



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 1486 OF 2013**

**PAUL WAWERU NGIGE..... PLAINTIFF**

**VERSUS**

**PIUS KINOI MAINGI..... DEFENDANT**

**JUDGMENT**

This suit was filed on 5<sup>th</sup> December, 2013 by a plaint dated 3<sup>rd</sup> December 2013. The Plaintiff sought the following reliefs;

- a) General damages.
- b) An order restraining the Defendant by himself, his servants and/or agents from trespassing, building, alienating, transferring, cultivating or otherwise interfering with Land Reference Numbers Mavoko Town Block 10911, 10912 and 10917.
- c) Costs of the suit.
- d) Interest on damages and costs.
- e) Any other relief the court may deem fit to grant.

**The Plaintiff's case:**

In his plaint, the Plaintiff stated as follows: At all material times, the Plaintiff was the registered owner of Land Reference Numbers Mavoko Town Block 3/10911, 10912 and 10917 (hereinafter together referred to only as "the properties"). On diverse dates from 1<sup>st</sup> November, 2013, the Defendant trespassed on the properties by alienating, cultivating and attempting to erect dwelling houses thereon. The said acts of trespass denied the Plaintiff the right of user and enjoyment of the properties and caused him to incur considerable loss and damage.

At the trial, the Plaintiff who testified as PW1 adopted his witness statement as part of his evidence in chief and produced his bundle of documents dated 3<sup>rd</sup> December, 2013 as an exhibit. In his witness statement, the plaintiff reiterated the contents of the plaint. He added that he reported the Defendant's trespass to the police who advised him to file a civil suit.

On cross-examination, the Plaintiff stated that: He acquired one of the properties; Mavoko Town Block 3/ 10917 (hereinafter referred to as "Plot No. 10917") from one, Wilson Maina Mwangi on 14<sup>th</sup> January, 2011 and the other two properties from one, Jackson Karuru on 18<sup>th</sup> February 2011. The properties were all registered in the name of Wilson Kivuvo Mbithi (hereinafter referred to only as "Mr. Kivuvo") at the time of purchase. When he purchased the properties, the Defendant was already in the neighbourhood. The Defendant was occupying parcels of land known as Mavoko Town Block 3/10914, 10915 and 10916 (hereinafter referred to as "the Defendant's properties"). The Defendant was not occupying Plot No. 10917. He was informed by his neighbours that the Defendant had removed his fence. The Defendant was also grazing cattle on the properties. The properties and those owned by the Defendant were all previously owned by Mr. Kivuvo. He bought the properties after the hitherto larger parcel of land owned by Mr. Kivuvo had been subdivided. He did not know whether the Defendant purchased his properties and Plot No. 10917 from Mr. Kivuvo. He was not aware of any dispute between the Defendant and Mr. Kivuvo over Plot No. 10917. When he purchased the properties, there were no cautions lodged against the titles.

On re-examination, he stated that, he was not a party to Machakos HCCC No. 192 of 2012, Pius Kinoi Maingi v. Wilson Kivuvo Mbithi, that the defendant had filed against Mr. Kivuvo.

Following directions given by the court after the close of evidence, the Plaintiff filed his submissions on 23<sup>rd</sup> December, 2019 in which he

argued that he was entitled to the reliefs sought since the Defendant's recourse was limited to recovery of money paid to Mr. Kivuvo. The Plaintiff argued that although the Defendant claimed to have purchased Plot No. 10917 from Mr. Kivuvo, the Defendant did not prove that it was Plot No. 10917 that he purchased. The Plaintiff submitted further that Land Control Board (LCB) consent was not obtained in respect of the transaction between the Defendant and Mr. Kivuvo as required under section 6 of the Land Control Act, Chapter 302, Laws of Kenya which rendered the same void. In support of this submission, the Plaintiff cited Rioki Estate Co. (1970) Ltd v. Kinuthia Njoroge [1977] eKLR and Hiram Ngaithe Githire v. Wanjiku Munge (1979) KLR 50. With regard to the Defendant's claim against Mr. Kivuvo in relation to Plot No. 10917, the Plaintiff submitted that the Defendant should have either joined Mr. Kivuvo to this suit or consolidated this suit with the suit that he had filed in Machakos against Mr. Kivuvo.

#### The Defendant's case:

The Defendant filed a statement of a defence dated 20<sup>th</sup> February, 2014 on 14<sup>th</sup> March 2014. The Defendant denied the Plaintiff's claim in its entirety and stated further as follows: He had no interest or claim over Land Parcel numbers Mavoko Town Block 3/10911 and 10912 and had not trespassed on the same. He purchased Plot No. 10917 from Mr. Kivuvo in 2005. Mr. Kivuvo was the owner of then larger parcel of land known as Mavoko Town Block 3/2087 (hereinafter referred to as "the original parcel"). Upon payment of the full purchase price for Plot No. 10917 on 17<sup>th</sup> March, 2006, he was put in possession by Mr. Kivuvo. He realized later that Mr. Kivuvo had secretly sold Plot No. 10917 to other persons. He lodged a caution against the title of Plot No. 10917 among others and also commenced proceedings in the High Court at Machakos against Mr. Kivuvo in, Machakos HCCC No. 192 of 2012, Pius Koini Maingi v. Wilson Kivuvo Mbithi.

At the trial, the Defendant gave evidence and called two witnesses. The Defendant who testified as DW1 adopted his witness statement as part of his evidence in chief and produced the documents in his list of documents dated 20<sup>th</sup> February, 2014 as exhibits. In his oral testimony in court, the Defendant stated as follows: The Plaintiff wanted to evict him from Plot No. 10917 which he bought from Mr. Kivuvo in 2005. He initially bought land measuring 4 acres from Mr. Kivuvo for Kshs. 120,000/-. He thereafter purchased additional land measuring 2 acres for Kshs. 60,000/-. He fenced the land that he purchased from Mr. Kivuvo with sisal plants and put up his residence thereon.

In 2008, he learnt that Mr. Kivuvo had acquired a title for the original parcel. In 2011, he again learnt that Mr. Kivuvo had subdivided the said parcel of land. He reported these developments to the area chief who ordered that he should be given land measuring 6 acres that he had purchased. He later learnt that he had lost 2 acres which had been given to the Plaintiff. He was also yet to be issued with a title for the remaining 4 acres. He filed a suit against Mr. Kivuvo in the High Court at Machakos (HCCC No. 192 of 2012) which was still pending hearing. He was still in occupation of the land measuring 6 acres. He asked the Court to dismiss the plaintiff's suit which in any event should have been filed in Machakos.

On cross-examination, the Defendant stated that: When he bought land from Mr. Kivuvo, Mr. Kivuvo had no title to the original parcel. He only had an allotment letter. When Mr. Kivuvo acquired a title for the original parcel that measured 40 acres, he did not disclose the same to him. They did not obtain LCB consent for the sale transaction that he had with Mr. Kivuvo because Mr. Kivuvo went into hiding. He stated that he did not seek to consolidate Machakos High Court suit with this suit because Plot No. 10917 is within the jurisdiction of ELC Machakos.

The Defendant's first witness was George Ndambuki Makosi (DW2). DW2 adopted his witness statement as part of his evidence in chief. He stated further as follows: He knew the Defendant as they were neighbours on Mavoko Town Block 3/2087 (the original parcel). He was present on 8<sup>th</sup> July, 2005 when Mr. Kivuvo demarcated the 4 acre parcel of land that Mr. Kivuvo had sold to the Defendant. The demarcation was done with sisal plants. The Defendant thereafter settled on the property. On cross-examination he stated that the Defendant purchased additional land measuring 2 acres from Mr. Kivuvo in 2006.

The Defendant's last witness was Timothy Kilole Maingi (DW3). DW3 adopted his witness statement as part of his evidence in chief and stated further as follows: He was the son of the Defendant. He was present when Mr. Kivuvo sold land measuring 4 acres to his father on 28<sup>th</sup> June, 2005. He was also present on 8<sup>th</sup> July, 2005 when the land was demarcated. The Defendant bought additional land measuring 2 acres and that they had occupied the land purchased by the Defendant since then. After about three years, someone came and put up a fence on a portion of the Defendant's land thereby taking part of their land.

The Defendant filed his submissions on 12<sup>th</sup> October, 2020. The Defendant submitted that he had not committed any act of trespass as there was a surveyed road between his land and Mavoko Town Block 3/10911 and 3/10912 owned by the plaintiff. He submitted that that he could not have trespassed on Plot No. 10917 since he was the rightful owner of the said property that he had occupied since 2006. Relying on Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR and Section 107 (1) of the Evidence Act, Chapter 80 Laws of Kenya, the Defendant argued that the Plaintiff had failed to prove trespass and as such the Plaintiff's claim for damages was invalid.

The Defendant submitted further that it was the Plaintiff who encroached on the Defendant's property by up to 2 acres in the process denying the Defendant the use and enjoyment of the land and causing him considerable loss. The Defendant submitted further that the registration of the Plaintiff as the proprietor of Plot No. 10917 was illegal and unlawful. The Defendant contended that neither the Plaintiff nor Mr. Kivuvo carried out any survey or demarcation of Plot No. 10917 since the same was in the occupation of the Defendant.

In conclusion the Defendant submitted that the agreements of sale between him and Mr. Kivuvo were valid and enforceable as they met the requirements of section 3 (3) of the Law of Contracts Act. The Defendant submitted that he paid the full purchase price and as such met his obligation under the contract while Mr. Kivuvo did not. The Defendant submitted that He was a bona fide purchaser of Plot No. 10917 although Mr. Kivuvo failed to transfer the property to him.

#### Issues for determination.

The parties did not agree on the issues for determination by the court. From the pleadings the following in my view are the issues arising for determination in this suit;

1. Whether the Defendant trespassed on the Plaintiff's properties.
2. Whether the Plaintiff is entitled to the reliefs sought.
3. Who is liable for the costs of the suit?

Whether the Defendant trespassed on the Plaintiff's properties.

Section 3 of the Trespass Act provides as follows:

**(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.**

**(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.**

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.

To establish trespass, the Plaintiff had to prove that he was either lawfully in possession of the properties or was the owner thereof and that the Defendant entered and occupied the properties without any justifiable cause. The Plaintiff has produced title deeds and official searches in support of his ownership claim over of the properties. The Defendant has denied trespass on Mavoko Town Block 3/10911 and Mavoko Town Block 3/10912 alleging that he has no interest whatsoever in the said properties. The Plaintiff did not lead sufficient evidence in proof of the Defendant's alleged occupation and use of the two parcels of land. I am of the view that the dispute between the parties is over the ownership of Mavoko Town Block 3/10917(Plot No. 10917) in respect of which the plaintiff holds a title while the Defendant is in possession.

The Defendant contended that he was justifiably occupying Plot No. 10917 and as such he was not a trespasser thereon. The Plaintiff having proved that he is the registered owner of Plot No. 10917, the burden shifted to the Defendant to demonstrate that he has justifiable cause for occupying the property. The Defendant tendered evidence to the effect Plot No. 10917 was part of the 6-acre parcel of land that he acquired from Mr. Kivuvo between 2005 and 2006. I am satisfied from the evidence tendered in court by the Defendant that he indeed purchased from Mr. Kivuvo land measuring 6 acres; 4 acres on 28<sup>th</sup> June, 2005 and 2 acres on 17<sup>th</sup> March, 2006. In his evidence on cross-examination, the Plaintiff stated that although he purchased Plot No. 10917 from Wilson Maina Mwangi, the property was registered in the name of Mr. Kivuvo as at the time he purchased the same. Plot No. 10917 was registered in the name of the Plaintiff on 19<sup>th</sup> April, 2011. The Defendant contended that Plot No. 10917 was part of the land that was sold to him by Mr. Kivuvo. The Defendant contended that he has been in occupation of Plot No. 10917 from 2005 and that he has put up his residence on the property. The Defendant contended that when Plot No. 10917 was sold to the Plaintiff, he was in possession thereof. The Defendant contended that he filed a suit at the High Court in Machakos for specific performance of the agreements of sale that he entered into with Mr. Kivuvo and that that suit was pending hearing.

I am persuaded from the evidence on record that when the Plaintiff acquired Plot No. 10917, the Defendant was in occupation of the same. I am also persuaded that although the Defendant had no title to the land, he had a right to be on the land. The Defendant had purchased the property from Mr. Kivuvo who owned the same and paid the full purchase price. The Defendant had taken possession of the property awaiting the processing of a title in his favour. Plot No. 10917 was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 30 of the Registered Act provided as follows:

**30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -**

- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;**
- (b) natural rights of light, air, water and support;**
- (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;**
- (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;**
- (e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;**
- (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;**
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;**

**(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:**

**Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.**

Under Section 30(g) of the Registered Land Act reproduced above, the Defendant's possession of Plot No. 10917 was an overriding interest on the title thereof and the Plaintiff had an obligation to make inquiries of the Defendant's interest in the property before purchasing the same. The Plaintiff did not tender any evidence showing that he inquired from the Defendant who was in possession of the interest that he had on Plot No. 10917. Since the Plaintiff did not make such inquiry, he purchased Plot No. 10917 subject to the Defendant's interest in the property. Since the Defendant has an interest in the said property recognised in law and to which the Plaintiff's interest is subject, the Defendant cannot be said to be a trespasser on the property. The Defendant has demonstrated that he is in possession of Plot No. 10917 pursuant to lawful agreements of sale that he entered into with the previous owner of the property, Mr. Kivuvo, that the Plaintiff purchased the property and acquired a title in respect thereof while the Defendant was in possession and that the Defendant has filed a suit for specific performance of the said agreements. I am of the view that until the court declares in the pending suit that the Defendant is not entitled to specific performance of the agreements that he entered into with Mr. Kivuvo, the Defendant has a right to remain in possession of the suit property.

Due to the foregoing, it is my finding that the Defendant is not a trespasser on the suit property.

Whether the Plaintiff is entitled to the reliefs sought in the plaint:

The Plaintiff's claim was based on trespass. The Plaintiff has failed to prove that the Defendant has trespassed on Land Reference Mavoko Town Block 3/10911, 10912 and 10917(the properties). In the circumstances, the Plaintiff has failed to prove his case. The Plaintiff is therefore not entitled to the reliefs sought in the plaint.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. In this case, the plaintiff has failed in his claim against the Defendant. The Plaintiff shall bear the costs of the suit.

Conclusion:

In conclusion, I hereby dismiss the Plaintiff's suit with costs to the Defendant.

**Delivered and Dated at Nairobi this 29<sup>th</sup> day of September 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Thuo for the Plaintiff

Mr. Makau for the Defendant

Mr. E.Waweru-Court Assistant