



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 463 of 2001**

JAMES KASYULA MUTUA PLAINTIFF

VERSUS

FONTANA ENTERPRISES LIMITED.....DEFENDANT

JUDGMENT

By a plaint dated 14.3.2001 filed in court on 22.3.2001, the plaintiff, James Kasyula Mutua sued the defendant Fontana Enterprises Ltd seeking

- (a) **“possession of a piece of land, namely L.R No. 209/9646 Dandora Nairobi”.**
- (b) **“The plaintiff also sought damages for trespass at the rate of Kshs.100,000/= p.m. from 18th June, 1997 until possession is delivered up”,**
- (c) **“Interest at court rates on the said sum claimed until repayment in full from 18th June, 1997”,**
- (d) **“Interest at court rates”.**

The plaintiff’s claim arose from the defendant’s entry into his l and No. L.R No. 209/9464 Dandora, Nairobi without his (plaintiff’s) consent and taking possession thereof.

The plaintiff claimed further that by reason of the defendant’s act he lost income of Kshs.100,000/= which is the **“fair letting value of the said piece of land”**.

At paragraph 10 of the plaint, the plaintiff referred to two cases filed by the defendant against him, seeking to have him registered on the piece of land, but the cases were struck off and or dismissed by court.

In the defence filed on 8.5.2001, the defendant denied the plaintiff’s claim, and in para 3 thereof alleged conspiracy between the plaintiff and the Commissioner of Lands, **“to deny the defendant the use and quiet enjoyment of the suit premises.....”**

The defendant also claimed the land as his own. The defendant subsequently amended its defence on 23.1.2003. He denied that the plaintiff was the allottee of the suit premises, and asserted further at para 4 that it had since 1993, **“been in and continues to be in possession of the suit premises as of right by virtue of having been allocated the said property by the Commissioner of Lands in July, 1993”**.

The defendant alleged fraud on the part of the Commissioner of Lands and the plaintiff. He gave

particulars of such fraud.

The defendant brought in a 2nd defendant, the Attorney General, in a counter-claim, and alleged further that by a letter dated 15.7.1993 he was allotted the same piece of land which he subsequently paid for in full. The defendant gave further particulars of fraud at para 14 of the amended defence and also gave particulars of the cost of the improvement which he had undertaken on the land.

The defendant prayed for the cancellation of title to the defendant's name and an order compelling the Commissioner of Lands to issue a title deed to him. The records show that the amended defence was allowed by court on 17.1.2003.

Pursuant to that the Attorney General entered appearance to the counter-claim on 19.2.2003. When the case came before me for hearing on 26th April, 2006, the defendant's counsel failed to appear in court though he had been served by the plaintiff's counsel with a hearing Notice on 1st November, 2005. Such hearing Notice bearing his stamp was attached to the affidavit of service. At the request of the plaintiff's counsel I allowed him to proceed with the hearing of the suit.

The plaintiff, James Kasyula Mutua testified that he is the registered owner of property described as L.R No. 209/9464, Dandora Nairobi. He identified the original title deed in court, but produced a certified copy as an exhibit.

According to the plaintiff, the property was registered into his name solely on 18.6.1997, that despite this the defendant filed two cases against him, but these were struck out when it was discovered that the defendant had no right of claim to the land. He referred to para 10 of his plaint on this point.

The plaintiff said that he did not authorize the defendant to enter his land or put structures on his land. That the defendant entered his land on 18.6.1997 and he lost all his rights to his land and cannot therefore enjoy the land.

That the land measures 0.5500 hectares which is about one acre.

The plaintiff claimed that if he were to rent the empty space, he would get about Kshs.100,000/= p.m. He asked the court to award him what is just and fair.

He denied having colluded to get the title deed, as the land was empty when it was allocated to him.

He prayed the court to evict the defendant who carries on engineering works on his land, and put him (the plaintiff) in possession as the land belongs to him.

As the defendant failed to appear in court to defend the plaintiff's suit, I considered that the plaintiff's evidence challenged and I accepted it, especially after he produced in court the original title deed.

From that evidence, I was satisfied that he is the registered proprietor of the suit land and not the defendant.

I therefore found judgment for the plaintiff against the defendant as prayed in the plaint. I also proceeded to dismiss with costs to the plaintiff the counter claim filed by the defendant evidence was as no offered to prove it.

As for the plaintiff's claim for loss of user, I am reluctant to award him any money because I am not satisfied that he proved that claim, on a balance of probabilities.

The plaintiff's suit has succeeded and I grant the plaintiff the prayer for possession of the suit premises known as L.R No. 209/9646, plus costs and interest calculated at court rates.

Dated at NAIROBI this 19th day of May, 2006.

JOYCE ALUOCH

JUDGE