



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2491 of 1995

DAVID KITETU KIMULI.....PLAINTIFF

VERSUS

CITY COUNCIL OF MAKUENI.....1ST DEFENDANT

CITY COUNCIL OF MASAKU.....2ND DEFENDANT

JUDGMENT

1. Procedure

1. A dispute arose on encroachment of land between the plaintiff, David Kitetu Kimuli and Local Authority within the Muumandu section of Machakos District.

2. David Kitetu Kimuli was the unregistered freehold title interest in LR. Part of Muumandu / Kalama 1670, 1671, 1676. The three parcel of Land surrounded a parcel owned by the Local Authority known as LR Muumandu / Kalama 1675. This Land was divided by a road reserve.

3. The claim by the plaintiff was that the Local Authority allowed its licensees onto their land

LR Muumandu / Kalama 1675 and permitted such persons to encroach into the plaintiff land that was adjacent to it.

4. Kalama Location was on area known as Kyanzimoi in Muumandu sector of Machakos District. The Land in dispute bounded Muumandu Trading Centre.

5. In the 1980's, Kalama Location file under the jurisdiction of the County Council of Masaku. Both the plaintiff and the County Council of Masaku agreed Mutually, sometime, in 1979, on the boundary between their parcel of Land.

6. In 1980's, the Country Council of Masaku permitted its licensee onto their land Muumundu / Kalama 1675 and allowed such persons to encroach onto the plaintiff land and was situate adjacent land Muumunda / Kalama 1671 and 1676. This was trespass and the plaintiff being aggrieved sued the County Council of Masaku in the High Court of Kenya at Nairobi, case No. 3184/1984. That case was compromised between the two parties in the following terms:-

“This suit coming on 14th December, 1988 for hearing and judgement and in the presence

of counsel for the plaintiff and counsel for the defendant.

It is ordered by consent:-

- i. That the Machakos Land Adjudication Officer do mark the boundary, the subject matter of this suit in accordance with the defendant letters to the plaintiff dated 1st September, 1979 and 13th November, 1979.
- ii. That the decision of the Land Adjudication Officer be binding on the parties and be final.
- iii. That the defendants do pay to the plaintiff Ksh. 5000/- for his costs and disbursements.”

7. As far as the plaintiff was concerned this case was finalized.

8. Sometimes in 1992, the year of the first multiparty election in Kenya, the Minister of Local Government William Ole Ntimama published a Legal Notice in the Kenya Gazette supplement No. 88 of 30th October, 1992 Legal Notice 316, under powers conferred to him by section 5,9,28,39,41 and 46 of the Local Government Act and issued order that the District of Makueni be declared the County Council of Makueni. This gazette notice created councilors (18 in number) and the boundary plan which constituted the County Council. The plan was deposited with the Electoral Commission of Kenya.

9. The effect of this Judgement was to transfer Kalama Location area from the County Council of Masaku to the new established County Council of Makueni.

10. The County Council of Masaku wrote to the plaintiff advocate by letter dated 27th June, 1995 in reply to their letter of 20th June, 1995, that

“Pursuant to Kenya Gazette Supplement No. 88 of 30th October, 1992 under Legal Notice No. 316, the constituted land Kalama Location fell in the said Council.

You are therefore requested to refer the above case to the said Council who will be in a better position to handle it”.

11. The plaintiff was at a loss. He was not certain as to whether the County Council of Makueni assumed “rights , liabilities and assets” of the County Council of Masaku.

12. His advocate, under the plaintiff’s instructions filed a new suit on the 8th August, 1995 seeking the same orders against the County Council of Makueni to restrain their licensee from encroaching the land and pay compensation and damages from April, 1995.

13. When this new suit came before Aganyanya J in 1998, he made orders that

“ . . . this matter be and is hereby referred to land survey Makueni to arbitrate on issues of the boundaries in respect of the suit premises and mark correct boundaries as ordered by this court on Hccc3184 of 1998 dated 14 day of December 1988 which suit was between current plaintiff and Masaku County Council”.

14. Between 1998 & 2000 attempts were made to have the boundary demarcated. This was as follows:-

i) The surveyor visited the land pursuant to the 14 March 1988 orders, of Aganyanya J. He noted two portions marked A & B that was disputed.

This report was rejected by the plaintiff on grounds that it did not state who was the actual owner of the disputed area.

ii) A second survey was done 2 March 2000. On 2 May 2000 the land was reconfirmed as the previous surveyors.

iii) Judgement was entered as per the award on 24th May 2000 but this was set aside on 2nd June 2000 by Sheikh Amin J (as be then was)

15. It is said that the residents of Kalama Location complained that their Location was too far from the County Council of Makueni. They petitioned for a transfer. This was granted and M/s County Council of Makueni applied to court to be stuck out of this suit. This was on the grounds that once the transfer was made all assets suits and liability laid with the County Council of Masaku.

16. The plaintiff had on 2nd August, 2001 (dated 1 August 2001) filed an application upon the transfer of the County Council Masaku of Kalamu Location. This was granted by Aganyanya J on 7 July 2001.

17. The County Council of Makueni are still on record. They are the 1st defendant in this matter. The County Council of Machakos are the 2nd defendants herein.

18. The effect of the judgement of the 2nd defendant was that the consent on judgement between the plaintiff and the first defendant County Council of Makueni had to abide the trial of the 2nd defendant.

19. A report was made on 11 September, 2000 which established some encroachment. More details were requested by the plaintiff which was given that calmulated to a judgement that the award dated 11 September 2000 and

30th January 2001 be awarded. The only issue between the plaintiff and defendant No.1 was that of liability and damages.

20. The Land and Environmental Law Division was established in 2007. This file was placed before me for hearing. The parties once again entered into the issue of the surveyor to return back to the land and demarcate the area again. This exercise, agreed by the parties themselves by consent on 18th June, 2007 continued for three months.

21. The parties took dates for hearing that was scheduled 12 months later.

III. Findings

22. In evidence the plaintiff stated that the issue of the boundary between the 2nd defendant, the County Council of Masaku and himself was mutual. He was therefore surprised to find that the licensee of the County Council encroached onto the land that belonged onto the land that belonged to him. He prayed for a declaration by this court that the encroached parcel of land belongs to him and it be returned.

23. The parties each called a witness. The plaintiff called E.M. Musau B.A. Land Eco (Hons) MISK RV Msc. Urban Land Appraisal (Reading) UK who valued the land in dispute at a total of Ksh. 2,875,000/-. He presented his report dated 1st December, 2003 in which his terms of reference was to "inspect the property with a view of advising on a fair market value for compensation purposes of the land".

24. On the ground his report established that LR Muumandu / Kalama 1675 that belonged to the County Council was divided by the main Machakos – Muumandu – Wote road which is now newly tarmarcked. To one side of the road is the trading centre. To the other side of the road is a rectangular area of land belonging to the County Council and is adjacent to the plaintiff land parcel LR Muumandu /Kalama 1676 is said to be disputed.

25. The report further established that a rectangular with a slight southerly slope, a total of 46 NO. of shop developments and 12 NO. of plots not yet developed. The area encroached from LR Muumandu / Kalama 1675 – the market area is 2.3 acres or 100,500 square feet. This is equivalent to 20 commercial plots (50 x 100) but divided to “58 commercial plots of valued dimensions”.

26. The 1st defendant called Nicholas Ouma Onyango, their County surveyor but who had joined the said County on 14th August, 2007. He had been employed there for 8 months. He found that on the ground and on the Registered Index Map there was no difference and could not understand the complaint.

27. He nevertheless brought out the explanation on the allocation of persons on the land. The area was never allotted to any person to use as a commercial market. Application would be received (he produced a sample application) to apply to be allocated the plots for commercial use. The 1st defendant, the County Council of Makueni never acted on the same as stated earlier, allocated the plots. What would occur on the ground are councilors, who like politician would allocate the land. People would move in, take possession and then would apply to be allocated the property when they were already on the ground.

28. Indeed, evidence was deduced that when the new road was being constructed some of the persons were on the road reserve. They moved further in to encroach on the plaintiffs property.

29. The 2nd defendant witness Mutanya Makau a Council surveyor holds a diploma in surveyor. He is attached to the County Council of Masaku and he too is a new comer to the Council. He went on the ground and confirmed that the Registered Index Map was identical to what was on the map. He challenged PW2's report and maps stating that the same did not comply with the Registered Index Map. This Registered Index Map (R.1.M) was an authority and should be relied on.

30. According to this witness there was no encroachment. He did admit that shop/ kiosk had been constructed on the ground. None of these constructed shops / kiosks on the ground had a license nor a number to identify that they were there with the authority of the Council. The register was nonetheless handed to the County Council of Masaku.

31. It has also been further established, that the land in dispute falls under the Land Adjudication and Settlement Department. The issue therefore of the Registered Index Map does not come into play due to the existence of this dispute since 1979.

30. The District Land Adjudication Officer Machakos evoked section 30 to the Land Adjudication Act.

“30(1) Except with the consent in writing of the adjudication office, no person shall institute, and no court shall entertain any civil proceeding concerning an interest in land in an adjudication section until the adjudication register for that adjudication has become final in all aspects under section 29(3) of this Act.

(2) _____.

(3) _____.

(4) _____.

(5) _____.

(6) _____”

31. The adjudication officer granted the following “consent” of 29th October, 2002.

I, the Land Adjudication Officer for Machakos area in Machakos District, do hereby consent to the institution or continuation of the civil proceeding set out in the schedule below relating to land within Muumanda adjudication sector.

In order to complete the adjudication register for Muumandu adjudication sector, I shall in due course, require a copy of the final orders made in each of the case listed in the schedule.

David Kitetu Kimuli

v

County Council of Makueni

County Council of Masaku

P/Nos 1671 & 1675

“(boundary dispute)”

32. The plaintiff and the 2nd defendant Country Council of Masaku, as stated earlier, conceded to a consent judgement entered on 14 December 1988 that the boundary be as mutually agreed on in 1979. This was documented down by the market superintendent, one M.J. Ngao by his letter MKS ref MCC5/15/17/VOL II/343 dated 13th November, 1979 and in letter of mcc5/15/17/Vol II 353 dated 1 September, 1979.

33. When the Country Council was transferred to the 1st defendant, County Council of Makueni and this current suit filed in 1995, the plaintiff and 1st defendant took matters where the consent was left by the 2nd defendant for implementation. This exercise took five to six years to complete.

34. The District surveyor came up with two final reports one dated 11 September, 2000 and another 30th January, 2001 respectively which findings were read in court on 20 September, 2000 and 27 February 2001 respectively.

35. A consent to adopt these two findings was entered into by the plaintiff and the 1st defendant. The only issue left was that of damages and or mense profits.

36. Before the latter aspect could be determined the County Council of Makueni area in dispute was transferred back to the Country Council of Masaku.

37. My findings are that both the 1st and 2nd defendants are bound by their consent so entered to court as to the findings of the boundary.

The 2nd defendant consented to the boundaries as contained in the two letters of 1 September

1979 and

13 November, 1979. The further consent with the 1st defendant confirmed this boundary.

38. The findings of the surveyor confirmed by this court of 11 September, 2000 and 30 January 2001 are as follows:-

11.9.2000 report:-

i) Muumandu /Kalama/ 1670.

11.9.2000 report

“That the land to the East of Muundamu market is parcel number 1670 of plaintiff and has a clearly marked boundary by sisals separating it from market land parcel 1675. (Land) demarcated and beacons boundary. No shops nor structure encroached into plaintiff land (1670) the house of plaintiff built on land.”

ii). Muumandu / Kalama /1671

11.9.00 report and 30 January 20001 report.

Land to the west of Muumandu market is land parcel 1671(belonging to the plaintiff.)

The demarcation made as per the defendant letters to the plaintiff dated 1 September, 1979 and 13 November, 1978 of 5/15/17/Vol.III/343 ref 5/15 /17 /Vol. II/353 respectively.

The boundary (runs) from the river to the north of the cattle dip through a Kay apple tree, through a gum tree, black in colour to the gum tree to the west of a burnt gum tree. This is to the west of Muumundu market separating plaintiff land parcel 1671.

Note the gum trees marking the boundary are now uprooted but their position identifiable on the ground.

iii. Muumandu Kalama 1676

report 11.9.2000

Land south of Muumundu market is parcel No. 1676 (belonging) to the plaintiff demarcated and beacons the boundary separating the plaintiff land for that of defendant parcel No. 1675 after allowing 100ft. backwards to the line of shops where market was shop is. There are also shops encroached into plaintiff land.

39. The court would accept this position in that the County Council permitted its licensee to encroach onto the plaintiff land. The agreed issues which all the parties as of 27 June 2002, is answered accordingly .

40. That the plaintiff is indeed the owners of plots No. 1670,1671and 1676 situated at Muumundu shopping centre Machakos District previously within the jurisdiction of Machakos District.

41. The 1st defendant permitted persons earlier and on due dates between April 1995 and December 1995 to enter into the said plot more particularly No. 1671 without the consent of the plaintiff. That when the 2nd defendant took over the jurisdiction of the Muumandu Trading Centre for the second time the occupation continued and there were illegal occupation and

allocation.

42. As a result of this illegal allocation the plaintiff was deprived of the use of property. The plaintiff is entitled to repossession of the portion encroached by the defendant.

43. The plaintiff is entitled to the repossession of plot 1671 and 1676. He is entitled to mense profits.

i) Mense profits

44. The Civil Procedure Act Cap 21 Laws of Kenya defines mense profits, in relation to property means:-

“Those profits which the person in wrongful possession of such property actually received on might with or ordinary diligence have received therefore, together with interest as such profits but

does not include profit due to improvements made by the person in wrongly possession.”

45. The property herein is land more so to part 1671. The defendant collected revenue from the allocated property suit did not disclose to this court the actual amount.

46. The remedy herein would be in damages which I accordingly give at Ksh.500,000 with interest from 1989, the date of filing the former suit at courts rates.

47. The last issue concerns the two county Country council and who out of the two is liable for the damages and execution of this courts orders?

48. Under the Civil Procedure Rules, a party who sues two or more defendants, would seek orders against the defendant jointly and severally under order 1 and 21 Civil Procedure Rules. The defendants are required to issue notices where the one defendant desires to claim against another person who is already party to the suit that such defendant is entered to any relief or remedy relating to or connected to the subject matter.

49. The notice is issued without leave of the court and served upon the other co-defendants making such claim or specifying such question or issue. No appearance to the notice shall be necessary.

50. Failure to issue this notice the court would find both defendants jointly and severally liable for the claim.

51. In this case the two defendants are governed by the Local Authority Act Cap 265 Laws of Kenya, whereby on the transfer of a location and or creation of a new County Council the 2nd defendant claimed that the liability, right and assets fell upon the new County Council in this case 1st defendant.

52. The 1st defendant during it tenure stated it never allocated any of the plaintiff property. That it never acted on the allocations albeit the councilors may have politically done so. The 1st defendant now have jurisdiction over the said area. It is an area that is under their mandate.

53. Both council are responsible to allowing their licensee onto the property by way of encroachment. They are jointly and severally held liable for such trespass.

54. I enter judgement for the plaintiff against the defendant jointly and severally with costs to

the defendants.

55. In summary.

55.1. Judgement be and is hereby entered against the two defendants in favour of the plaintiff on the issue of the boundary as per the two awards given dated the 11 September 2000 for plot 1670 & 1676 and 30 January, 2001 for plot 1671.

55.1. That there is no encroachment on plot 1670.

55.2. That the demarcation and beacons between 1676 and 1675 having been laid and there are shops that are encroached into the plaintiffs land, that there be eviction of such trespassers namely the defendant 1 & 2 respectively jointly and severally.

55.3. That the plaintiff 1671 has been encroached into that there be eviction of such trespasses namely 1& 2 respectively jointly and severely from the said land.

55.4. The defendants are responsible in removing their licensee from the property as demarcated by the surveyor.

55.5 That the Land Adjudication do hereby accept the surveyor report as the lawful demarcated area.

55.6. That the extent of encroachment on plot 1671 is 2.3 acres valued at the accepted sum by this court at Ksh.2.875,000/- a sum as of 1 December 2003.

55.7. That the order herein is for repossession of the encroached area by the defendants 1 & 2 is granted.

55.8. That the jurisdiction of the disputed area is now held with the County Council of Masaku the 2nd defendant herein.

55.9. That the defendants do pay damages with effect from April, 1995 at Ksh.500,000 together with interest and so jointly and severally.

55.10. That the defendant bear the cost of this suit jointly and separately.

DATED THIS 28TH DAY OF JULY 2008 AT NAIROBI

M.A. ANG'AWA

JUDGE

D. Kituku instructed by D. Kituku & Co. Advocates for the plaintiff – present

O.N. Makau instructed by Onesmus Makau & Co. Advocates for the 1st defendant – present

W. Kilonzo instructed by Wambua Kilonzo & Co. Advocates for the 2nd defendant -resent