



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 108 OF 2015

STEPHEN ABU MUKHOBI..... PLAINTIFF

-VERSUS-

DANIEL ORIA ODHIAMBO.....1<sup>ST</sup> DEFENDANT

ROBERT ODHIAMBO NDIEGE.....2<sup>ND</sup> DEFENDANT

JUDGEMENT

1. By a plaint dated 29<sup>th</sup> January 2015 and Amended on 17<sup>th</sup> July 2015 the plaintiff seeks judgment against the defendants jointly and severally for:-

**a. A permanent injunction restraining the defendants either by themselves, or through their agents, servants employees, proxies or any one acting on their behalf of capacity from trespassing, entering into, encroaching or in any other way interfering with the plaintiff's quiet possession of all that piece of land known as Dandora IV Shop Plot No.46822.**

**b. The defendants be ordered to give vacant possession of the suit plot and in default they be evicted.**

**c. Costs of this suit.**

2. Upon being served with copies of plaint and summons to enter appearance the 1<sup>st</sup> defendant entered appearance on 10<sup>th</sup> April 2015 through the firm of M/S Nungo, Oduor & Waigwa Advocates. He filed a statement of defence dated 13<sup>th</sup> July 2017 and filed court in 14<sup>th</sup> July 2017.

3. It appears the 2<sup>nd</sup> defendant neither entered appearance nor filed a statement of defence.

4. The matter was fixed for hearing on 28<sup>th</sup> January 2020. On that date none of the defendants attended court. The plaintiff's counsel informed the court that the defendants' had been served. The court was satisfied that the defendant had been served and directed that the hearing proceeds exparte.

5. P.W.1 Stephen Abu Mukhobi the plaintiff in this case adopted his witness statement dated 29<sup>th</sup> January 2015. He told the court that he is the registered owner of plot number Dandora IV Shops Number 46822 pursuant to a lease granted to him (hereinafter) referred to as "the suit property"). He relied on the documents in his list of documents dated 29<sup>th</sup> January 2015. He produced letters of allotment dated 9<sup>th</sup> September 1993 as exhibit P1. The said letter of allotment is for Dandora IV Shops Plot No 46822. He also produced a lease agreement between himself and the Nairobi City Commission as exhibit P2. He also produced the approved development plans. A letter dated 3<sup>rd</sup> November 2014. A demand letter dated 17<sup>th</sup> November 2014 and photographs of the building in dispute as exhibits P3 to P6 respectively.

6. He further told the court that Robert Odhiambo Ndiege (the 2<sup>nd</sup> defendant) was on site when the construction was going on. That the defendants did not stop the construction even after the court issued the orders of injunction of 22<sup>nd</sup> July 2015. He prays that the 1<sup>st</sup> defendant be ordered to vacate the suit property.

7. In his statement of defence dated 13<sup>th</sup> July 2017 and filed in court on the 14<sup>th</sup> July 2017 the 1<sup>st</sup> defendant denied each and every claim in the  
plaint.

In paragraph 6 of the statement of defence he states:-

**“In response to paragraph 6 of the plaint, the 1<sup>st</sup> defendant states that he has neither breached any of the constitutional rights of the plaintiff as alleged nor encroached the plaintiff’s land and as such the plaintiff is called upon to strictly prove the same”.**

Paragraph 7 of the statement of defence states:-

**The 1<sup>st</sup> defendant denies the contents of paragraphs 7, 7A and 7B of the plaint together with the adumbrated particulars of conspiracy/representation in toto and puts the plaintiff to strict proof thereof and further states that he has never been in ownership, possession and/or occupation of the suit property.”**

As stated earlier the defendants did not attend court to challenge the plaintiff’s claim.

8. At the close of the oral testimony the plaintiff tendered written submissions. His submissions are dated 9<sup>th</sup> March 2020. It is his submission that the suit land was allocated to him by the then Nairobi City Commission. He subsequently entered into a lease agreement with the commission. He was granted a lease to all that parcel of land known as Dandora IV Shops number 46822 for a period of 99 years with effect from 1<sup>st</sup> July 1993.

9. He further stated that on or about November 2014 the defendants trespassed onto the suit plot and started constructing thereon.

10. It is the plaintiff’s submissions that the 1<sup>st</sup> defendant claimed that the suit land had been allocated to him in 2014 in his capacity as the area Member of County Assembly. Later on he claimed the land was registered in the name of the 2<sup>nd</sup> defendant. This could not be true as the plaintiff had never surrendered the lease and still remains the registered owner of the suit property.

11. He further submits that the documents produced in court confirm his ownership of the suit property. They have not been challenged. The defendant did not file any documents or adduce evidence showing that they own the suit property. The defendants have encroached on the suit property. He put forward the case of **Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another [2017] eKLR; Stephen Gitau Nganga & Another [2017] eKLR**. He prays that he be found to have proved his case as against the defendants and that the prayers in the Amended Plaint be granted.

12. I have considered the pleadings, the evidence on record and the written submissions tendered by the plaintiff. I have also considered the authorities cited. The issues for determination are:-

**i. Whether the plaintiff is the owner of the suit property.**

**ii. Whether the defendants have encroached on the suit property.**

**iii. Who should bear costs of the suit?**

13. It is not in dispute that the plaintiff was allocated the suit property by the then Nairobi City Commission. The letter of allotment and lease were produced in court as exhibits in this case. There is no doubt that the plaintiff is the owner of the suit property. The said documents have not been challenged.

14. The defendants did not file any documents to challenge the plaintiff’s documents. Indeed paragraphs 6 and 7 of the 1<sup>st</sup> defendant’s statement of defence are clear that he does not lay claim to the suit property. The defendants neglected and/or refused to attend court to challenge the plaintiff’s ownership of the suit property. In the case of **Hassan Mohammed Haji vs Mohamed Keynan & Another [2019] eKLR**. It was held thus:-

**“It is trite law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent in a particular fact or set of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issued. Therefore in the circumstances this court is inclined to find that the plaintiff is the registered owner of the suit property as his title to the property has not been challenged by the defendants and or any evidence to the contrary presented.”**

15. I find that the plaintiff has proved by way of letter of allotment, lease agreement and payment receipts that he is entitled to the suit property.

16. There is evidence on record that the suit property was encroached by the defendants. There is a building on the suit property. The defendants continued with the construction despite the court orders which were issued stopping the construction. The plaintiff told the court that the building is now occupied by tenants. He confirmed that they are not his tenants. The plaintiff produced photographs showing the construction on his own plot. The defendants squandered their opportunity by failing to attend court to fight the plaintiff’s claim. I find that the defendant encroached on the plaintiff’s plot and constructed a building thereon. They are trespassers on the suit property.

17. Having stated so, I find that the plaintiff is entitled to the reliefs sought.

18. It is trite law that costs usually follow the events. Section 27 of the Civil Procedure Rules gives this court discretion to award costs.

19. In conclusion, I find that the plaintiff has proved his case against the defendants on a balance of probabilities. I ender judgment in his favour as against the defendants jointly and severally for:

**a. That a permanent injunction is hereby issued restraining the defendants either by themselves, or through their agents, servants, employees, proxies or any one acting on their behalf or capacity from trespassing, entering into, encroaching or in any other way interfering with the plaintiff's quiet possession of all that piece of land known as Dandora IV shops plot number 46822.**

**b. That the defendants are hereby ordered to give vacant possession of the suit plot being Dandora IV Shops Number 46822 within sixty (60) days from the date of this ruling. In default the plaintiff shall be at liberty to use lawful means to evict the defendants.**

**c. That costs of the suit shall be borne by the defendants.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18<sup>TH</sup> DAY OF MARCH 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. B. M. Musyoki for the plaintiff

No appearance for the Defendants

Phyllis - Court Assistant