



**REPUBLIC OF KENYA**

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

**E.L.C CASE NO.154 OF 2017**

**MCCORD KYALO MULWA.....1<sup>ST</sup> PLAINTIFF**

**ROSELINE MUTINDI KATONI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**FESTUS KAVIVYA MATHEKA.....1<sup>ST</sup> DEFENDANT**

**PATRICK MUSYOKI MBEVI..... 2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are husband and wife. Both reside in Nairobi. They have sued the defendants over land parcel number 104 Kalimbini Land Owners Welfare Association (Kalawa) which they claim to have bought from the 1<sup>st</sup> Defendant.

2. By their plaint dated 24<sup>th</sup> April, 2017 and filed in court on 25<sup>th</sup> April, 2017, the two plaintiffs pray for judgement against the defendants jointly and severally for: -

**(a) A declaration that the Plaintiffs are the lawful, bonafide, rightful proprietors of land parcel number 104 KALIMBINI LAND OWNERS WELFARE ASSOCIATION (KALAWA) measuring five (5) acres part of all that property known as L.R Number 1756/5 (Original Number 1756/3/2).**

**(b) A permanent order of injunction restraining the Defendants by themselves, agents and servants or through any person claiming under their right, authority and instructions from entering, interfering, constructing, demolishing, leasing out, carry on any business thereon or committing any act whatsoever of all that property known land parcel number 104 KALIMBINI LAND OWNERS WELFARE ASSOCIATION (KALAWA) measuring five (5) acres part of all that property known as L.R Number 1756/5 (Original Number 1756/3/2).**

**(c) An order that the Defendants do forthwith restore the Plaintiffs fence at their own sole expense to the Plaintiffs standard as was before damage, in the alternative the Defendants be ordered to settle the value thereof of the fence.**

**(d) An Order that the 1<sup>st</sup> Defendant do execute all necessary documents to effect transfer in favour of the plaintiff in respect of all that property known as land parcel number 104 KALIMBINI LAND OWNERS WELFARE ASSOCIATION (KALAWA) measuring five (5) acres part of all that property known as L.R Number 1756/5 (Original Number 1756/3/2).**

**(e) General damages.**

**(f) Costs of this suit with interest.**

**(g) Any other order and/or relief which this Honourable court may deem fit and appropriate in the circumstances to grant.**

3. The Plaintiffs' claim is denied by the Defendants vide their statement of defence dated 28<sup>th</sup> July, 2017 and filed in court on 31<sup>st</sup> July, 2017.

4. Hearing of the Plaintiffs case commenced on the 28<sup>th</sup> January, 2019 in the absence of the defendants. There was an affidavit of service filed by the Plaintiffs on the 28<sup>th</sup> January, 2019 which clearly showed that the defendants were served with the hearing notice on the 22<sup>nd</sup> November, 2018.

5. The two Plaintiffs, Mccord Kyalo Mulwa (1<sup>st</sup> Plaintiff), Roseline Mutindi Katoni (2<sup>nd</sup> Plaintiff) as well as their witness, Patrick Kui (PW1) adopted their respective statements which they recorded on 24<sup>th</sup> April, 2017 and filed in court on 25<sup>th</sup> April, 2017 as their evidence in chief.
6. The 1<sup>st</sup> Plaintiff's evidence was that he had been looking for land to purchase in Sultan Hamud when his cousin, one Cyrus Mutua Ngunyo, introduced him to one Anthony Muindi Mwatu who knew the 1<sup>st</sup> Defendant herein. Mwatu led the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant who had a 5 acre piece of land to sell. On the 09<sup>th</sup> October, 2010, the 1<sup>st</sup> Plaintiff while in the company of one Mwatu and the 1<sup>st</sup> Defendant visited the suitland. The 1<sup>st</sup> Plaintiff took the 2<sup>nd</sup> Plaintiff who is his wife to view the suitland upon which he as well as the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant negotiated the purchase price. The same was agreed at Kshs.750,000/=. The two Plaintiffs paid the 1<sup>st</sup> Defendant Kshs.300,000/= in cash on the 15<sup>th</sup> October, 2010. The balance of the purchase price was to be paid upon the 5 acres that the two Plaintiffs had bought from the 1<sup>st</sup> Defendant was excised from the Defendant's 10 acre farm.
7. The 1<sup>st</sup> Plaintiff hired Patrick Kui (PW1) who is a surveyor to carry out the survey upon which parcel number 104 Kalimbini Land Owners Welfare Association was created. On the 16<sup>th</sup> June, 2011 the 2<sup>nd</sup> Plaintiff withdrew Kshs.450,000/= from Co-operative Bank, Moi Avenue Branch in Nairobi which they paid to the 1<sup>st</sup> Defendant. And on the same date, the two plaintiffs and the 1<sup>st</sup> Defendant executed a sale agreement (P.Exhibit No.1). They also paid Kshs.3,100/= for the survey exercise and were issued with three receipts produced as P.Exhibit Nos.2(a), (b) and (c) respectively.
8. In the same year, the two plaintiffs took possession of the suitland and they commenced to utilize it by building a residential house as well as setting aside one (1) acre for farming. They produced two (2) photographs to show the development on the land as P.Exhibit No.3.
9. That in the year 2013, Patrick Musyoki Mbui, the 2<sup>nd</sup> Defendant herein laid claim to the trees in the land that the two Plaintiffs bought from the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant demanded from the two Plaintiff's Kshs.50,000/= for the trees. Thereafter, the 2<sup>nd</sup> Defendant cut down the trees which he used to burn charcoal. He also demolished the fence made from concrete posts and barbed wire.
10. The 1<sup>st</sup> Plaintiff reported the matter to Sultan Hamud Police Station (See extract of O/B No.9/25/2/2012 P.Exhibit No.4).
11. The 1<sup>st</sup> Plaintiff re-engaged Patrick (PW1) to re-survey the suitland and it was established that the 2<sup>nd</sup> Defendant had encroached onto the Plaintiffs' land.
12. The 2<sup>nd</sup> Plaintiff supported the 1<sup>st</sup> Plaintiff in her evidence in chief. She produced bank statement as P.Exhibit No.6 to support the withdrawal that she made of Kshs.450,000/= from Co-operative Bank, Moi Avenue in Nairobi on the 16<sup>th</sup> June, 2011.
13. Patrick Kui's (PW1) evidence in chief was that in the year 2011, Festus Matheka, the 1<sup>st</sup> Defendant herein, hired him to excise 5 acres from his 10 acre farm. The witness said that he did as instructed by the 1<sup>st</sup> Defendant. That on 28/01/17 upon being instructed by the 1<sup>st</sup> Plaintiff, he went back to the farm where he resurveyed it and planted beacons in the presence of one James Mutua and Mutua Kasoo who are neighbours of the 1<sup>st</sup> Defendant. He added that he had invited the 1<sup>st</sup> Defendant to witness the exercise but the latter declined. The witness produced the report that he prepared as P.exhibit No.9.
14. In his written submissions, the Plaintiffs' Counsel submitted that the Plaintiffs have clearly demonstrated that they are the lawful, bonafide, rightful proprietors of land parcel number 104 Kalimbini Land Owners Welfare Association as evidenced by the sale agreement dated 16<sup>th</sup> June, 2011 (P.Exhibit No.1). That from P.Exhibit No.1, the 1<sup>st</sup> Defendant who was the registered proprietor of land parcel number 104 Kalimbini Land Owners Welfare Association sold 5 acres of all that property known as LR number 1756 (original number 1756/3/2) to the plaintiffs.
15. That the Plaintiffs had shown that the 2<sup>nd</sup> Defendant took it upon himself to deliberately disregard the proprietary interest of the plaintiffs by breaking down their fence. That the 2<sup>nd</sup> Defendant proceeded to fence off the entire land and began making use of it to the exclusion of the plaintiffs. The counsel urged the court to find the defendants 100% liable for the damage on account of trespass severally and jointly.
16. The counsel urged the court to award the plaintiffs general damages as fair, just and reasonable compensation for the damage done to them. The counsel cited the cases of **Gujral Sandeep Singh Ragbir vs. Minister for Public Works, Roads and Transport County Government of Kajiado & another [2018] eKLR** and **Nakuru Industries Ltd vs. S.S Mehta & Sons [2016] eKLR**.
17. In the case of **Gujral (supra)**, the Plaintiff was awarded Kshs.1,000,000/= as general damages for trespass and Kshs.9,000,000/= as exemplary damages. And in the case of **Nakuru Industries (supra)** the Plaintiff was awarded Kshs.500,000/= as general damages for trespass.
18. Arising from the evidence on record, the Counsel urged the court to award the Plaintiffs Kshs.2,000,000/= being general damages and Kshs.4,000,000/= being exemplary damages.
19. From the evidence on record, I am satisfied that the two plaintiffs are the lawful, bonafide, rightful proprietors of land parcel number 104 Kalimbini Land Owners Welfare Association (Kalawa) which they bought from the 1<sup>st</sup> Defendant as evidenced by the sale agreement marked as P.Exhibit No.1. That being the case, the 2<sup>nd</sup> Defendant had no justification to break the fence that the Plaintiffs' had erected on their shamba. As if that was not enough, the 2<sup>nd</sup> Defendant fenced off a portion of the Plaintiffs land and continued to make use of it to the exclusion of the Plaintiffs. The 1<sup>st</sup> Defendant did not take any action to rectify the situation. The action by the two defendants is

outrageous. I have looked at the defence dated 28<sup>th</sup> July, 2017 and filed in court on 31<sup>st</sup> July, 2017. It does not in any way rebut the evidence by the Plaintiffs. However, parties are bound by their pleadings. The plaintiffs have not pleaded for the award of exemplary damages and are therefore not entitled to the same. From the evidence on record, my finding is that the sum of Kshs.200,000/= would suffice as general damages. Being satisfied that the two Plaintiffs have proved that they have a cause of action against the defendants on a balance of probabilities, I hereby proceed to enter judgment against the defendants jointly and severally as hereunder: -

(a)

(b)

(c)

(d)

(e) Kshs.200,000/= being general damages.

(f)

**Signed, dated and delivered at Makeni this 10<sup>th</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Ms. Kyalo holding brief for Mr. Mutiso Makau for the Plaintiff

No appearance for the Defendant

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**10/07/2019.**