



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 352 OF 2017

JONATHAN PETER KILONZOPLAINTIFF

VERSUS

MUTUA NGANDADEFENDANT

AND

STEPHEN MUASA KILONZO..... THIRD PARTY

JUDGEMENT

1. By his amended plaint dated 16th May, 2018 and filed in court on 17th May, 2018, the Plaintiff prays for judgement against the Defendant for: -

- (a) **Special damages of Kshs.790,000/= as particularized at paragraph 4 of the plaint.**
- (b) **Mesre profits from 2005 at the rate of Kshs.20,000/= per annum from 2005 till 2016 when the defendant ceased activity on the land.**
- (c) **Costs of the suit and interests from the date of filing suit.**

2. He has averred in paragraphs 3, 4 and 5 of his amended plaint that he was the bonafide and registered owner of all that parcel of land Known as Mavindini/Mavindini/1309 measuring 3.56 hectares situated within Makueni County, that in 2005, the Defendant trespassed into the said land parcel number Mavindini/Mavindini/1309 and demolished his house, toilet, store house, cowshed, destroyed bricks, cut down trees and grazed livestock therein as a result of which the he suffered loss and damages for which he holds the Defendant entirely liable particulars of which are:-

- (a) Demolished house - Kshs.450,000/=
- (b) Demolished toilet - Kshs. 75,000/=
- (c) Demolished store house - Kshs. 50,000/=
- (d) Demolished cowshed - Kshs. 25,000/=
- (e) Cut down trees - Kshs. 30,000/=
- (f) Grazed grass - Kshs. 60,000/=
- (g) Bricks - Kshs.100,000/=
- Total..... **Kshs.790,000/=**

and that the Defendant has since continued to unlawfully utilize the said land parcel number Mavindini/Mavindini/1309 and thus the Plaintiff claims Kshs.220,000/= being profits at the rate of Kshs.20,000/= per annum from 2005 till 2016 when the Defendant ceased activity on the land after the same was compulsorily acquired by the Government of Kenya.

3. The Plaintiff's claim is denied by the Defendant in his amended defence dated 04th June, 2018 and filed in court on 03rd July, 2018. In paragraphs 4, 5 and 6, the Defendant has averred that in the alternative the Plaintiff obtained the title by way of fraud particulars of which are: -

- (a) Obtaining the said title documents without adhering to the regulations as set out in the law.**
- (b) Deliberately procuring the title document in order to defeat the interest of the Defendant herein.**
- (c) Making false representation to the Registrar as to the status of the land in order to defeat the proprietary interest of the Defendant.**
- (d) Knowingly obtaining the title document without disclosing the overriding interest of the Defendant.**
- (e) Procuring the title documents with the full knowledge of the purchase and occupation by the Defendant.**

That the Defendant is a bonafide owner of the suit property by virtue of having bought it from the allottee on 05th June, 2004, one Stephen Musa Kilonzo and that in the alternative, the Defendant denies that the Plaintiff is the owner of the suit property since the same was surrendered to the Government which proceeded to pay necessary compensation to the Plaintiff and hence the Plaintiff is devoid of locus standi in these proceedings.

4. Pursuant to the Defendant's notice of motion application dated 09th July, 2018 and filed in Court on 10th July, 2018 seeking for leave to enjoin a 3rd Party, the same was allowed on 03rd October, 2018 by consent of the parties herein.

5. On the 12th November, 2018, the 3rd party filed his defence to the Defendant's claim, the same being dated 10th November, 2018.

6. The 3rd Party has averred in paragraphs 3, 4, 5 and 6 of his defence that he has never owned the Plaintiff's property, Mavindini/Mavindini/1309 and that he did not have the capacity to sell it to the Defendant and did not do so, that he owned Mavindini/1834 which he sold to the Defendant and gave him vacant possession and use to date, that the Defendant's allegations that he (3rd Party) represented to him (Defendant) as the owner of Mavindini/Mavindini/1309 are untrue and are denied together with the particulars of representation pleaded in the 3rd Party notice, that the Defendant's claim against him is misconceived, unmerited, frivolous and a non-starter and therefore deserve to be dismissed with costs.

7. During the hearing of the Plaintiff's case, on 04th February, 2019, the Plaintiff adopted his witness statement dated 16th May, 2018 as his evidence.

8. In summary, his evidence was that the Defendant trespassed into his land registration No. Mavindini/Mavindini/1309 in the year 2005 while claiming that the land was his. He said that the Defendant destroyed his (Plaintiff's) house, toilet, cowshed and other structures. He estimated the value of the damaged property to be Kshs.790,000/=. He went on to say that the Defendant has been using the said land from the year 2005 up to the year 2016 thus denying him a profit of Kshs.20,000/= per year. He added that before filing this suit, he issued the Defendant with demand letters dated 11th May, 2016 and 08th September, 2016.

9. The Plaintiff produced a copy of title deed, certificates of official search, two copies of demand letters dated 11th May, 2016 in his amended list of documents dated 16th May, 2018 as P.Exhibit Nos. 1, 2, 3 and 4 respectively.

10. His evidence in cross-examination by Ms. Njuguna for the Defendant and the 3rd Party was that the Defendant trespassed into the suit land in the year 2005. The Plaintiff went on to say that he acquired his title deed in 2007. He said that he was compensated by the Government in 2016/2017 when it acquired his land in the same period. He agreed that by the time he commenced this suit, the suit land was no longer his. He revealed that the valuation report was prepared in 2018.

11. His evidence in re-examination was that the compensation that he seeks is for the years 2005 to 2016.

12. The Plaintiff called Mathusela Masesi Mute (PW1), a professional valuer, as his expert witness. The witness told the court that he prepared his report dated 19th April, 2018 which was in respect of land parcel number 1309. He said that there was a house which was built with bricks and GCI sheets, toilet and bathroom also made of bricks and cement. He estimated the cost of the house at Kshs.450,000/= while the cost of the toilet and bathroom was Kshs.75,000/=. All in all, he estimated the total value of the improvements on the land at Kshs.790,000/=. He said that he saw the structures on 19th April, 2018. The witness produced his report as P.Exhibit No.2.

13. His evidence in cross-examination by Ms. Njuguna was that he has been a valuer for 20 years. He said that he conducted the report in the year 2018 and added that he was in a position to tell the age of the structures whose year of construction he gave as 2005. He said that they were destroyed in 2018.

14. His evidence in re-examination was that destruction occurred before 2018.

15. On the other hand, Nicholas Mutua Nganda who is the Defendant herein adopted his witness statement dated 05th December, 2017 as his evidence. He produced the documents in his list of documents dated 29th November, 2017, 04th February, 2019 and supplementary list of documents dated 13th March, 2019 as D.Exhibit Nos. 1 to 5, 6 to 7 and 8 to 15 respectively.

16. His evidence in cross-examination by Mr. Omondi was that he bought land parcel number Mavindini/Mavindini/1309 from Stephen Mwasya Mutua. He said that he and Stephen did not enter into any agreement even though he admitted that D.Exhibit No.8 shows that the seller is one Stephen Mwanza Kilonzo. He went on to say that page 3 of the same document shows that the seller is John Mwanza Kilonzo. According to him, he dealt with Stephen Mwanza Kilonzo and if John Mwanza Kilonzo is mentioned, that would not be correct. He said that Stephen did not show him any title deed. Even though the Defendant indicated that he carried out a search to confirm that the land belonged to Stephen, he later changed his mind and admitted that he did not do so and that Stephen only showed him a book that indicated that the land in question was his. He agreed that the title deed (P.Exhibit No.1) shown to him by the Plaintiff's Counsel shows the Plaintiff to be the owner of land parcel number 1309 and that Mavindini/Mavindini 1843 is owned by Stephen Kilonzo. He said that Stephen Kilonzo had the authority to sell land parcel number 1309 which he (Defendant) had been in occupation of since 2005 up to 2016. He revealed that he used to cultivate on it. He said that he used to graze his cows on it thus profiting from it for all those years that he was in occupation. He however maintained that he bought the land in question from Stephen Mwanza Kilonzo.
17. In his evidence in re-examination by Ms. Kyalo, the Defendant reiterated that he bought the land from Stephen Mwanza Kilonzo. He said that he could not carry out search owing to the fact that demarcation was ongoing. He denied having lived on the land illegally.
18. Peninah Mbovu Mutua (DW1) in her evidence in chief adopted her witness statement recorded on 12th February, 2018 as her evidence.
19. Her evidence in cross-examination by Mr. Omondi was that there were no title deeds during the sale. She said that there was a demarcation book duly signed and stamped by a demarcation officer.
20. Fredrick Mwendo's (DW2) in his evidence adopted his witness statement that he recorded on 24th January, 2019.
21. On being cross-examined by Mr. Omondi, Kioko (DW2) told the court that he witnessed the final payment between the Plaintiff and Stephen. He went on to say that it was in respect of plot number 1309 and that there were no title deeds then. According to him the parties had adjudication number. On being shown the document marked as P.exhibit No.1, Kioko (DW2) told the court that the same was a title deed issued in February, 2007 to one Jonathan Peter Kilonzo. He said that it was for parcel number Mavindini/Mavindini/1943. He also said that land parcel number 139 belongs to Peter and that Stephen had authority to sell it.
22. His evidence in re-examination was that he witnessed the sale in respect of land parcel number 1309.
23. Nicholas Kithuka Maulyo (DW3) in his evidence in chief adopted his statement dated 04th February, 2019 as his evidence.
24. His evidence in cross-examination by Mr. Omondi for the Plaintiff was that he witnessed the sale transaction between Stephen and Mutua (Plaintiff) in respect of land parcel number 1309. He said that demarcation process had been completed even the title deeds had not been issued. He said that land parcel number Mavindini/Mavindini/1309 (P.Exhibit No.1) is registered in the name of Jonathan Peter Kilonzo while Mavindini/Mavindini/1843 is registered in the name of Stephen Kilonzo. According to him, Stephen Kilonzo could not be able to sell the latter parcel of land.
25. Maulyo (DW3) in his evidence in re-examination by Ms. Kyalo for the Plaintiff was that there was a demarcation book in the name of Stephen Mwanza Kilonzo.
26. The 3rd Party, Stephen Mwasya Kilonzo in his evidence in chief adopted his undated witness statement filed in court on 12th November, 2018. He produced a copy of the title deed for land parcel number Mavindini/Mavindini/1843 as T.P.Exhibit No.1. He said that he sold land parcel number Mavindini/Mavindini/1843 to Mutua Nganda, the Defendant herein. He pointed out that he did not sell land parcel number Mavindini/Mavindini/1309 to the Defendant and that the latter still owes him after paying Kshs.180,000/= out of the purchase price of Kshs.300,000/=.
27. It was the 3rd Party's evidence that he did not sign the agreement relied upon by the Defendant and pointed out that the said agreement is not witnessed. He went on to reveal that he did not allow the Defendant to enter into land parcel number 1309.
28. On being cross-examined by Ms. Kyalo for the Defendant, the 3rd Party reiterated that he sold land parcel 1843 to the Defendant. He said that he did not sign the agreement the Defendant is relying on. He revealed that it was the Defendant who prepared the agreement in his own book and that the signatures contained in the said book are not his. He went on to say that there were no eye witnesses when the Defendant paid him in cash and in livestock. He said that people at home know him as Stephen Mwasya Kilonzo and pointed out that Jonathan was his brother.
29. The Plaintiff's Counsel in his written submissions urged the court to enter judgment in favour of the Plaintiff and against the Defendant. The Counsel submitted that from the evidence on record, it is clear that the Defendant took away the Plaintiff's right to use and abused the suit property between the year 2005 and 2016. The Counsel went on to submit that the Defendant has not denied being in occupation of the suit property and indeed demolishing the properties therein contending that he bought the property from Stephen Mwasya Kilonzo, the 3rd Party herein. The Counsel was of the view that no evidence was brought forth to show that the 3rd Party was indeed the owner of the said suit property and thus had the authority to sell it.
30. In his submissions for the 3rd Party, the Counsel submitted that the latter entered into a sale agreement with the Defendant in respect of land parcel number Mavindini/Mavindini/1843 and not Mavindini/Mavindini/1309. The Counsel pointed out that in his evidence, the 3rd Party had shown that he is not the owner of land parcel number Mavindini/Mavindini/1309 and that the agreement was in the custody of the Defendant.

31. On the other hand, the Defendant's Counsel framed seven issues for determination. These were: -

- (a) *Whether or not the Plaintiff has Locus Standi to claim injunction over the land parcel known as Mavindini/Mavindini/1309 hereinafter referred to as "the Property".*
- (b) *Whether or not a title to land acquired by fraud is indefeasible.*
- (c) *Whether or not the Defendant trespassed to the land parcel known as Mavindini/Mavindini/1309.*
- (d) *Whether or not the Plaintiff and the Third party have colluded against the Defendant.*
- (e) *Whether or not the Plaintiff is entitled to special damages.*
- (f) *Whether or not the plaintiff is entitled to mesne Profits at the rate of 20,000/= per annum from 2005 till 2006 when the Defendant ceased activity on the land.*
- (g) *The final issue is in regards to costs.*

A. Whether or not the Plaintiff has Locus Standi to claim injunction over the land parcel known as Mavindini/Mavindini/1309 hereinafter referred to as "the Property".

32. The Defendant's Counsel submitted that in paragraph 3 of the amended plaint dated 16th May, 2018, the Plaintiff had admitted that he is not the owner of the parcel of land known as Mavindini/Mavindini/1309, as the same was surrendered to the Government through compulsory acquisition for the construction of Thwake dam. The Counsel added that the Plaintiff had also admitted in cross-examination that the Government had made the necessary compensation to him. The Counsel was of the view that the Plaintiff therefore lacks locus standi to bring this suit. the Counsel cited the case of **National Environment Tribunal vs. Overlook management Ltd. & 5 others [2019] eKLR** in support of his submissions. In the aforementioned case, the court stated: -

"In determining a person's capacity to sue, the Court had to be satisfied that the action was justifiable and a dispute between the parties existed."

33. Arising from the above, the Counsel was of the view that the Plaintiff has no locus standi to pray for a permanent injunction against the Defendant in respect of the suit property as it does not belong to him.

B. Whether or not a title to land acquired by fraud is indefeasible

34. Regarding the Plaintiff's submissions that his title is indefeasible, the Defendant's Counsel invited the court to be guided by the provisions of **Section 26(1) of the Land Registration Act, 2012** which provide:-

"...(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...."

35. Arising from the above, the Defendant's Counsel submitted that a title acquired through fraud is defeasible and cited the case of **Esther Ndegi Njiru & Another vs. Leonard Gatei [2014] eKLR** where the Court held as follows: -

"..... They also submitted that the Plaintiff's claim that he has title, is not foolproof of ownership. Being the registered owner of the suit property, the Plaintiff is deemed to be the absolute and indefeasible owner of this suit property. However, the said certificate can be challenged if the same was acquired through fraud or misrepresentation in which he is found to have been aware and involved...."

36. The Counsel submitted that the Defendant in his evidence stated that the 3rd Party sold the suit land to him while they were sitted on it and brought three witnesses to affirm the said facts. The Counsel went on to submit that the 3rd Party did not adduce any evidence to prove that the signature in the sale agreement was not his.

C. Whether or not the Defendant trespassed to the land parcel known as Mavindini/Mavindini/1309.

37. The Defendant's Counsel submitted that the Defendant took possession of the suit land after he purchased it from the 3rd Party thus the evidence adduced by the plaintiff does not meet the ingredients of trespass.

D. Whether or not the Plaintiff and the Third party have colluded against the Defendant.

38. The Defendant's Counsel submitted that the role of a 3rd Party in any proceedings is to defend the suit. The Counsel added that the Defendant has established that the acts of the 3rd Party resulted in the Defendant being sued by the Plaintiff and that the Defendant has shown that there exists liability by the 3rd Party in respect of this suit. The Counsel cited the case of **Oceanfreight (EA) Ltd vs. Thechnomatic Ltd & Another [2010] eKLR** where the Court stated thus: -

"...joinder may be sought in connection with different causes of action, provided only that there exists a basis of liability of the third party to the defendant; and such a basis of liability can arise by operation of the law, in the light of the applicable facts and circumstances."

The Counsel submitted that the Plaintiff and the 3rd Party are represented by the same advocate and that during the hearing, the 3rd Party appeared to be prosecuting the case thus leading credence to the evidence of the Defendant that there was a collusion between the Plaintiff and the 3rd Party who are also brothers.

E. Whether or not the Plaintiff is entitled to special damages

39. The Defendant's Counsel submitted that the sale agreement produced by the Defendant did not indicate that there were assets/property on the suit property when the Defendant took vacant possession. The Counsel cited the assessment and valuation report dated 23rd April, 2014 done before compulsory acquisition which indicated that there were no permanent improvements. The Counsel was of the view that the Plaintiff did not tender any evidence to show that he actually incurred the pleaded expenses to entitle him to special damages.

F. Whether or not the plaintiff is entitled to mesne Profits at the rate of 20,000/= per annum from 2005 till 2006 when the Defendant ceased activity on the land

40. The Defendant's Counsel submitted that although the Plaintiff in his amended plaint claims mesne profits at the rate of Kshs.20,000/= per annum from 2005 till 2016 when the Defendant ceased activity on it, the Plaintiff failed to show how he arrived at the said figure.

41. The Counsel cited the case of **Karanja Mbugua & Another vs. Marybin Holding Co. Ltd [2014] eKLR** where the Court stated thus:-

"...This Court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act."

42. Regarding the issue of costs, the Counsel urged the court to award the Defendant the same as he had been maliciously dragged into this case by the Plaintiff for no apparent reason.

43. Having read the evidence on record and the submissions filed by the Counsel for the parties herein, my finding is that whereas I agree with the Defendant's Counsel that the prayer for permanent injunction cannot be issued against the Defendant for the obvious reason that the suit land has already been compulsorily acquired by the Government for the construction of Thwake Dam, there is no denial that the said land parcel number Mavindini/Mavindini/1309 prior to its acquisition was registered in the Plaintiff's name. In any case, that is not one of the prayers in the amended plaint dated 16th May, 2018 and filed in court on 17th May, 2018. The Defendant is silent in his amended defence regarding the parcel number of the land that he bought from the 3rd Party. Whereas the Defendant can be excused for not conducting an official search at the Land's office as the suit land was then not registered, there is no evidence to show that the Defendant carried out due diligence before he purchased the land in question so as to know who the owner was according to the adjudication register. The Defendant has not denied the fact that the land that he claims to have bought from the 3rd Party and had taken possession of was the same parcel of land that was compulsorily acquired by the Government. The Defendant appears not to have taken any action to defend his proprietary rights, if any, during the compulsory acquisition process. The Defendant has not adduced any evidence to show that the Plaintiff acquired the title to the suit property fraudulently. As such my finding is that the Plaintiff's title was indefeasible.

44. There is nothing in the evidence that can make this court to infer that the Plaintiff and the 3rd Party colluded against the Defendant. It is clear from the evidence on record that the 3rd Party sold his parcel of land No. Mavindini/Mavindini/1834 to the Defendant.

45. I am not satisfied that the Defendant has adduced evidence to show that there exists liability of the 3rd Party to him and his claim against the 3rd Party must fail.

46. Arising from the above, it is clear that the Defendant's presence, possession and occupation of land parcel number Mavindini/Mavindini/1309 from the year 2005 up to 2016 was without permission of the Plaintiff.

47. The Defendant was for the period in question a trespasser. The Defendant has not in any way challenged the valuation of the Plaintiff's property that he is said to have destroyed. In my judgment, I hold that the Defendant is under obligation to make good the damage and also pay costs of the suit.

48. The upshot of the foregoing is that the Plaintiff has satisfied this court that he has a cause of action against the Defendant and in the circumstances, I hereby proceed to enter judgment for the Plaintiff and against the Defendant as follows;

(a) **Special damages of Kshs.790,000/= as particularized at paragraph 4 of the plaint.**

(b) **Mesne profits from 2005 at the rate of Kshs.20,000/= per annum from 2005 till 2016 when the Defendant ceased activity**

on the land i.e. Kshs.220,000/=.

(c) Costs of the suit and interests from the date of filing suit.

Signed, dated and delivered at Makueni this 28th day of February, 2020.

MBOGO C.G.,

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. Kabiru for the Defendant

No appearance for the Plaintiff

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE,

28/02/2020.