



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 235 OF 2014

(FORMERLY ELC KERUGOYA 91 OF 2013)

PIUS MULWA MASAI (Suing as legal representative of the
Estate of **MASAI KABOLELYA**.....**PLAINTIFF**

VERSUS

NZEMBI MUSILI.....**1ST DEFENDANT**

GREGORY MAINGI.....**2ND DEFENDANT**

PATRICK KITAKA.....**3RD DEFENDANT**

VENDI A.K.A. BAKARI.....**4TH DEFENDANT**

JOSEPH MBUVA.....**5TH DEFENDANT**

DOMINIC MBULA MUTIE.....**6TH DEFENDANT**

JUDGEMENT

1. By a plaint dated 16th December 2010 the Plaintiff sought the following reliefs against the Defendants:

- a. A permanent injunction restraining the Defendants, their agents, servants or employees or any other person under their authority from entering parcel No. 1247.*
- b. An eviction order be issued against the Defendants, their servants and/or agents.*
- c. Costs of the suit and any other relief the court may deem just and expedient.*

2. The basis of the said suit was that the Defendants had entered and trespassed upon *Plot No. 1247* (hereinafter *the suit property*) and commenced construction thereon without the consent and authority of the owner who was deceased. The Plaintiff filed suit in his capacity as the legal representative of the estate of the deceased owner, *Masai Kbolelya*.

3. The 1st, 2nd, 3rd, 5th and 6th Defendants filed their separate statements of defence denying the Plaintiff's claim. They denied any trespass on the suit property and claimed that they had been allocated the suit property by the County Council of Mbeere. They pleaded that there was nothing preventing the defunct local authority from allocating them or any other person the suit property. They also pleaded that the Plaintiff was guilty of laches and acquiescence and that the suit was time-barred.

4. This suit was first heard *ex parte* on 8th July 2019 when the Defendants failed to turn up for hearing despite the date having been taken by consent in the presence of their advocate. The court delivered an *ex parte* judgement on the same day substantially allowing the Plaintiff's suit. The only prayer which was declined was the order of a permanent injunction restraining the Defendants, their servants or agents from entering the suit property.

5. The record shows that vide a notice of motion dated and filed on 26th July 2019 under certificate of urgency the Defendants sought the setting aside of the *ex parte* judgement and stay of execution on the basis that the hearing had proceeded *ex parte* owing to the mistake of their previous advocates who had failed to attend court and inform them of the hearing date.

6. When the said application was scheduled for hearing on 7th October 2019 the Plaintiff's advocate conceded the application on condition that a fresh hearing be conducted expeditiously and the Defendants meet costs of the application. The *ex parte* judgement was consequently set aside and the suit fixed for hearing 26th November 2019. The Defendants were granted 30 days within which to file and serve their respective trial bundles.

7. When the suit was listed for hearing on 26th November 2019 the Plaintiff and his advocate attended court ready to proceed with the suit. The Defendants' advocate, however, sought an adjournment on the basis that he was unable to trace some of his witnesses and that some of his clients were out of the country. The Plaintiff's advocate opposed the application for adjournment and informed the court that the Defendants had not served her with their trial bundles and that they had not paid the thrown away costs ordered on 7th October 2019 in full. The court was not satisfied that there was any good reason to adjourn the suit and accordingly it declined the application for adjournment.

8. The Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his witness statement dated 27th September 2012 as his sworn testimony. He produced a copy of his late father's death certificate as exhibit P1 and a limited grant *ad litem* as exhibit P2. He also produced a letter dated 18th February 2009 from the Land Adjudication Officer Mbeere District as Exhibit P3. During cross-examination by the Defendants' advocate the Plaintiff stated that the suit property was allocated to his late father by the Survey Department of the Ministry of Lands. However, he did not have a copy of the relevant letter of allotment.

9. Upon the close of the Plaintiff's case, the Defendants' advocate informed the court that the 6th Defendant had filed his trial bundle and that he needed about one week to call him as a witness. The renewed application for adjournment was declined hence the Defendants closed their case without testifying.

10. Upon conclusion of the hearing, the Plaintiff was granted 30 days to file his written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiff's period to file theirs. By the time of preparation of the judgement, however, none of the parties had filed their submissions.

11. The court has considered the pleadings, documents and evidence on record in this matter. The court has noted that the Defendants did not tender any evidence to controvert the Plaintiff's claim despite being accorded an opportunity to do so. In the circumstances, the court is inclined to accept the Plaintiff's evidence that the suit property indeed belonged to his late father as per the records of the Land Adjudication Office.

12. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his case on a balance of probabilities as required by law. Accordingly, there shall be judgement for the Plaintiff against the Defendants in the following terms:

a. An eviction order be and is hereby issued against all the Defendants, their agents, servants, employees or any other person claiming through them from the suit property i.e. parcel No. 1247 within Karaba Adjudication section.

b. The prayer for injunction is hereby declined since the Defendants have all along been in possession.

c. The Plaintiff is hereby awarded costs of the suit against the Defendants.

13. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **27TH DAY** of **FEBRUARY, 2020**.

In the presence of Ms. Ndorongo for the Plaintiff and in the absence of the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020