



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. 516 OF 2018**

**SAMUEL MAINA MWAURA.....PLAINTIFF**

**- VERSUS -**

**NGUGI KIMANI.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed this suit against the Defendant claiming the following reliefs:

- i. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property;**
- ii. A declaration that the Defendant, whether by himself or his servants, agents or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly, a trespasser on the same;**
- iii. An Order of permanent injunction restraining the Defendant by himself, his agents, and/or servants, from alienating, damaging, possessing, building, developing, and/or in any other manner whatsoever from dealing with the Plaintiff's plot or any portion thereof known as LR. NO.36/111/1252;**
- iv. An Order of mandatory injunction compelling the Defendant to demolish and remove the buildings and/or any other structures constructed and/or in the process of construction on the Plaintiff's plot LR. NO.36/111/1252 failing which the Plaintiff be at liberty to demolish and remove the same at Defendant cost.**
- v. Damages for Trespass against the Defendant and interest thereon;**
- vi. Any other relief that this Honorable Court may deem fit and just to grant.**

2. The Defendant who is alleged to have been served with summons to enter appearance neither entered appearance nor filed any defence. The hearing therefore proceeded ex-parte.

**Plaintiff's case**

3. The Plaintiff testified that he is the registered owner of LR No. 36/111/1252 IR No.31813 (suit property) which is situated at Eastleigh in Nairobi. The Plaintiff was allocated the suit property on 11<sup>th</sup> June 1976. The suit property was registered in his name on 1<sup>st</sup> April 1978. His evidence is that when the suit property was allocated to him, it was vacant.

4. The plaintiff applied to the Nairobi City Council in 1980 for approval of buildings plans. The building plans were duly approved. When he went to the ground the same year to start construction, he found that the Defendant had trespassed into the suit property and had constructed permanent structures on it.

5. The Plaintiff further testified that he had noticed that the defendant who is the owner of LR No. 36/111/1251 which neighbours the suit property had either mistakenly or deliberately constructed on the suit property because the Defendant's plot was still vacant.

6. The Plaintiff started looking for the Defendant but he did not find him. He instead found the Defendant's brother. He wrote a demand

letter to the defendant through his brother asking the Defendant to desist from the trespass. There was no response to the demand letter.

7. The Plaintiff was then advised to pursue the matter through the firm of G Kamonde Advocate who was said to be acting for the Defendant. The Plaintiff wanted to amicably solve the issue through exchange of the plots as the two plots were in the same location and contained the same measurements. This did not however work as there was no response from the Defendant. This is what forced the plaintiff to institute this suit against the Defendant.

**Analysis of evidence.**

8. I have gone through the documents produced by the Plaintiff. According to a search conducted on the suit property on 22<sup>nd</sup> September 2011, the Plaintiff is the registered owner of the suit property. The first demand letter addressed to the Defendant was dated 23<sup>rd</sup> September 2011. It was addressed to the Defendant and was said to be care of LR No. 36/111/1251 which is said to belong to the Defendant. There was another demand made in July 2012.

9. The defendant's lawyer was reached out by the Plaintiff's lawyer. When the Defendant's lawyer insisted to know the reason why the Plaintiff had not taken possession of the suit property which was allotted to him in 1976, the Plaintiff's lawyers responded through their letter of 3<sup>rd</sup> September 2012 stating that they were willing to settle the issue amicably. Things then went quiet until this suit was filed on 30<sup>th</sup> November 2018.

10. This suit was filed 38 years after the Defendant allegedly trespassed on to the suit property. It is clear from the evidence of the plaintiff that he could not trace the Defendant as early as 1980. This is why he wrote a demand through his brother. This alleged demand letter through the defendant's brother was not produced.

11. It is clear that the first attempt to seek to recover the suit property was made in the year 2011. As at this time, the Plaintiffs claim had become stale by virtue of being statute barred. This is why when in 2012, the Defendant's lawyer insisted to know why the Plaintiff had not taken possession of the suit property, the Plaintiff's lawyers indicated that they were ready to sort out the issue amicably. This is because they were aware the Plaintiff's claim was statute barred.

12. It is evident that the Plaintiff could not even trace the whereabouts of the Defendant. The person in possession of the suit property is operating a school by the name of Eastleigh Good Hope Community Academy. It is not the Defendant who is operating this school. According to the plaintiff, it is the Defendant's tenant who is operating the school.

13. The service summons which was effected, was effected upon a caretaker who refused to receive summons. The summons were pinned at the school. The Defendant does not reside there. This was therefore not proper service. It is even very possible that this suit was filed against the Defendant who may not even be alive and in that case, the suit may even be a nullity ab initio as one cannot bring a suit against a deceased person.

**Disposition:**

14. From the analysis herein above it is clear that firstly no proper summons were served. Secondly, it is very likely that the Defendant may not be alive because he could not be traced as from 1980's. Lastly, the Plaintiff's claim is statute barred. I therefore proceed to dismiss the Plaintiff's suit with no order as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of :-

Ms Namisi for Plaintiff

Court Assistant: Mercy

**E.O. OBAGA**

**JUDGE**