



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 174 OF 2013

AHMED OSMAN BACHANI.....PLAINTIFF

VERSUS

HELLEN NASERIAN MATU.....1ST DEFENDANT

DANIEL MOKAYA ONYANCHA.....2ND DEFENDANT

JOHN NJEGA.....3RD DEFENDANT

MICHAEL MZEE.....4TH DEFENDANT

BENSON MWAURA.....5TH DEFENDANT

TERESIA WAMBUI.....6TH DEFENDANT

GOCHO MATHEGEA.....7TH DEFENDANT

AGNES OGUTU.....8TH DEFENDANT

MERCY WANJIRU.....9TH DEFENDANT

JUDGEMENT

1. This case was instituted by the Plaintiff vide the Originating Summons dated 5/2/2013, seeking a declaration that the Defendants' continued occupation of land reference number 209/12525, Industrial Area, Nairobi ("the Suit Property") is unlawful and constitutes trespass. He seeks an order to evict the Defendants and demolish the structures they put up on the Suit Property; a permanent injunction restraining them or their representatives from interfering with the Suit Property; that the Defendants pay mesne profits equivalent to rent chargeable to be calculated from 2006, and damages for trespass together with the costs of the suit.

2. The suit was supported by the Plaintiff's affidavit sworn on 5/2/2013. He deponed that he is the registered owner of the Suit Property, and annexed a copy of the title over the Suit Property together with an official search dated 1/2/2013. He averred that all his efforts to occupy the Suit Property have been frustrated by the Defendants who are in occupation of the land. He attached photographs demonstrating their occupation of the suit land and averred that the presence of the Defendants on the Suit Property was hindering him from developing the land. Further, that he had been served with an enforcement notice, a copy of which he attached, by the City Council of Nairobi ordering him to remove the Defendants from

the land.

3. The Plaintiff's Originating Summons was opposed by the replying affidavit of the 5th Defendant, Benson Mwaura sworn on 18/6/2013. Mr. Mwaura deponed that the Suit Property lies on a road reserve and that the Defendants have been occupying the Suit Property for over 30 years uninterrupted since 1965, having been licensed by the City Council of Nairobi to carry out various businesses, mainly the running of food kiosks. He attached copies of the business permits and receipts issued to various businesses by the City County of Nairobi.

4. He further deponed that on or about August 2007, a representative of Reeno Hides & Skins, visited the Suit Property and asked the Defendants to relocate elsewhere, which prompted them to lodge a complaint with the City Council of Nairobi. In response, the Town Clerk wrote to the Commissioner of Lands and Director of Surveys seeking clarification on the allocation of the Suit Property while pointing out that it lay on a road reserve and will be required for future development of the area. He attached copies of the letters. He also deponed that the Plaintiff had failed to disclose that there was another suit pending between the same parties, being **Milimani Chief Magistrates Court Case No. 6877 of 2007** over the same plot. He attached copies of the pleadings in the said suit and urged the court to dismiss this suit.

5. The Plaintiff filed a further affidavit dated 5/7/2013 in response to the Defendants' replying affidavit. He deponed that the Defendants' business permits obtained from the City Council of Nairobi did not disclose the premises from which they had been authorised to carry out their businesses. On the issue of the suit pending in the Chief Magistrate's court, he deponed that he filed an application to be joined to the suit but the application was not heard because his advocates advised him that the magistrates courts lacked jurisdiction to hear the matter.

6. The Defendants participated partly in this matter. However, they did not file submissions. The court has considered the Originating Summons, the affidavits filed, the annexures as well as the submissions filed by the Plaintiff. The Plaintiff acquired the Suit Property in September 2008 and it was transferred to his name on 3/4/2009 during the pendency of **Milimani Chief Magistrates Court Case No. 6877 of 2007**, in which the previous owner of the Suit Property had sued the Defendants herein over the Suit Property.

7. Looking at the history of the land, Reeno Hides and Skins Limited was registered as the owner of the Suit Property on 2/8/1995 for a term of 99 years from 1/4/1995. The company charged the land to the Industrial and Commercial Development Corporation on 17/1/1996 to secure repayment of Kshs. 5,000,000/=. It would seem that the loan was not repaid and Industrial and Commercial Development Corporation entered into an agreement with the Plaintiff and transferred the Suit Property to him as chargee on 3/4/2009 in consideration of the sum of Kshs. 6,300,000/=.

8. The Defendants averred that they had been in occupation of the Suit Property for over thirty years running food kiosks. The copies of the business permits issued by the Nairobi City Council show that they were to engage in the activity of tea and cooked food in the semi-permanent informal sector on Workshop Road. This confirms that the City Council only licensed the Defendants to run their food businesses on the road reserve knowing well that if and when the land forming part of the road reserve was required for road construction, the Defendants would be asked to vacate the premises. Had the Plaintiff carried out due diligence before entering into the sale transaction with the Industrial and Commercial Development Corporation, he would have noted the Defendants' businesses operated on the suit land.

9. The letter from the City Council of Nairobi dated 21/8/2007 addressed to the Commissioner of Lands made reference to the excision of a road reserve along Workshops Road. It stated that inspection on the ground and of survey plans F/R no. 86/56 and F/R No. 51/22 had shown that the new allocation of the Suit Property which formed part of the road reserve for Workshops Road, would not leave adequate space for the road to serve the industrial developments around. Further, that Workshops Road, also connected Factory Street and Commercial Street. The letter sought the advice of the Commissioner of Lands on the

allocation of the road reserve which would be required for future development of the area. The letter does not seem to have elicited any response from the Commissioner of Lands.

10. In light of the fact that the Suit Property falls on a road reserve which was not controverted by the Plaintiff, the court declines to grant the orders sought in the Originating Summons dated 5/2/2013. Each party will bear its own costs.

Dated and delivered at Nairobi this 3rd day of July 2019

K.BOR

JUDGE

In the presence of: -

Mr. J. Kabaiku for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants