

REPUBLIC OF KENYA

High Court at Machakos

Civil Case 57 of 2001

JOYCE MUKULU KILONZO.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF MACHAKOS.....DEFENDANT

RULING

The plaintiff's claim against the defendant as discerned from the amended plaint dated 6th March, 2004 is that she is the registered owner of land parcel numbers Machakos Municipality Block 1/187 and 188 respectively, hereinafter "*the suit premises*". However, on or about 2nd March, 2001 the defendant wrongfully and unlawfully trespassed onto the suit premises and unlawfully pulled down, cut down and uprooted the fence, cut banana trees and threatened to demolish the developments on the suit premises. As a result of the said action, the plaintiff had suffered loss and damage. She therefore prayed for an order of permanent injunction, general damages for trespass, costs of the suit and interest.

In its amended defence dated and filed in court on 28th April 2008, the defendants denied each and every allegation put forth against it by the plaintiff and put her to strict proof thereof. Otherwise it was the defendants' view that the plaintiff's claim was statute barred, bad in law, incompetent and abuse of the process of court and should be dismissed with costs.

When the case came before me for hearing on 8th May, 2012, **Mrs Nzei**, learned counsel appeared for the plaintiff, whereas **Mr. Kaluu** held brief for **Mr. Kilonzo**, learned counsel for the defendant. **Mr. Kaluu** sought an adjournment on behalf of **Mr. Kilonzo** on the grounds that the hearing date had been fixed *ex parte* and that **Mr. Kilonzo** was involved in several matters before the High Court of Kenya at Malindi. I rejected the application for adjournment and ordered the matter to proceed to hearing whereupon **Mr. Kaluu** indicated that he had no further instructions in the suit and left.

The plaintiff testified that she owned the suit premises. The suit premises had been allocated to her by the County Council of Machakos in 1977. They are on a lease for 99 years. She resides on the suit premises and has also put up rental houses. She had sued the defendant because its councillors and officers trespassed on the suit premises, cut the chain link fence and mature K-apple trees as well as banana trees. They also took away her tyres. She contacted her lawyers who issued a demand letter to the defendant. Instead the Municipal Council of Machakos responded in a letter addressed to the defendant that the suit premises belonged to it and that they should not interfere. The defendant having refused to comply, she instituted the instant suit. With that, the plaintiff closed her case. Counsel for the plaintiff then sought time to put in written submissions, which request was granted.

On 18th July, 2012, the plaintiff filed her written submissions whereas the defendant did so on 22nd May, 2012. I have carefully read and considered them.

The defendant has under the guise of written submissions introduced evidence which it ought to have tendered during the hearing. Written submissions cannot replace evidence. Indeed it is evidence from the bar. Accordingly, this court will ignore anything in the defendant's written submissions that remotely suggest to be evidence of the defendant. The defendant having failed to turn up and defend the suit, the evidence of the plaintiff went unchallenged. The plaintiff was able to demonstrate on a balance of probability and with documents that she was the registered proprietor of the suit premises. That on diverse dates, the defendant's councillors and officers descended on the suit premises and cut the chain link,

mature K-apple trees and banana trees. She further demonstrated that permanent orders of injunction were deserved, to bar the defendant from repeating the acts of trespass and destruction complained of in the amended plaint. The plaintiff's evidence having not been rebutted or challenged in any way, she is entitled to the prayers; however without general damages for the simple reasons that the claim is time barred since it was introduced for the very first time in the amended plaint dated 6th March, 2004. Yet the acts complained of were committed on 2nd March, 2001. The claim ought to have been filed within 3 years. Nor was any evidence tendered on the issue.

I note though that **Mwela, J** in his ruling dated 4th July, 2001 stated that this was basically a boundary dispute. In the court's view with exact measurements, a surveyor should have been able to sort out the dispute without further ado. Though the parties tried to go the way **Mwera J** had suggested, midway, they appear to have run out of steam.

Further as I read the file in preparation to crafting this ruling I came across different proceedings which were mixed in this suit. In the same file there are judicial review proceedings. These are **Misc. Civil application No. 15 of 2006-Peter Kimeu Matheka vs District Officer, Kwa Kavisi Divisional & Others.** I do not know what relation those proceedings have been with the instant suit. Indeed these proceedings have been presided over by judges in this suit. This confusion ought to be corrected and I direct the Deputy Registrar to do so.

Otherwise, I enter judgment in favour of the plaintiff in terms of prayer (a) and (c) of the amended plaint.

DATED, SIGNED at MACHAKOS this 15TH day of OCTOBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**