



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 527 OF 2010

JAMES ONESMUS GITONGA WERU.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGMENT

1. By a plaint dated 3rd November 2010 by plaintiff has sued the defendant seeking:-

(a) A permanent injunction to restrain the defendant either by itself, or through its servants, employees, agents and anybody acting or purporting to act under the defendant's authority from entering, encroaching on, using as a dumpsite or in anyway interfering with all that parcel of land known as Title Number Nairobi/Block 86/11;

(b) A permanent injunction restraining the defendant, either by itself or through its servants, employees, agents and anybody acting or purporting to act under the defendant's authority from interfering with the plaintiff's possession and quiet enjoyment of all that parcel of land known as Title Number Nairobi/Block 86/-.

(c) A permanent injunction restraining the defendant, either by itself or through its servants, employees, agents and anybody acting or purporting to act under the defendant's authority from charging and collecting fees from its agents and/or other garbage collectors in respect of title Number Nairobi/Block 86/11.

(d) A mandatory injunction compelling the defendant, either by itself or through its servants, employees, agents or anybody acting under its authority to remove the barbage that has since been deposited on all that parcel of land known as Title Number Nairobi/Block 86/11.

(e) General damages for trespass.

(f) Mesne profits from the year 2001 til lvacant possession is granted;

(g) Costs of this suit;

(h) Interest on (d) and (e) above.

(i) Such other further or consequential relief and remedies which this honourable court may deem fit to award.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance on 3rd January 2011 and filed a statement of defence dated 23rd May 2011.

3. PW1, James Onesmus Gitonga Weru, the plaintiff told the court that he is the lessee of LR No. Nairobi/Block 86/11 situated in Dandora. He stated that he acquired the same in 1992. He produced a letter of allotment, a sale agreement between him and the defendant, a receipt for payment of agreement of lease and a certificate of lease as exhibits. Thereafter he sought approvals from the defendant to as he intended to put up flats. He told the court that later on the defendant caused the garbage to be dumped on the suit plot. It is his case that the defendant has been charging and collecting fees from its agents and/or garbage collectors therefore enriching itself at the expense of the plaintiff. These actions have diminished the value of the suit property and he stands to suffer irreparable loss and damage. He adopted his witness statement dated 24th October 2011 and the list of documents dated the 24th October 2011. He prays for general damages for trespass, loss of profit, cost of rehabilitation plus cost of the suit.

4. PW2, James Githaiga Rikwa a registered valuer, told the court that he valued the suit plot and prepared a report. He said he valued the suit

property at Kshs.309,552,776/-. He told the court he visited the site and confirmed the dumping. He produced a report as exhibit in this case. He also told the court that the plaintiff gave him some drawings, a sub-division plan and building plans. He said the plaintiff intended to put up a commercial building with residential flats on the upper floor. He assessed the rental loss at Kshs.110,526,776/-. He also told the court that there was a portion that the owner had not started working on. There was a decrease in value of the suit property because of the ongoing dumping activities.

5. PW3 Simon Gatimu Mwaniki a businessman told the court he used to work with the City Council in the public health department as a senior Headman. He told the court his duties were in the dumping site. He told the court a quarry was dug at Dandora Phase 6. That the suit property is about 800 metres from the garbage dump. The dumping reached the plaintiff's land. The garbage was piled until it encroached on peoples plots. The garbage dump in phase 6 has not been filled. He further told the court that it is impossible for the plot owners to develop their properties.

6. DW1, Andrew Nyasiengo Odendo, an employee of Nairobi City Council told the court , he was in charge of Dandora dump site since 2012. He also stated that he has worked there since 2002, that Dandora dump site has been there since 1996 and measures approximately 43.5 hectares. That it is the only legal dumping area in Nairobi County. That the plaintiff is the only one who has lodged a claim. The plaintiff's letter of allotment should be accompanied by the council's resolutions. It would be impractical to allocate such land as it was covered with waste. He produced the report of the chief valuer of the defendant as exhibit D1. The suit property cannot be located on the ground. As at 2012 the area was covered by waste as it was already a dumpsite. It was not possible for the surveyor to identify the beacons at the time. He further stated that no one has come out to claim land within the dumpsite. One of the conditions in the letter of allotment is to develop the plot, if it is not developed within a certain period the land reverts back to the council automatically. He prays that the plaintiff's suit be dismissed with costs.

7. DW2 Githuku Thomas Waweru, a valuer with the defendant told the court that he was adopting his witness statement dated 23rd May 2018. He told the court that he is the principal valuer and that he is the custodian of all records in respect of the properties of the county government, that the defendant has a designated dumpsite in Dandora area. That the said dumping site has been in existence for thirty years. He further told the court that the dumpsite has not spilled over to the adjacent properties. That the county has not received any other complaint from any private owners. He told the court hat the plaintiff has presented a certificate of lease in respect of LR NO. Nairobi/Block 86/11. He went through the records and found that the suit property is within the dumpsite. Further the records in respect of the suit property do not exist. He took the court through the process of applying for a plot to the point where a certificate of lease is issued. He told the court if any of the process is not followed then the certificate of lease is not legal. Further that the place has been a dumpsite since time immemorial. There was no resolution for change of user. A mayor or the town clerk cannot have the authority of a full council resolution. The absence of a beacon certificate, it is not possible that the land was identified on the ground. There is no evidence that the land was physically identified on the ground and a beacon certificate issued. He told the court that the defendant has gotten title for the entire dumpsite and there is nothing for the plaintiff to claim. He produced the valuation report as exhibit D1.

8. At the close of the witnesses' testimonies the parties tendered written submissions.

The plaintiff's submissions.

9. The plaintiff has articulated the process he went through to acquire title to the said property. No evidence was led by the defendant to disapprove the plaintiff as the legally registered owner to the land. The plaintiff relies on section 24 and 26 of the Land Registration Act, 2012, which vests absolute proprietorship to an individual as long as it is not fraudulently obtained. He has put forward the case of **Reuben Arap Serem vs Zipporah Meli [2017] eKLR**.

10. The plaintiff led the court through his evidence which was corroborated by the defendant's own testimony that the portion of Dandora Area 6 and particularly the plaintiff's parcel Block 86/11 to date is covered in waste deposited by the authority of the defendant. The defendant has trespassed onto the plaintiff's suit property.

11. In cases where trespass to land results in damage then the computation of damages on the basis of restitution of land. He relied on **Haslburys Laws 4th Edition, Volume 45 at paragraph 26, 1503.**

(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

(c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.

(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the right or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

He has also put forward the cases of **Park Towers Ltd vs John Mithamo Njika & 7 Others [2014] eKLR** quoted with approval in **Ali Farah vs Moses Ole Nasisit [eKLR]**; **Kenya power & Lighting Company Ltd vs Philip A M Kimondi [2018] eKLR** where the Court of Appeal quoted with approval the case of **Stroms Bruks Aktie Boing vs Hutchison [1905] AC 515.**

12. Owing to the loss and damages caused by the defendants trespass, the plaintiff prays for general damages of Kshs.310,000,000/- as guided by the valuation report. Section 2 of the Civil Procedure Act and order 21 rule 13 provides mesne profits. The plaintiff has put forward the cases of **Attorney General vs Halal Meat Products Ltd [2016] eKLR ; Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR**. The plaintiff has been able to prove that mesne profits should be awarded resulting from the defendant's trespass to his land. The plaintiff prays for Kshs.3,395,604/- per year from the year 2001 until vacant possession is granted. He also prays for costs of the suit.

The Defendant's submissions

13. The Defendant's submissions are dated 28th November 2019. They have put out six issues for determination. They are:-

- I. Whether the plaintiff is the legal owner of the land parcel known as Nairobi/Block 86/11.*
- II. Whether the title was lawfully obtained.*
- III. Whether the plaintiff was able to identify the physical location of the suit land on the ground.*
- IV. Whether the plaintiff's claim for Kshs.309,552,776 has been sufficiently proved on a balance of probability.*
- V. Whether the plaintiff is entitled to the reliefs sought.*
- VI. Whether the plaintiff is entitled to costs.*

14. The plaintiff has failed to meet the threshold of burden of proof under section 107 of the Evidence Act. Even though the plaintiff claims he is the registered owner of the suit property he failed to prove that the same was lawfully acquired. He was not able to prove that during the site visit the surveyors were able to identify the physical location of the suit property hence the claim is based on an inexistent property. The dispute relates to boundaries. The plaintiff and his witnesses stated that by around April 2001, the garbage had accumulated in the area next to the quarry became too much and started encroaching on the private plots in the area including the plaintiff's which was 800 meters from the designated dumping site. Reliance was placed on **section 18(2)** of the Land Registration Act, 2012 which provides that **"courts shall not entertain any action or other proceedings relating to a dispute as to the boundaries of the registered land unless the boundaries have been determined"**. The claim for special damages of Kshs.309,552,776 cannot be awarded as it was neither pleaded nor proved. It has put forward the case of **Equity Bank Ltd vs Gerald Wangombe Thumi Nyeri HC Civ Appeal No. 152 of 2011**.

15. The plaintiff has failed to prove his case on a balance of probabilities and he is not entitled to general damages and mesne profits. The plaintiff is seeking for losses that can be quantified hence the claim for general damages is misplaced. It has put forward the case of **Siree vs Lake Turkana El Molo Lodges [2002] Eklr**. Failure to plead loss of user is fatal to the plaintiff's case. It has put forward the case of **Maritim & Another vs Anjere [1990] EA 312 at 316; Sande vs Kenya Cooperative Creameries Ltd CA Civ Appeal No. 154**. A party is bound by his pleadings, a claim for loss of user is a claim for special damages and claim must be pleaded and particulars proved. It is mandatory for the plaintiff to establish the boundary between his plot and the dumpsite before this court can entertain his claim. It prays that the plaintiff's suit be dismissed with costs to the defendant.

16. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

- (i) Whether the plaintiff is the legal owner of land parcel No. Nairobi/Block 86/11 and if so, was it obtained lawfully?*
- (ii) Whether the defendant has trespassed into the suit property and converted it to a dumpsite.*
- (iii) Is the plaintiff entitled to the other reliefs sought?*
- (iv) Has the claim for Kshs.309,552,776/- been sufficiently proved?*
- (v) who should bear costs?*

17. It is the plaintiff's case that he is the registered owner of Nairobi/Block 86/11. He produced the certificate of lease signed on 12th October 2000 and issued on 13th October 2000 as exhibit in this case. That thereafter his subdivision plans were approved. The defendant on the other hand contends that the suit property Nairobi/Block 86/11 does not exist on the ground. DW2 Githuku Thomas Waweru the principal valuer with the defendant, took the court through the process of applying for a plot to the point where a certificate of lease is issued. He further told the court that if any of the process is not followed then the certificate of lease cannot be said to be lawfully obtained.

18. The plaintiff produced a certificate of lease issued on 13th October 2000 as exhibit P1. There is a letter of allotment dated 27th October 1992. However, I find that there are no minutes confirming the resolutions from the council (then) approving the said allocation. The plaintiff has not exhibited a beacon certificate to confirm the plot had been surveyed and boundaries fixed. The plaintiff when cross examined by the defendant's counsel confirmed that it is not possible to identify the parcel of land on the ground. It was also admitted by PW2 James Githaiga Rikwa on cross examination. The question is whether PW2 was able to carry out the valuation when he could not locate the land. He also told the court that he relied on drawings and approved plans which he did not produce before the court.

19. The evidence of DW2 has not been challenged by the plaintiff. I find that in the absence of the council resolution minutes approving

allocation to the plaintiff, the title to the suit property could not have been lawfully obtained. There is no evidence that the plaintiff applied for the plot. Section 26(1) of the Land Registration Act 2012 provides that:-

26(1)The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b)where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

20. In my view, the plaintiff's failure to produce the letter of application preceding the letter of allotment and the beacon certificate shows that the certificate of lease may have been acquired illegally. According to DW1's testimony subdivision could not have been done in the area designated as a dumping site. He also told the court the approvals could have been obtained fraudulently. I find that the certificate of lease held by the plaintiff cannot be said to be absolute.

21. I find that the plaintiff has failed to prove his case as against the defendant on a balance of probabilities and is not entitled to the reliefs sought.

22. Had this court found that the plaintiff has proved that he is the absolute and indefeasible owner of the suit land, I would still not have awarded Kshs.309,552,766 as the same was neither specifically pleaded nor proved. I am guided by the cited authority of **Equity Bank Ltd vs Gerald Wangombe Thumi Nyeri HC Civi Appeal NO. 152 of 2011**. Parties are bound by their pleadings. As there is evidence that the area is covered in waste I would have awarded the plaintiff Kshs.500,000 general damages for trespass.

23. All in all I find that the plaintiff has failed to prove his case as against the defendant on a balance of probabilities and the same is dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MAY 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Koech for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant