

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO.968 OF 2013

MARTIN WAWERU NGURU.....PLAINTIFF

VERSUS

GODFREY MOMANYI ONCHANYA.....1ST DEFENDANT

PETER RABAN.....2ND DEFENDANT

MOSES MAVISI.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff sued the Defendants on 6/8/2013 in their capacity as the officials of Mukuru Slum Water and Sanitation Improvement Project, which he claimed had encroached on his parcel of land known as land reference number 209/11233 situated along Aoko Road, South B, Nairobi (“the Suit Property”) and constructed public washrooms. The Plaintiff lodged a complaint with the Ministry of Lands over the trespass on his land on 28/11/2005, but the Defendants neglected his warning and continued the trespass. The Plaintiff seeks an order to restrain the Defendants from trespassing onto or occupying the Suit Property in any way that will interfere with the Plaintiff’s use of the Suit Property. He also seeks an eviction order against the Defendants or anyone claiming under them.
2. The Defendants did not enter appearance or file defence. The Plaintiff filed an affidavit sworn by Josephat Simeon Mutunga on 22/1/2014 in which he deponed that on 23/11/2013 he served the summons to enter appearance and other documents on the Defendants.
3. The suit was heard by Lady Justice Gitumbi on 20/7/2015. The Plaintiff gave evidence. He stated that he initially filed a suit in the Magistrate’s Court against the Defendant for trespass on his land but was forced to withdraw the suit owing to the issue of lack of jurisdiction. He stated that the Defendants had encroached on his plot which is before River Bank and built the ablution block on his land. He produced a copy of his title and urged the court to grant the orders sought in the plaint.
4. The Plaintiff filed submissions which the court has considered. He urged the court to uphold the protection of his title pursuant to Sections 25 and 26 of the Land Registration Act. The court notes that the title over the Suit Property was issued to the Plaintiff in 1990. He charged the land to Barclays Bank of Kenya in 1991. The charge was discharged in 1992. The Plaintiff attached the letter from the Ministry of Lands and Housing dated 28/11/2005 addressed to the Chairman of Mukuru Slum Water and Sanitation Improvement Project, notifying them that the Plaintiff had lodged a complaint regarding the construction of the ablution block on his land. The letter requested the chairman to halt further developments until the issue of the ownership of the plot was determined. The letter asked the chairman of the project to inform the Director of Physical Planning how the site for the development was identified. The Plaintiff annexed an ownership certificate in respect of Kajiado/Kitengela/Rongai 6413/A/B issued by Canpan Investment Limited together with a letter from this company. The court notes these two documents have no relevance to this case.
5. The issue for determination is whether the Plaintiff has proved his case on a balance of probabilities. The Plaintiff did not adduce evidence as to when the construction of the ablution block commenced and why he did not obtain an injunction when the construction commenced. The Plaintiff only led evidence to show that he is the registered owner of the Suit Property but did not lead any evidence to show that the ablution block is actually on the Suit Property. He did not lead evidence on what portion of the Suit Property the ablution block occupied. It is not also clear whether by the time this suit was heard the Defendants were still the office bearers for Mukuru Slum Water and Sanitation Improvement Project or the project had new office bearers who should have been served so that they could defend this claim.
6. The court notes that even though the Plaintiff is the registered owner of the Suit Property, the block of ablutions constructed on the Suit Property serves a large number of people living in Mukuru slums. Weighing the Plaintiff’s proprietary rights in the Suit Property against the broader public interest served by the ablution block for sanitation purposes and good hygiene for a great number of people living in Mukuru slums, the court is of the view that granting the orders sought in the plaint is not the most efficacious remedy in light of the public nature to which the suit land is being put. In the court’s view, monetary compensation for the land occupied by the ablutions block is the proper redress for the Plaintiff.
7. The court declines to grant the orders sought in the plaint. The court directs the Nairobi City County to undertake a survey of the Suit Property within 60 days of the date of this judgement, to establish the portion of the Plaintiff’s land occupied by the ablutions block constructed under the Mukuru Slum Water and Sanitation Improvement Project, for purposes of compensating the Plaintiff for the value of the Suit Property occupied by the block of ablutions. Each party will bear its own costs.

Dated and delivered at Nairobi this 1st day of July 2019

K.BOR

JUDGE

In the presence of:-

Ms. P. Njoroge holding brief for Mr. Mutiso for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court Assistant