



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 305 OF 2010**

**DR. MATHEW KIRIAGO AKAMA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**  
**MESHACK OMARI MANOTI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**MATHEW KANGWANA.....DEFENDANT/RESPONDENT**

**JUDGMENT OF THE COURT**

The Plaintiffs commenced this suit by way of a Plaint dated 21<sup>st</sup> June, 2010 and filed on 24<sup>th</sup> June 2010. The Defendant acknowledged service of the summons to enter appearance and the Plaint by signing at the reverse of the summons on 5<sup>th</sup> July, 2010. The Defendant did not enter appearance and /or file his Defence within the prescribed time, and the Plaintiff thereupon filed a request for judgment on 17<sup>th</sup> September 2010. Interlocutory judgment was entered against the Defendant on 23<sup>rd</sup> September 2010. The suit was fixed for formal proof and the same was heard before me on 19<sup>th</sup> October, 2011. The Defendant was served with a hearing notice but did not appear at the said hearing, and I proceeded to hear the Plaintiffs' witness. The Plaintiffs' written submissions were subsequently filed in court on 28th October 2011.

The 1<sup>st</sup> Plaintiff Dr. Mathew Kiriago Akama (PW I) testified on behalf of the Plaintiffs. The 1<sup>st</sup> Plaintiff testified that he together with the 2<sup>nd</sup> Plaintiff are registered proprietors as tenants in common in equal shares and entitled to the possession of the land parcel number known as L.R 209/13393 Grant No. 90905, measuring 0.800 of an hectare, which is situated in the Langata area in the City of Nairobi and hereinafter referred to as the suit property. The 1<sup>st</sup> Plaintiff also testified that the Grant was for a term of 99 years from 1<sup>st</sup> July, 1996 and the same was registered by the Registrar of Titles on 3<sup>rd</sup> January 2002. The 1<sup>st</sup> Plaintiff produced the original Grant No. 90905 in court for inspection and he produced in evidence a copy certified by the Registrar of Titles on 23<sup>rd</sup> July, 2010 under Section 23 (2) of the Registration Titles Act (Cap 281), which was marked as Plaintiff Exhibit No. 1.

Plaintiffs' counsel submitted that the effect of the said registration is provided for in Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya, the regime of law under which the Grant is issued, as follows:-

“The certificate of title issued by the registrar to purchase of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenges except on ground of fraud or misrepresentation to which he is proved to be a party”

The 1<sup>st</sup> Plaintiff further testified that sometimes in February, 2010, the Defendant entered into a portion of the suit property, took possession of the same and commenced construction of a building thereon. At the time the Defendant entered into the suit property, the Plaintiffs had erected a barbed wire perimeter fence thereon and they were preparing to commence construction on the same. The 1<sup>st</sup> Plaintiff testified that the Defendant demolished the barbed wire perimeter fence.

The 1<sup>st</sup> Plaintiff also testified that prior to filing this suit he caused a demand letter dated 21<sup>st</sup> June, 2010 to be issued by his counsel and served on the Defendant. The demand letter was produced in evidence and marked Plaintiff Exhibit No. 4. The 1<sup>st</sup> Plaintiff testified that the Defendant ignored the demand letter and proceeded with his unlawful actions.

The 1<sup>st</sup> Plaintiff in his evidence stated that in addition, he reported the Defendant’s actions to the Langata Police Station during the months of March and April 2010. Upon being summoned by the police the Defendant contended that the portion where he was erecting a building was not within the Plaintiffs’ parcel of land. The 1<sup>st</sup> Plaintiff further testified that in light of the Defendant’s contentions, they engaged the services of the Provincial Surveyor Nairobi in May, 2010 to establish the location of the boundaries of their parcel of land. The Provincial Surveyor prepared a report dated 8<sup>th</sup> June, 2010 which the 1<sup>st</sup> Plaintiff produced in evidence as Plaintiff Exhibit No. 2.

The Provincial Surveyor’s report states that the beacons were found in stable condition and used for orientation. The findings in the report are that there is a stone house built inside the suit property and that there is a stone wall erected around the said house. The 1<sup>st</sup> Plaintiff testified that he informed the Defendant about the Provincial Surveyor’s findings who ignored the same and proceeded with the construction of the stone perimeter wall on the suit property.

The 1<sup>st</sup> Plaintiff produced 5 photographs of the structures the Defendant had erected on the suit property as evidence, and the same were marked Plaintiff Exhibit No. 3(a), 3(b), 3(c) 3(d) and 3(e). The photographs show the house erected by the Defendant on the suit property, the materials deposited thereon and the excavation done for construction of the stone wall.

The 1<sup>st</sup> Plaintiff concluded his testimony by stating that the Defendant’s actions have denied the Plaintiffs access to their parcel of land, and they have been unable to develop it. The Plaintiff’s are praying for judgment against the Defendant as follows:-

- a) A declaration that the Plaintiffs are the *bona fide* proprietors and entitled to the possession of all the parcel of land known as L.R No. 209/13393 Grant No. I.R. 90905.
- b) An order of eviction of the Defendant from the parcel of land known as L.R No. 209/13393, Grant No. I.R 90905 or alternatively, an order compelling the Defendant to remove the structures erected on the parcel of land known as L.R No. 209/13393 Grant No. I.R. 90905 at his cost within such time as the court may deem fit failing which the Plaintiffs be at liberty to remove the same at the Defendant’s cost.
- c) A permanent injunction to restrain the Defendant by himself, his servants and or agents or otherwise howsoever from remaining on or continuing in occupation of the parcel of land known as L.R. No. 209/13393 Grant No. I.R 90905.

- d) Damages for trespass to land.
- e) Costs of and incidental to this suit.
  
- f) Interest on (d) and (e) above at Court rates.

The main issue for determination is whether the Plaintiffs have proved their case on the balance of probabilities. After carefully considering the pleadings and the Plaintiffs' evidence I am satisfied that the Plaintiffs have discharged this burden of proof. I find that the Plaintiffs are the lawful registered proprietors as tenants in common in equal shares of the land parcel number known as L.R 209/133393 by virtue of Grant No. 90905 issued to them and registered by the Registrar of Titles on 3<sup>rd</sup> January 2002. Further the Plaintiff's ownership thereof is absolute and indefeasible under section 23(1) of the Registration of Titles Act (Cap 281), and entitles the Plaintiffs to possession of the said property. I also find that possession had been effected by the Plaintiffs through the putting up of a perimeter fence on the suit property.

The Plaintiffs have also proved on a balance of probability that the Defendant is a trespasser and is not in lawful possession of the suit property. This has been through the oral, written and visual evidence submitted by the 1<sup>st</sup> Plaintiff. The Provincial Surveyor's report and the photographs submitted show that the Defendant did enter and construct a stone house and wall on the suit property, and further evidence shows that he has remained on the suit property despite demands by the Plaintiffs to vacate and to remove the structures built thereon. The Plaintiffs' evidence has not been controverted by the Defendant and this court accepts the same.

In the circumstances I enter judgement for the Plaintiffs in the following terms:

- (i) The Plaintiffs are granted a declaration that they are the *bona fide* proprietors and entitled to the possession of all the parcel of land known as L.R No. 209/13393 Grant No. I.R. 90905.
- (ii) The Defendant is ordered to remove the building and structures erected on the parcel of land known as L.R No. 209/13393 Grant No. I.R. 90905 at his cost within 60 days of service of the decree of this court, and in default thereof the Plaintiffs are at liberty to remove the same at the Defendant's cost.
- (iii) The Defendant by himself, his servants and or agents is permanently restrained from remaining on or continuing in occupation of the parcel of land known as L.R. No. 209/13393 Grant No. I.R 90905.
- (iv) The Plaintiffs are awarded a global figure of 30,000/= Kenya shillings as damages for trespass.
- (v) The Plaintiffs shall have the costs of the suit.
- (vi) Interest on (iv) and (v) above at court rates.

Dated, signed and delivered in open court at Nairobi this 22<sup>nd</sup> day of November, 2011.

**P. NYAMWEYA**

**JUDGE**