



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

KAJIADO ELC CASE NO. 636 OF 2017

(Formerly Machakos ELC 189 of 2015)

RACHAEL MUTABARI

**(Suing for and on behalf of Humility Ministries)1ST
PLAINTIFF**

**BERNARD NJOGU NJOROGE.....2ND
PLAINTIFF**

MARY WANJIKI NJUNGE.....3RD PLAINTIFF

PETER M. KARIUKI.....4TH PLAINTIFF

MARTHA WANJIKU.....5TH PLAINTIFF

GIVERN WANJALA.....6TH PLAINTIFF

BILLY JOSEPH LENANA NGAAGI.....7TH PLAINTIFF

LUCY KANYI NJOMO.....8TH PLAINTIFF

DENNIS NJOROGE.....9TH PLAINTIFF

VERSUS

KASAIN OLE KORUTA..... DEFENDANT

Consolidated with Machakos ELC Case No. 207 of 2015

KASAIN OLE KORUTA..... PLAINTIFF

VERSUS

LUCY KANYI NJOMO ALIAS LUCY MUNGASIO.....1ST DEFENDANT

**MARY WANJIKI NJUNGE ALIAS MARY NJUNE.....2ND
DEFENDANT**

GIVERN WANJALA ALIAS LEVI WANJALA.....3RD DEFENDANT

MARTHA WANJIKU DEMENGE.....4TH
DEFENDANT

JAMES NGATIA.....5TH DEFENDANT

SOMPET KEEJA KANCHORI.....6TH
DEFENDANT

RACHEL MATABARI.....7TH
DEFENDANT

JOSEPH NGAAKI LENANA.....8TH
DEFENDANT

DENNIS NJOROGE.....9TH
DEFENDANT

BERNARD NJOGU NJOROGE.....10TH
DEFENDANT

PETER MUTHEE.....11TH
DEFENDANT

HUMILITY MINISTRY.....12TH
DEFENDANT

ROBERT MUNGAI.....13TH
DEFENDANT

CORRIGENDA

Paragraph (1) Line (1) of the judgment delivered on 3rd February 2020 erroneously states that the date of the Complaint is 29th July, 2017 instead of 29th July, 2015.

Accordingly, Paragraph (1) Line (1) aforesaid is hereby corrected under section 99 of the Civil Procedure Act to read as follows:

In the Complaint dated the **29th July, 2015**, the Plaintiff sought for the following Orders:

Dated, signed and delivered at Kericho this 15th day of June 2020

CHRISTINE OCHIENG

JUDGE

REPUBLIC OF KENYA

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HUMILITY MINISTRY.....12TH DEFENDANT
ROBERT MUNGAI.....13TH DEFENDANT

JUDGEMENT

In the Plaintiff dated the 29th July 2017 the Plaintiff sought for the following Orders:

- a) That a permanent injunction restraining the Defendant/ Respondent by himself, his employees, servants, agents or anybody claiming through him from entering into, trespassing onto, demolishing or in any other way from interfering with or in any other manner dealing with the parcels known as PLOT numbers 938/ Business – Noonkopir Trading Centre; 1473/Residential – Business; 1226/ Residential Noonkopir T Centre; 305/ Business – Noonkopir T Centre;; 669/ Business – Noonkopir T Centre; 1079 / Business – Noonkopir T Centre; 1106/ Residential – Noonkopir T Centre; 943 / Residential – Noonkopir T Centre or any portions thereof;
- b) A declaration that the Plaintiffs/ Applicants are the legal and sole owners of the suit properties;
- c) An order that the Defendant/ Respondent ceases approaching the Plaintiffs/ Applicants to try to induce them into making illegal arrangements;
- d) Costs of this suit;
- e) Any other or further relief that this Honourable Court may deem fit to grant in the circumstances

The Defendant also filed a suit Machakos ELC No. 207 of 2015 as against the Plaintiffs on 22nd September, 2015 where he sought for the following orders:

- a) A permanent injunction does issue to restrain the Defendants jointly and severally from further trespassing onto the Plaintiff's parcel of land.
- b) The Defendants be ordered that within seven (7) days of the court's orders they jointly and or severally remove all items of trespass and or nuisance on the Plaintiff's parcel, including vegetation, fences, walls, structures, excavations and or mountings at the respective Defendant's own cost.
- c) Mesne profits at the rate of Kshs. 20,000 per acre per month pro rated to the extend of the land trespassed upon by the respective Defendants from 1st June, 2015 to the date of full payments.
- d) Costs
- e) Interest on costs
- f) Any other or further order the court may deem fit and just to grant in the interest of justice.

The Defendants in the respective suits filed their Defences wherein they denied the averments on each of the Plaintiffs contending that they owned their parcels of land. Further, they insisted that each opposing party had trespassed on the other party's land.

The two matters were consolidated vide an order dated the 18th January, 2015 with the Machakos ELC No. 189 of 2015 made the lead file. The matter proceeded for hearing with the Plaintiff calling one witness while the Defendant had two witnesses.

Evidence of the Plaintiffs

The Plaintiffs were represented by PW1 who stated she had instructions to testify on their behalf. She confirmed that the 1st Plaintiff was registered under the Societies' Act. She explained that the Plaintiffs on various dates between the year 2001 and 2003 legally purchased their respective parcels of land, took occupation and carried out developments thereon. Further, that they were issued with Letters of Allotment and been paying land rates/rent to Kajiado County. She claimed that around the year 2002, the Defendant purchase a plot which was a subdivision of land parcel number Kajiado/ Noonkopir township/ 214 but has never taken occupation thereon save for constructing a perimeter wall around his plot. The Defendant entered the suit properties in the month of October 2014 and January 2015 and laid a claim on the same contending that he is the owner thereof and consequently causing surveyors that accompanied him to extend boundaries as well as install beacons. Plaintiffs reported the Defendant to the Provincial Administration but he declined to cease from his acts of trespass over the suit properties. Despite demand issued to the Defendant to cease trespassing on the suit properties he has failed to do so. Prior to October, 2014, there has never been any acts of interference whatsoever from the Defendant. PW1 confirmed in court that they were shown the beacons to their respective parcels of land by the vendor. They did not know the Defendant's land until he put up a perimeter wall. The Plaintiffs produced the Allotment Letters; Official Searches; Sale Agreements; Land Rates Clearance & Receipts; Approved Physical Plans as well as Demand Letters from the Defendant's Advocates as their exhibits.

Evidence of the Defendant

DW1 Moses Yiare confirmed that he sold land parcel number Kajiado/ Noonkopir Township/ 214 to the Defendant. He explained that he initially had an allotment letter which he transferred to the Defendant. The Defendant as DW2 contended that he is the proprietor of land parcel number Kajiado/ Noonkopir Township/ 214 and holds a Certificate of Title to that effect. He claimed the Plaintiffs' have trespassed on his land without any document of title and continue to make developments thereon. Further, they have subjected the property to waste and damage. He confirmed that except for a perimeter wall, he had not developed his land. He explained that when he discovered the encroachment and complained to the County Government, he was advised to fence off the portion, which had not been encroached upon. Further, that the road provided in the map is not accessible, as it has been encroached upon. He insisted the Plaintiffs carried out developments when he had already acquired his land. The Defendant produced various documents including Certificate of Title for Kajiado/ Noonkopir Township/ 214; Land Search report; Demand Notices; Sale Agreement dated 13th May, 2010; Letter dated 27th April, 2012 from the Commissioner of Lands; Lease Document dated 20th April, 2012 in the name of Moses L. Yiare; Letter of Allotment dated the 22nd June,

1995 in the name of Moses L. Yiare; Copy of Surveyor's Report dated 6th February, 2015; Copies of the Minutes of the meetings and Report by the Sectoral Committee on Lands, Physical Planning, Environment and Natural Resources; Rate Clearance Certificate ; Relevant Maps; Copies of Funds Transfer Instructions and Receipt of payment of Stand Premium dated 18th September, 1995 as his exhibits.

Evidence of the County Surveyor

On the 20th June, 2018, the parties had agreed by consent that the dispute herein was to be referred to the County Surveyor to re establish boundaries and identify beacons. The County Surveyor presented his report where he stated that parcel No. 214 had several building therein developed by the Plaintiffs as follows: one developed by Levi Wanjala and four developed by Lucy Kanyi. He concluded that the survey plan and the development on the ground were not in tandem. Further, the 15 metre access road had been developed. The existing perimeter wall erected by the Defendant is not also as per the surveyed boundaries.

The Plaintiffs and Defendant filed their submissions, which I have considered.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Testimonies of the Parties' Witnesses; Exhibits and submissions, the following are the issues for determination:

- Whether the Plaintiffs' are entitled to the orders sought.
- Whether the Defendant is entitled to the orders sought

As to whether the Plaintiffs are entitled to the orders sought. The Plaintiffs sought for a permanent injunction to restrain the Defendant from interfering with their aforementioned parcels of land; A declaration that they are the legal and sole owners of the suit properties; An order that the Defendant/ Respondent ceases approaching the Plaintiffs to induce them into making illegal arrangements and costs. The Plaintiffs' claim the Defendants have trespassed on their aforementioned parcels of land and interfered with their occupation as well as ownership thereof. The Plaintiffs produced various letters of allotment in respect of their land. They contended that they have developed their parcels of land but the Defendant had not done so, except for constructing a perimeter wall. They hence wanted the Defendant to be permanently restrained from interfering with their land. The Plaintiffs in their submissions relied on the cases of **Ratland Gordhanbai Patel V Lalji Makonji Civil App. No, 70 of 1956; Giella V Cassman Brown & Company Limited 1973 EA 358 and Mrao V First American Bank of Kenya Limited (2003) eKLR** to buttress their claim. The Defendant in opposing the Plaintiffs' claim submitted that the Plaintiffs had trespassed on his land and relied on the cases of **Eliud Njoroge Gachiri V Stephen Kamau Nganga (2018) eKLR and Judith Julia Wanjiro Njoroge V Samuel Ngeru Mwangi (2019) eKLR** to buttress this argument. Further, that the Defendant is the legitimate proprietor of his land as opposed to the Plaintiffs who only hold letters of Allotment. He relied on the case of **Waas Enterprises Limited V City Council of Nairobi & Another (2014) eKLR** to support his assertion that the Defendant's land once allotted to him was not available to be allotted to the Plaintiffs.

As per the evidence of the County Surveyor Wesley Risancho, he confirmed undertaking measurements of the Plaintiffs' and Defendant's parcels of land to re establish boundary as well as beacons in the presence of all the affected parties. After undertaking measurements, he found that it is actually the Plaintiffs who had encroached on land parcel number, 214 with the 6th and 8th Plaintiffs having one and four structures thereon respectively. As per the map that he produced in Court, it was clear that the Plaintiffs had not only encroached on the Defendant's land but also undertaken developments on the 15 metre access road. He concluded that the survey plan and the development on the ground were not in tandem. Further, the existing perimeter wall erected by the Defendant is not also as per the surveyed boundaries. It further emerged in evidence that the Defendant had been issued with his Certificate of Title while the Plaintiffs' still held letters of allotment in respect to their plots. PW1 stated that it is the vendors who pointed out the beacons to them. However, based on the evidence of the County Surveyor who is an expert witness including the maps presented, I find his evidence authentic since it is the County that was developing plans and had knowledge of the boundaries and beacons of respective plots. Insofar as the Plaintiffs claim it is the Defendant who had trespassed on their land, but based on the evidence before me, I find that they have failed to discharge their burden of proof to prove this averment. In the case of **Eliud Njoroge Gachiri V Stephen Kamau Nganga (2018) eKLR**, the Court held that: '**Trespass is described under the Trespass Act Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on , private land without the consent of the occupier thereof shall be guilty of an offence. This clearly means any unauthorized entry whether present or continuous is trespass.**

In associating myself with this case and based on the evidence before me, I am unable to find that the Defendant indeed meets the criteria of trespasser as envisioned in the Trespass Act and will hence not make an order restraining him from his land. It is against the foregoing that I find the Plaintiffs are not entitled to the orders sought in the Plaintiff since they are actually the ones who trespassed on the Defendants land.

As to whether the Defendant is entitled to the orders sought. The Defendant sought for an permanent injunction against the Plaintiffs; Mesne profits from 1st June, 2015 at Kshs, 20,000 per month, the Plaintiffs to remove their structures and costs. The Defendant in his submissions relied on the cases of **Waas Enterprises Limited V City Council of Nairobi & Another (2014) eKLR; Judith Julia Wanjiro Njoroge V Samuel Ngeru Mwangi (2019) eKLR; Kibet Ruto V Samuel Kipleting Bett (2017) eKLR; Joseph Muchina Njogu V Francis Mucacia Sibashi (2019) eKLR; ; Sarah Chepkemoi Bett V Recho Koech (2018) eKLR and Caroline Wanyua Mwendwa & Another V China Road and Bridge Corporation (Kenya) (2018) eKLR** to buttress his claim. I note the Defendant is the registered proprietor of his land and produced a Certificate of Lease to prove his claim. However the Plaintiffs all had letters of allotment. Section 26 of the Land Registration Act stipulates that a Certificate of Lease is a prima facie proof that the person named therein is the proprietor unless it is proved that he obtained the same through fraud, illegally or unprocedurally. From the documents presented as well as the evidence of the Plaintiff, there is no indication that the Defendant acquired the lease illegally and it is clear that the same was processed procedurally. In associating myself with the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

and in the case Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR Kimondo J held that:

“... from a legal standpoint, a letter of allotment is not a title to property.....”

I find that the Defendant herein is indeed the proprietor of his land and is hence entitled to protection of the law. Further, I further find that the Defendant's Certificate of Lease supersedes the Plaintiff's letters of Allotment and will proceed to uphold the said title.

On the Defendant's quest for injunction as against the Plaintiffs', I opine that since the County Surveyor in his evidence confirmed that it is indeed the Plaintiffs' who had encroached on his land and in relying on the principles established in the case of **Giella V Cassman Brown & Company Limited 1973 EA 358**, I find that he is entitled to injunctive reliefs as against the Plaintiffs who have encroached on his land. Further, he is also entitled to have the Plaintiffs' remove their structures therefrom and restrict themselves on the boundaries of their plots as per the County Plans. The Defendant sought for mesne profits, however, in his evidence, he admitted that he had not developed the land as he had been away and only put up a wall. The Plaintiffs also contended that the Defendant had never restrained them from developing their parcels of land upto 2014. On this claim, I find that the Defendant failed to discharge his burden of proof to demonstrate the losses he had incurred as a result of the Plaintiffs' encroachment. I note the County Surveyor also confirmed that the Defendant's wall was also not aligned to the map. Insofar as he has made out a case for mesne profits in his submissions, it is trite law that mesne profits which is akin to special damages need to be specifically proved. However, in the Defendant's evidence he failed to prove the mesne profits he sought from the Plaintiffs. In the circumstance, I will decline to grant him the same.

It is against the foregoing that I find the Plaintiffs have not established their case on a balance of probability and will proceed to dismiss it. I will however proceed to make the following orders in favour of the Defendant:

1. A permanent injunction be and is hereby issued restraining the Plaintiffs jointly and severally from further trespassing onto the Defendant's parcel of land.
2. The Plaintiffs be and are hereby ordered that within Ninety (90) days from the date hereof jointly and or severally do remove all items of trespass and or nuisance on the Defendant's parcel, including vegetation, fences, walls, structures, excavations and or mountings at their own cost.
3. Costs Awarded to the Defendant and to be borne by the Plaintiffs
4. Interest on costs

Dated and delivered at Kajiado on 3rd February, 2020.

CHRISTINE OCHIENG

JUDGE