



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 277 OF 2017

KARIUKI MATHU.....PLAINTIFF

-VERSUS-

THE REGISTERED TRUSTEES OF

SHILO TABERNACLE CHURCH 1ST DEFENDANT

PETER MUTHAMA 2ND DEFENDANT

JUDGMENT

1. By his amended plaint dated 05th December, 2019 and filed in court on 10th December, 2019, the Plaintiff prays for judgment against the Defendants jointly and severally for: -

- a) A permanent injunction restraining the Defendants from trespassing on the Plaintiff's parcel of land being LR No. 12080 at Kibwezi.**
- b) The honourable court do issue eviction notice against the Defendants from occupying the suit property which is LR No. 12080.**
- c) Special damages of Kshs. 7,000/= per day until since 1st May, 2016.**
- d) General damages.**
- e) Costs and interests of this suit.**

2. The Plaintiff has averred in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of his plaint that, he is lawful owner of plot L.R No. 12080 located at Kibwezi, that he had leased the said land to Rawji Investment Limited until 2016 when the said lease expired, that the original lessee, one Rawji Investment Company Limited, went ahead and sub-leased the property to the 1st Defendant, that once the lease period was over, the Plaintiff served the original lessee with termination notice where he agreed to leave the suit parcel of land without any hiccups, that the original Lessee then informed the Plaintiff that the sub tenants would leave and that it will make sure that the property was to be left without any tenants, that the original Lessee then moved out of the suit premises leaving behind the Defendants who are strangers to the Plaintiff since there was no contractual obligation or tenancy between themselves, that the Defendants took advantage of the situation and the Defendants have failed, refused and ignored to leave the suit premises thereby denying the Plaintiff quiet possession and that the Defendants have of late been very disturbing and the Plaintiff has been denied access to his lawful property by the Defendants and therefore he will be out of business due to the Defendants trespassing.

3. The Plaintiff's claim is denied by the Defendants vide their statement of defence dated 20th May, 2019 and filed in courts on even date.

4. During the hearing of the Plaintiff's case, the Defendants did not attend court despite having been served on 2nd October, 2020 with a hearing notice as shown in the affidavit of service sworn at Nairobi on 2nd October, 2020.

5. The Plaintiff adopted his statement filed in court on 25th June, 2018 as his evidence in chief. He told the court that the Defendants who are a church and Peter Mutama were illegally sublet a portion of the suit property by Rawji Investment Limited who were his former tenants. In his statement, the Plaintiff stated that he is the registered owner of the suit property known as LR No. 12080 in Kibwezi District of Makueni County. He went on to say that when the lease with Rawji Investment Ltd expired, the latter issued a notice to her sub tenants. He pointed out that despite the notice, the church did not vacate his premises and he was forced to serve it with a similar notice to vacate. He said that instead of vacating, the church carried out development on the premises. It was also his evidence that the continued stay of the

Defendant on the suit premises has a financial implication to him and his tenant since the development carried out by the Defendant is ruining his land.

6. The Plaintiff went on to say that there is a section of his property that can fit 12 to 14 trucks per day which the church has denied him from making use of thus further denying him Kshs. 7,000/= per day. He went on to say that he has a lease agreement with Matrix Enterprises who are his current tenants and who issue receipts for parking of motor vehicles.

7. In support of his evidence, the Plaintiff produced a copy of title deed for the suit property, a copy of gazette notice to show that the suit land was demarcated as private land on 24th July, 1970, a Deed plan, a demand notice by his lawyer to the Defendant upon expiry of the lease, a second letter by his mother to Mr. David K. Mutindi, a letter by Rawji Investment to the Plaintiff's mother, a letter by Kingori Kariuki and Associate Advocates addressed to Kibwezi High Way Garage over illegal occupation of premises, a letter dated 23rd August, 2016 from Kingori Kariuki and Associates & Co. Advocates to the County Commissioner over the issue of illegal occupation of suit premises by Shilo Tabernacle as PEX Nos. 1(a), (b), (c) 2, 3, 4, 5 and 6 respectively.

8. Further the Plaintiff produced the letter dated 13th September, 2016 from Kingori Kariuki and Associates & Co. Advocates to Rawji Investment Ltd to remind the latter that one illegal tenant by the name of Shilo Tabernacle was yet to vacate the premises as PEX No. 7. The Plaintiff went on to produce a court order dated 23rd November, 2017 as PEX No. 8. He also produced 4 receipts for parking issued by Matrix Enterprises as PEX No. 9.

9. The Plaintiff urged the court to enter judgment against the Defendants as per the amended plaint.

10. In his written submissions, the Plaintiff's counsel framed three (3) issues for determination namely: -

- a) ***Whether the Plaintiff is the lawful owner of parcel L.R No. 12080 and if the Defendants have trespassed into his property.***
- b) ***Whether the Plaintiff is entitled to prayers sought in his plaint.***
- c) ***Who should bear the costs.***

11. On whether or not the Plaintiff is the lawful owner of land LR No.12080 and if the Defendants have trespassed into his property, the Plaintiffs' counsel cited Article 40(1) of the constitution which provides for the protection of right to property. The counsel further cited Section 26(1) of the Land Registration Act No. 3 of 2012 which provides as follows: -

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -

- a) ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b) ***Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.***

12. Arising from the above, the counsel submitted that from the evidence and the exhibits produced by the Plaintiff, it is clear that he is the owner of the suit property. The counsel added that from the evidence on record as well as paragraph 5 of the application by the Defendants, it is also clear that the Defendants have trespassed into the suit property.

13. The counsel went on to submit that the defence is simply made of mere denials that they were not in occupation of the Plaintiff's property.

14. It was also the Plaintiff's counsel's submissions that the Plaintiff produced receipts (PEX No.9) from a tenant who has leased the suit property to show that the area occupied by the church is used as a parking where each truck/tractor pays Kshs. 500/= and that the Plaintiff has been losing Kshs. 7,000/= per day since 1st May, 2016.

15. The counsel further cited the case of **Union Insurance Co. Kenya Ltd -Vs- Ramzan Abdul Dhanji Civil Application No. Nbi. 179 of 1998**. However, the counsel did not provide a copy of the authority and as such, I will not take the authority in consideration.

16. On whether the Plaintiff is entitled to the prayers sought in his plaint, the counsel submitted that the Plaintiff has suffered damage as a result of the Defendants' actions. The counsel pointed out that the Plaintiff had engaged the Defendants severally to give vacant possession but they failed to do so. He went on to add that on 23rd November, 2017 the court issued orders which were served upon the Defendants but the latter ignored the said orders. Based on the above, the counsel submitted that the Plaintiff is entitled to the prayers in his plaint.

17. On the issue of costs, the counsel submissions were that the same should be borne by the Defendants.

18. From the evidence on record, I have no doubt in mind that the Plaintiff is indeed the registered owner of all that parcel of land known as LR No. 12080 Kibwezi. His evidence is buttressed by a copy of title, a deed plan and a copy of Kenya Gazette produced as PEXH. Nos 1 (a), (b) and (c) respectively.

19. The evidence on record further shows that the Defendants herein were sub tenants of Rawji Investment.

20. From the Plaintiff's evidence, Rawji Investment Ltd irregularly and unlawfully subleased part of the leased property to Shilo Tabernacle Church. That evidence has not been controverted by the defence filed by the Defendant herein.

21. Upon being served with notice of the intention not to renew the lease by the Plaintiff, Rawji Investment Ltd complied while the Defendants who were the illegal subtenants declined to give vacant possession even after the Plaintiff had served them with appropriate notices. The Defendants therefore are trespassers. Trespass is actionable per se. In the case of **Duncan Nderitu Ndegwa -Vs- KPTC Ltd & Anor [2013] eKLR** P Nyamweya, J held;

"....once a trespass to land is established it is actionable per se, and indeed to proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs. 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property by the 1st and 2nd Defendants' trespass."

22. In my judgment, I am of the view that award of Kshs. 300,000/= would be adequate compensation.

23. As for award of damages for the loss of Kshs. 7,000/= per day, the Plaintiff's evidence was that the receipts that he produced as PEX No. 9 were by Matrix Enterprises who are his current tenants. It is Matrix Enterprises who should be complaining of the loss and not the Plaintiff and as such, I will not award the Plaintiff any damages under this heading.

24. From the sum total of the evidence on record, I am satisfied that on a balance of probabilities, the Plaintiff has a cause of action against the Defendants. As was correctly submitted by the Plaintiff's counsel, the defence filed by the Defendants on 23rd May, 2019 consists of mere denials and which denials are of no consequence in light of the overwhelming evidence by the Plaintiff.

25. Consequently, I hereby proceed to enter judgment for the Plaintiff and against the Defendants as herein under;

a) A permanent injunction restraining the Defendants from trespassing on the Plaintiff's parcel of land being LR No. 12080 at Kibwezi.

b) The honourable court do issue eviction notice against the Defendants from occupying the suit property which is LR No. 12080.

c) Kshs. 300,000/= being general damages.

d) Costs and interests of this suit.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 11TH DAY OF MAY, 2021.

.....

MBOGO C.G.

JUDGE

Court

Assistant:

Mr.

Kwemboi