



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC SUIT NO. 149 OF 2018**

**FRANCIS NJUGUNA THUO.....PLAINTIFF**

**VERSUS**

**JULIUS MACHARIA TAKI in his capacity as the member of**

**COUNTY ASSEMBLY WITEITHIE WARD.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 15<sup>th</sup> May 2018, the Plaintiff sought for Judgment against the Defendants jointly and severally seeking for the following orders:-

- a. A Declaration that the Plaintiff is the rightful registered proprietor of all that land parcel known as original land Reference Number L.R No. 14936(with resultant titles known as L.R No. 14936/1-13), all measuring approximately 0.3997 Ha situate within Witeithie ward***
- b. A Declaration that the 1<sup>st</sup> Defendant has unlawfully encroached onto the property of the Plaintiff, which is all that property known as original land reference L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997 Ha situate within Witeithie ward.***
- c. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants be restrained by themselves, their servants, agents employees and/or anyone from encroaching onto or interfering in any manner howsoever with the Plaintiff's quiet user and enjoyment of all that property known as L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997.***
- d. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants be restrained by themselves, their servants, agents, employees and /or anyone claiming ownership through or under them by permanent injunction from making public allegations and/or claims howsoever that all that property known as original L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997 Ha belongs to anyone else besides the Plaintiff***
- e. Damages for trespass***
- f. Punitive or exemplary damages.***
- g. Costs of this suit***
- h. Any other or further relief this honourable Court may deem fit to grant.***

In his statement of Claim, the Plaintiff averred that in 1990, he bought L.R No. 14936, from **Frame Tree Farms Limited**, and the said land was transferred to him in 1992. That he took possession and started developing the said land as he deemed fit. That in 2005, he engaged a Surveyor who carried out subdivision of the suit property and on 23<sup>rd</sup> August 2006, the resultant 13 deed plans being L.R No. 14936/1-13, were duly registered in his name.

Further that he has retained possession and has been in full control of the suit property without any interference until May 2018, when the

1<sup>st</sup> Defendant unjustifiably claimed that the said suit property was public land and started encroaching on the said suit property. That prior to **May 2018**, the 1<sup>st</sup> Defendant publicly alleged that the suit property was meant to be a public utility and engaged his agents/employees to forcefully enter the suit property and removed the beacons that had been rightfully placed. That the Plaintiff's demands to the 1<sup>st</sup> Defendant to stop the trespass were not fruitful.

That on **9<sup>th</sup> May 2018**, the 1<sup>st</sup> Defendant publicly declared that under no circumstances shall the **County Government of Kiambu**, allow the Plaintiff's continued ownership and / or use of the suit land and that the same was declared in his presence and that of the Surveyor. That the Defendants have been legally notified in writing that there is no eviction order against the Plaintiff and no order to the effect that the land is public land. It is the Plaintiff's contention that the suit property is neither located on a public amenity nor set aside for any public use. That it is not specifically mentioned in the **Ndungu's Land Report**, and does not fall under any titles revocation notices.

The Plaintiff further averred that he has suffered loss by way of deprived rights of user and damages. That the 1<sup>st</sup> Defendant's actions as a servant of the **County Government of Kiambu**, have been oppressive, arbitrary and unconstitutional and they are bordering on actual harassment and disregard for the Plaintiff's right to peaceful enjoyment of his property.

The suit is contested and the 2<sup>nd</sup> Defendant filed its statement of Defence dated **5<sup>th</sup> March 2019**, and denied all the allegations made in the Plaintiff. The 2<sup>nd</sup> Defendant denied that the 1<sup>st</sup> Defendant is its servant or agent and that it should be held accountable for his actions. It further denied being issued with a notification in writing over the said parcel of land. It was its contention that the Plaintiff has not proved any interference with his parcel of land by the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant entered appearance vide Notice of Appointment dated **28<sup>th</sup> May 2018**, through the **Law Firm of Kimani Wakimaa & Company Advocates**, but did not file any Defence nor participate in the hearing.

The matter proceeded by way of viva voce evidence, wherein the Plaintiff testified for himself and closed his case. The Defendants did not call any witnesses.

#### **PLAINTIFF'S CASE**

**PW1 Francis Njuguna Thuo** adopted his witness statements as his evidence in Court. He produced his list of documents dated **15<sup>th</sup> May 2018**, as Exhibits 1 to 5 and urged the court to allow his prayers.

That the 1<sup>st</sup> Defendant encroached on his land. That he had reliable information that the Governor had gone to see the plot. Further, that the area MCA engaged his agents and visited his plot and later trespassed on it, That they continued the act of trespass and destroyed his property. That the County Government of Kiambu intended to construct a hospital, though no hospital was constructed. That the area MCA and the **County Government of Kiambu** tried to repossess his property. That the MCA and the Governor are joined at the hip and 1<sup>st</sup> Defendant is the Representative of the County Government.

The Plaintiff and the 2<sup>nd</sup> Defendant filed written submissions which the Court has read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

The Court will first determine whether the 1<sup>st</sup> Defendant is an employee and or servant/agent of the 2<sup>nd</sup> Defendant. **Article 176 of the Constitution makes provisions for County Government and under Article 176(1) it provides;**

***“there shall be a County government for each county, consisting a County Assembly and County Executive.”***

From the above, it is not in doubt that the 1<sup>st</sup> Defendant is not an agent nor an employee of the 2<sup>nd</sup> Defendant as their offices are distinct.

The Plaintiff had sued the 2<sup>nd</sup> Defendant on the basis that the 1<sup>st</sup> Defendant was acting on its behalf. No evidence nor direct allegations were made against the 2<sup>nd</sup> Defendant. Therefore, the Court finds and holds that the suit as against the 2<sup>nd</sup> Defendant is not tenable, having held that the 1<sup>st</sup> Defendant was not its agent.

Though duly served, the 1<sup>st</sup> Defendant only entered appearance but did not file a Defence and the allegations made by the Plaintiff remained uncontroverted. It is not in doubt that the Plaintiff is the registered owner of the suit property as he has produced in evidence, a Grant evidencing the same. **Section 26 of the Land Registration Act** provides that

***“(1) 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, unprocedurally or through a corrupt scheme.”***

The Plaintiff being in possession of the Certificate of title is therefore the **absolute** and **indefeasible** owner of the suit property. No evidence has been produced to show that his title to the suit property has ever been impeached or no evidence has been called to challenge his registration. Therefore, the Plaintiff being the registered owner of the suit property, remains the indefeasible and absolute owner.

The Plaintiff has accused the 1<sup>st</sup> Defendant of interfering with his title. In his list of documents, the Plaintiff has produced, a **Grant**, and demand letter. It was also the Plaintiff's evidence that he was present when the 1<sup>st</sup> Defendant sought to declare his property public land. This evidence has not been controverted. Though there is no recording or corroboration by a third party, the Court is satisfied that the demand letter and moving this Court is enough proof that indeed there was interference with the Plaintiff's quiet possession of the suit property as there is no way he could have moved the Court without justifiable cause, in the absence of any evidence to the contrary. This Court is thus satisfied that the 1<sup>st</sup> Defendant ought to be restrained from interfering in any manner whatsoever with the Plaintiff's quiet possession of the suit property.

The Plaintiff has also sought for damages for trespass. Though the Plaintiff has alleged that there was trespass into his property and that the 1<sup>st</sup> Defendant's through his servants removed beacons, from the suit property, he has not produced any evidence of such trespass. Trespass is the unjustifiable intrusion of someone's land. In this case, the Plaintiff needed to have proved that there was intrusion by providing photographs or any tangible proof of the same which he has failed to do. Therefore, this Court finds that the Plaintiff is not entitled to the prayers sought for damages for trespass.

Consequently the Court finds and holds that the Plaintiff has failed to prove his claim against the 2<sup>nd</sup> Defendant, but has partially proved his claim against the 1<sup>st</sup> Defendant.

Having now carefully read and considered the pleadings, the evidence adduced and the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiff has proved his claim to the required standard of balance of probabilities and his claim vide the Plaint dated **15<sup>th</sup> May 2018** is allowed in the following terms;

*a. A Declaration be and is hereby made that the Plaintiff is the rightful registered proprietor of all that land parcel known as original land Reference Number L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997 Ha situate within Witeithie ward.*

*b. The 1<sup>st</sup> Defendant be and is hereby restrained by himself his servants , agents employees and/or anyone from encroaching onto or interfering in any manner howsoever with the Plaintiff's quiet user and enjoyment of all that property known as L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997.*

*c. The 1<sup>st</sup> Defendants be and is hereby restrained by himself, his servants, agent , employees and /or anyone claiming ownership through or under them by permanent injunction from making public allegations and/or claims howsoever that all that property known as original L.R No. 14936(with resultant titles known as L.R No. 14936/1-13) all measuring approximately 0.3997 Ha belongs to anyone else besides the Plaintiff*

*d. Costs of this suit to be borne by the 1<sup>st</sup> Defendant.*

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT THIKA THIS 29<sup>TH</sup> DAY OF JULY 2021.**

**L. GACHERU**

**JUDGE**

**29/7/2021**

**Court Assistant – Dominic**

### **ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the

parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Waigwa for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**M/s Mbugua for the 2<sup>nd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**29/7/2021**