IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.97 OF 2009

GEOFFREY MUHORO……....PLAINTIFF

VERSUS

LAKE FLOWERS LIMITED……DEFENDANT

JUDGMENT

The plaintiff, Geoffrey Muhoro, instituted this suit on 13th June, 2005 against the defendant, Lake Flowers Limited, claiming, in the main an order of injunction to restrain the latter from damaging, alienating, wasting, cultivating, building or putting up temporary structures and encroaching the former's parcel of land known as L.R. No.22957/4 (the suit property). The plaintiff further seeks that the defendant be ordered to pull down, flatten and remove all the temporary structures on the suit property; that he be ordered to compensate the plaintiff for being denied the use of the suit property from 1998 as well as the cost of the trees cut down on the suit property by the defendant.

The plaintiff testified that in 1967, he applied and was granted Temporary Occupation Licence in respect of the suit property for agricultural purpose. Subsequently, he obtained an allotment letter and thereafter a grant. The defendant on the other hand is the registered proprietor of a distinct parcel of land known as NAIVASHA/MUNICIPALITY BLOCK 4/42. The plaintiff stated that the defendant has expanded its activities beyond its parcel of land into the suit land, has erected green houses and temporary flower sheds.

The plaintiff, the Commissioner of Lands and the family of the late Samuel Mbugua Githere were involved in a litigation being High Court at Nairobi Misc. Civil Application No.1238 of 1998 (Judicial Review) in which the dispute appears to involve part of the suit property. Due to that dispute, the Registrar placed a caveat against the suit property on 23rd December, 1998 and subsequently the Commissioner of Lands, on 6th September, 1999, addressed a letter to, among others, the plaintiff confirming that as long as the dispute was in court they were not authorized to enter, develop or engage in any transaction in relation to the suit property. He also confirmed that the caveat in question was still in force.

On behalf of the defendant, Mohamood Mohamed Abdalla testified that the defendant is the registered proprietor of NAIVASHA/ MUNICIPALITY BLOCK 4/42 which they purchased from Mohamed Akbarali Alidina on 15th April, 1996. The original number was LR No.114/IX/5 before the amendment to the index map. Since they purchased the property, they have been engaged in flower farming. The witness further stated that this property extends to Lake Naivasha hence it enjoys riparian rights.

On 22nd March, 1996, the District Officer, Naivasha wrote to the Director of the defendant authorizing

him to clear the bushes in preparation for flower farming. In September, 1998, the defendant became aware of the plaintiff's claim and raised its concern with the Town Clerk, Naivasha Municipal Council and the Commissioner of Lands. Specifically, the defendant complained that the plaintiff's activities (ploughing) interfered with public road and part of the defendant's riparian land. I suppose, in response to these complaints, the Commissioner of Lands wrote the letter of 6th September, 1999, referred to above, to the plaintiff and three others, warning them not to deal with the suit property as there was a caveat.

The defendant called one John Richard Githere Mbugua, who was one of the applicants in the Nbi.H.C.Misc. Civil Application No.1238 of 1998. He confirmed that his farm neighbours that of the defendant and therefore, like the defendant, he enjoys riparian rights of Lake Naivasha and is also a member of Lake Naivahsa Riparian Association.

He stated that in Nbi. H.C. Misc. Civil Application No.1238/1998, his family sued the Commissioner of Lands for the irregular allocation of part of the family land to the plaintiff and also in order to protect the riparian area of Lake Naivasha. As far as he is concerned, the application is still pending determination.

That constitutes the evidence presented by both parties. The main, perhaps, the only question which falls for determination in this dispute is whether the defendant's flower farming and other farming activities are on the plaintiff's parcel of land? Put differently, whether the plaintiff is entitled to the reliefs sought in this suit?

The plaintiff has led evidence of the history of the suit property as follows:

The suit property initially measuring 4.6 acres was allocated to the plaintiff by way of a temporary occupation licence on 1st February, 1967 for a term of nine (9) months from that date and thereafter until determination in accordance with the terms of the licence and subject to payment of yearly rent. Thirty (30) years later on 4th April, 1997, the Commissioner of Lands issued a letter of allotment in favour of the plaintiff. The letter allotted to the plaintiff 42.0 hectares up from the original 4.6 acres in 1967. The stand premium and other charges amounting to Kshs.1,556,793/= were duly paid.

The following year, 1998, the plaintiff sub-divided the original parcel and curved out four (4) plots namely, Nos.22957/1/2/3 and 4. He sold three of the resultant parcels and retained the last parcel No.22957/4. It is his contention that the defendant has encroached on part of this parcel.

I have stated earlier but reiterate here that the defendant is the registered owner NAIVASHA MUNICIPALITY BLOCK 4/42. The defendant, through Mahamood Mohamed Abdalla, has also given the background to the acquisition of this property by the defendant, starting with an indenture of July, 1958 to assignment between Mohamed Akbarali Alidina and eventually to the defendant in April, 1996, culminating in the issuance of a certificate of lease the following year on 26th March, 1997. All the documents relied on for this history are unanimous on one thing; that the parcel of land NAIVASHA MUNICIPALITY BLOCK 4/42 measured 0.8498 hectares (or approximately 2.1 acres). I will demonstrate this from the evidence presented in this matter.

The indenture of 1958 is specific that the area it relates to is -

"…..two decimal seven acres or thereabouts."

The assignment between Mohamed Akbarali Alidina of 1996 specifies that the assigned parcel contains by measurement:

"……two decimal one (2.1) acres or thereabouts."

The letter from the Director of Survey to the Commissioner of Lands regarding RIM Amendment to NAIVASHA MUNICIPALITY BLOCK 4/42 states in part that:

"…..and note that L.R. No.1144/IX/5 is now parcel No.42 and it measures 0.39H (approx.)"

The lease as well as the green card are clear that the parcel is 0.8498 hectares. Mahamood Mohamed Abdullah himself in cross-examination confirmed that:

"The defendant owns 2.1 acres. I grow flowers on 18 acres. ……We exercised riparian right, that is why the size is large."

From the totality of the witness' evidence, it is apparent that his claim to nearly 15.9 acres over and above the defendant's land is two-fold. First, as he explained in his evidence, the riparian right extending some 18 acres and secondly, a letter from the District Officer to which reference has already been made, giving the defendant's director permission to clear bushes on the land.

From what I am able to glean from the pleadings and annextures, the Lake Naivasha Riparian Association to which the defendant is also said to be a member appears to have had for years an agreement with successive governments, since the colonial period, to manage the riparian land around Lake Naivasha. Again from what I have gathered in the course of this trial, the Association has been instrumental for the conservation both of the environment and wildlife including the marine ecosystem. But what gives rise to a riparian right? This is a concept with its origins in English Common law and today exists in many countries with a common law heritage.

Simply put, all landowners whose property is adjoining to a body of water, have a right to reasonable use of it. Riparian rights include such things as the right to access for swimming, boating, fishing, the right to erect piers, the right to use water for domestic purposes, and so on. Explained simply, riparian right is a right flowing from the fact of ownership of land which extends to the body of water. It is a right exercised subject to the rights of other riparian land owners. The defendant in this matter can only exercise riparian right by virtue of what rightfully belongs to it. It is highly unlikely that the riparian area alone the defendant is enjoying is 15.9 acres of land, more than seven times the land it lawfully owns.

On 22nd March, 1996, one month before the defendant acquired its parcel, Block 4/42, the District Officer addressed a letter to the Director of the defendant company purporting to give the defendant authority to clear the land in dispute for flower farming. The District Officer wrote:

"It has been noted that the area was <u>once cultivated but later abandoned by the former owners</u>. Accordingly we will not object to your clearing the same with the intention of growing rose flowers……..."
(Emphasis supplied)

The letter appreciated that the land in question had its owners who had not been using it. Secondly it did not, indeed could not vest in the defendant ownership. The occupation of the land by the defendant only amounted to an act of trespass and more importantly the District Officer had no powers whatsoever to alienate private property. The suit property is registered under the **Registration of Titles Act** in the name of the plaintiff, who has demonstrated how the property evolved to him.

In terms of **section 23(1)** of the **Registration of Titles Act,** the certificate of title issued to the plaintiff is conclusive evidence that he is the absolute and indefeasible owner of the property subject only to encumbrances, easements, restrictions and conditions contained in the title. The title of the proprietor cannot be challenged except on the ground of fraud or misrepresentations to which he is proved to be a party. The plaintiff's title has not been challenged on any of the above grounds as the defendant has not made any counter-claim.

I want to conclude with three points raised by the plaintiff. The plaintiff has through submissions urged the court to discharge the caveat registered on the property. That relief has not been sought in this matter. Secondly, there has been argument as to whether or not the judicial review application was

determined. I am satisfied from the submissions that it was determined on 20th April, 2005 when it was dismissed with costs to the respondent (the Commissioner of Lands) and the interested party (the plaintiff herein) by Makhadia, J.

Finally, the prayer for a declaration that the defendant is liable for damages and should - **"……compensate the plaintiff for non-use of his land from 1998 and for the loss of all the trees cut by the defendant……"**

is in the form of *mesne* profit hence a special damages claim. The same has not been proved.

For all the foregoing reasons, judgment is hereby entered for the plaintiff against the defendant in terms of prayer (a) of the plaint and the latter is accordingly restrained. The second limb of prayer (a) is in the form of a mandatory injunction which is similarly granted in those terms.

Costs to the plaintiff.

Dated, Delivered and Signed at Nakuru this 25th day of March, 2011.

W. OUKO
JUDGE