

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 58 OF 2001

DAVID NDOLO NGILAI ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JUSTUS MUSAU WAMBUA ALIAS 'NGEKA' ::::::::::::::::::::::::::::::: DEFENDANT

J U D G E M E N T

By an amended plaint dated 2.5.2001, the plaintiff David Ndolo Ngilai brought this suit against the defendant Justus Musau Wambua alias Ngeka seeking the following orders:

- 1. A perpetual injunction restraining the defendant by himself, his agents and/or servants from interfering with plot No. 463.**
- 2. An order of eviction.**
- 3. Mesne profits and general damages for trespass.**
- 4. Costs of the suit and interest.**

The plaintiff's claim is that the defendant has trespassed onto his land plot No. 463 since sometime between November 2000 and March 2001. Plaintiff wants the defendants stopped from the said encroachment and eviction. The defendant filed a defence dated 23.11.2001 in which he denied ever trespassing onto plot No. 463 and instead blamed the plaintiff for trespassing onto his plot No. 465. He also denied that plot No. 463 belongs to the plaintiff.

The plaintiff called a total of 3 witnesses in support of his case while the defendant was the lone witness for the defence.

What is not in dispute is that both the plaintiff and the defendant father's one Wambua Ndolo were members of Lukenya Ranching and Farming Co-operative Society. The plaintiff is Member No. 120 as evidenced by his membership card No. 1. P.W.3 Joseph Muasya the manager of the society testified that the defendant's father was member No.41. The defendant is not a member of the co-operative society. Plot No. 465 on which the defendant lives belonged to his father. The plaintiff and defendant's father were allotted plots by the co-operative society by virtue of their membership.

At paragraph 3 of the defence the defendant put the plaintiff to strict proof to prove that the plot 463 was his. The plaintiff produced a letter of allotment Ex. No.2 dated 21.12.1992. This is the date the plaintiff said he joined the society. The allotment letter has another date 14.8.1999, when the plaintiff said that letters were issued. This is the same plot that P.W.2 said his father P.W.1 had given him to cultivate. The surveyor P.W.4 Mr. Koti told the court that he is familiar with 20 acre and 40 acre plots in the society as he did the initial survey and set the boundaries. It is his evidence that plot 463 belongs to P.W.1 whereas plot 465 belongs to the defendant's father. There is no doubt that the said plot No. 463 belongs to P.W.1.

The plaintiff adduced evidence that he is owner of another plot No. 701 which measures 40 acres. He produced the allotment letter from Lukenya Ranching and Co-operative Society Limited Ex. NO. 6. It is dated 29.8.1991. Though the defendant pleaded at paragraph 4 of his defence that it is plot No. 701 that borders plot 465, he never adduced any evidence in support of that allegation. However, the plaintiff told court that the plot that borders plot No.

465 is 463 not 701. Indeed P.W.4 the surveyor who visited the site and drew a sketch of the area confirmed that the plot that borders plot 465 is 463 not 701. P.W.4's report and sketch is Ex. No.5. The plot in issue is 463 not 701. At paragraph 5 of his defence defendant claims that it is plaintiff who has trespassed on his land but he failed to adduce any evidence in support of that allegation.

P.W.2, the son of P.W.1 told court that he is the one who has been in actual occupation of plot No. 463. He recalled how he planted maize and bean crop between the period November 2000 and March 2001 when he found the defendant supervising his children who were uprooting his crop which had germinated. He said that the defendant refused to heed his pleas to stop. In his evidence in court, the defendant is not clear whether he is denying the allegations as per his defence or not. At one time he says that he 'doubts' whether he trespassed on anybody's land. In the same statement he says he does not know whether he trespassed on anybody's land. P.W.4's evidence is very clear. There was evidence from P.W.1, 2 and 3 that the defendant was served to attend to survey by P.W.4 and re-establishment of the boundary but he neglected to attend. I do not believe that these witnesses were lying. P.W.3 the manager of the society was aware the society had also called upon the defendant to go to their office to present his complaint if any and he refused or neglected. P.W.4 found that the owner of plot No. 465 had encroached onto plot No. 463 by 2.63 acres. P.W.4 re-established the boundary in the presence of independent witnesses from the society. His evidence has not been rebutted by the defence.

The defendant in his wavering defence also seemed to be saying that his brothers who are also settled on the land may have encroached on the land but this is an afterthought and I believe a lie. He was seen ploughing by P.W.2 and this has gone on since 2000 – 2001 season. There is ample evidence adduced by the plaintiff to show that it is defendant who encroached onto his plot No. 463.

The plaintiff prays for mesne profits and general damages for the said trespass. According to P.W.1 and 2 they would harvest 8 bags of maize and 3 bags of beans from that land if the rain was adequate. We were not told what the whole area cultivated produced as this is only a little portion of the whole plot. The court was not also told how much was claimed as mesne profits that is how much does a bag of maize cost or bag of beans unless it was expected that the court assess the cost from the current market price. Since those details were not availed to court, the court will award general damages to the plaintiff for the 4 seasons that the defendant has been in occupation of that portion of land and the court makes an award of Kshs. 50,000/- as general damages for trespass.

Having found that the defendant has trespassed onto the plaintiff's land, the court grants a prayer for perpetual injunction to issue restraining the defendant by himself, his agents and or servants from interfering with plot No. 463, an order of eviction is granted which takes effect forthwith, an award of 50,000/- General damages and costs of the suit plus interest.

Dated, read and delivered at Machakos this Day of 2004.

R. V. WENDOH

JUDGE