



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

**Civil Suit 187 of 2005
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

AVVERSI ERNESTO1ST PLAINTIFF

ACTIS DATO GRAZIELLA2ND PLAINTIFF

VERSUS

RICCARDO LIZZIER1ST DEFENDANT

MICHAEL MWANGI WANDIA2ND DEFENDANT

JUDGMENT

(1) Avversi Ernesto and Actis Dato Grazielle, the Plaintiffs in this case, are husband and wife. They are both Italians but they own a home in Kenya on Plot L.R. No.9953/1 Zimmerman Estate, Nairobi (“the suit land”). The entire suit land originally belonged to Riccardo Lizzier, the First Defendant, but he had it sub-divided and sold a portion thereof measuring 0.205 of a hectare to the Plaintiffs. The Plaintiffs constructed a house on the suit land which is now the subject of dispute in this suit.

(2) After selling the suit land to the Plaintiffs, the First Defendant appeared to have had second thoughts and decided to sell the same piece of land to Michael Mwangi Wandia, the Second Defendant. The Plaintiffs got no wind of this until the Second Defendant turned up at their doorstep on the 17th December 2004 claiming to have bought the place and asked them to vacate the premises and hand over vacant possession.

Fortunately, the Plaintiffs had by a decree dated the 3rd May 2001 in Nairobi HCCC No.3645 of 1995 been declared the owners of the suit property. The First Defendant was one of the three Defendants in that case. And he appears not to have appealed against that judgment and decree.

(3) In an effort to drive the Plaintiffs out of the suit land, the First Defendant resorted to acts of criminal damage in relation to the property. In November 2004 he removed the Plaintiffs gate. On the 7th February 2005, the First Defendant and a group of people under his command broke and entered into the Plaintiffs’ home and destroyed the perimeter wall and roof tiles. Earlier, on the 2nd February 2005, he had also entered and destroyed the hedge. In the course of all this, the First Plaintiff alleges that he was physically assaulted by the First Defendant.

(4) Working in cahoots with the First Defendant, the Second Defendant had fraudulently got himself registered as the owner of the suit property now known as Plot L.R. No.15314/8. So the position on the ground now was that the Plaintiffs were occupying a property they believed to be theirs and yet registered in the name of the Second Defendant as proprietor.

It was in those circumstances that the Plaintiffs brought this suit against the Defendants and sought, among other reliefs, a permanent injunction restraining the Defendants and/or their servants and agents from trespassing on the suit property; an order directing the Registrar of Titles to cancel the title issued to the Second Defendant in respect of Plot L.R. No.15314/8; special damages in the sum of K.Shs.99,355/= and aggravated/exemplary damages for trespass against the First Defendant.

(5) The First Defendant was served with process but he did not enter appearance or file a defence. Because of that, interlocutory judgment was entered against him on the 25th October 2005, after which the case was set down for formal proof.

On the 7th March 2005, the Second Defendant appointed the firm of Macharia Kahonge & Company, Advocates, to act for him in this case. This was followed by a consent judgment on the 17th March 2005 under the terms of which a permanent injunction was issued against him;

he unequivocally abandoned all past, present and future claims in relation to the suit premises; the Registrar of Titles was directed to cancel the title which had been issued to the Second Defendant and to surrender to the Plaintiffs' Advocates the Deed Plan and letter from the Commissioner of Lands extending the lease. He was also ordered to pay the Plaintiffs' costs of K.Shs.13,000/=. So when the case came for formal proof, the claim against the Second Defendant had already been finalized and settled.

(6) Only Actis Dato Graziella, the Second Plaintiff, gave evidence. She said that Avversi Ernesto, the First Plaintiff, is her husband. They have lived in the suit premises for seventeen years and had obtained a final decree against the First Defendant declaring them to be proprietors of the suit premises. They had bought it from the First Defendant and paid the agreed consideration in full. On the 7th February 2005, while they were still in bed, the Second Plaintiff and her husband heard some people knocking down their perimeter wall. On looking through the window, she saw many labourers destroying the wall. She tried to plead with them to stop but they ignored her. Her husband came out armed with a saw and when they saw this, some of them ran away but a few remained. One worker tackled her husband and violently knocked him down. He got up, returned to the house and came back armed with a bow and arrows. At that point, the First Defendant appeared and attacked the First Plaintiff with his crutches. The Plaintiffs could not get out of the gate to seek help from anyone because the labourers were throwing stones at them. Eventually, they got somebody to call the Police who came to the scene.

She recalled an incident in 2003 when the First Defendant destroyed their borehole fence and gate when the Plaintiffs were away in Italy. When the First Defendant attacked her husband with his crutches, he sustained serious personal injuries. She also claimed that the First Defendant at one time threatened to burn down the house. He was arrested and charged with malicious damage to property and assault and she gave evidence against him.

(7) The Second Plaintiff said that the actions of the First Defendant and his agents caused them considerable loss and damage and they claim K.Shs.99,335/= as special damages and exemplary damages against the First Defendant. They also ask for a permanent injunction against both Defendants restraining them from entering or trespassing on the suit land. And against the Second Defendant, the Plaintiffs had asked for an order directing the Registrar of Titles to cancel any title issued to the Second Defendant which has already been done. On the 7th March 2005, the Second Defendant sensibly submitted to judgment which was entered by Ransley, J together with costs agreed at K.Shs.13,000/=. So the Plaintiffs' claim against the Second Defendant does not form part of this judgment.

(8) I accept the evidence of Actis Dato Graziella (the Second Plaintiff) that the First Defendant after selling the suit land to the Second Defendant resorted to persistent harassment of the Plaintiffs in an attempt to drive them out. In the process, some damage was caused for which the Plaintiffs hold the First Defendant responsible. The First Defendant was in fact charged with malicious damage to property and assault in the Chief Magistrate's Court in Nairobi (Criminal Case No.426 of 2005). At the close of the prosecution's case, the trial magistrate held that the accused had no case to answer and acquitted them under section 210 of the Criminal Procedure Code.

(9) The Plaintiffs' claim for K.Sh.99,355/= as special damages must be rejected for lack of proof. In her evidence, Graziella simply referred to invoices and receipts contained in the Plaintiffs' bundle of documents. No attempt whatsoever was made to prove these documents and produce them in evidence. Apparently, the court was expected to plough through the bundle and dig out the relevant receipts to support the claim.

(10) The First Plaintiff's claim for damages for personal injuries also must fail for lack of proof. The First Plaintiff did not give evidence so the court did not hear his story. Apart from that, no medical evidence was produced. Again the court was expected to dig out the relevant receipts from the bundle as proof that the First Plaintiff was treated at The Aga Khan Hospital in Nairobi.

(11) Graziella testified that on the 7th February 2005 early in the morning, their home was invaded by a gang of workers who pulled down the wall and damaged the roof. According to her, these people were acting on the instructions of the First Defendant. She said the First Defendant assaulted her husband. Since at that point in time the Second Defendant was also still pressing his claim to the suit land, it is quite possible that the gang might also have been instigated by the Second Defendant. On that evidence, I am not prepared to hold that the persons who invaded the Plaintiffs' home were acting on behalf of the First Defendant.

(12) There is nonetheless enough evidence to prove that the First Defendant was involved in the destruction of the borehole fence and gate. Though the First Defendant is said to be a cripple and moves about with the assistance of crutches, he comes out as quite an aggressive person. The Plaintiffs have proved their case for a permanent injunction against the First Defendant.

(13) I therefore enter judgment for the Plaintiffs and issue a permanent injunction, in terms of prayer (b) of the Plaint filed on the 18th February 2005, restraining the First Defendant, his servants and agents from entering or trespassing on the suit land and from interfering with the Plaintiffs' possession and quiet enjoyment thereof in any manner whatsoever or otherwise howsoever. The Plaintiffs will also have the costs of the suit.

Orders accordingly.

Finally, it is self-evident that an unusual delay has been occasioned in the delivery of this judgment and the parties are entitled to an apology.

Dated and delivered at Nairobi this First day of December 2006.

P. Kihara Kariuki

Judge