



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 735 OF 2017**

**JESULUN MURERWA MWARANIA.....PLAINTIFF**

**=VERSUS=**

**RICHARD M MWANGI.....1ST DEFENDANT**

**JAMES GITHINJI.....2ND DEFENDANT**

**EMBAKASI RANCHING CO LTD.....3RD DEFENDANT**

**JUDGMENT**

**Background**

1. Through a plaint dated 23/11/2017, the plaintiff instituted this suit against the 1st and 2nd defendants. He subsequently filed an amended plaint on 14/3/2013 in which he brought on board the 3rd defendant. He sought the following prayers against the defendants:-

- (a) A permanent injunction restraining the defendants, their agents and or servants from trespassing on the suit premises by carrying thereon any developments or in any manner whatsoever interfering with the plaintiff's quit and peaceful possession of the suit premises.***
- (b) A declaration that the plaintiff is the bonafide owner of the suit premises.***
- (c) Costs of the suit.***
- (d) Any other order as the court may deem appropriate.***

**Plaintiff's Case**

2. The Plaintiff's case is that he is the owner of the plots designated as numbers 2356 and 2357 (the suit properties) situated within Ruai in Nairobi. He contends that he acquired the suit properties from the 3<sup>rd</sup> defendant vide sale agreements dated 30/8/1993. He has been in peaceful possession since 1993. On 17/11/2017, the 1st and 2nd defendants trespassed on the suit properties by depositing thereon construction materials and causing a foundation to be dug on the two plots. He further contends that he reported the trespass to the 3rd defendant who confirmed that the plaintiff was the legal owner of the suit properties. He reported the matter to Ruai Police Station and OB No 12/18/11/2017 was entered in the Occurrence Book.

**The 1st Defendant's case**

3. The 1st defendant filed a statement of defence and counterclaim dated 23/12/2017 in which he denied the plaintiff's claim. He contends that he purchased the properties known as Nairobi Block 136/2356 and 2357 (originally known as Plot Numbers F558 B and F559 B) from the 2nd defendant in 2010. He further contends that the 2nd defendant was allotted the said properties by the 3<sup>rd</sup> defendant through share certificate number 692. His case therefore is that the properties described by the plaintiff are not the same as the ones he owns. He states that the construction materials and the foundation are on his properties. He denies being a trespasser. Through the counterclaim, the 1st defendant seeks the following orders against the plaintiff:

- (a) That the plaintiff's suit be dismissed with costs together with interest.***
- (b) That the 1st defendant be declared the bonafide owner of all that parcel of land being Title Numbers Nairobi Block 136/2356 & 2357 (originally known as Plot Numbers F558 B & F559B allotted by Embakasi Ranching Company Limited.***

***(c) That a permanent injunction be issued restraining the plaintiff by himself, his servants, gents and/ or whomsoever in any means howsoever from trespassing and/or in any other way interfering with the 1st defendant's possession of all that parcel of land being Title Numbers Nairobi Block 136/2356 & 2357 (originally known as Plot Numbers F558B & F559 B allotted by Embakasi Ranching Company Limited.***

***(d) Costs of this suit and of the counterclaim together with interest thereon at for such period and at such rate as this honorable court may deem appropriate.***

4. The 2nd and 3rd defendants neither entered appearance nor filed defences. At the hearing, the plaintiff's asked the court to mark the claim against the 2nd defendant as withdrawn. The request was granted.

5. The plaintiff testified on 3/2/2020 as PW1. He adopted his witness statement dated 14/12/2018 as his sworn in evidence-in-chief. His evidence was that he entered into two sale agreements with the 3rd defendant on 308/1993 for the purchase of the suit properties which measured 30m by 36m and 36 m by 36 m respectively. He was shown the suit properties and the beacons by the 3rd defendant's company surveyor on 19/12/1993 and on 15/2/1994 respectively. He enjoyed quiet possession from 1993 till 17/11/2017 when he was informed by his neighbor, Christopher Njuguna, that someone had illegally poured construction materials on the suit properties and had dug a foundation on the suit properties. He visited the suit premises on 18/11/2017 and confirmed the information. He reported the matter to Ruai Police Station under OB No. 12/18/2017. He made inquiries at the Lands Office but there was no record relating to the suit property. He proceeded to the 3rd defendant's office where he was informed that he was the legitimate owner of the suit properties. He paid site visit fees to the 3rd defendant. During the site visit, the locations of his properties were confirmed. He was issued with an informal certificate of ownership upon payment of Kshs.50,000. He was also issued with a waiting card for both plots. He stated that the suit properties belonged to him and the defendants should be stopped from trespassing on the suit properties. He produced a bundle of 9 documents.

6. The defendants did not lead any evidence.

#### **Analysis**

**and**

#### **Determination**

7. I have considered the plaintiff's pleadings. I have also considered the 1st defendant's defence and counterclaim. The 2nd and 3rd defendants neither entered appearance nor filed defences. Although the 1st defendant filed a defence and counterclaim, he did not lead any evidence to support his defence and counterclaim. Despite having been served with a hearing notice on 20/12/2019 through his counsel, the 1st defendant did not attend the hearing. I have considered the brief submissions by Mr Otenyo, counsel for the plaintiff.

8. Three issues fall for determination in this suit. The first issue is who between the plaintiff and the 1st defendant is the lawful owner of the suit property. The second issue is whether the 1st defendant has committed acts of trespass on the suit properties. The third issue relates to the fate of the 2st defendant's counterclaim. I will make simultaneous pronouncement on the first and second issues.

9. The plaintiff contends that he purchased the suit properties from Embakasi Ranching Company Limited through two separate sale agreements. He produced the sale agreements. He also produced receipts which relate to purchase price. He stated that he had been in possession of the suit properties since 1993. His evidence was uncontroverted. In the absence of any controverting evidence, I find that the plaintiff has made out a case on a balance of probabilities.

10. The 3rd issue relates to the fate of the 1st defendant's counterclaim. No evidence was led to support the counterclaim. In the absence of supporting evidence, I find that the 1st defendant has failed to prove his counterclaim.

#### **Disposal Orders**

11. In light of the above findings, I make the following disposal orders in tandem with the prayers made in the Plaintiff and in the counterclaim.

***(a) Prayers (a) and (aa) of the Amended Plaintiff are granted.***

***(b) The 1st defendant's counterclaim is dismissed and the plaintiff is awarded costs of the counter-claim, to be borne by the 1st defendant.***

***(c) The plaintiff shall have costs of the suit, to be borne by the 1st and 3rd defendants jointly and severally.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF MARCH 2020**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Odenyo for the plaintiff

**June Nafula-Court clerk**