



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 245 OF 2016

**YUDA IMUNYA Alias YUDA K. IMUNYA.....PLAINTIFF**

**VERSUS**

**ATANASIO KIBARA.....DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated 24<sup>th</sup> November 2016, the plaintiff instituted this suit averring that he is the recorded owner in possession of P/No. 5392 measuring about 0.48 acres situated in Karama market within Karama Adjudication Section having bought it from Adrian Baiyenia Kaumbuthu on or about 9/10/1995. That his family took possession and have been utilizing the suit land from hence forth to date, where they have made developments including fencing the land. They have mature coffee trees and they also plant food crops like potatoes, beans and maize. He contends that defendant invaded the land in November 2016, constructed an iron structure and also deposited building materials, prompting the plaintiff to file this suit. The plaintiff seeks the following orders;

a. A permanent Injunction restraining the Defendant, his family members, employees, servants, agents, representatives and/or anybody else acting for, through or on his behalf or at his behest, direction or instructions, from entering into, trespassing onto, taking possession of any portion of and/or whatsoever interfering with the plaintiff's *peaceful, quiet, exclusive, uninterrupted and undisturbed possession, cultivation, development, user and enjoyment of land parcel No. 5392, measuring about 0.48 acres, situated near Karama market within Karama Adjudication Section.*

b. Costs of the suit plus interest at court's rates.

2. The defendant filed his statement of defence dated 20<sup>th</sup> January 2017, which contains a general denial of plaintiff's claim.

3. **PW1, Yuda K. Imunya**, the plaintiff introduced himself as a businessman residing in Nairobi South B. He adopted the statement dated 24/11/2016 as his evidence, where he stated that he is the recorded owner in possession of P/No. 5392 measuring about 0.48 acres situated in Karama market within Karama Adjudication Section having bought it from Adrian Baiyenia Kaumbuthu on or about 9/10/1995. His family took possession and have been utilizing the suit land from henceforth to date making developments on the suit land. That the suit land has never been subjected to any dispute and the defendant who is a member of Karama Adjudication Section Land Committee has never claimed or utilized the suit land.

4. That sometime in November 2016, the defendant purporting to employ his official capacity as a member of Karama committee forcibly stormed into the suit land when the plaintiff was away in Nairobi and being assisted by his agents hurriedly constructed an incomplete small iron sheet and timber house and also deposited some building stones, vowing to forcibly block the plaintiff from accessing or utilizing the land in any way. The defendant has no justiciable or protectable right or interest in the suit land.

5. He also testified that he was not aware of any objection as he has never been served with summons, hence the summons availed by the defendant are a forgery.

6. During his oral evidence in court, plaintiff stated that the defendant has not lodged any counterclaim.

7. On cross examination he stated that he bought the land in 1995 when transfer was effected at the lands office, he does not have the agreement as people used to go to the lands office. He was shown the land by the vendor and thereafter there was consolidation. The land was being utilized by one George Thurairia at the time of purchase who is a brother to the defendant and who sold it to the vendor Andrian Baiyenia who then sold it to the plaintiff.

8. The plaintiff started utilizing the land in 1995. There is coffee on the land though he is not the one who planted it and there are no

structures on the suit land save for what the defendant put up in his absence. He is not aware that the land once belonged to the defendant's father, neither is he aware of any objection raised in regard to the suit land. He has never been served with any summons and the allegation that he was served but he refused to appear is false. His family and himself are the ones on the suit land as they have fenced and cultivated it.

9. Pw1 further stated that there is a house on the suit land but the same was built in defiance to the court injunction order and that the land does not belong to the defendant's father. He averred that defendant is a member of the committee of Karama Adjudication Section.

10. In support of his case, the plaintiff produced the documents in his list dated 24.11.2016 as his evidence. The said documents are;-

- a. A statutory consent dated 8/11/2016.
- b. Letter confirming plaintiff's ownership of the suit land dated 23/11/2016.
- c. Photographs showing various types of developments and the illegal semi-permanent house and stones.
- d. Demand letter.

11. **PW2, George Thurania Kibara**, introduced himself as a step brother of defendant. He adopted his statement dated 10/07/2017 as his evidence. He avers that initially, the suit land was his fathers, Kibara M'Kuchiana who also got the land through inheritance. That his father bequeathed him the suit land during the fragment and gathering period in 1966 and he gathered it in 1966 in the presence of his father who died in 1995. According to his estimation, the defendant would have been 2 years in 1966 and his inheritance from their father was 1.48 acre land in Nchuraine Village within Karama Adjudication Section where he lives and farms with his family and they are actual neighbors with defendant. Pw2 contends that he sold the land to one Baiyenia Kaumbuthu Adrian in 1985, who in turn sold the said land to the plaintiff in 1995.

12. That the lower side of the suit land, the immediate neighbor was Andrew Kailikia who died and his land is folio no. 29 measuring about 0.15 acre and shares a common boundary with the suit land. Facing upwards the suit land borders Pentecostal (Bethsaida) church and on the right side it borders Karama health centre, while on the left, it borders the land of M'Mwitari Kibara. He knows that the plaintiff and his family have been utilizing the land since 1995 and the suit land has never had any dispute or claim from anybody. He is surprised to note that the defendant trespassed onto the plaintiff's land intending to grab it as he is abusing his powers as a land committee member in Karama Adjudication Section and a powerful pastor in a Pentecostal church in Mwera-o-kieni area about 2 km from the suit land.

13. On cross examination, he confirmed that him and defendant share one father, that defendant's mother has never stayed on the suit land as she married their father in 1957 and her house was built there but it was not her land. The coffee on the suit land was planted by their brother, 200 bushes and he sold 53 points in 1985.

14. In re-exam he stated that he did not have any agreement in 1985 and he could not have kept the same as he did not anticipate to be asked for the document, that the defendant's mother had a house there when she got married but she relocated to Nchuraine where they all went as they each had 1.85 acres and each child of the defendant's mother got 1.85 acres and when she died she was buried in Nchuraine. So the 0.53 acres he sold never belonged to defendant's mother and it is not true that the defendant bought land there but uses his position as a member of Karama Adjudication Section and as a pastor to unlawfully claim the suit land.

15. **PW3 Baiyenia Kaumbuthu Andrian** adopted his statement dated 10/07/2017 as his evidence. He has known the plaintiff since childhood. He resides in Karama area within Meru County. He contends that he is the one who sold the suit land to the plaintiff in 1995, having bought it from George Thurania in 1985. His evidence on the positioning of the land is similar to that of pw2. He knows that the plaintiff and his family have been utilizing the land since 1995 and the suit land has never had any dispute or claim from anybody, not even against the person who sold it to him or himself. He is surprised to note that the defendant trespassed onto the plaintiff's land intending to grab it.

16. In cross examination he stated that he only knew the defendant as a pastor but they are not related. He did not know how Kibara subdivided the land as he had bought the land when it had about 100 coffee bushes as the other bushes were destroyed by a road. The land used to be utilized by George Thurania and he did not know how the defendant and his siblings shared the land. He avers that the documents of transfer are available at the lands. He is not aware of any objection.

17. The folio of the suit land was 298 which is the original number that George Thurania gave him. His neighbors were Kibara, Bethsaida on the upper side, Karama health centre and Andrew Kailikia. He contends that the defendant brought up a structure on the upper side where there is a church nearby.

18. In re-examination, he stated that Karama Adjudication Office had the transfer documents from George Thurania to himself, that there was no dispute when he bought the land in 1985 or when he sold it in 1995 and in 10 years there was no problem. The original number was 298 and later when he sold the land to the plaintiff, the latter was given another number 5392. The defendant brought up a house there by force and he has never had land anywhere there and he is a committee member of Karama Adjudication Section which is a very powerful position and he is also a pastor so he uses his position to claim the suit land.

19. **PW4 Leonard Mugwika Tuaruchiu** adopted his statement dated 10/07/2017 as his evidence which is more or less similar to that of pw2 and 3. He added that he knows the parties for a period of over 30 years. He knows that his late brother's land, Andrew Kailikia borders the suit land which belongs to the plaintiff.

20. He remembered that sometime in November 2016 the defendant purporting to employ his official capacity as a member of Karama

committee forcibly stormed into the suit land when the plaintiff was away in Nairobi and being assisted by his agents hurriedly constructed an incomplete small iron sheet and timber house and also deposited some building stones, vowing to forcibly block the plaintiff from accessing or utilizing the land in any way.

**21. DWI Atanasio Kibaara**, the defendant adopted his statement dated 23/5/2017 as his evidence. He avers that he was the registered owner of land parcel 6019 measuring 0.05 acres in Karama Adjudication Section and he also owns the adjoining parcel 5392 measuring about 0.48 acres. He has carried out developments on the suit land.

22. That on or about 24<sup>th</sup> November 2016, the plaintiff through an agent one M'Mwenda fenced off the two portions of land. Thus the defendant lodged an A/R Objection case, and it was only after filing the objection case that the plaintiff was awoken from his slumber. He contends that the person who sold the land to the plaintiff is not even a clan member in the area and has never owned land there. Dw1 further stated that the suit land was gathered by his father who died in 1997 and left it to his mother who in turn left it to him. That as a family, they were born and bred on the said portion of land and have been utilizing the same since time immemorial. The original parcel no. being 1174.

23. Dw1 further states that the issues at hand regard parcel no. 5392 which is at the A/R stage, hence it is only fair that the plaintiff first exhausts the available remedy before rushing to court. He filed the objection case no.572. To this end, he made reference to the summons dated 23/11/2016 between himself and the plaintiff and he did appear as ordered.

24. Dw1 admitted that George Thurairira is his step brother and they both have their own land. He however stated that plaintiff has never entered the said land.

23. On cross examination, he stated that he had no document to show that the suit plot was his, that in his defence he did not indicate that the suit land was his, nor did he lodge a counter claim. He knows that the plaintiff stays and works in Nairobi. He admitted that the summons issued to the plaintiff were not signed but have only a thumb print and he did not use his position in the committee to use that document.

26. In re-exam he stated that he was given the summons and it was not his duty to give the other party the said summons as it is a committee member who ensures that the summons are served. He added that plaintiff has a house at Angiri Primary School.

**27. DW2 Julius Kooru Kabara** adopted his statement dated 23/05/2017 as his evidence. He is a brother of defendant. He contends that defendant is the bonafide owner of the suit land, that they were born and raised on the said parcel of land. He is aware that the defendant had lodged an objection when the plaintiff allegedly wanted to fence off the adjacent portion. He further states that plaintiff has never utilized the suit land, that he is a total stranger in that area as he comes from a different clan (mburi ntune clan) while they come from ng'ombe njeru clan.

28. In his oral evidence in court, Dw2 stated that the houses in the photos availed by the plaintiff were put up by the defendant, while the fence was put up by the plaintiff. The plot in dispute is no. 5392 and is on one side of the road. He has never seen the plaintiff on the suit land and that their father left the said land to the defendant.

29. In cross examination he stated that defendant had documentation showing his ownership of the suit land, though he didn't know if the same had been availed in court.

30. In re-exam, Dw2 stated that his brother had documents of ownership in the AR objection case in 2015 and he was given a number. The plaintiff had never used the land and the coffee on the suit land was planted by their mother. M'Mwitari Kibaara is their elder brother who stays next to the suit land.

**31. DW3 M'Mwitari Kibaara** introduced himself as a neighbour of defendant. He also adopted his statement dated 23/05/2017 as his evidence. He avers that he has lived side by side with defendant since birth given the fact that their forefathers had been the owners of the suit land. He has never seen nor heard the plaintiff, and that it is their clan members who gave a portion of the land for the building of the nearby hospital. The suit land was handed over to the defendant's father who before his death passed it on to his children and it was the defendant's mother who planted the coffee and to date the land is being utilized by the defendant who had built a house thereon.

32. In his testimony in court, Dw3 stated that he saw barbed wire being put up and asked the owner (defendant) if he had sold the land, he can't recall when the barbed wire was put but according to his statement it was in 2016. He has never used the land.

33. On cross examination he stated that the defendant was his brother as they have the same father, and that defendant is also a committee member of the parcels of land in that area. He did not know if the defendant had ownership documents appertaining to the suit land, and he cannot tell if PW2 is the one who sold the land. He also stated that plaintiff was sued at lands, but he doesn't know if he was sued in any criminal or civil case. He doesn't know the coffee number of the mother of the defendant.

34. On re-examination he stated that he only knew there was coffee on the suit land and that there was a case.

35. The plaintiff submitted that he had satisfied the three conditions for grant of permanent injunction as his evidence and his witnesses did prove a prima facie case. It was submitted that the defendant produced no documents to lay claim on the suit land, and that the statement of defence comprises of mere denials without raising any defence. If the plaintiff and his family are forcibly evicted from their land they will lose the land and all their properties thereon which they attach a lot of sentimental value having been in exclusive and continuous possession, cultivation, user and enjoyment of the same since 1995 to date. Such loss cannot be quantified for compensation and they would suffer irreparable loss. He also submitted that the balance of convenience tilts in his favour.

36. The plaintiff further sought refuge in Article 40 (1) (a) & (b) and 2 (a) of the Constitution of Kenya which protects the plaintiff's right to

acquire and own property and prohibits the arbitrary deprivation of property.

37. It was further submitted that DW1, DW2 and DW3 testified to facts not pleaded in the statement of defence and it is trite law that a party is bound by his pleadings and cannot be allowed to depart from it. The defendant did not produce any documents from the lands office to show that the suit land is his and his evidence was choreographed. He pleads that the court do find and hold that he has proven his case and be granted his prayers as prayed.

38. In support of his case, the plaintiff relied on the following cases; **Benedict Karuti Rukwaru & another V Julius Kabilo[2013]eKLR, Meru H.C.C.A No. 27 of 2007 Martha Thirindi M'Ruciaka V Sebastian Murungi M'Rimbeere**, and **Samson Emuru V Ol Suswa Farm Ltd [2006]eKLR**.

39. The defendant submitted that the Land Consolidation Act and the Land Adjudication Act provide for elaborate dispute resolution mechanisms arising during the process of adjudication of rights and interests in land and from the evidence presented by the defendant, it paints a picture that the subject matter herein ought to have been subjected to some dispute resolution mechanisms provided for under the adjudication statutes of which the plaintiff has frowned upon the laid down procedures. Further the plaintiff is not a bonafide purchaser for value as he ought to have done due diligence to establish whether the vendor had acquired the suit property legally and procedurally and thus did not approach the court with clean hands. He prays for the dismissal of the the suit.

40. The defence relied on the following cases; **Geoffrey Muthinja Kabiru & 2 others V Samuel Munga Henry & 1756 others [2015]eKLR, Chemey Investment Ltd V Ag & 2 others [2018]eKLR**, and **Daniel Kipruto Metto V Chase Bank (Kenya) Limited[2018]eKLR**.

### **Determination**

41. I have carefully considered the pleadings, the evidence on record and the submissions of the parties and I do find that the issue for determination is whether the prayer for permanent injunction sought in the plaint should be granted. In determining this question, the court will delve into the issue of ownership of parcel 5392 as well as the matter of jurisdiction.

### **Ownership**

42. Who owns parcel 5392? In paragraph 5 of the plaint, the plaintiff has pleaded that he is the recorded owner of the aforementioned parcel. During the trial, the plaintiff and his witnesses gave a cogent plausible account of how he came to be the owner of the land. He bought the same from pw3 who in turn had bought the suit parcel from pw2, a brother of the defendant. The document produced as P-exhibit 2 is a letter from the Tigania East Sub county Adjudication and settlement officer indicating that the recorded owner of the suit parcel is the plaintiff. Thus far, the evidence of the plaintiff is strongly in his favour.

43. The defendant's pleadings (statement of defence dated 20/01/2017) contains a mere denial of plaintiff's claim. He does not claim or even counterclaim to own the suit parcel. Even during the trial, the defendant had stated that;

**“In my defence, I have not indicated that parcel 5392 is mine, I have stated that I use the land”**

44. In the case of **Samson Emuru V Ol Suswa Farm Ltd [2006]eKLR (supra)** cited by the plaintiff, it was stated that;

**The provisions of order VI rule (3), (4) clearly spell out the formal requirements of matters that must be pleaded. Failure to plead this aspect, the appellant therefore failed to notify the other side and thus took the respondent by surprise. The importance and object for ensuring that the pleadings provide a brief summary of the case of each party is also articulated in the text book by Bullen and Leake and Jacob's 12<sup>th</sup> Edition page 8. As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings.... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. On this issue raised by the appellant which was not pleaded, I am of the view it was an afterthought and an ambush on the part of the respondent”.**

45. The defendant has not denied that he is a committee member of the Karama Adjudication section. Indeed one of his brothers (Dw3) confirmed this piece of information. Thus defendant is aware about adjudication records. He therefore ought to have availed tangible evidence regarding the adjudication records of the suit land. To be precise, he ought to have clarified as to whether, he was the recorded owner of this land.

46. As the matter stands, the evidence of the defence was not supported by the pleadings and further, defendant did not prove ownership of the suit parcel.

47. The provisions of Article 40 of the Constitution guarantees the property rights of every person, where under sub article (3), it is stipulated that:

**“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”.**

48. The plaintiff has sought protection of his right to property before this court as the recorded owner of the suit land and as such, his claim is

well founded.

### Jurisdiction

49. In the submissions of the defendant, it is stated that the dispute ought to have been subjected to the dispute resolution mechanisms available under the adjudication statutes. Defendant also contends that the dispute was already at the A/R Objection stage of which the defendant had filed the case no. 5392. Again the first point of call in determining this issue is the pleadings. The statement of defence at paragraph 9 states that he would raise a preliminary objection at a later stage as he had no locus to be sued. No such preliminary objection was ever lodged. In paragraph 10 of the said statement of defence, the defendant submitted himself to the jurisdiction of the court. He cannot turn around at the submission stage to claim that the matter ought to have been resolved under the adjudication statutes.

50. As regards the claim that the plaintiff filed the suit after defendant had filed the A/R Objection case, I have not found tangible evidence to support this averment. The document which defendant appears to rely on is the summons apparently issued to the plaintiff to attend court on 23.11.2016. The said document is dated 16.11.2016. The consent issued to the plaintiff to file the suit (P-exhibit 1) is dated 8.11.2016 which was valid for 60 days and was to be null and void if the suit was not filed. The suit was filed on 28.11.2016 well within the period stipulated in the consent. The question is who was conducting the purported objection proceedings when the adjudication officer had already given consent to institute the suit.

51. Both Section 8 of the Land Consolidation Act and Section 30 of the Land Adjudication Act do not envisage a situation where parallel proceedings are undertaken before the land adjudication officer and before the courts. That is why in the consent letter, the adjudication officer states that he would require the final order of the court in order to complete the adjudication register. He does not say that he will await the outcome of any objection proceedings. It follows that even if there were any such objection proceedings undertaken in respect of the suit land, they were invalidated by the consent issued to the plaintiff to file suit.

52. All in all, I find that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff against the defendant as prayed in the plaint plus costs and interest at court's rates:

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

Ms. Otieno for defendant

Mwirigi K holding brief for C.P Mbabu for plaintiff

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**