



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO 161 OF 2016

KENYA EVANGELICAL LUTHERAN CHURCH REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

NGOWA MWERU.....1ST DEFENDANT

MARK EMANUEL GONZI.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff seeking orders to have defendants evicted from land that the plaintiff owns; plaintiff having been allotted the land in a Group Ranch; defendants not filing any defence and not contesting the suit; judgment entered for the plaintiff)

1. This suit was instituted on 16 June 2016 through a plaint that seeks the following prayers:-

- a) A permanent injunction restraining the defendants by themselves or their agents or servants or persons claiming under them from dealing with or trespassing on the plaintiff's parcel of land;*
- b) A permanent injunction compelling the defendants by themselves or their agents, servants to vacate and restore the plaintiff's land to its original state failing which they be evicted from the plaintiff's parcel of land;*
- c) Damages for trespass;*
- d) Costs of this suit;*
- e) Interest on damages and costs from the date of judgement till payment in full;*
- f) Any other relief that this honourable court may deem just to grant.*
- g) Costs and interest of the suit.*

2. The plaintiff is a church organization registered under the Societies Act, Cap 108, Laws of Kenya. In the plaint it has pleaded that on or about 7 October 1982, it applied for a plot of land and was duly allocated the requested plot in Mwereni Group Ranch, on which land it intended to undertake various developments including a church and associated public amenities. It pleaded to have been in occupation and actual possession of the disputed land measuring 9.5 acres within the Group Ranch, and that on it is developed a church building, a water tank, a residential house, toilet buildings, a posho mill, a kiosk and a football pitch.

3. It pleaded that in June 2007, the 2nd defendant started to encroach on the suit property, claiming ownership of an unspecified and unsurveyed portion, on the basis of a purported sale by the 1st defendant to him. The plaintiff wrote to the Ministry of Lands through the District Land Adjudication and Settlement Officer on 18 June 2007 seeking intervention to stop the illegal encroachment and trespass. The office wrote back and asked the Group Ranch Chairman to resolve the issue and further directed the status quo to be maintained.

4. The plaintiff further pleaded that the 1st defendant stopped the encroachment, only for him to resume his activities in January 2014, and the 2nd defendant followed suit by putting up temporary structures on the suit property in defiance of the local authority's directives that they should not carry out any development as they had no right whatsoever. The plaintiff further pleaded that they have requested to be issued with a title to the suit property but it has not been issued yet.

5. Despite being duly served, the defendants did not enter appearance, file defence, nor attend court at the hearing of the suit.

6. The plaintiff called 3 witnesses. PW1, Edward Tinga Mangale, stated that he was the Chairman of Mwereni Group Ranch from 1979 for about 8 years. He was the Chairman in the year 1982. He testified that the plaintiff church had already been allocated land in the group ranch, and was granted more land upon request, in order to undertake additional developments. This eventually led to the church being allocated a total of 9.5 acres including the land the church already held. PW1 stated that the request by the church for more land was made vide a letter dated 29 September 1982. He produced minutes of the meetings where the request was considered. He personally issued the church with a receipt of Kshs 200/=. He stated that a site visit was made before the additional allocation, which was attended by himself, the chief, Mwachiwala Mwero the village elder, and the Location Development officer, among others.

PW1 continued to narrate that the church wanted the land from the road to their initial land which they had developed, and the Secretary, Thomas Chigamba, drew a sketch of the area when they visited the site on 7 October 1982. He testified that the secretary then wrote to the church on the same day, confirming that their request had been approved. The church then paid Kshs. 200/= for the allotment and was issued with a receipt. He confirmed that they have no records of anyone who complained about the allocation at the Annual General Meeting (AGM) where the request was allowed. He testified that there are semi structures within the church's property near the road and some of the 'vibandas' are used to sell traditional liquor. He however doesn't know who made them but most definitely not the church.

7. He acknowledged that he knew the defendants well. He testified that Harobainea Ngoa, the late father to the 1st defendant, was among those who allocated the land to the church and therefore the son (1st defendant) cannot now claim the land together with the 2nd defendant who has never been allocated the land.

8. PW2 was Thomas Chabogo, a former secretary of Mwereni Group Ranch from 1980 to 1989. He testified that during that time the plaintiff brought a request to him asking for more land to enable the church to expand and he directed them to make a formal request. They then wrote the letter dated 29 September 1982. He stated that the committee considered the application for land and they went on a site visit. At the site, he drew a sketch map showing the land allocated to the church. During his tenure, there was no complaint about the allocation. PW-2 further stated that Harobaine Ngoa was among those who took them around during the site visit to mark the land that was being allocated to the church. He is among those who gave out the land for it would have been land to be allocated to their clan. PW-2 explained that the process of allocating land to a church or a dispensary is that the committee approves such allocation and this is then put to the AGM. If approved, the request is forwarded to the lands office for issuance of a title deed.

9. The last witness to testify was Karanu Waweru. He is the legal officer of the plaintiff. He testified that the church records show that in 2007, the 2nd defendant encroached on the church's land. This prompted the church to write a letter dated 18 June 2007 addressed to the District Land Adjudication and Settlement Office. Following the complaint, the 2nd defendant stopped encroaching but resumed activity in 2014. PW-3 produced minutes of a meeting held by Mwereni Group Ranch held on 5 September 2015 where the committee confirmed that the church is the rightful owner of the land.

10. With the above evidence, the plaintiff closed its case and on 8th March 2021 counsel for the plaintiff filed her written submissions.

11. I have considered the pleadings, the evidence, and submissions of counsel. The suit property which measures 9.5 acres is part of the larger 43,466 acres owned by Mwereni Group Ranch as seen in the Certificate of Title for the Parcel No. Kwale/Mwereni/14. The plaintiff had managed a church on the suit property since 1974 and on 29 September 1982, it made a formal application to the ranch for an expansion of the land initially allocated so that the total acreage of its land would be 9.5 acres. This request was approved by the Group Ranch. The plaintiff proceeded to pay for the allocated plot as seen in the receipt dated 7 October 1982. After the allocation, the plaintiff had peaceful and uninterrupted occupation of the suit property, making developments on it which include a church building, residential house for the pastor, a posho mill, a kiosk, toilet, and a football pitch.

12. In 2007, the plaintiff claims that the defendants invaded the suit property and the Church leadership wrote on 18 June 2007 to the District Land Adjudication and Settlement Officer to intervene on the illegality. The Office of the Land Adjudication and Settlement wrote back on 19 June 2007 directing parties to maintain status quo pending the matter's determination. After these, the defendants retreated, only to resume a second invasion in 2014. The plaintiff wrote to several offices including the Directorate of Criminal Investigation LungaLunga, the District Land Adjudication & Settlement Office as well as the Mwereni Group Ranch to report the encroachment and demand for intervention. On 7 September 2015, the Ranch wrote to the Office of Land Adjudication and Settlement clarifying that the ranch granted the church the parcel of land and any person on the land was encroaching on it.

13. It is my view that the plaintiff has proved on a balance of probabilities that it is the allottee of the disputed land.

14. The plaintiff has gone to the extent of developing the suit property, for the benefit of the public, by constructing a water tank, a posho mill, as well as the football pitch. The developments done by the plaintiff are significant and of much value not only to the church but to the community. It is wrong for the defendants to trespass into this land and proceed to make developments in it. This is an affront to the proprietary rights of the plaintiff over the said land. It is even alleged that some of the developments are now being used as illicit liquor dens, which is certainly detrimental to the image of the church.

15. The defendants have not felt bold enough to face the plaintiff in court. They are clearly trespassers with no colour of right. I do not hesitate to issue an order directing them to vacate the disputed land within 30 days of service upon them of this judgment. They should also remove all their structures from the land within this period and restore the land to the state that they found it or else the plaintiff is at liberty to remove them and pass over the costs to the defendants. I am also persuaded to award general damages in the sum of Kshs 500,000 for their acts of trespass. The same will attract interest from the date of this judgment at court rates till payment in full.

16. I now make the following final orders :-

a) The defendants are hereby ordered to vacate the 9.5 acres within Mwereni Ranch allotted to the plaintiff within 30 days of service upon them of this judgment and to also remove their structures from the said land and restore the land to the state that they found it. In default, the plaintiff is at liberty to evict the defendants and remove the said structures and pass over the costs to the defendants.

b) A permanent injunction is hereby issued restraining the defendants whether by themselves, their servants or agents or otherwise howsoever from entering, remaining, being upon, utilizing, trespassing, developing, or in any other way dealing with the portion of 9.5 acres belonging to the plaintiff within Mwereni Group Ranch.

c) The plaintiff is hereby awarded the sum Kshs 500,000/= being general damages for trespass jointly and/or severally against the 1st and 2nd defendants. The said sum to attract interest at court rates from the date of this judgment till payment in full.

d) Costs of the suit is awarded to the plaintiffs to be borne by the defendants jointly and severally.

17. Judgment accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIROMENTAL & LAND COURT OF KENYA

AT MOMBASA