



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & LC. NO.486 OF 2013**

**KENNEDY OBUCHI NYANGENYO .....PLAINTIFF**

**VERSUS**

**UASIN GISHU COUNTY GOVERNMENT....DEFENDANT**

**JUDGMENT**

1. The Plaintiff approached the court through the plaint dated the 16<sup>th</sup> October, 2013, claiming he was the registered lessee of the property known as ELDORET MUNICIPALITY/ BLOCK 9/ 3107, and has been in possession of the said plot since 2006. That on or about 14<sup>th</sup> October 2013, unknown persons invaded the property, dug holes and constructed a perimeter fence. That on making inquiry, he was informed that the property had been purchased by the Defendant, and since then he has been prevented him from accessing his dwelling house. He therefore filed this suit seeking to be declared as the lawful owner of the suit property, and the Defendant to be permanently restrained from trespassing into, constructing upon, disposing off and/or interfering in any other way with the suit property, and costs.
2. The suit is opposed by the Defendant through their filed statement of defence dated 26<sup>th</sup> January, 2018. The statement of defence comprises of denials of the averments made in the plaint. The Defendant also denied having been served with any demand letter or notice of intention to sue.
3. The Plaintiff filed a reply to the statement of defence dated 15<sup>th</sup> February, 2018, among others averring that he had served the Defendant with a notice of intention to sue. That further the Defendant had issued the Plaintiff with a letter of intent to compulsorily acquire the suit property.
4. That during the hearing, the Plaintiff testified as PW1 adopting the deposition in his affidavit sworn on the 16<sup>th</sup> October 2013, that was filed in support of the injunction application of even date. He testified that he had bought the suit land, which is a quarter of an acre, from one Charles Muchiri in 2004 and was on the 15<sup>th</sup> June, 2006 registered as the owner, and certificate of lease issued to him. That he has paid the land rates to Defendant as evidenced by the receipts that he attached. The Plaintiff produced the copies of the certificate of lease, certificate of official search, two property rates payment requests and bill in his name as exhibits. He also produced four copies of photographs depicting some structures plus two persons, new fence of concrete poles and barbed wires, and proposed development plan on Block 9/2188 as exhibits. The Plaintiff further testified that he was using the structure on the land as the family home, but in 2013 he found some people digging holes to fence off the plot and when he made enquiries, they told him that they had been sent by the Defendant. That he went to the Defendant's offices and after being referred from one office to another for a week without getting a solution, he filed this suit. During cross examination the Plaintiff testified that Eldoret Municipality/Block 9/3107, the suit land, was subdivided from Eldoret Municipality/Block 9/2188. That the sale agreement was over parcel 2188, but that he had not availed a copy to the court. That he could not tell whether the lessor's consent to subdivide parcel 2188 and transfer parcel 3107 to him had been obtained, as the transactions were handled by an agent on his behalf. That the lease was not given to him and therefore did not know its terms, and that the rates he had paid was only for the 2004 to 2013, which is the period covered by the receipts he had produced as exhibits. Further that he had asked his advocate to do a demand notice to those who had committed the trespass but they reiterated that they were acting on instructions of the Defendant.
5. The Plaintiff closed his case on the 14<sup>th</sup> June, 2021, after which various directions, including that the Defendant file and serve their statements and documents in 21 days and in default their case be deemed closed, were issued after hearing the submissions from counsel for both parties. That during the subsequent mention of the 2<sup>nd</sup> December 2021, only counsel for the Plaintiff attended court, and upon confirming that the Defendant had not complied with the earlier directions, and that the Plaintiff had filed their submissions dated the 23<sup>rd</sup> July 2021, a date for judgement was fixed.
6. The following are the issues for the court's determinations;

**a. Whether the Plaintiff is the registered proprietor of the suit property.**

- b. Whether the Plaintiff's title to the suit land has been legally impugned.**
- c. Whether the Defendant had any lawful authority or legal right to enter onto the suit land and fence it.**
- d. Whether permanent injunction order should issue against the Defendant.**
- e. Who pays the costs of the suit.**

7. The court has carefully considered the parties' pleadings, oral and documentary evidence presented by the Plaintiff, submissions filed, the superior courts decisions cited thereon and come to the following findings;

a. That though the Plaintiff did not file any witness statements with his claim, his counsel on record informed the court before taking of *viva voce* evidence, that his client will rely on his filed supporting affidavit sworn on 16<sup>th</sup> October 2013. This was not objected to by the Defendant's counsel and the Plaintiff testified based on that affidavit. Though none of the parties have taken issue with the Plaintiff testifying on the basis of his affidavit instead of a witness statement, the court finds it necessary to examine the propriety of the use of an affidavit in place of a witness statement, in view of the provision Order 3 Rule 2 of the Civil Procedure Rules, which provides for documents to accompany a plaint to include;

- a. "-----"
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses excluding expert witnesses
- d. -----"

That provision, and the Civil Procedure Rules generally, is ambiguous on the question of the failure to file witness statements, and its implication to the trial, and for this reason, it is important to understand the object behind the filing witness statements.

b. That at a basic level, a suit is initiated by filing of the relevant pleadings which, under Order 2 Rule 3 of the Civil Procedure Rules, are required to plead facts and not evidence. With this in mind, it follows that there are provisions concerning each form of pleading in order to raise the facts, and evidence in support of the claim and or defence. For suits initiated through plaints, that is done vide witness statements as required by Order 3 Rule 2 of the said Rules. In other suits, one would for instance use an affidavit to raise evidence in support a petition, originating summons, or an application by way of chamber summons or notice of motion filed to the court. That with the foregoing in mind, I am persuaded that the form of the document to be used in each situation, tallies with the manner in which the dispute will be disposed of. For instance, petitions, originating summons and applications to court can be disposed of without oral hearing, as the evidence in support of the case is already contained in affidavits, where the person testifying affirms the correctness of the averments thereof under threat of perjury under section 11 of the Oaths and Statutory Declarations Act, chapter 15 of Laws of Kenya. The depositions in the affidavits then become evidence proper upon which the court can act without further recourse to the person testifying, though he may be summoned to be cross-examined on the affidavits on application of the opposing party. This is to be contrasted with ordinary suits and claims for instance, which require witness statements to be filed with the pleadings post the Civil Procedure Rules 2010. My observation is that witness statements are used to raise evidence in support of the claim or defence, but they lack the quality of evidence, only serving at the first instance to indicate the evidence that is to be raised, and the person who will adduce that evidence. This is then tested when the witness ultimately testifies before the court, and the veracity of the evidence is tested through cross-examination to gain the force of evidence. With this in mind, the question that arises is whether a supporting affidavit similar to that filed by the Plaintiff suffice in place of a witness statement? I think so. At the first instance, the supporting affidavit raises all the necessary averments that the Plaintiff intended to testify over. In fact, the affidavit goes beyond what a witness statement would address by actually attaching the documents to be relied on, such that the entirety of the Plaintiff's case was known. Further, an affidavit escalates the evidentiary weight of the statements made, as they are made under oath at the risk of penal consequences for making untruthful statements. Therefore, the court finds that the Plaintiff's use of the affidavit in place of a witness statement did not prejudice the Defendant in any way.

c. That the court is reminded of its duty under Article 159 of the Constitution of Kenya to exercise judicial authority and administer justice without undue regard to procedural technicalities. This duty to administer justice is reiterated under the Civil Procedure Act chapter 21 of the Laws of Kenya and the Environment and Land Court Act No. 19 of 2011 which states that the overriding objective was to promote among other things, the just determination of disputes. I wish to cite with approval the determination of the Honourable Justice Njagi in *Alexander Khamasi Mulimi v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR* wherein, making observations on the interplay between the overriding objectives and lapses in procedural compliance with the Civil Procedure Rules, he stated:

"21. In the case of Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 Others (Supra) where the appellant in the case had not served the notice of appeal on the respondents within 7 days as required by the Court of Appeal Rules Ouko, JA was of a contrary view and in a majority judgment held that:

The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases .....

**Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of**

**the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness .....**

I reiterate what the court said in **Githere V Kimungu(1976-1985) E.A 101**, that:-

“... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case”.

That essentially, the Rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the Constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act, place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

d. That it ought to be clearly understood that the courts have not belittled the role of procedural rules. It has been emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. The courts, litigants and their lawyers alike, are thus enjoined to abide strictly by the rules. The litigants and their legal representatives ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the courts, in some instances may allow the liberal application or interpretation of the rules to facilitate substantive justice in appropriate cases that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard to procedural technicalities”. Similarly, in this suit, the administration of substantive justice to the parties requires that the court considers the Rules as a tool to aid in determination of disputes, and not a leash to limit the court from venturing beyond its provisions where this would result in justice for both parties and most importantly, where this would not result in prejudice to the opposing party. In this suit, the use of the supporting affidavit did not in any way compromise the ability of the Defendant to mount his defence. The Defendant did not oppose this reliance and he had the opportunity through counsel to cross-examine the Plaintiff on his testimony during the oral hearing.

e. That with the foregoing having been settled, the next issue for determination is whether the Plaintiff has established, on a balance of probabilities, his claim that he owns the suit property and that the Defendant has trespassed thereon. The Plaintiff has produced a certificate of lease issued by the Land Registrar of lands in his name which in terms of section 24 of the Land Registration Act No. 3 of 2012, provides a rebuttable presumption of his ownership of the suit property. The Plaintiff has further produced receipts showing payment of rates as late as 27<sup>th</sup> March 2013 to the Defendant, further buttressing his claim, and acting as a confirmation that the Defendant knew of his interest over the suit land. That a certificate of search has also been produced in proof of his status as the registered proprietor of the property. The Defendant did not call any witnesses to rebut the Plaintiff’s case and therefore, based on the evidence presented, the court finds that the Plaintiff has demonstrated on a balance of probabilities that he is the registered proprietor of the suit property, ELDORET MUNICIPALITY/ BLOCK 9/ 3107. That the Plaintiff’s title has not been impugned as required under section 26 of the Land Registration Act No.3 of 2012 and therefore his interest is protected under Article 40 of the Constitution, 2010.

f. The Plaintiff has demonstrated the invasion of the suit property by agents of the Defendant, without any evidence in rebuttal being presented. He has explained that the property was his domicile, and he has shown the disruption that the Defendant’s invasion and fencing off of his property has caused to him and his family. That the Plaintiff has established through the photographs that the Defendant’s actions have changed the suit property in terms of holes being dug, and fences erected without his permission. The court finds that the allegation of trespass into the Plaintiff’s property by the Defendant’s agents has been proved on a balance of probabilities, and permanent injunction should be issued. That the court wishes to add that in the circumstances of this case, the Plaintiff would have been entitled to some reasonable damages had the same have been pleaded and sought.

g. That as the Defendant’s actions of invading the Plaintiff’s land and erecting a fence blocking him and his family from accessing the property is what necessitated this suit, and the Plaintiff has emerged successful, then under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the Plaintiff is entitled to costs.

h. That in view of the foregoing, the court finds for the Plaintiff as against the Defendant and orders as follows;

- a. That the Plaintiff is the registered proprietor and therefore owner of land parcel Eldoret Municipality/Block 9/3107, the suit property.
- b. That the Defendant is directed to vacate from the suit property within thirty (30) days.
- c. That further, a permanent injunction is hereby issued restraining the Defendant from in any manner interfering with the Plaintiff’s ownership and use of the suit property or in any part thereof, without his consent/permission.
- d. The plaintiff’s costs be paid by the Defendant.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 2<sup>ND</sup> DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: .....Absent.....

DEFENDANT: ...Absent.....

COUNSEL: .....Absent.....

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA,J.**

**ELC ELDORET**