



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 614 OF 1998

MATHARE UNITED TRADERS & FARMERS CO. LTD.....PLAINTIFF

VERSUS

WAMBUI MAINA & 22 OTHERS.....DEFENDANTS

JUDGEMENT

1. The Plaintiff is the registered proprietor of L.R. No. 209/11388 (original number 218/4) located in Nairobi. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants were shareholders of the Plaintiff company. The Plaintiff's claim is that the Defendants unlawfully occupied a portion of its land between 1989 and 1990 and erected temporary residential and commercial structures on the land without its consent. Despite notice to vacate the land, the Defendants failed to heed the notice making it impossible for the Plaintiff to subdivide its land and handover the subdivided portions to its members.
2. The Plaintiff seeks an order to evict the Defendant from a portion of its the land known as L.R. No. 209/11388 together with a mandatory injunction to restrain the Defendants from continued occupation on the suit land.
3. The 6th, 15th, 16th, 20th and 21st Defendants filed a joint defence on behalf of members of Huruma Jisaidie Nikusaidie Group in which they denied the Plaintiff's claim. They averred that they are poor small scale roadside traders who have been living on the suit land since 1978. They claimed that they constructed their dwelling structures between 1978 and 1983 when the suit land was vacant. They averred that they have no other place to live as they do not own any other land. They further argued that the suit land is a public utility land. They averred that on several occasions unknown persons had visited the suit property intending to unlawfully grab it but the Defendants successfully repulsed them.
4. The Defendants counterclaimed for a declaration that the suit land was illegally allocated and registered in the Plaintiff's name and sought cancellation of the title documents issued to the Plaintiff. They seek an order of rectification of the register by the Land Registrar to delete the Plaintiff's name and substitute it with that of the Government of Kenya.
5. The suit was heard by Ojwang J. in September 2005 before he was elevated to the Supreme Court. Ojwang J. heard the Plaintiff's case and two of the Defendants' witnesses. The Plaintiff produced copies of its title issued on 1/3/1991. Entry number 2 registered against the title shows that the land was charged to Fackson Wainaina Kagwe on 14/3/1991. A certificate of subdivision authorising subdivision of the plots 1 to 139 was given by the Town Clerk and noted on the register on 14/5/1991. There was a partial discharge in respect of L.R. No 209/11388/143 in July 1991 which was surrendered to the Government on the same date.
6. The subdivision certificate issued by Nairobi City Commission confirmed that the Town Planning Committee at its meeting held on 16/1/1979 recommended the approval of the subdivision of L.R. No. 218/4 into sub-plots 141 to 150 only. In the letter dated 11/6/1985, the Nairobi City Commission notified the Commissioner of Lands that the developers had revised the subdivision scheme of plot 218/4 to add an extra 10 subplots which the Director of City Planning and Architecture had no objection to. The Plaintiff also produced copies of its Memorandum and Articles of Association together with the certificate of incorporation which confirmed that it was incorporated on 26/2/1969.
7. The Plaintiff's Chairman testified that they bought the suit land in 1970. The Plaintiff subdivided the land and each shareholder was given a portion. He testified that the Defendants occupied a portion of the Plaintiff's land in 1990, which would be the portion with plot numbers 141 to 150. He stated that the Defendants were not shareholders of the Plaintiff company and were entitled to these plots. The Plaintiffs complained to the area Chief and the City Council and sought their help to evict the Defendants.
8. The witness stated that no portion of land was returned to the Government as the Defendants claim since the land was meant for residential purposes. Some of the Defendants were employees of the Plaintiff including one of the Defendants called Mbui. According to the

witness, the Plaintiff bought land that ran from the river to the road and the land was vacant when it was bought.

9. The Plaintiff's Secretary gave evidence and produced the list of the members who held shares in the Plaintiff's company and also produced a copy of the Plaintiff's register. He maintained that the Defendants occupied the suit plots between 1989 and 1990. They occupied it forcefully when the Plaintiff tried to stop them. They refused to move out when they were given quit notices. The Defendants chased away the surveyor sent by the Plaintiff to survey the 10 plots.

10. The witness gave the names of the 10 persons who were entitled to allocation of the 10 suit plots. He stated that its whole land measured 9.7 acres and the 10 plots measure $\frac{3}{4}$ acre in total. It was his evidence that the land was vacant when the Plaintiff bought it and that the Defendant moved into it in 1990. At the time he gave his testimony, there were 70 people living on the 10 plots.

11. The Plaintiff's 3rd witness who stated that it was his responsibility to show members the plots that they had been allocated by the Plaintiff also stated that the Defendants went to the land between 1989 and 1990. He confirmed that the total number of plots created from the Plaintiff's land were 168, 10 of which are the subject matter of this suit.

12. The 4th witness denied that the suit land is public land. He stated that the Plaintiff had been paying rates to the City Council and land rent to the Commissioner of Lands every year. It was his evidence that he began seeing the Defendants on the suit land around 1995. Prior to this, the Defendants would go to the suit land and build shanties which would be destroyed. He confirmed that the Defendants occupied $\frac{3}{4}$ acre of the suit land which is the part that does not have beacons.

13. One of the Defendants who owned a bar on the suit land gave evidence for the defence. He stated that they have been on the suit land from 1979 and that the Plaintiff was aware of this fact. He denied that the land on which they live belonged to the Plaintiff. He denied ever receiving a notice to vacate the land. He maintained that he was residing on government land and not the Plaintiff's land.

14. Lawrence Muchene, another resident on the disputed land gave evidence for the defence. He stated that the area Member of Parliament allocated a portion of land to the marginalized population in Huruma/Mathare area in 1978 to enable them carry on business and reside on the land. He stated that in the late 1990's they received letters which were plastered on their premises asking them to vacate the suit plots. He produced photographs showing the location of the suit land and the developments on it.

15. The court notes that the 22nd Defendant who gave evidence did not file any Defence. The Plaintiff submitted that the Defendants did not adduce evidence to show that the suit land on which they reside is public utility land which was allocated to them. The Plaintiff urged that the Defendants failed to prove their counterclaim.

16. The issue for determination is who between the Plaintiff and the Defendants owns the Suit Property. The Plaintiff produced a copy of the certificate of title confirming that it was registered as the proprietor of the suit land on 1/3/1991. The land measures 3.925 ha. The portion occupied by the Defendant measures $\frac{3}{4}$ of an acre. No evidence was led to show that the Defendants occupy public land.

17. The court is persuaded that the Defendants have unlawfully occupied the Plaintiff's land. They did not show that the Plaintiff fraudulently acquired the title over the suit land.

18. The court dismisses the Defendant's counter claim and enters judgment for the Plaintiff in terms of prayers (a) and (b) of the plaint dated 16/3/1997.

19. The Plaintiff will have the costs of this suit and of the counterclaim.

Dated and delivered at Nairobi this 1st day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Makumi holding brief for Mr. Gaturu for the Plaintiff

Ms. Atieno holding brief for Mr. Kamunde for the Defendant

Mr. V. Owuor- Court Assistant