



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 111 OF 2014

VICTOR DENA CHITSWA..... PLAINTIFF

VERSUS

NATHANIEL MUNGA NZAKA1ST DEFENDANT

ENOS KAMORA..... 2ND DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that the defendants have trespassed into his land and made developments; plaintiff praying for orders of vacant possession or eviction and permanent injunction against the defendants; defendants filing defence claiming that they developed a different parcel of land; plaintiff tendering evidence demonstrating that the development is on his land; defendants not offering any contrary evidence; judgment entered for the plaintiff)

1. This suit was commenced by way of a plaint which was filed on 20 May 2014 which plaint was later amended on 11 April 2019. The plaintiff has pleaded that he is the registered proprietor of the leasehold interest comprised in the land described as Plot Title Number 134 Uwanja wa Ndege (the suit land). He has pleaded that on 10 May 2014, the 1st defendant trespassed into the suit land and began carrying out construction on the instruction of the 2nd defendant. He has pleaded that there is now excavation done on the plot and he has suffered loss and damage. In the suit, the plaintiff has asked for orders of vacant possession or eviction of the defendants from the suit land; a permanent injunction against them from trespassing or dealing with the suit land; a permanent injunction to stop the defendants from undertaking any construction on the suit land; mesne profits; costs and interests.

2. The defendants filed defence where it was averred that they have constructed on their parcel of land being Plot No 27 Uwanja wa Ndege. It is pleaded that Plot No. 134 is far off from Plot No, 27.

3. When the matter came up for hearing, counsel for the defendants applied for an adjournment which I declined and I placed the matter aside to proceed. Counsel for the defendants did not show up again and neither were the defendants present. I directed the matter to proceed.

4. In his evidence, the plaintiff testified inter alia that it is the 1st defendant who built on the land and on being confronted, stated that it was the 2nd defendant who instructed him to build. He approached the 2nd defendant who was not cooperative. He stated that on the plot, the defendants have built a commercial building which is however not complete. He testified that he got the plot from the Urban Council in the year 2007 and wished to put up a commercial building which he has now been unable to do so because of the encroachment. He produced as an exhibit a letter dated 18 March 2013 from the Town Council of Mariakani which letter states that the Council records indicate that the Plot No. 134/R 134 is registered under the name of the plaintiff. He also produced as exhibits various payment receipts in respect of land rates for the suit plot. He relied on a survey report dated 8 October 2019 prepared by M/s Edward Kiguru Land Surveyors which report does demonstrate that there is a building on the suit land.

5. I invited counsel to file written submissions but only counsel for the plaintiff did so. I have considered his submissions before arriving at my decision. Inter alia counsel for the plaintiff submitted that there is no proper defence on record for want of a court receipt but I find it difficult to hold as much at this stage, without the input of the defendants on whether or not they made payment, for it may happen for a receipt to fall off the court file or get lost. I will thus assume that there is a defence but no evidence tendered in support of it.

6. The evidence of the plaintiff is not controverted by the defendants. I have taken note of the letter dated 18 March 2013 from the Town Council of Mariakani and the various rates payments receipts produced by the plaintiff to demonstrate ownership of the suit land. The survey report does reveal that there is a structure developed on the suit land. I do observe in their defence that the defendants stated that they were developing on Plot No. 27 but they have not come with any evidence to that effect. They have also not come with any evidence to justify why they ought to develop the suit land. The only conclusion I can reach is that the defendants trespassed into the suit land without any

colour of right and made the developments in issue. I therefore have no hesitation in making the order that they do give vacant possession of the suit land to the plaintiff. If they do not do so within 14 days of this judgment then they may be forcibly evicted. I also issue an order of permanent injunction restraining them from entering, being upon, utilising, developing, or in any other way, interfering with the quiet possession of the plaintiff of the suit land and also stopping them from constructing or entering into any dealings over the suit land. On the prayer for mesne profits, the plaintiff did not provide any specifics on the quantum thereof and I am unable to make any award in respect of mesne profits. In lieu thereof, I do make an award of general damages for trespass in the sum of Kshs. 250,000/= in recognition of the fact that the defendants had no right to encroach into the plaintiff's land. I also award the plaintiff the costs of this suit jointly and/or severally as against the defendants.

7. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of February, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Makuto holding brief for Mr Lewa for the plaintiff.

Defendants ; both present but their counsel

M/s J. O Magolo & Co. Advocates absent.

Court Assistant; David Koitamet.