



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 486 OF 2017**

**ALIXANDER NGIGI alias ALEXANDER**

**NGIGI MACHARIA .....1 ST PLAINTIFF**

**AGOSTINO MAINA WAITARA .....2 ND PLAINTIFF**

**VERSUS**

**MARK NDUNGU .....1 ST DEFENDANT**

**NDICHU GITERE.....2 ND DEFENDANT**

**JUDGMENT**

1. The plaintiffs brought this suit on 24/7/2017 through a plaint dated 21/7/2017. An amended plaint dated 2/2/2018 was subsequently filed on 5/2/2018. Through the amended plaint, the plaintiffs contended that they were the lawful owners of a piece of land they described as **Land Reference Number 36/1/2, Subdivision No 20 Section IV, (Original Number 11/2/23A/2 of Section 111)**, situated in Eastleigh, Nairobi (**the suit property**). It was their case that in June 2017, they discovered that part of the suit property had been invaded and fenced off by the defendants. Consequently, they sought the following verbatim orders against the defendants:

**a) A declaration that LR No 36/1/2 Subdivision No 20 Section IV (Original No 11/2 or 23A/2 of Section III) Eastleigh in Nairobi County, within the Republic of Kenya lawfully belongs to the plaintiffs.**

**b) A permanent injunction to issue restraining the defendants, their servants, and or agents from trespassing, constructing, entering, wasting, damaging, alienating, sale, removal or disposition of the property in or in any other way whatsoever interfering with the plaintiffs' possession and/ or ownership of LR No 36/1/2 Subdivision No 2 of Section IV Original No 11/2/23A/2 of Section III situated in Eastleigh, Nairobi County, within the Republic of Kenya.**

**c) That an order be issued evicting the defendants, their servants and/or agents from LR No 36/1/2 Subdivision No 2 of Section IV Original No 11/2/23A/2 of Section III situated in Eastleigh, Nairobi County, within the Republic of Kenya.**

**d) Costs of the suit and interest.**

**e) General damages for trespass.**

2. The 1st defendant appointed the firm of Mbichire & Co Advocates who on 18/9/2017 filed a notice of appointment bearing the same date. They did not, however, file a statement of defence. The 2nd defendant filed a memorandum of appearance through the firm of Macharia Gikaria & Associates on 20/3/2018. They similarly did not file a statement of defence.

3. When this matter came up for hearing before me on 14/10/2019, Mr Gachie, counsel for the 2nd defendant, intimated to the court that the 2nd defendant had lost interest in the matter. The 1st defendant was absent despite having been served through his advocate on 4/4/2019. Consequently, the plaintiffs' suit proceeded to hearing *ex parte*.

4. Alixander Ngigi alias Alexander Ngigi Macharia (1st plaintiff) testified as PW1 and was the only witness called by the plaintiffs. He stated that he was the 1st plaintiff and he was testifying on his own behalf and on behalf of the 2nd plaintiff. He adopted his written statement dated 2/2/2018 and filed on 5/2/2018 as his sworn evidence-in-chief. He produced 7 exhibits: (i) Copy of Indenture dated 17/12/197; (ii) Official Search dated 23/3/2017; (iii) Rates Invoice; (iv) Originating Summons in Nairobi HCCC No 46 of 2006(OS); (v) Decree in Nairobi HCCC No 46 of 2006 (OS); (vi) Judgment in Nairobi HCCC No 855 of 2001; and (vii) Photographs.

5. In summary, PW1's evidence was that the suit property is owned by persons who previously belonged to a partnership under the name

**Kwirera Village Company.** The partnership was dissolved pursuant to a court order issued in Nairobi HCCC No 855 of 2001 (OS). The High Court had authorized him together with two other persons to execute relevant instruments on behalf of the proprietors of the suit property. Some of the proprietors of the suit property are deceased hence they have been unable to convey the respective shares of the proprietors. In June 2017, they learnt that part of the suit property had been invaded and fenced off. Upon carrying out investigations, they established that the 1st defendant had trespassed onto the suit property and had purported to sell the suit property to the 2nd defendant who had in turn erected illegal temporary structures on the suit property. Consequently, they brought this suit seeking the above orders.

6. On 7/11/2017, Ms Ndirangu Kamau, counsel for the plaintiffs, filed brief written submissions in which she urged the court to find that the plaintiffs had proved their case on a balance of probabilities. She referred to the Indenture dated 7/12/1971.

7. I have considered the pleadings, evidence and submissions before court. The defendants did not put forth defences to contest the plaintiffs' claim. They did not lead evidence. They did not file submissions to counter the plaintiffs' claim. Consequently, the plaintiffs' claim is undefended. What therefore remains is a determination on whether the prayers sought by the plaintiffs are appropriate in the circumstances.

8. The first prayer is a declaration that the plaintiffs are the proprietors of the suit property. Both the indenture and the official search indicate that the plaintiffs together with other people are the registered proprietors of the suit property. The defendants are not among the registered proprietors. Consequently, prayer 1 will be granted with appropriate modifications.

9. The second prayer relates to an injunctive order while the 3rd prayer relates to an eviction order. In the absence of any defence by the defendants, the two prayers will be granted. The fourth prayer relates to costs. In the absence of defence, this prayer too will be granted.

10. The fifth prayer relates to general damages for trespass. The plaintiffs did not lead any evidence to assist the court assess damages awardable in relation to the alleged trespass. The land belongs to more than ten people. The other co-proprietors did not make a claim for trespass. In the circumstances, I will award the plaintiffs nominal damages assessed at Kshs 400,000 together with interest from the date of judgment.

#### **Disposal Orders**

11. In light of the foregoing, I make the following disposal orders in this suit in tandem with the prayers made in the amended plaint:

*(a) It is hereby declared against the defendants herein that, Land Reference Number 36/1/2 Subdivision No 20 of Section IV (original No 11/2 or 23A/2 of Section III) situated in Eastleigh, Nairobi, belongs to the plaintiffs together with the other persons named in the parcel register thereof.*

*(b) A permanent injunction is hereby issued restraining the defendants together with their servants and or agents, against trespassing, constructing or entering on or wasting, damaging, alienating, selling, or disposing the said property or in any other way, whatsoever, interfering with the registered proprietors' possession of the said property.*

*(c) An order is hereby issued directing the eviction of the defendants together with their servants or agents from the said property.*

*(d) The defendants shall jointly and severally pay the plaintiff's nominal damages of Kshs 400,000 only.*

*(e) The defendants shall jointly and severally bear costs of this suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

June Nafula - Court Clerk