



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1039 OF 2012

ESTHER MUKAI MWENDWA.....1ST PLAINTIFF

GARAGE MAHAL LIMITED.....2ND PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

JUDGEMENT

1. In the Amended Plaint filed in court on 16/5/2013, the 1st Plaintiff claimed that she was the beneficial owner of land reference number 209/9943 (“the Suit Property”) situated within Nairobi and that she had been in possession of the land since 1981. The 1st Plaintiff claimed that she leased part of the Suit Property to the 2nd Plaintiff as a workshop for repairing motor vehicles. The Plaintiffs claimed that the Defendant’s officers trespassed onto the Plaintiffs’ parcel of land on 12/12/2011 at around 4.30 a.m. and demolished the structures on it. The Plaintiffs claimed that their assets were damaged and stolen when the Defendant’s officers trespassed onto the land and attempted to evict the Plaintiffs. The 2nd Plaintiff claimed that it obtained all the necessary licenses for running its business on the Suit Property after the Defendant officers inspected and approved the carrying on of the business on the suit land.

2. The Plaintiffs claimed that on filing this suit on 21/12/2012, they obtained orders of injunction to restrain the Defendant from trespassing onto the Plaintiff’s premises and that while the orders were in force, the Defendant invaded the Suit Property and destroyed the Plaintiffs’ premises on 1/3/2013 at around 5.30 a.m. The Plaintiffs claimed that the Defendant sent a group of 50 workers and a tractor which completely flattened the Suit Property. The Plaintiffs claimed that their source of livelihood was destroyed and that the Defendant’s actions were deliberate, oppressive and arrogant for which they ought to pay exemplary damages.

3. The Plaintiffs claimed that they suffered loss and damage in the sum of Kshs. 14,191,300/= made up as follows: damage to the garage shade -Kshs. 4,205,000/=; damaged plumbing and drainage systems -Kshs. 293,000/=; food crops destroyed -Kshs. 300,000/=; damaged or stolen motor vehicle parts and others Kshs. 9,293,000/=. The Plaintiffs sought Kshs. 14,191,300/= against the Defendant together with loss of profits at Kshs. 100,000/= per day for the period the court may determine.

4. The Defendant denied the claim in its defence filed on 10/6/2013. It denied threatening to evict the Plaintiffs’ from the suit land and averred that the Plaintiffs erected illegal structures on the Suit Property without obtaining the necessary approvals from the Defendant as required by law. It contended that the law required that unauthorised illegal structures were to be brought down to ensure proper planning and development within the Defendant’s jurisdiction. The Defendant denied issuing any licenses to the Plaintiff. The Defendant averred that it was not in contempt of any court orders and added that the Plaintiffs’ application for injunction was dismissed by the court on 8/3/2013. It denied that the Plaintiffs had the legal capacity to file this suit. The Defendant added that the Plaintiffs’ had no right to return to the Suit Property where she was a trespasser on public land hence the Plaintiffs could not claim damages.

5. The Plaintiffs called two witnesses. Peter Muthama Mutinda, the 2nd Plaintiff’s Manager gave evidence. The 2nd Plaintiff ran a garage on the Suit Property situated at Parklands, Nairobi, which it had rented from the 1st Plaintiff. He stated that the 2nd Plaintiff obtained an oral lease from the 1st Plaintiff said to be the owner of the Suit property. He claimed that the 2nd Plaintiff obtained all the necessary licenses and approvals to operate the business. The 1st Plaintiff filed suit and obtained orders to prevent her from being evicted from the Suit Property but the Defendant’s officers went to the Suit Property on 20/12/2012, demolished part of the gate and dug a trench. The witness claimed that they confronted the Defendant’s officers and managed to repulse them from damaging the Suit Property completely.

6. Mr. Mutinda stated that the Defendant’s officers informed him that they had orders to evict him from the Suit Property to pave way for another owner to occupy the land and added that the court orders issued earlier did not bar the Defendant from dealing with the Suit Property since it was not a party to the suit. He was aware that the 1st Plaintiff had obtained interim orders, a copy of which had been given to him which contained a penal notice. He claimed that the watchman called him on the morning of 1/3/2013 and informed him that the Defendant’s

officers accompanied by a group of over 50 men went to the land with a bulldozer to demolish the suit premises. He rushed to the scene and found the Suit Property being destroyed by the Defendant.

7. He claimed that the 2nd Plaintiff had many spare parts in a container on the Suit Property which was broken into and spare parts stolen by the Defendants. The premises were completely destroyed and the cars on the ground were tolled out of the premises. Mr. Mutinda claimed that he went personally to the Defendant's offices and served the court order which the Defendant ignored. He stated that he took pictures of the demolition with his own camera and later had an assessor carry out an assessment of the damage. The report indicated that they sustained damages of Kshs. 14,500,000/=. He claimed that the Defendant acted against a lawful court order and was in contempt of court. He stated that the 2nd Plaintiff continued to suffer loss of business of Kshs. 100,000/= per day and that they had not found alternative premises to run the business. He added that they were living under constant danger of eviction from the Suit Property by the Defendants.

8. On cross examination he stated that he did not know who was on the Suit Property but clarified that the Plaintiffs were on the suit land from 2008 to March 2013. The land belonged to a lady who had leased it to the 2nd Plaintiff. He claimed they had a garage on the suit land and also planted vegetables and other crops on it. He claimed the Defendant issued business licenses to the 2nd Plaintiff but did not produce the licenses in evidence. He did not have the original permit and license. He confirmed that the Plaintiffs did not pay rates for the suit land. He conceded that the Defendant was not a party to the proceedings in which the court order restraining dealings with the suit land was issued. He did not have evidence to confirm service of the court order on the Defendant. He claimed that the persons who went to demolish the structures at night went there with the Defendant's vehicles including lorries, breakdown vehicles and bulldozers. He claimed that the Defendant fenced the suit land after that. The 2nd Plaintiff found a suitable place on Thika Road for its business after a year. He claimed that the Suit Property belonged to a lady called Mukai who had given the 2nd Plaintiff authority to be on the land.

9. Mr. Chris Mwenda Mwititi gave evidence. Mr. Mwititi claimed that he worked for Wisemen Limited, which prepared the assessors' report dated 26/3/2013 signed by Monda Zachariah on 26/3/2013. He produced the report in evidence. It contained many receipts in the 2nd Plaintiff's name as well as invoices in respect of different motor vehicles. He did not participate in the preparation of the assessors' report. The assessors went to the Suit Property after the demolition had taken place. He did not have copies of original receipts and invoices.

10. The Defendant did not call any witnesses. Parties filed written submissions which the court has considered. The issue for determination is whether the court should grant the orders sought by the Plaintiffs. The Plaintiffs submitted that the Defendant's failure to call any evidence meant that the Plaintiff's claim was uncontroverted and unchallenged. The Plaintiffs urged that they had established that the Defendant invaded their premises, demolished their structures and evicted them from the Suit Property. The 2nd Plaintiff claimed that it lost business worth Kshs. 2,400,000/= for the year that it did not operate its business following the Defendant's demolition of its structures since it was making profit of Kshs. 100,000/= per day. It claimed the sum of Kshs. 28,800,000/= for lost business and urged the court to award this sum together with special damages.

11. The Defendant submitted that the suit was hopeless and a waste of judicial time based on the fact that the Suit Property does not belong to the Plaintiffs who did not produce evidence of ownership of the land. The Defendants denied that the Plaintiffs had obtained a court order restraining it from dealing with the Suit Property. The Defendants contended that the proposed garage shade claimed by the Plaintiffs was built after the demolition and added that the valuation on plumbing and drainage was undated and unsigned. The Defendant argued that the Plaintiffs were not deserving of a permanent injunction since the Plaintiffs had not presented evidence that the Defendant trespassed onto their land. The Defendant submitted that the Suit Property belonged to it and that it had never allotted or leased it to the Plaintiff. The Defendant denied issuing any letter of allotment or title to the Plaintiff. The Defendant maintained that the Plaintiffs were not deserving of damages since the Defendant had not infringed its rights.

12. Mr. Peter Muthama Mutinda who gave evidence on behalf of the Plaintiffs produced two copies of titles over the Suit Property, one in the name of Joseph Wanyoike Kiarie dated 11/6/1991 and the second one in the name of George Kuria Mwaura issued on 13/10/2009. The witnesses called by the Plaintiffs did not lead any evidence to show their interest in the Suit Property or the existence of a lease between the 1st and 2nd Plaintiffs. The copy of the court order Mr. Mutinda produced related to **ELC Case No. 472 of 2009** being a claim for adverse possession by the 1st Plaintiff against the estate of Joseph Wanyoike Kiarie. The Defendant in the instant suit was not a party to that suit. There is no evidence that the Defendant was made aware of the existence of that court order or whether the court allowed the 1st Plaintiff's claim for adverse possession of the Suit Property. It is not clear from the photographs produced by the Plaintiffs when the photos were taken. The invoices and receipts produced by Mr. Chris Mwenda Mwititi do not support the claim for loss of business of Kshs. 28,800,000/= made by the Plaintiffs.

13. The Plaintiffs have failed to prove their claim. The suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 22nd day of January 2020

K.BOR

JUDGE

In the presence of:-

Mr. P. Malanga holding brief for K. Kivuva for the Plaintiffs

Ms. Lilian Maina for the Defendant

Mr. V. Owuor- Court Assistant