



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 147 of 2003**

**STEELMAKERS LIMITED..... PLAINTIFF**

**VERSUS**

**JEJO LIMITED.....1<sup>ST</sup> DEFENDANT**

**MADHOBE CONSTRUCTION LTD..... 2<sup>ND</sup> DEFENDANT**

**YUSUF MOHAMMED BARKADLE..... 3<sup>RD</sup> DEFENDANT**

**SALAD JUMALE AWALE..... 4<sup>TH</sup> DEFENDANT**

**EYASU W. GABRIEL.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

This suit was initiated by plaint dated 18.02.03 and filed the same day in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants were the only defendants. However, on 10.12.03 an amended plaint was filed adding the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants among the defendants. The amended plaint prayed for Judgment against the defendants jointly and severally for:-

- a) A temporary injunction restraining the defendants themselves, their servants, or agents or otherwise howsoever from building or continuing to build a perimeter wall on L.R. No. 15136 (I.R. 57416) until the final determination of this suit.
- b) A mandatory injunction compelling the defendants to vacate the plaintiff's property and to demolish the perimeter wall erected on the suit property.
- c) Delivery up of vacant possession to the plaintiff.
- d) A permanent injunction restraining the defendants whether by themselves, their agents or servants from trespassing on the plaintiff's property, to wit, L.R NO.15136 Nairobi.
- e) General damages for trespass.
- f) Aggravated damages.
- g) Costs of this suit.

h) Any other or further relief the court may deem fit to grant.

By defence dated 02.04.04 and apparently filed on 05.04.04 (the court stamp showing date of filing is faint) the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants essentially denied the accusations levelled against them in the amended plaint.

Vide notice dated 22.03.07 issued under Order XXIV rule 1 of the Civil Procedure Rules, counsel for the plaintiff withdrew the suit against the 1<sup>st</sup> defendant. That left the 2<sup>nd</sup> – 5<sup>th</sup> defendants as the only defendants to the suit.

At the hearing of the suit on 29.07.08 the plaintiff was represented by learned counsel, Mr J.L. Onguto while there was no appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

Plaintiff's counsel pointed out that the 2<sup>nd</sup> – 5<sup>th</sup> defendants had been served with notice of hearing for 29.07.08 by substituted service through advertisements in the Daily Nation newspapers of 11.07.08 and 14.07.08 but that the defendants failed to attend court for the hearing. The court was satisfied that the defendants had been duly served with hearing notice and allowed the plaintiff company to prosecute its case on 29.07.08. The plaintiff called two witnesses, i.e. James Murigi and Gordon Ochieng Odeka. The essence of their evidence is given below.

James Murigi (P.W.1) told the court that he was the Administration Manager of the plaintiff company. His duties entailed overseeing the suit property of the plaintiff company, i.e. L.R. No.15136 (I.R. 57416) situated along Mombasa Road here in Nairobi; overseeing the plaintiff company's staff welfare; and doing general administration of the plaintiff company.

It was P.W.1's evidence that the plaintiff company does not now occupy the suit property because there are some people who encroached on the property in 2003 and started building a perimeter wall there. He said he did not know the people by name and that the plaintiff company came to court to stop them from building the perimeter 'fence'. P.W.1 explained that initially the plaintiff company cited only the 1<sup>st</sup> and 2<sup>nd</sup> defendants as sole defendants to the suit after being informed by the people it found at the site that they were doing the subject construction on behalf of the two. However, when the plaintiff company enquired at the offices of the two defendants, the latter said they were doing the construction on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Accordingly, the plaintiff company joined the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to the suit vide the amended plaint filed on 10.12.03.

P.W.1 continued to narrate that he learnt here in court that the five defendants also claimed ownership of the suit property and that he (P.W.1) saw two titles with the same L.R. No. as the suit property produced by the defendants showing the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants as registered joint tenants in common in equal shares of the suit property under the Registration of Titles Act, Cap.281. P.W.1 referred the court to the plaintiff's bundle of documents filed on 09.07.07. The first of the two questioned titles runs from page 31 – 34. P.W.1 pointed out that that title is not dated where the purported signature of the Commissioner of Lands appears (page 34) but that the said title is shown to have been lodged for registration on 23.04.91. The second of the two questioned titles runs from page 35 – 38. The said title is likewise not dated where the purported signature of the Commissioner of Lands appears (page 38) but it (the title) is shown to have been lodged for registration on 28.01.92.

P.W.1 told the court that the plaintiff company has its own title to the suit land, signed by the Commissioner of Lands on 30.12.92. He showed the original title to the court and produced a certified copy thereof as Plaintiff Exhibit 1. P.W.1 told the court that the plaintiff company bought the suit property from Major General Cheruiyot, that the plaintiff company entered into a sale agreement on 03.03.97, that the property was transferred to the plaintiff company on 20.06.97 and that the plaintiff company took possession of the property immediately. I interpose here to record that there is in the plaintiff's bundle of documents alluded to above a transfer (pages 20 – 23) relating to the suit property and that the transferor is Augustine Kipsongok arap Cheruiyot while the transferee is Steelmakers Limited (plaintiff herein) registered on 20.06.97.

It was P.W.1's evidence that the plaintiff company has paid land rent and rates for the suit property from 1997 to date and that the defendants came onto the property in 2003. I interpose here to note that paragraph 6 of the amended plaint cites the date of the defendants' occupation of the suit land as 03.02.03 and that the plaint is accompanied by an affidavit verifying the correctness of the said plaint. P.W.1 added that the plaintiff company tried to get onto the suit land by initially putting up a small 'mabati' (corrugated iron sheets) house there. The structure was put up in one day. Next day, more than 50 Somalis came, demolished and burnt the small house and a fracas ensued. P.W.1 said the plaintiff company called the police who came and stopped the fracas but that the defendants' servants or agents are on the suit property to date and that the plaintiff company is unable to use its property or enter upon it.

P.W.1 reiterated the prayers in the amended plaint filed on 10.12.03, except that he withdrew the claim against the 1<sup>st</sup> defendant.

The next and only other plaintiff's witness was Gordon Ochieng Odeka (P.W.2). He told the court that he was a Senior Land Officer in the Lands Department of the Ministry of Lands, Nairobi. He said that from his Ministry's records, the suit property was originally allocated to Major General Augustine Cheruiyot. He (P.W.2) produced a bundle of certified copies of his Ministry's records relating to the suit land as Plaintiff Exhibit 2.

It was P.W.2's evidence that Augustine Cheruiyot obtained a formal title to the suit land and that the title was issued to him and registered in his name on 30.12.92 after he had made requisite payments. P.W.2 told the court he was aware that the property subsequently changed hands and was transferred to Steelmakers Limited (plaintiff herein) on 20.06.97 and that the Commissioner of Lands consented to the transfer. P.W.2 told the court that there is no record in the Ministry of Lands of any allocation of the suit property to any other person after 20.06.97. It was also P.W.2's evidence that the plot had not been allocated to any other person prior to being allocated to Major General Augustine Cheruiyot. He (P.W.2) said the titles purportedly issued to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants appearing at pages 31 and 35 of the plaintiff's bundle of documents filed on 09.07.07 did NOT originate from the Ministry of Lands and are NOT part of the Ministry of Lands records, which are up to 19.05.08. P.W.2 added that on 24.07.08 he also checked his Ministry's records and that the only title reflected in those records as the latest relating to the suit land is the one to the plaintiff herein.

P.W.2's evidence concluded the plaintiff's evidence in this case. Thereafter plaintiff's counsel asked to be allowed to file written submissions and he was allowed to do so. He subsequently filed the written submissions on 04.09.08 and on 23.09.08 he (plaintiff's counsel) adopted his written submissions.

I have given due consideration to the evidence tendered by the plaintiff company and the legal submissions made in support of the plaintiff's case.

The evidence tendered by the plaintiff's two witnesses, which has been set out hereinabove, remains uncontroverted as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not attend court at the hearing of this case despite having been served with notice of the hearing through substituted service. There is no record in the court file of the 2<sup>nd</sup> defendant company having filed any defence to the suit. The substituted service effected through advertisements in the Daily Nation newspapers of 11.07.08 and 14.07.08 alluded to above related to the 2<sup>nd</sup> defendant company as well but the said defendant did not deem it fit to respond thereto.

It is instructive that the two titles purportedly issued to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants bear no date at the places where the alleged signature of the Commissioner of Lands appears. One title purports to have been lodged for registration on 23.04.91 while the other title purports to have been lodged for registration on 28.01.92. How could the same defendants be issued with the title alleged to have been lodged for registration on 28.01.92 while their title alleged to have been lodged for registration on 23.04.91 still subsisted? And why should the same defendants obtain two titles to the same land? It just does not add up!

It is clear from the evidence of plaintiff's witnesses, especially P.W.2's evidence that the two titles

purportedly issued to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants for the suit land are not genuine. They are forgeries. The only genuine title is the one (Plaintiff Exhibit 1) issued to Augustine Kispsongok arap Cheruiyot under the Registration of Titles Act, signed by the Commissioner of Lands on 24.12.92 and registered in Cheruiyot's name on 30.12.92. That title was subsequently transferred to Steelmakers Limited the plaintiff herein on 20.06.97. Section 23(1) of the Registration of Titles Act provides as follows:

**'23. (1) The certificate of title issued by the registrar to a purchaser 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 challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.'**

Evidence tendered before this court establishes firmly that the plaintiff company herein is the registered owner of the suit land, L.R. No.15136 (I.R. 57416). No fraud or misrepresentation has been ascribed to the plaintiff company or proved against it relating to its acquisition of the land. I find the plaintiff company to be the absolute and indefeasible owner of the suit land. As was held by the then Court of Appeal for Eastern Africa in Moya Drift Farm Ltd -vs- Theuri [1973] E.A. 114, an absolute and indefeasible owner of land is entitled to take proceedings in trespass. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have no colour of right to be on the suit land. They are trespassers, have been in illegal occupation of the suit land, situated along Mombasa Road, Nairobi and measuring approximately 2.103 hectares. The said defendants must get out of the suit land fast and be penalized appropriately for their illegal occupation of the land.

I make the following orders:-

1. Prayers (b), (c) and (d) are granted as prayed, as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.
2. Under prayer (e), I award against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally general damages for trespass in the sum of Kshs.1,500,000/=.
3. Under prayer (f) seeking aggravated damages, I order the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally to pay mesne profits to the plaintiff company at the rate of Kshs.75,000/= per month from 03.02.03 until delivery of possession of the suit land.
4. Under prayer (g), I award the plaintiff the costs of the suit, as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

Orders accordingly.

Delivered at Nairobi this 29<sup>th</sup> day of October, 2008.

**B.P. KUBO**

**JUDGE**