



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 203 OF 2014**

**DANIEL WATAKA MASAMBU ..... PLAINTIFF**

**VERSUS**

**MOSES MUTECHO WANYONYI .....1<sup>ST</sup> DEFENDANT**

**JACKLINE TERESA N. OLALE ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF BUNGOMA.....<sup>D</sup> DEFENDANT**

**J U D G M E N T**

**DANIEL WATAKA MASAMBU** (the plaintiff herein) and **FRANCIS KITUNI WACHANA** (now deceased) are the joint proprietors of the land parcel **NO NAITIRI TOWNSHIP/25** (the suit land). They were issued with the Certificate of Lease on 1<sup>st</sup> July 2005 by the Republic of Kenya.

By an amended plaint dated 20<sup>th</sup> March 2018 and filed herein on the same day, the plaintiff sought Judgment against **MOSES MUTECHO WANYONYI**, **JACKLINE TERESA N. OLALE** and **THE COUNTY GOVERNMENT OF BUNGOMA** (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) in the following terms: -

- 1. An eviction order against the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the land parcel NO NAITIRI TOWNSHIP/25 belonging to the plaintiff and general damages.**
- 2. Costs and interest.**
- 3. Any other relief this Honourable Court may deem fit and just to grant.**

The basis of the plaintiff's claim is that whereas he and **FRANCIS KITUNI WACHANA** are the proprietors of the suit land holding the Certificate of Lease issued to them on 1<sup>st</sup> July 2003 (the correct date is infact 1<sup>st</sup> July 2005) for a period of 99 years, the defendants invaded the said land in the year 2010 and have started putting up structures thereon. The plaintiff is therefore unable to utilize the suit land and has suffered loss and damage hence this suit.

Together with the plaint, the plaintiff also filed his statement and the following documents.

- 1. Certificate of lease for the land parcel NO NAITIRI TOWNSHIP/25.**
- 2. Certificate of Search for the land parcel NO NAITIRI TOWNSHIP/25.**
- 3. Land Rate Receipts**
- 4. Letter dated 16<sup>th</sup> September 1982.**

By a further list of documents dated 24<sup>th</sup> June 2015, the plaintiff filed the following documents: -

- 1. Bundle of receipts from the Ministry of Lands.**
- 2. Receipts by Kenya Commercial Bank.**

### 3. Land Rate slips

### 4. Letter from DANIEL W. MASAMBU to the COUNTY COUNCIL OF BUNGOMA.

And in yet a further list of documents filed on 27<sup>th</sup> January 2020, the plaintiff filed the following document: -

#### 1. Rent Clearance Certificate.

In his statement dated 19<sup>th</sup> June 2015 and filed herein on 24<sup>th</sup> June 2015, the plaintiff states that in 1978, he and his now deceased partner **FRANCIS KITUNI WACHANA** acquired the suit land from the Ministry of Lands and they were duly registered as the lessee for a period of 99 years. That they have been duly paying the land rates for the suit land to-date and only the Ministry of Lands through the Commissioner of lands can revoke the lease and not the 3<sup>rd</sup> defendant.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any defences to the suit.

The 1<sup>st</sup> defendant filed his defence to the amended plaint on 9<sup>th</sup> June 2020 in which he pleaded, inter alia, that the plaintiff had not produced any letter of allotment in support of his claim to the suit land. He added that he was allotted the suit land by the 3<sup>rd</sup> defendant in 2007 as the same was undeveloped and un – occupied and was therefore repossessed in 2004. That the plaintiff did not protest when the suit land was allocated to the 1<sup>st</sup> defendant who has been paying the land rates. The 1<sup>st</sup> defendant therefore denied having trespassed onto the suit land and sought that the plaintiff's suit be dismissed with costs.

The 1<sup>st</sup> defendant also filed his witness statement dated 6<sup>th</sup> March 2015 in which he stated that in 2005, he was informed that the 3<sup>rd</sup> defendant had repossessed all the undeveloped commercial plots within **NAITIRI MARKET** and interested persons may apply for the same. He therefore applied for the suit land which was allocated to him in May 2007 and in October 2009, he developed it after his plans had been approved by the 3<sup>rd</sup> defendant. During all that period, he did not hear anybody claiming ownership of the suit land and he is therefore surprised that the plaintiff is claiming it.

The 1<sup>st</sup> defendant also filed the following documents: -

1. Letter dated 17<sup>th</sup> May 2007 addressed to him by the 3<sup>rd</sup> defendant authorizing him to develop the suit land within 2 years.
2. Receipt for Kshs. 6,000/= being plan approval fees.
3. Receipt for Kshs. 6,395/= being land rates.
4. Demand Notice for rates dated 20<sup>th</sup> January 2015.
5. Approved development plans.

On 4<sup>th</sup> December 2019, the suit against the 3<sup>rd</sup> defendant was withdrawn with no orders as to costs.

The hearing commenced on 18<sup>th</sup> January 2021 when the plaintiff and the 1<sup>st</sup> defendant were the only witnesses who testified. They were led respectively by their Counsel **MR KUNDU** and **MR KHAKULA** and adopted their statements whose contents I have already summarized above. They also produced as their documentary evidence the list of documents filed herein.

At the end of the plenary hearing, the parties were allowed 14 days each within which to file and serve their submissions. The matter was to be mentioned on 16<sup>th</sup> February 2021 to confirm compliance. However, only **MR KUNDU** Counsel for the plaintiff filed his submissions.

I have considered the evidence by the plaintiff and the 1<sup>st</sup> defendant who are the only parties who testified in this case. I have also considered the submissions by **MR KUNDU**.

It is common ground that the suit land has since 1<sup>st</sup> July 2005 been registered in the names of the plaintiff and one **FRANCIS KITUNI WACHANA** who hold a 99-year lease from the **REPUBLIC OF KENYA** as per the Certificate of Lease produced herein. That registration confers upon the plaintiff all the absolute rights to the suit land subject only to the encumbrances permitted by the law. **Section 24(b)** of the **Land Registration Act 2012** provides as follows: -

*“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all the implied and expressed rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of the lease.”*

**Section 26(1)** of the same Act provides that: -

*“The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute*

***and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.”*** Emphasis added.

Similar provisions were found in **Sections 27(a)** of the repealed **Registered Land Act** under which the Certificate of Lease to the suit land was issued. It is clear therefore that the law bestows sanctity of title to the plaintiff as the holder of the Certificate of Lease to the suit land. Unless demonstrated otherwise, the plaintiff is the absolute and indefeasible owner of the suit land and among the rights and privileges that he enjoys include the right to evict any trespassers. That is among the remedies that the plaintiff seeks herein. There is nothing to suggest that his title was obtained through fraud misrepresentation, illegally, unprocedurally or through any corrupt scheme. Indeed, I have not heard the 1<sup>st</sup> defendant impeach the Certificate of Lease held by the plaintiff.

The 1<sup>st</sup> defendant's case is that the suit land was allotted to him in 2007 by the 3<sup>rd</sup> defendant after the plaintiff had failed to develop it. He then developed it and has been paying land rates and rent. That may be so. However, for as long as the plaintiff held the Certificate of Lease to the suit land and which has not been cancelled to-date, that land was not available for allocation to the 1<sup>st</sup> defendant or any other person or entity. The law, as is now clear, protects the sanctity of title to land so long as there are no grounds to impeach the same. This position has been re – affirmed in many cases including **JOSEPH ARAP NG'OK .V. MOIJO OLE KEIWUA & OTHERS C.A CIVIL APPEAL NO 60 OF 1997 [1997 eKLR]**, **NJILUX MOTORS .V. KD & L & ANOTHER C.A CIVIL APPEAL No 206 OF 1998** and also **RUSSEL & CO LTD .V. COMMERCIAL BANK OF AFRICA LTD 1986 KLR 633**. Therefore, unless there is evidence that a title to land was acquired fraudulently or through an illegal or un – procedural process, the Courts have always up – held the sanctity of title. In the circumstances of this case, no attempt has been made to impeach the plaintiff's title.

The 1<sup>st</sup> defendant has pleaded in his defence that he acquired the suit land after it had been repossessed by the 3<sup>rd</sup> defendant following the plaintiff's failure to develop it within 2 years. This is what he said during the plenary hearing: -

***“When I was allocated the plot, it was not developed. I was given the plot by the COUNCIL. I was to develop it within 2 years. It had been repossessed. I was given an allotment letter.”***

The 1<sup>st</sup> defendant did not produce any allotment letter issued to him by the 3<sup>rd</sup> defendant in respect to the suit land. The letter dated 17<sup>th</sup> May 2007 addressed to him by the 3<sup>rd</sup> defendant and which he refers to as an allotment letter is simply an approval directing him to develop the suit land within a period of 2 years. His building plans were subsequently approved by the 3<sup>rd</sup> defendant. However, that notwithstanding, if the 3<sup>rd</sup> defendant was minded to repossess the suit land from the plaintiff for whatever reasons, that was an administrative action and the rules of Natural Justice required that it gives the plaintiff an opportunity to be heard before arriving at that decision. This is because, **Article 47(1) and (2) of the Constitution** provide that: -

***47(1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”***

***(2) “If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”***

By the time the 3<sup>rd</sup> defendant was allocating the suit land to the 1<sup>st</sup> defendant and authorizing him to develop it by its letter dated 17<sup>th</sup> May 2007, the plaintiff already had a Certificate of Lease issued to him and his partner some 2 years earlier on 1<sup>st</sup> July 2005 with respect to the same land with the Republic of Kenya as lessor. Since that action adversely affected the plaintiff's right to property as protected by **Article 40 of the Constitution**, the 3<sup>rd</sup> defendant was under an obligation to give the plaintiff an opportunity to be heard before repossessing the suit land and allocating it to the 1<sup>st</sup> defendant as it purported to do. Therefore, other than the fact that the 3<sup>rd</sup> defendant had no powers to alienate land already registered in the names of the plaintiff and allocate it to the 1<sup>st</sup> defendant, even if it had such powers, they ought to have been exercised in the manner prescribed by the law and not arbitrarily. Unfortunately for the 3<sup>rd</sup> defendant, it failed on both fronts and this Court must intervene.

The plaintiff has sought orders to evict the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the suit land. As is now clear, the suit land is the property of the plaintiff who, together with his partner, hold the Certificate of Lease issued to them on 1<sup>st</sup> July 2005. The 1<sup>st</sup> defendant confirms in his defence that he has developed the suit land after it was allocated to him by the 3<sup>rd</sup> defendant. He had no permission from the proprietors of the suit land to carry out any development thereon and neither could the 3<sup>rd</sup> defendant lawfully allocate him the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are therefore essentially trespassers on the suit land. The plaintiff is therefore entitled to the orders to evict them.

The plaintiff also sought an order for general damages although he did not specify for what reasons. However, from the evidence herein, the general damages awardable can only be on account of the trespass by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the suit land. When he was cross – examined by **MR KUNDU**, the 1<sup>st</sup> defendant also confirmed that the 2<sup>nd</sup> defendant has occupied the suit land. This is what he said: -

***“I have put up a shop and rental units on the plot which measures 20 fit by 80 fit. I occupy half of the plot. The other portion is occupied by the 2<sup>nd</sup> defendant.”***

The 2<sup>nd</sup> defendant having opted not to defend the suit, the allegations against him have not been rebutted. Infact, they have been confirmed by his co – defendant. Trespass is actionable per se i.e. without proof of any damage – **KENYA POWER & LIGHTING COMPANY**

In **M'MUKANYA .V. M'MBIJIWE 1984 KLR 761**, the ingredients of the tort of trespass were restated as follows: -

***“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (see THOMSON .V. WARD 1953 2 QB 153).”***

In the circumstances of this case, the plaintiff has demonstrated that by virtue of being the registered proprietor of the suit land, he is entitled to the immediate and exclusive possession thereof. While there is no mathematical formula for assessing the general damages for trespass to land, the Court must apply its discretion in a manner that is fair and reasonable. Some of the factors that the Court will take into account include the location, value and size of the land, the length of time that the trespass has taken and also if there has been any damage to the property. The conduct of the trespasser is also an important consideration. Most importantly however, each case must be considered on its own peculiar circumstances bearing in mind that no two cases can be similar in all respects. In the circumstances of this case, it became clear from the oral testimony of the 1<sup>st</sup> defendant that the suit land is a plot measuring 20 feet by 80 feet. However, the value of the land was not disclosed though it is situated in **NAITIRI TOWNSHIP** within **BUNGOMA COUNTY**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants appear to have occupied it since 2007 after it was allocated to the 1<sup>st</sup> defendant by the 3<sup>rd</sup> defendant. I do not however consider the 1<sup>st</sup> and 2<sup>nd</sup> defendants' conduct to be in any way oppressive or arbitrary. The suit land was allocated to them by the 3<sup>rd</sup> defendant as vacant land, albeit illegally. The 1<sup>st</sup> and 2<sup>nd</sup> defendants do not strike me as persons who set out to grab the suit land knowing very well that it belonged to another person. Indeed, during cross – examination, the 1<sup>st</sup> defendant stated that it was only in 2014 when he discovered that the plaintiff had the lease to the suit land. I would not therefore categorize the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the typical land grabbers whose intentions were to defraud the plaintiff of his property knowing very well that he already had the Certificate of Lease. If anything, it is the 3<sup>rd</sup> defendant who put the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the situation in which they now find themselves. Taking all that into account and bearing in mind that the 1<sup>st</sup> and 2<sup>nd</sup> defendants will, as a result of this Judgment, lose their developments on the suit land, I will award a nominal sum of Kshs. 10,000/= for the trespass.

With regard to costs, the law as provided under **Section 27(1)** of the **Civil Procedure Act** is that they follow the event and are at the discretion of the Court unless for good reasons, the Judge decides otherwise. Such discretion must always be exercised judiciously. Each case must be considered on its own peculiar circumstances. In this case, the 3<sup>rd</sup> defendant against whom this suit was withdrawn on 4<sup>th</sup> December 2019, was the cause of this litigation by alienating land which already belonged to another person. I would have penalized it in costs if it was still a party in these proceedings. In the circumstances of this case, it would be unfair to condemn the 1<sup>st</sup> and 2<sup>nd</sup> defendants to pay costs of the suit when the 3<sup>rd</sup> defendant which precipitated these proceedings has been let off the hook. The interests of justice will best be served by ordering each party to meet their own costs.

Ultimately therefore and having considered all the evidence herein, there shall be Judgment for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the following terms: -

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall vacate the land parcel NO NAITIRI TOWNSHIP/25 within three (3) months of this Judgment.**
- 2. In default of (1) above, the 1<sup>st</sup> and 2<sup>nd</sup> defendants shall be evicted from the said land parcel NO NAITIRI TOWNSHIP/25.**
- 3. The plaintiff is also awarded the sum of Kshs. 10,000/= being damages for trespass upon the land parcel NO NAITIRI TOWNSHIP/25.**
- 4. Each party shall meet their own costs.**

**BOAZ N. OLAO.**

**J U D G E**

**26TH MAY 2021.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

Right of Appeal explained.

**BOAZ N. OLAO.**

**J U D G E**

**26<sup>th</sup> May 2021.**