the Plaintiff claims and that from the testimony of the PW1 it was clear that the Defendant had encroached/trespassed on the access passage between the plaintiff plot No. 19 and plot No. 55 which has made the plaintiff to incur losses in his business.

The Defendant submitted that the suit herein is a proper case for *res judicata* under Section 7 of the Civil Procedure Act, in that in the former suit which was determined on the 18th day of April 1986 being HCCC No. 2489 of 1977 the Plaintiff in the current suit sued Muranga County Council as the 1st Defendant and the Defendant herein as the 2nd Defendant. Further, that the Plaintiff in the former suit was in relation to the same subject matter being Plot No. 19 and Plot No. 55 Kamuhuha Market, and the court found that both these spaces belonged to the 1st Defendant who also had a right as well as a duty to shift or re-plan the space in accordance with the development programme of Kamuhuha Market.

The 1st Defendant also submitted that the Plaintiff's claim against the Defendant is bad in law, as the relief sought is not available to the Plaintiff herein because Murang'a County Council which had allocated the Plaintiff and the Defendant their respective plots is not a party to this suit, and if there was any wrong committed by the said Murang'a County Council it can only be challenged by way of a judicial review. Further, that section 29 of the Physical Planning Act (Cap 286) gives the said County Council powers to control or prohibit any zoning and maintain all the land planned for open spaces and parks according to the physical plan development.

The Defendant relied on the Surveyor's report filed in Court which he contended shows that there is no encroachment to any plot by Plot No. 55, and submitted that it was the surveyor's evidence that the law was followed in closing the so called access road and the said access road does not exist in the plans held by the Murang'a County Council. The Defendant also sought to rely on his list of documents which he submitted confirm that the plots were allocated according to the plans of the Muranga County Council. However, the said documents are inadmissible since they were not produced during the hearing by their makers, nor were any of the circumstances in section 35(2) of the Evidence Act shown to be applicable to allow the court to admit them in evidence.

I have carefully read and considered the pleadings, evidence and submissions made in this suit. There are three issues for consideration. The first is whether this suit is *res judicata*. This issue has already been addressed and determined by rulings given in this suit, firstly by Honourable Justice Hayanga on 1st November 2002, and secondly, by Honourable Justice Mary Angawa on 8th May 2008 wherein it was held that the suit filed herein is not *res judicata*. I will therefore not belabour this issue.

The second issue is whether this suit is incompetent for reason of non joinder of Muranga County Council. The Plaintiff's suit is for trespass, and it is an established principle of law that trespass to land is a direct interference with the possession of another person's land without lawful authority as held by the Court of Appeal in **M'Mukanya v Mbiyiwe 1984 (KLR) 761**. It is the Defendant and not the County Council of Muranga who is alleged to have encroached and to be in possession of the Plaintiff's plot, and it is the finding of this Court that the suit herein is therefore properly filed and the relief sought appropriate in the circumstances.

The final issue for determination is whether the Defendant has encroached upon and trespassed upon the Plaintiff's plot. The Court of Appeal in **M'Mukanya v Mbiyiwe 1984 (KLR) 761** held that the tort of trespass is a violation of a right to possession, and that the Respondent in that case needed to prove on a balance of probabilities that he had the right to immediate and exclusive possession of the suit land, which is different from ownership. The Court of Appeal further held that exclusive possession supporting a claim for trespass does not necessarily mean continuous physical possession and occupation, and that once a person had paid due rent and had been given a plot number upon allocation, he is presumed to be in possession and can sue for trespass.

It is not disputed that the Plaintiff was allocated Plot 19 in Kamahuha Market and the surveyors report established that the said plot measures 40 feet width by 90 feet length, is fully developed and the Plaintiff is in occupation of the entire plot. It is also not alleged that the Defendant has encroached on the said Plaintiff's plot that measures 40 feet by 90 feet. What is disputed is the Plaintiff's right to possession of an access road measuring 10 by 90 feet, which is said to be adjacent to his plot and between his plot and the Defendant's plot.

The Plaintiff has not produced evidence of any such access road, or any allocation of the same to him by the Muranga County Council or any other authority. In addition, PW1's testimony in his evidence and report is that no access passage exists between the Plaintiff's Plot No. 19 and the Defendant's Plot No. 55, and that although such access was envisaged it was removed in replanning when the said portion of land was allocated to Plot 55. In addition, I did not find any provision for an access road on the common boundary between plot 19 and plot 55 upon perusal of the two maps produced by PW1 in evidence.

In light of the foregoing findings, I find that the Plaintiff has not proved his case, and the suit filed herein on 12th July 2001 and as amended on 25th March 2002 is hereby dismissed, and costs awarded to the Defendant.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of ____June____, 2012.

P. NYAMWEYA

JUDGE