



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO 250 OF 2004

SIMON WAMBUGU WATHUTA.....PLAINTIFF

VERSUS

GABRIEL NDIRANGU MUIRU.....1ST DEFENDANT

SIMON KAGO GACHERU.....2ND DEFENDANT

MR. KARANJA (*sued as the Management*

***Committee, Mbora Primary School*).....3RD DEFENDANT**

JUDGMENT

The plaintiff instituted this case against the defendants in their capacity as Management Committee of Mbora Primary School. The plaintiff's claim is that he is the registered proprietor of a parcel of land known as Nyandarua/Mirangine/403 measuring 2.03 hectares. The plaintiff claims that on 21st September 1992, the defendants trespassed, took possession of a portion of his land measuring approx. 2 acres, and put up classrooms and other buildings. The possession/occupation by the defendants is unlawful, devoid of any legal basis and the plaintiff sought for orders of eviction, general damages and mesne profits.

The defendants filed a statement of defence in which they denied having invaded the plaintiff's land and claimed that the dispute before this court is a boundary dispute as such this court has no jurisdiction to deal with the same. In further defence, the defendants' claim that they are in lawful occupation of their portion of land which was pointed out by the Government Surveyor, the defendants also claim to have purchased their portion of land for valuable consideration. They also claim the plaintiff has never been in occupation of the said land therefore he cannot allege trespass. Finally they contend that the plaintiff's suit is time barred and should be struck out.

The plaintiff testified in this matter in support of his case, he produced a copy of the title deed of title number Nyandarua/Mirangine/403 which was registered on 1st March 1988 in his favour. He also produced a certificate of official search which confirmed his proprietorship. This search was conducted on 1st December 2004. He further produced a consent by Ol kalao Land Control Board dated 14th march 1986, for the transfer of the suit land from Savlon Wathika Mirika to himself. He also produced several correspondences from the District Lands Office, Nyahururu regarding this dispute which involved the plaintiff's piece of land over a boundary disputes with other parcels of land.

The plaintiff also produced the Mirangine Settlement Scheme registry map in support of his case. According to the plaintiff there was a case between him and Lucy Nyakero over the suit premises before the Senior Resident magistrate's Court at Nyahururu. Lucy Nyakero is the person who purportedly sold her piece of land to the defendants. The plaintiff testified that he has always lived on his piece of land. Although the boundary dispute was referred to the District Land Registrar the land Registrar did not determine the case but instead referred the parties to file their case in court.

On the part of the defendants, Gabriel Ndirangu Muiru testified that Mbora Primary School was established in 1992. It is a public school with 350 pupils. The parents bought a piece of land where the school is constructed. He produced a copy of the sale agreement between the school and Lucy Nyakero over a parcel of land known as Nyandarua/Mirangine/670 at a price of Kshs 250,000/= . The parents have since constructed classrooms from standard 1 to 8 and since they occupied the school, nobody has demanded the same.

The defendants in their capacity as members of the committee have been pursuing titles for the school which is currently in the name of the settlement Fund Trustees i.e. Nyandarua/Mirangine/670. In this regard, they obtained a mutation certificate which they lodged at the Lands Office, Nairobi. The previous owner of the Mirangine Settlement Scheme, that is, the Mirangine Co-operative Society issued a letter to the defendants confirming that the land belongs to the school. The defendants were aware that there was a boundary dispute between the plaintiff and the original owner of this land – Lucy Nyakero.

This boundary dispute was determined in Nyahururu, SRMCC No. 101 of 1992 where the court ordered a surveyor to establish the boundaries. The defendants denied that the plaintiff has ever been in occupation of the land occupied by the school. The defendants denied that the school is constructed on the plaintiff's parcel of land.

Although parties were ordered to exchange and file written submissions, it is only counsel for the plaintiff who filed written submissions. I have gone through those submissions and the authorities cited. The plaintiff urged the court to grant the prayers sought on the grounds that the plaintiff is the registered proprietor of the suit premises. The plaintiff was able to prove ownership through production of his title documents. Counsel punched holes on the defence case on the grounds that there is no counterclaim and the defendants have no rights recognised or noted in the plaintiff's title thus the defendants cannot be entitled to any rights. The provisions of section 28 of the Registered Lands Act confer upon the plaintiff absolute ownership which cannot be defeated except as provided in this Act. Counsel relied on the case of **Anna Wangui Ithebu & Anor. Vs. Joel Magu & 2 others [2005] eklr.**

The issue that fall for determination in this case is whether the plaintiff has proved on a balance of probabilities that he is entitled to the prayers sought in the plaint that is eviction of Mbora Primary School from the plaintiff's parcel of land number Nyandarua/Mirangine/403, general damages for trespass, mesne profits and costs of the suit. The defence raised the issue of limitation of period in their defence, that is, the plaintiff's suit is time barred. The plaintiff in his evidence is categorical that he is the registered proprietor of the suit premises. He produced the title that was registered in March 1988. In his statement of claim he alleged that the defendants trespassed on his land on 21st September 1992. This suit was filed on 6th September 2004 a few days before it was barred under the provisions of **section 7** of the **Limitation of Actions Act**.

Still on the issues under controversy, the defendants have denied having trespassed on the plaintiff's property. The defendants are a public school. The Chairman of the Committee testified that the school is built on plot No. Nyandarua/Mirangine/670. The school has had peaceful occupation since they occupied the premises in 1992. They denied that the plaintiff has ever been in occupation or even demanded the suit premises. The defendants produced copies of proceedings in Nyahururu SRMCC case No. 101 of 1992 which was between the original proprietor and the plaintiff herein.

That case was determined, and the court found that there was an error in the maps that required to be rectified. The Land Registrar visited the suit premises in 1992 and sent the surveyors to pick the boundaries on the ground after which the registry index map was amended. After that the original

proprietor who was the plaintiff withdrew the case against the defendant.

Based on the evidence before this court, it is not possible for this court to determine with certainty that the defendants have trespassed upon the plaintiff's parcel of land. The defendants were categorical that they are occupying their own parcel of land, whereas the plaintiff is claiming that the defendants have encroached, trespassed on his two acres of land. Although the plaintiff produced registry index map they do not show exactly where the defendants have trespassed on his parcel of land.

This is more of a boundary dispute that ought to have been determined before the registrar of titles or before the land disputes tribunal. The plaintiff by his own evidence testified and produced communication from the District Land Registrar on the boundary dispute; however he said the boundary dispute was never resolved and parties were advised to go to court. Going by the evidence before the court, it is merely the plaintiff's word as against the defendants' word. Each side stood their ground, the defendants, maintained that they are occupying their parcel of land; the plaintiff could not prove where the defendants are trespassing on his land. The plaintiff has not been able to prove on a balance of probability the allegations contained in his claim. Accordingly the plaintiff's case is dismissed with costs to the defendants.

Judgment read and signed on 1st day of April 2009

M. KOOME

JUDGE