



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 534 OF 2013

BENSON MUTISO MAKAU.....PLAINTIFF

=VERSUS=

LYDIA WAMBUI KIMEMIA.....1ST DEFENDANT

RAYMOND KABAYA.....2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 8th May, 2013 seeking the following reliefs;

1. A mandatory injunction compelling the defendants to demolish and/or pull down forthwith any construction that they had put up on Plot No. V 2322 which was a portion of all that parcel of land known as L.R No. 105/7984 owned by Embakasi Ranching Company Limited situated in Ruai, Nairobi County (hereinafter referred to as “the suit property”).
2. A permanent injunction restraining the defendants from trespassing on or setting foot on, constructing on, wasting, damaging, alienating, selling, or disposing of or otherwise interfering with the plaintiff’s quiet possession of the suit property.
3. Costs of the suit.

In his plaint dated 7th May, 2013, the plaintiff averred that at all material times, he was the owner of the suit property which he acquired in 2007. The plaintiff averred that in December, 2012 he went to inspect the suit property and found that the 2nd defendant and one, James Macharia who were acting on the instructions of the 1st defendant had demolished a fence that he had put up around the property and had put up another fence around the property. The plaintiff averred that the 1st defendant had since then laid a claim to the suit property although a surveyor from Embakasi Ranching Company Limited had confirmed that the property belonged to the plaintiff. The plaintiff averred that in addition to fencing the suit property, the defendants had also constructed a structure on the property. The plaintiff averred that the actions of the defendants complained of amounted to trespass and malicious damage to property. It was on account of the foregoing that the plaintiff sought the reliefs set out herein earlier.

The defendants entered appearance and filed a defence and counter-claim against the plaintiff on 11th June, 2013. The 1st defendant averred that she was a stranger to Plot No. V 2322 (“the suit property”) claimed by the plaintiff and that she had nothing to do with the same. The 1st defendant denied that she had instructed the 2nd defendant and one, James Macharia to demolish the plaintiff’s fence and to put up another fence around the suit property. The 1st defendant averred that she owned Plot No. P.8972 and Plot No. P. 9439 which she acquired in 1998 from Embakasi Ranching Company Limited. The 1st defendant averred that she took possession of the two parcels of land and put up a fence around the same in 2004. The 1st defendant averred that when she was putting up a fence around the two parcels of land, there was no other fence in existence and as such she could not have demolished the plaintiff’s fence as alleged. The 1st defendant denied further that she had put up a structure on the suit property. The 1st defendant averred that the parcels of land that she was occupying and which she had fenced belonged to her and that she could not trespass on her own land.

In her counter-claim, the 1st defendant averred that the plaintiff with a surveyor from Embakasi Ranching Company Limited, one, Jack Kamau entered into her two parcels of land namely, Plot No. P.8972 and Plot No. P. 9439 without her permission on 1st February, 2013 and purported to carve out a portion thereof which they caused to be allocated to the plaintiff and which the plaintiff had claimed to be Plot No. V 2322 (“the suit property”). The 1st defendant averred that when she complained to Embakasi Ranching Company Limited following the said acts of trespass, the directors of Embakasi Ranching Company Limited disassociated themselves with the said illegal actions by the plaintiff and the said surveyor. The 1st defendant averred that it was the same surveyor from Embakasi Ranching Company Limited who had showed her the location of the two parcels of land in 2003 and again in 2008. The 1st defendant denied that she had trespassed on the suit property which she contended was created from her two parcels of land. The 1st defendant sought judgment against the plaintiff by way of a

counter-claim for:

1. A declaration that the 1st defendant was the legal owner of Plot No. P.8972 and Plot No. P. 9439.
2. A permanent injunction restraining the plaintiff and Jack Kamau and/or their agents from trespassing, interfering with, curving out or altering the boundaries of Plot No. P.8972 and Plot No. P. 9439 owned by the 1st defendant within Embakasi Ranching Company Limited's land at Ruai.
3. Damages for trespass, mental anguish and time wasted.
4. Costs of the suit and the counter-claim together with interest.

The plaintiff filed a reply to the defendants' statement of defence and defence to counter-claim on 19th July, 2013. The plaintiff joined issue with the defendants in their statement of defence save where the same consisted merely of admissions. The plaintiff averred that the parcel of land in dispute was on a map known as Borehole on which it was demarcated as Plot No. V 2322. The plaintiff averred that the parcels of land owned by the 1st defendant namely, P.8972 and P. 9439 were not on the Borehole map and as such were not on the same location as the parcel of land in dispute. The plaintiff averred that his claim was in respect of Plot No. V 2322 owned by him and not Plot No. P.8972 and Plot No. P. 9439 claimed by the 1st defendant. The plaintiff averred that the reliefs sought against him by the 1st defendant in the counter-claim were inconsequential and could not be issued by the court.

At the trial, the plaintiff gave evidence and called one witness while the defendants gave evidence and called two witnesses. The plaintiff told the court that he was the owner of the suit property and that he acquired the property from one, Mary Wambui Muhuri and her husband, Muhuri Muchiri on 5th February, 2007. The plaintiff stated that after he acquired the suit property, he was issued with a non-member certificate of plot ownership No. 013534 by Embakasi Ranching Company Limited in respect of the property on 9th February, 2007. The plaintiff stated that in 2012, he wanted to sell the suit property and upon visiting the property he found out that someone was trying to put up a fence around it. The plaintiff stated that he reported the incident to the police and to Embakasi Ranching Company Limited ("Embakasi Ranching") which confirmed that the property still belonged to him. He stated that he was advised by Embakasi Ranching to fence the property. The plaintiff stated that after putting up a fence around the property, he was informed that one, Macharia was trying to demolish the fence and upon inquiry, he learnt that the said Macharia was acting on behalf of the defendants who claimed to own the suit property. The plaintiff stated that he met with the 1st defendant at the offices of Embakasi Ranching where the 1st defendant was informed that the property in dispute belonged to the plaintiff. The plaintiff stated that the 1st defendant did not accept the decision by Embakasi Ranching and decided to lodge a complaint against him with the police.

The plaintiff stated that when he purchased the suit property, the same was vacant and that development started on the property after the filing on this suit. The plaintiff stated that a demand letter was written to the 1st defendant before this suit was filed. The plaintiff reiterated that he was the owner of the suit property and that the two parcels of land claimed by the 1st defendant were in a different location. He stated that whereas the suit property was in an area known as MAP BOHOLES, the two parcels of land owned by the 1st defendant were in an area known as CAPITAL HILL. He stated that both areas are within Embakasi Ranching land. The plaintiff produced a number of documents as exhibits and urged the court to grant the reliefs sought in the plaint.

The plaintiff's witness was Jack Kamau Wachira (PW2). PW2 told the court that he was a registered surveyor working with Embakasi Ranching. He stated that he had worked with Embakasi Ranching since 2003. He adopted his witness statement dated 19th July, 2013 as part of his evidence in chief. PW2 told the court that according to the records held at Embakasi Ranching, the suit property belonged to the plaintiff who held non-member certificate of plot ownership No. 013534. PW2 told the court that the 1st defendant was known to him and that they had met at the office of Embakasi Ranching. PW2 denied that he had taken the 1st defendant's original documents relating to the two parcels of land that she owned. PW2 also denied that he had conspired with the plaintiff to dispossess the 1st defendant of her parcels of land. PW2 stated that the plaintiff bought the suit property from Godfrey Muchiri who was a member of Embakasi Ranching and was a director of that company as at the time PW2 was giving evidence. He stated that Godfrey Muchiri was the original allottee of the suit property.

In her evidence, the 1st defendant adopted the contents of her replying affidavit sworn on 26th May, 2013 and her witness statement of the same date as part of her evidence in chief. The 1st defendant stated that upon purchasing the two parcels of land, namely, Plot No. P.8972 and Plot No. P. 9439 from Embakasi Ranching, she was issued with two (2) non-member certificates of plot ownership No. 001298 and No. 002336. The 1st defendant stated that the originals of the said certificates got lost in the custody of PW2 who had retained the same when she visited the office of Embakasi Ranching in search of parcel numbers for her two parcels of land. The 1st defendant stated that the originals of the said certificates had endorsements at the back thereof to the effect that she had been allocated and shown the two parcels of land. The 1st defendant stated that she had been shown the two parcels of land by PW2 and his assistants before her non-member certificates of plot ownership got lost. The 1st defendant averred that after being shown the two parcels of land, she put a euphorbia fence around them in 2004, and in 2006 she put up a semi-permanent house on the properties and also dug a pit latrine.

The 1st defendant stated that she also constructed a shed for rearing pigs on the two parcels of land. The 1st defendant stated that the semi-permanent house that she built on the two parcels of land was initially occupied by her husband and subsequently by other people who were taking care of the premises. She stated that when the house was not occupied, a neighbor by the name James Macharia (DW3) used to look after the premises. The 1st defendant told the court that in February, 2013, the 2nd defendant called and informed her that someone had put up a fence within her two parcels of land and inquired whether she had sold the same. The 1st defendant stated that she left her place of work in Mombasa and visited the two parcels of land.

The 1st defendant stated that when she arrived, she found when the fence that had been put up inside her two parcels of land had been removed. She stated that she reported the incident to Embakasi Ranching and subsequently at Embakasi Police Station. The 1st defendant stated that at the police station, she met the plaintiff who had also gone there to make a report on the incident. She stated that when the police failed to resolve the dispute, she instructed an advocate to handle the matter. The 1st defendant stated that when she met the plaintiff, he told her that he was the one who had put up a fence on her two parcels of land and that he had been advised to do so by PW2. The 1st defendant stated that her advocates sent demand letters to the plaintiff and PW2 and that before she took further action on the matter, the plaintiff filed the present suit against her and the 2nd defendant. The 1st defendant produced a number of documents as exhibits in support of her case.

The 2nd defendant gave evidence after the 1st defendant. The 2nd defendant told the court that he did not understand why the plaintiff had sued him since he did not commit any act of trespass on the plaintiff's property. He stated that the 1st defendant was known to him as a neighbor in Ruai. He told the court that he settled in Ruai in 1992 and that the 1st defendant came later and settled in the neighborhood and that she witnessed the 1st defendant fencing her plots on which he used to graze his cattle. He corroborated the evidence of the 1st defendant that before she fenced the plots, there was no other fence around the said parcels of land. He denied that he destroyed the plaintiff's fence. The 2nd defendant stated that the plaintiff was well known to him. He stated that the plaintiff did not have a parcel of land in the area where the 1st defendant's parcels of land are located. He stated that the plaintiff resided about 1 kilometer from the area. The 2nd defendant stated that he came to know of the dispute when he was called by the 1st defendant's workers who told him that there was a person who was claiming that one of the 1st defendant's parcels of land belonged to him. The 2nd defendant stated that he called the 1st defendant and informed her of the claim. He corroborated the evidence of the 1st defendant that after the 1st defendant had fenced the two parcels of land, she constructed thereon a semi-permanent house and a structure for pigs. The 2nd defendant told the court that he also knew Muhuri Muchiri who was said to have sold the suit property to the plaintiff. He stated that the said Muhuri Muchiri was related to one of the original directors of Embakasi Ranching who was also going by the same name. He stated that the said Muhuri Muchiri did not also own land in the area where the land in dispute is situated. He maintained that the land in dispute belonged to the 1st defendant.

The next witness to give evidence for the defendants was James Macharia (DW3). He told the court that the 1st defendant was known to him and that they were neighbours in Ruai. DW3 told the court that he was with the 1st defendant when she was being shown the parcel of land in dispute by Jack Kamau Wachira (PW2) around 2002/2003. He stated that after the 1st defendant had been shown the parcel of land, she engaged him to fence the same with euphorbia. He confirmed that he fenced the two parcels of land that were owned by the 1st defendant. He stated that the 1st defendant thereafter put up a temporary house on the said parcels of land made of iron sheets and also dug a pit latrine. He stated further that the 1st defendant's husband later put up another house for pigs. DW3 stated that there was a time when a site visit was arranged and the 1st defendant was not around and that he went for the site visit on behalf of the 1st defendant who had given him her title documents. He stated that he stood on the 1st defendant's two parcels of land and the surveyor, Jack Kamau (PW2) from Embakasi Ranching, who was accompanied by a director from that company confirmed that the two parcels of land belonged to the 1st defendant. DW3 stated that he was later informed that the plaintiff had come and laid a claim to a portion of the two parcels of land. He stated that the plaintiff resided in the neighbourhood and if indeed he owned the disputed land, he would have raised an objection to the many activities that were undertaken on the property. DW3 stated that the 1st defendant was the owner of the property in dispute.

The next to give evidence was Lawrence Wachira Muthima (DW4). DW4 told the court that he bought land in Ruai in 1990 and started residing in the area in 1998. He stated that he met the 1st defendant at the office of Embakasi Ranching and after talking, they got to know each other. He stated that sometimes in 2008, the 1st defendant called him and asked him to attend a site visit on her behalf. DW4 stated that he together with DW3 and Jack Kamau (PW2) went for a site visit and Jack Kamau (PW2) confirmed that the land in dispute belonged to the 1st defendant. DW4 stated that he paid for the site visit on behalf of the 1st defendant and that the said Jack Kamau (PW2) signed at the back of the receipt for the payment he made for the site visit confirming that the property in dispute belonged to the 1st defendant.

The last witness for the defendants was Ezekiel Makau Mutiso (DW5). DW5 told the court that he was a resident of Ruai where he had resided since 1998 when the residents were few. He stated that as at the time he was giving evidence, he was residing on the disputed land which according to him was owned by the 1st defendant. He stated that he was staying on a structure made of iron sheets and that he had resided in the premises since 2013. He stated that the house where he was staying was constructed earlier and that when the house was being put up, there was a fence of euphorbia plants around the property. DW5 stated that the plaintiff was known to him as he had parcels of land in the neighbourhood. He stated that the plaintiff never came to the property in dispute when the iron sheet house thereon was being put up. He stated that the property in dispute was owned by the 1st defendant.

After the end of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 25th July, 2019 while the defendants filed their submissions on 5th July, 2019. I have considered the evidence tendered by the parties in support of their respective cases and the submissions by the parties' advocates. The parties did not file a statement of agreed issues. From the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Whether the defendants trespassed on the plaintiff's parcel of land known as Plot No. V 2322.
2. Whether the parcel of land known as Plot No. V2322 claimed by the plaintiff and the parcels of land known as Plot No. P. 8972 and Plot No. P. 9439 claimed by the 1st defendant are at the same location on the ground.
3. Whether the plaintiff trespassed on the 1st defendant's parcels of land known as Plot No. P. 8972 and Plot No. P. 9439.
4. Whether the plaintiff is entitled to the reliefs sought in the plaint.

5. Whether the 1st defendant is entitled to the reliefs sought in the counter-claim.

6. Who is liable for the costs of the suit?

The issues flagged out above are intertwined. I will therefore consider all of them together. The plaintiff's case is that he is the owner of all that parcel of land known as Plot No. V2322 which is a portion of L.R No. 105/7984 owned by Embakasi Ranching Company Limited ("Embakasi Ranching"). As stated earlier in this judgment, in his plaint, the plaintiff contended that he acquired Plot No. V2322 (the suit property) in 2007 and that during a routine inspection of the suit property in 2012, he found that the same had been fenced by the defendants who had also damaged a fence that he had put up earlier around the property and had constructed a building thereon without his permission. The plaintiff contended that the defendants' actions aforesaid were illegal and amounted to trespass and malicious damage to property.

On their part, the defendants denied any knowledge of Plot No. V2322 (the suit property) claimed by the plaintiff. The defendants contended that the parcel of land claimed by the plaintiff is a portion of the 1st defendant's two (2) parcels of land known as Plot No. P.8972 and Plot No. P.9439 which she purchased from Embakasi Ranching in 1998. The defendants contended that the 1st defendant took possession of her two plots in 2003 and fenced the same in 2004. The defendants contended that when the 1st defendant took possession of the two parcels of land, the same were not fenced and that she was shown the location and the beacons for the two parcels of land. The defendants contended that the plaintiff's claim was an attempt by the plaintiff in collusion with a surveyor from Embakasi Ranching to deprive the 1st defendant of her two parcels of land which she acquired lawfully. The defendants denied that the 1st defendant had trespassed on Plot No. V2322 and contended that what the 1st defendant was occupying was her two parcels of land in respect of which the plaintiff had no claim.

I have considered the evidence adduced by the parties and their witnesses on the acquisition and possession of Plot No. V 2322, and Plot No. P. 8972 and Plot No. P.9439 owned by the plaintiff and the 1st defendant respectively. I am satisfied from the evidence on record that Plot No. V 2322 claimed by the plaintiff falls within Plot No. P.8972 and Plot No. P.9439 owned by the 1st defendant. The 1st defendant placed overwhelming evidence before the court showing that she acquired and occupied Plot No. P. 8972 and Plot No. 9439 before the plaintiff and his predecessor in title acquired Plot No. V 2322 which is on the same ground and location as the two parcels of land.

The dispute between the parties in my view would have been resolved easily by Embakasi Ranching which sold Plot No. P.8972 and Plot No. P.9439 to the 1st defendant and also issued the plaintiff with a non-member certificate of plot ownership for Plot No. V 2322 which is on the same location as the 1st defendant's parcels of land. It is not clear to me why the plaintiff did not find it necessary to join Embakasi Ranching to this suit as a party or to call its officers as witnesses. I did not find the evidence of PW2 trustworthy. First, PW2 claimed that he was not giving evidence on behalf of Embakasi Ranching although he was an employee of the said company which was the custodian of the records of the properties in dispute. He chose to give oral evidence not backed by any document from Embakasi Ranching while he was in a position to get the necessary documents that would have put weight to his evidence. His failure to place before the court the documents held by Embakasi Ranching on the parcels of land in dispute can only be interpreted to mean that the same would have been contrary to his evidence and against the party on whose behalf he was giving evidence.

Secondly, I observed that PW2 was prejudiced against the 1st defendant and that he was out to support the plaintiff's claim at any cost. I noted from the evidence tendered by the parties that PW2 had dealt with both the plaintiff and the 1st defendant prior to the dispute. PW2 did not mention either in his written witness statement or evidence in chief that he had met the 1st defendant prior to the dispute and that he had gone with her to the parcel of land in dispute and confirmed to the 1st defendant that the same belonged to her. These facts only came out of PW2 during cross-examination. Again, although PW2 did not dispute the fact that the 1st defendant purchased Plot No. P.8972 and Plot No. P.9439 from Embakasi Ranching, he claimed that the 1st defendant was not allocated any land by Embakasi Ranching. PW2 claimed that the land that the 1st defendant had shown him when they went for a site visit was blank in the allocation map and that a decision was to be made by the directors of Embakasi Ranching whether to allocate the land to the 1st defendant or not. PW2 claimed that he was subsequently forced by a former Chairman of Embakasi Ranching to confirm that the parcels of land that the 1st defendant had showed him during the site visit were the plots that had been allocated to her.

PW2 did not tell the court whether the parcels of land that he was "forced" to confirm as belonging to the 1st defendant were the same ones being claimed by the plaintiff as forming part of Plot No. V 2322. PW2 who had the benefit of Embakasi Ranching records did not also tell the court the location of the plots that were sold by Embakasi Ranching to the 1st defendant if the same were not the ones that the 1st defendant had shown him during the site visit. PW2 was however very emphatic that the parcel of land in dispute belonged to the plaintiff. I did not find PW2's evidence credible.

From the totality of the evidence before the court, the case emerging is that of double allocation of land that has become typical of Embakasi Ranching operations. The plaintiff had submitted that if the dispute before the court concerned double allocation of land then his certificate of ownership of the land in dispute should prevail over those held by the 1st defendant. The plaintiff relied on a number of authorities in support of this submission. I would agree with the plaintiff that if he was the first to be allocated the suit property or had acquired the property from the first allottee then his certificate of ownership could prevail against those held by the 1st defendant. In this case however, the evidence before the court shows that 1st defendant was the first to acquire the parcel of land in dispute from Embakasi Ranching. The evidence on record shows that the plaintiff acquired the suit property from Mary Wambui Muhuri on or about 5th February, 2007. Mary Wambui on her part is said to have acquired the suit property from Embakasi Ranching on or about 2nd August, 2002 going by her non-member certificate of plot ownership No. 006714(PExh.4). On the other hand, the 1st defendant acquired her two parcels of land from Embakasi Ranching in 1998 before the plaintiff and his predecessor in title acquired the suit property. In the circumstances, the 1st defendant's proprietary interest in the parcel of land in dispute must prevail against that of the plaintiff being the first in time and due to the fact that the 1st defendant is in possession.

Due to the foregoing, it is my finding that the 1st defendant did not trespass on Plot No. V 2322 claimed by the plaintiff as the said parcel of

land falls within Plot No. P.8972 and Plot No. P.9439 that were allocated to the 1st defendant earlier and in respect of which the 1st defendant was in possession when she was alleged to have committed trespass. It is also my finding that it is the plaintiff who trespassed on Plot No. P. 8972 and Plot No. P.9436 owned by the 1st defendant when he entered the same without the 1st defendant's permission and fenced off a portion thereof on the instructions of PW2. There is overwhelming evidence before the court showing that when the plaintiff purported to fence the suit property, the same was in the possession of the 1st defendant who held valid certificates of ownership issued by Embakasi Ranching in respect thereof. The 1st defendant had a right in the circumstances to be on the property in dispute and the plaintiff had no right to enter into the said property that was part of the 1st defendant's two parcels of land without her permission or a court order. In the absence of either of the two, the plaintiff was a trespasser.

In view of the above findings, I am not satisfied that the plaintiff has proved his case against the defendants. The plaintiff is therefore not entitled to any of the reliefs sought in the plaint. On the other hand, I find the 1st defendant's counter-claim proved. The 1st defendant has proved that she was the owner of Plot No. P. 8972 and Plot No. P.9439 and that the plaintiff entered the two parcels of land without her permission and fenced a portion thereof which he claimed to be Plot No. V2322. The 1st defendant did not however prove that she suffered any loss as a result of the plaintiff's invasion of her property. She told the court that the fence that the plaintiff had erected on her parcels of land had been removed by the time she came to the property on being alerted of the trespass. I would therefore award the 1st defendant only nominal damages in acknowledgment of the fact that an act of trespass was committed by the plaintiff on her land. In conclusion, I hereby enter judgment for the defendants against the plaintiff on the following terms:

1. The plaintiff's suit is dismissed.
2. It is declared that the 1st defendant is the lawful owner of Plot No. P. 8972 and Plot No. P. 9439.
3. A permanent injunction is issued restraining the plaintiff by himself or through his agents from trespassing on, interfering with or altering the current boundaries of Plot No. P. 8972 and Plot No. P. 9439 belonging to the 1st defendant within Embakasi Ranching Company Limited's land in Ruai.
4. I award the 1st defendant Kshs. 20,000/- as general damages for trespass together with interest at court rates from the date hereof until payment in full.
5. The 1st defendant shall have the costs of the suit and the counter-claim while the 2nd defendant shall have only the costs of the suit.

Delivered and Dated at Nairobi this 5th Day of May 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Plaintiff

N/A for the Defendants

C. Nyokabi-Court Assistant