



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 27 OF 1999

ISAAC WAMBUA NZYOKA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST DEFENDANT

JOSEPH M. KAKULA.....2ND DEFENDANT

JUDGMENT

Introduction

1. The suit was instituted before this Court vide a Plaint dated 15th January, 1999 and filed on the same date. The Amended Plaint dated 30th January, 2018 was filed on the same day.
2. In the Amended Plaint, the Plaintiff averred that at all material times, he was the registered owner of Plot number 111 in Kangundo Town; that the defunct Kangundo Town Council used to exercise jurisdiction over all the plots within Kangundo Town and that on or about 21st December, 1998, the Kangundo Town Council wrongfully purported to allocate to the 2nd Defendant Plot number 303 within the Township and pointed to the 2nd Defendant Plot number 111 on the ground.
3. In the Amended Plaint, the Plaintiff has sought for the following orders:
 - a) A permanent injunction to restrain the 1st Defendant from maintaining the said unlawful allocation to the 2nd Defendant and the 2nd Defendant from entering the suit premises and carrying out construction works thereon or in any other manner from interfering with the Plaintiff's plot number 111 at Kangundo Town.*
 - b) General damages.*
 - c) The costs of the suit and interest.*
 - d) Any other relief that this Honourable Court may deem fit and necessary to grant.*

I. The Plaintiff's Case

4. On 7th February, 2019, the Plaintiff testified as PW1. He adopted his witness statement as his evidence in chief. PW1 informed the court that he owns land known as Plot No. 111 situated within Kangundo town; that he has a letter of allotment to this effect and that he has been paying all the statutory dues to the Kangundo Town Council up to the year 1998.
5. It's the Plaintiff's case that sometimes on or about the 21st December, 1998, the 2nd Defendant was allocated Plot No. 303 by the 1st Defendant; that the 1st Defendant pointed out to the 2nd Defendant the Plaintiff's Plot No. 111; that Plot No. 303 which was pointed out on the ground by the defunct Kangundo Town Council, now the County Government of Machakos, to the 2nd Defendant was Plot No. 111 and that the 2nd Defendant subsequently started to develop it.
6. According to PW1, the Defendants have deprived him of ownership and possession of Plot number 111; that the 2nd Defendant is a trespasser to his land and that the 2nd Defendant proceeded to dig a foundation and was in the process of erecting a building on the land.
7. It was his testimony that when Kangundo Town Council declined to approve his building plans, they proceeded to allocate the same land

to the 2nd Defendant. The Plaintiff stated that they litigated with the 2nd Defendant over the same land and a determination was made by Porter J. on 29th October, 1982 and that he received a demand letter from the 2nd Defendant after 16 years had lapsed from the date of the delivery of the Judgement by Porter J.

8. PW1 informed the court that the register of Kangundo Town Council does not have plot number 303; that he owns plots numbers 110 and 111 and that he purchased the two plots many years ago. In cross-examination, PW1 stated that he purchased plots numbers 110 and 111 on 29th November, 1954 as a block measuring 60 feet by 100 feet which he sub- divided into two; that in the year 2012, the 1st Defendant refused to give him approvals to develop the suit property and that the 2nd Defendant was taken to his plot without involving him.

9. According to the Plaintiff, he was not aware of the visit that the Defendants made to the suit property on 18th January, 1999; that he only found out later that his land had been converted from plot number 111 to 303 and that the report of 19th January, 1999 was not brought to his attention at all.

10. Asked about Machakos PMCC No. 62 of 1992, PW1 stated that he was not aware about the suit; that in the Judgment of Porter J, the court decreed that the Council had a right to the suit property and that the Judge did not make a finding that the 2nd Defendant had trespassed on the suit property; that it's not true that his plot was 40 feet by 100 feet as stated in RMCC No. 101 of 1977 and that the plot he bought measured 60 feet by 100 feet.

11. It was the evidence of the Plaintiff that after sub dividing his land, plot number 111 measured 20 feet by 100 feet while plot number 110 measured 40 feet by 100 feet; that the 2nd Defendant has since developed the suit property by putting up a storeyed building and that the father of DW2 in RMCC 101 of 1977 is the one who sold to him the suit property. The Plaintiff produced a bundle of documents which I would refer to later.

The Defendants' case:

12. The 1st Defendant vide its Defence filed in Court on 8th February, 1990 averred that on 12th June, 1998, the 2nd Defendant applied to be registered the proprietor of a vacant parcel of land in Kangundo Town; that on receipt of its surveyor's report, it approved the 2nd Defendant's Application on 7th October, 1998 and that the plot that was allocated to the 2nd Defendant was given plot number 303.

13. The 1st Defendant denied in its statement of Defence of pointing out plot number 111 to the 2nd Defendant; that plot number 111 in Kangundo Town has always been registered in the 2nd Defendant's name; that upon receipt of a complaint from the Plaintiff, the 1st Defendant's representatives visited the *locus quo* and ascertained that the Plaintiff's plot numbers 111 and 110 were intact.

14. In his statement of Defence, the 2nd Defendant averred that he is the owner of plot number 303 which is situated in Kangundo Township; that the said plot neighbours plot numbers 111 and 110 which belong to the Plaintiff and that he has developed his plot. According to the Defence filed by the 2nd Defendant, he bought his plot in the year 1975 from Simon Wambua Kivutha and has developed it.

15. The 2nd Defendant averred in the Defence that due to the previous litigation between himself and the Plaintiff in PMCC No. 101 of 1977; HCCA No. 254 of 1980 and PMCC No. 652 of 1992, he was not able to get the number for his plot and that he was given the plot number 303 upon finalization of the said cases.

16. In his evidence, the 2nd Defendant, DW1, reinstated what is contained in the Defence which I have summarized above. It was the evidence of DW1 that the land he purchased in 1975 from Mr. Kivutha measured 20 feet by 100 feet; that the Plaintiff has been engaging him in several court cases since he bought the said plot and that PMCC NO. 101 of 1977 was dismissed.

17. According to DW1, after PMCC No. 101 of 1977 was dismissed, the Plaintiff filed an appeal in the High Court being HCCA No. 254 of 1980; that the court allowed the Appeal but held that the Plaintiff would not be awarded damages for trespass because there was no evidence of the said trespass and that when he filed PMCC No. 652 of 1992, the same was dismissed.

18. The 2nd Defendant denied the allegation of fraud and bad faith in the allocation of plot number 303. DW1 denied that he had invaded the plot belonging to the Plaintiff. In cross examination, the 2nd Defendant emphatically stated that he had never claimed ownership of Plot No. 110 or 111 or any plot belonging to the Plaintiff; that the two (2) plots for the Plaintiff are fully developed and that currently Plot No. 303 which was registered in his names was fully developed with two (2) storeyed commercial buildings whose development plan had been approved by the 1st Defendant and other relevant offices. DW1 stated that he had been paying the requisite statutory dues.

II. The Submissions:

19. The Plaintiff's advocate submitted that the Plaintiff produced a copy of the 1st Defendant's abstract of the Land Registrar which showed that the Plaintiff was the owner of Plot No. 111 and that the High Court in HCCC Appeal No. 254 of 1980 found that that there had been no room upon which the 2nd Defendant could be allocated a plot.

20. The Plaintiff's advocated submitted that Plot No. 111 which was allocated to the Plaintiff herein initially was the same as Plot No. 303 which was fraudulently created by the 1st Defendant into the Plaintiff's remaining portion of land and allocated it to the 2nd Defendant; that the Plaintiff was entitled to the injunction orders sought against the Defendants because the Plaintiff had proved that he was the legal and registered owner of Plot No. 111 and that the said plot was the same as Plot No. 303.

21. The 1st Defendant did not file submissions. The 2nd Defendant's advocate submitted that it was not true that Plot No. 111 was the same as Plot No. 303; that the Plaintiff's evidence was to the effect that he was the owner of Plot No. 60 at Kangundo which measured 40 by 100ft which was divided into two plots namely 110 and 111 each measuring 20ft by 100ft and that this evidence was repeated by the Plaintiff in PMCC No. 652 of 1992. It was submitted that the Plaintiff had not placed before the court any evidence to show that Plot No. 111 and Plot No. 303 were the same.

Analysis and determination

22. I have carefully considered the Plaintiff's Complaint, the Defendants' Defences, the adduced oral and documentary evidence, the submissions tendered as well as the authorities referred to herein by the parties. The issues that arise for determination are as follows:

- a) *Whether Plot Nos. 111 and 303 are one and the same.*
- b) *Whether the Plaintiff is entitled to an order of Permanent Injunction.*
- c) *Who will bear the costs of the suit?*

23. It is not in dispute that all that parcel of land known as Plot Nos. 110 and 111 Kangundo Township were acquired and registered in the name of the Plaintiff. According to the Plaintiff, he purchased a parcel of land number 60 in 1954 whereafter he sub-divided it into two portions known as Plot number 110 and 111.

24. PW1 informed the court that Plot No. 60 measured 60ft by 100ft. The extent of the land that the Plaintiff purchased in 1954 is not supported by any document. However, it is the Plaintiff's case that after sub dividing Plot number 60 into Plots numbers 110 and 111, the 1st Defendant showed and allocated to the 2nd Defendant plot number 111, and went ahead to allocate the said plot a different number being Plot number 303.

25. On his part the 2nd Defendant informed the court that he owns plot number 303 which he purchased on 10th March, 1975 from one Simon Wambua Kithuva (*deceased*); that Plot No. 303 measures 20ft by 100ft and that after the said purchase, the Plaintiff engaged him in numerous litigation. According to the 2nd Defendant, it took a while to get the registration of his plot in his name due to the protracted litigation that commenced in 1977 to 1998 at the behest of the Plaintiff.

26. From the Pleadings and the tendered documents, it is quite evident that the suit property has been marred with prolonged and protracted litigation emanating from the Resident Magistrate's Court No. 101 of 1977 up to HCCA No. 254 of 1980.

27. The proceedings in RMCC No. 101 of 1977 shows that the Plaintiff herein sued the 2nd Defendant. In the said matter, the Plaintiff informed the court that on 30th June, 1975, he found the 2nd Defendant building on his plot number 60 which he purchased in 1954; that the plot measured 40 by 100 feet and that he demolished the construction that was coming up. It was the testimony of the Plaintiff that he had sub divided the plots into two, namely plot numbers 110 and 111.

28. After hearing RMCC No. 101 Of 1977, the trial Magistrate dismissed the Plaintiff's claim by holding as follows:

"For those reasons the plot in dispute is the property of Joseph Munyao Kakula. The Plaintiff's suit is therefore dismissed. The Defendant is awarded costs."

29. The Plaintiff filed an Appeal against the said decision in Nairobi HCA No. 254 of 1990. In his decision dated 29th October, 1982, Porter J. held as follows: -

"The Plaintiff said that he had bought his plot a 40 by 100 feet plot from one Isaya Kithuba in 1954. The Defendant said that he bought a plot 20 by 100 feet from the son of Isaya in March 1975...There was no evidence given of the title of Isaya's son to land at the market. There was therefore very little evidence that the defendant respondent had any title to that space next to the plaintiff, particularly as the defendant did not buy until more than 20 years after the establishment of the market...On the face of it therefore the respondent has no right to a plot and the appellant's claim should have succeeded."

30. In the holding, Porter J found that the 2nd Defendant had not trespassed on the Plaintiff's plot as follows:

"No damages can arise from trespass as there is no evidence upon whose plot the Respondent entered - Harrison Thiaka or the appellant and the council all have a right to some part of that land...Injunction to issue restraining the Defendant from entering or in any other manner interfering with the Plaintiff's plot number 60 at Kithimani market."

31. From the analyzed pleadings, it follows that indeed there has been litigation between the Plaintiff and the Defendant over a piece of land known as plot number 60 measuring "40 feet by 100 feet" which was sub divided into two plots being plot numbers 110 and 111.

32. The next issue to determine is whether plot number 111 is the same as plot number 303. Although the Plaintiff's claim in Machakos RMCC No. 101 of 1977 and Nairobi HCA 245 of 1980 was that he purchased Plot number 60 measuring 40 feet by 100 feet, which he subsequently sub- divided into plot numbers 110 and 111, his story changed when he testified in this court that plot number 60 measured "60 feet by 100 feet".

33. Indeed, in her evidence in another suit that the Plaintiff filed against the 2nd Defendant being Machakos PMCC No. 652 of 1992, a Miss Nzioka informed the trial court that she sold to the 2nd Defendant a plot that she had been given by her father and that the Plaintiff bought from her father a plot measuring 40 feet by 100 feet.

34. The assertion by Miss Nzioka that the Plaintiff purchased a plot measuring 40 feet by 100 feet from her father was confirmed by the Plaintiff when he testified in Machakos PMCC No. 101 of 1977. When the Plaintiff was recalled to testify in the same case, he informed the court that “plots are allocated in 20 and 40 feet” and that when the court visited the area, it found that he had already developed “37 ft”.

35. In the said PMCC No. 101 of 1977, the Plaintiff stated as follows “after allocation by the county council of 40 feet I made negotiations with my neighbour that Ndulu Mwose (sic) where between his shop and mine there was a space (sic) I was entitled to half the space. I took 3.5 of the space.” This generous neighbour that purportedly donated to the Plaintiff “space” was not called to testify. Indeed, one of the neighbours, a Mr. Thiaka, denied in Machakos RMCC No. 101 of 1977 of having donated any “space” to the Plaintiff as alleged.

36. The fact that indeed the Plaintiffs land is 40 (42) feet by 100 feet, as confirmed by the Plaintiff and Miss Nzioka in earlier proceedings was confirmed by the Clerk to Kangundo Town Council vide his letter dated 19th January, 199 in which he stated as follows:

“We took measurements on the ground and found out that Isaac Nzioka (the Plaintiff) has constructed 39 feet out of his registered 42 feet, i.e. plot number 110 20 feet by 100 feet and plot number 111 22 feet by 100 feet. Joseph Kakula’s (the 2nd Defendant) measurement were found to be 20ft by 100 ft.”

37. The above letter by the Town Clerk confirms that indeed the Plaintiff’s entire land measured no more than 42 feet by 100 feet, a fact that the Plaintiff himself confirmed when he testified in 1977, and not 60 feet by 100 feet. The claim by the Plaintiff in his testimony that his land measured 60 feet by 100 feet was meant to disentitle the Defendant of his portion of land measuring 20 feet by 100 feet and which he has since developed.

38. Indeed, as correctly submitted by the 2nd Defendant, the Plaintiff’s plot number 111 at most measures 22 feet by 100 feet, and when combined with plot number 110 should measure at most 42 feet by 100 feet. The Defendant’s plot measuring 20 feet by 100 is therefore different from the Plaintiff’s plot number 111.

39. In any event, even if the Plaintiff purchased land measuring 60 feet by 100 feet in Kangundo town, which is not true, the burden to show that he is now occupying a parcel of land which is smaller than what he purchased, and that it is the 2nd Defendant who has trespassed on the other portion, was on the Plaintiff.

40. In this regard, the Plaintiff should have produced in evidence a sale agreement to show that indeed the land he purchased was 60 feet by 100 feet and not otherwise, and a surveyor’s report to show the extent of the land that he is currently in possession. Having failed to do this, it follows that the Plaintiff did not prove his case to the required standards.

41. For those reasons, I dismiss the Plaintiff’s claim with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE